"New" human rights: U.S. ambivalence toward the international economic and social rights framework

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It is not charity, but a right—not bounty but justice that I am pleading for... The confluence of affluence and wretchedness continually meeting and offending the eye, is like dead and living bodies chained together.

—Thomas Paine

A Bill of Rights for the disadvantaged, applicable to white and Negro families alike... could mark the rise of a new era, in which the full resources of the society would be used to attack the tenacious poverty that so paradoxically exists in the midst of plenty.

—Dr. Martin Luther King Jr.

WHO NEEDS “NEW” RIGHTS?: THE UNITED STATES AND THE OUTSIDER STATUS OF ECONOMIC AND SOCIAL RIGHTS

Economic and social rights (including rights to food, adequate housing, public education, the highest attainable standard of physical and mental health, fair wages, decent labor conditions, and social security) still occupy a second-class, “outsider” status in official United States domestic and foreign policy. This is no accident. The full recognition and implementation of such rights pose a direct threat. But that threat is not primarily to democracy or “American values” as some believe. Rather, because they demonstrate our system’s failure to achieve equality, they threaten the deeply held belief that our country has achieved a truly representative, human rights–based society.
This chapter provides an overview of American engagement with the international economic and social human rights system. It particularly explores how and why the U.S. engagement with international economic and social rights has been so deeply ambivalent. The chapter begins by reviewing the international context in which U.S. attitudes about economic and social rights developed and early U.S. influences on the drafting and promulgation of foundational human rights instruments. As described below, however, the initial, and deep, official U.S. engagement with the international human rights framework was soon undermined. American racism, among other factors, resulted in an effective suspension of U.S. formal engagement with internally applicable international human rights treaties for decades. Further, Cold War politics played a key role in the ultimate division of the UN’s Covenant on Human Rights into two separate treaties. This period helped entrench fear and distrust about the domestic application of human rights which surfaces in some circles even today.

Although the United States signed all of the instruments in the International Bill of Rights in the late 1970s in preparation for ratification, domestic and foreign policy concerns undermined or voided entirely the practical legal application of international human rights standards in the United States. With few exceptions, that ideological legacy, including the formal rejection of economic and social rights, continues to impact U.S. government policy into the twenty-first century.

Nevertheless, there is room for optimism. The chapter ends by briefly highlighting some contemporary efforts that may help overcome the disappointing history of American ambivalence and make socioeconomic rights a reality in the United States. Among those opportunities is the growing awareness of, and attention to, economic and social rights among grassroots groups, leading non-governmental organizations, and other U.S. human rights advocates. Rejecting U.S. ambivalence, these entities grapple with such “domestic” U.S. problems as racial and ethnic discrimination, poverty, homelessness, abuses of workers’ rights, and lack of access to health care by invoking international economic and social human rights standards.

EVERYTHING OLD IS “NEW” AGAIN: INTERNATIONAL CONTEXTS FOR THE RECOGNITION OF SOCIOECONOMIC RIGHTS

Political precursors to contemporary socioeconomic rights were in the air during the U.S. postrevolutionary period. By the 1790s, the French constitution provided for free public education and maintenance of the poor and Thomas Paine was promoting his views on the redistribution of land and wealth in *Agrarian Justice*. Rights to land and cultural integrity of indigenous peoples, resistance to the enslavement of African Americans, the theft of their labor, prohibitions on their literacy and violent interference with the enjoyment of family, religion, or cultural life, calls for recognition of the inheritance and employment rights of women, the rights of workers to a fair wage under safe conditions and to bargain collectively, the rights of Asian and European immigrants to enter the country and live decent lives—all represented early
forms of economic, social, and cultural rights advocacy in the United States. And, of course, the rights to "property" and "the pursuit of happiness" were enshrined in our Declaration of Independence, if only for free white men who already owned property.

The title of this chapter, "'New' Rights?" however, reflects the common perception that socioeconomic rights concepts were "new" to the United States during the post–World War II period in which the foundational international human rights instruments were being drafted. The United States and the major European powers were most familiar with the liberal tradition of individual civil and political rights such as those elaborated in the French Declaration of the Rights of Man, the U.S. Declaration of Independence, and the U.S. Bill of Rights. This led some in the United States to define civil and political rights as the equivalent of "human rights." For them, it seemed self-evident that individuals needed protection against a state's abuse of its power: torture, arbitrary arrest, detention, and execution, as well as arbitrary restrictions on freedom of movement, freedom of religious belief and political conscience, freedom of speech, and the right to political participation. Such "negative" rights, it was argued, were clearly defined and had a long and well-developed comparative jurisprudence analyzing their scope and implementation. Courts would adjudicate them primarily as protections against state abuse of power over individual autonomy or the state's failure to appropriately protect individuals from certain private abuses.

In this strong form of Western liberal rights analysis, food, housing, education, and health care seemed, at best, "private" concerns that could or should be negotiated in the marketplace as matters of individual responsibility. To the extent that poverty or other deprivations led to lack of access to such goods, religious and other private charities were to step in. Government could also address such social problems, but in the limited form of voluntary benefit provisions that were to be applied in a nondiscriminatory manner, rather than as "rights" that are fundamental to all.

Further, some argued, economic and social rights are "positive" in nature and therefore required affirmative actions by the subnational state, as well as the significant expenditure of state resources, to fulfill. Such public expenditures should therefore be authorized by legislative process and administered by the executive. It was considered anti-democratic and an infringement on the separation of powers for courts to step in except if such rights were being unconstitutionally or unfairly recognized or applied by the other branches. This liberal philosophical view largely defined U.S. federal approaches to the rights of individuals while the fundamental international human rights instruments were being drafted and beyond.

On the subnational level, however, a number of state constitutions took a different approach. For example, many states recognized the importance of a broad-based right to public education as important for a representative democracy. A number recognized subsistence, health, or other social welfare rights as well. Yet even such state constitutional socioeconomic rights provisions tend to be narrowly construed.

The United States was not alone in its criticism and caution. Developing countries were also concerned that state responsibility for implementation of
A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES

economic and social rights would severely disadvantage poor countries by imposing significant costs that they would be unable to bear. Historians have charted in detail how the recognition of individual economic and social rights, nondiscrimination rights, and the right to the self-determination of peoples was to become part of a global political game in the period following the founding of the UN and in the Cold War to follow.13

Despite the post–World War II U.S. and international concerns about socioeconomic rights outlined above, concepts associated with socioeconomic justice are not entirely “new”—even to American political and social contexts. Economic and social rights originate from very old beliefs about the inherent claims of individuals on society and the obligations of that society to provide the fundamentals necessary to protect human dignity. Such concepts originated from both non-Western and Western sources.14 Although the formal international human rights legal framework is a product of twentieth-century norm creation in the United Nations and in American and European regional bodies, there were many precursors to contemporary human rights systems in non-Western contexts. For example, certain communitarian cultural traditions and religious doctrines among Asian and African peoples required the effective redistribution of wealth and material assistance to the poor, the sick, widows and orphans, and strangers to the community. Nevertheless, the provision of such assistance was generally structured as a duty of the faithful rather than the right of those in need.15

Similarly, Western religious leaders and European liberal philosophers and political activists elaborated various bases for a moral obligation to address the needs of the poor.16 Even during the revolutionary foundations of the United States, activist Thomas Paine argued for a more just and equitable division of property and other economic and social goods.17 Religious, philosophical, and political influences also informed Western popular movements of the eighteenth and nineteenth centuries, including the French and American revolutions, the anti-slave trade and abolitionist movements, the women’s movement, and the movement for workers’ rights.18 Latin American constitutions such as Mexico’s Constitution of 1917 protected the rights of workers.19 The early twentieth century saw efforts to protect the rights of European linguistic and religious minorities, and the elaboration of President Woodrow Wilson’s views on the “self-determination of peoples.”

These varied religious, philosophical, and political influences were all represented to some extent at the UN’s founding and during the drafting of the International Bill of Rights although the traditions as interpreted by the major powers—the United States, the Soviet Union, the United Kingdom, France, and China—played the most dominant roles.20

But it was the devastation caused by World War II, including the revelations of the nature and extent of the Holocaust and other wartime horrors that further undergirded calls for the recognition of international human rights, including economic and social rights. In addition to the sheer physical violence associated with both world wars, it was widely recognized that economic dislocation, rampant inflation and the associated inability to purchase food and other basic needs, massive unemployment, as well as existing racial and
religious prejudice, had created conditions ripe for the perverted philosophies of fascism and Nazism to take popular hold.\textsuperscript{21}

The protection of economic and social human rights can be seen as an additional security measure, aimed at the prevention of further global and domestic conflicts. Further, the sheer inhumanity that millions witnessed in newsreels and print demonstrated how starvation, enslavement, and horrific medical experiments could be used as weapons against civilian populations. Exposing such atrocities could also reveal how recognizing and protecting rights to food, appropriate working conditions and wages, and the right to the highest attainable standard of health could be linked directly to civil and political rights to life, prohibitions on slavery, and integrity of the person.

These realities led to popular demands (despite governmental fears about the undermining of state sovereignty) that the promotion and protection of all human rights and fundamental freedoms (including socioeconomic rights) should be a primary purpose of the new United Nations so that it could fulfill its promise as an international peace and security organization.\textsuperscript{22} United States President Franklin D. Roosevelt had called for such a pride of place for human rights, including economic and social rights, and United Kingdom Prime Minister Winston Churchill had confirmed this view in the Atlantic Charter of 1941.\textsuperscript{23} That Charter also laid out a clear vision that the “freedom from want” was essential to the U.S.-British vision of a postwar international system.

Although the obligation to promote and respect human rights and fundamental freedoms was imposed on all UN member states by the legally binding Charter of the United Nations,\textsuperscript{24} it remained necessary to specifically elaborate the content of those human rights. Thus, the first UN Commission on Human Rights was charged with the drafting of a bill of rights (to be partially modeled on domestic constitutional standards of the day—including the U.S. Bill of Rights) that would elaborate specific human rights standards for which member states were to be responsible. Economic and social rights were an important part of this set of standards from the beginning. They were certainly controversial, but the participation of the Soviet Union, as well as Latin American, Middle Eastern, and Asian and Pacific states, made the inclusion of socioeconomic rights in the International Bill of Rights almost inevitable.\textsuperscript{25}

Although official U.S. policy later became overtly hostile to the recognition and implementation of economic and social human rights in the United States, the influence of U.S. leaders was crucial on the international stage and in the Commission’s deliberations. United States presidents Franklin D. Roosevelt and Harry S. Truman, along with Eleanor Roosevelt (head of the U.S. delegation to the UN and appointed as the first chair of the UN Commission on Human Rights in 1947) were key players with regard to the inclusion of economic and social rights in early international human rights instruments. The subsequent U.S. hostility to the international socioeconomic rights regime stemmed both from Cold War rejection of Eastern bloc political and economic philosophies as well as fears about the real or imagined implications of making such rights an operable part of U.S. law.
FROM NATIONAL TO INTERNATIONAL ECONOMIC AND SOCIAL SECURITY: ROOSEVELT'S FOUR FREEDOMS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

United States official foreign and domestic policy was to become distinctly unfriendly toward socioeconomic rights by the beginning of the twenty-first century. But, in the period leading up to the founding of the United Nations, the United States was, in fact, a leader in the articulation of such rights. Rather than being "alien" to American values, economic and social rights were embraced and elaborated by none other than U.S. President Franklin D. Roosevelt.

The nation's initial engagement with socioeconomic rights and subsequent official discomfort with them resulted from a complex interplay of domestic and international social and political priorities. FDR's early vision allowing for a holistic view of international human rights contributed to an atmosphere of global optimism and possibility as World War II ended. America's later ambivalence toward economic and social rights and its exceptionalist approach to human rights set the stage for further domestic and international conflict during the long Cold War and well beyond.

During World War II, President Roosevelt eloquently described the principles that would come to be known as "the Four Freedoms." In his 1941 State of the Union Address, he began to lay out what would become a foundational framework for an international economic, social, and cultural human rights regime:

> We look forward to a world founded upon four essential human freedoms. The first is the freedom of speech and expression everywhere in the world. The second is the freedom of every person to worship God in his own way everywhere in the world. The third is the freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peace-time life for its inhabitants everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.\(^6\)

This early iteration, set forth during the midst of the violence plaguing Europe, Africa, and Asia, but prior to the U.S. entry into the war, clearly delineates the international context of human rights. The "freedom from want," for example, which was to serve as a partial underpinning of many specific economic and social rights, is described as part of an international economic order necessary to allow for such a freedom to be protected.

Roosevelt's list extended beyond a traditional American concern with civil and political rights to address the poverty, unemployment, and lack of access to basic needs that his administration had sought to address in New Deal legislation.\(^7\) By treating these freedoms as equally important and linked, Roosevelt appeared to embrace the principle that civil, political, economic, social, and cultural rights are indivisible. Although most UN member states
still fail to put it into practice, Roosevelt’s acknowledgement of the interde-
pendence of rights categories was later to be reiterated at important moments
in the international human rights movement and even confirmed by U.S. of-
ficials.28

By articulating clearly that the freedoms applied “everywhere in the
world,” Roosevelt rhetorically acknowledged that certain rights should be
universal, rather than limited only to certain races, ethnicities, cultures, or
political and economic systems.

A few years later, while the United States was fully engaged in the war,
Roosevelt further developed the economic and social rights aspects of the
“four freedoms” concept and highlighted the links between the international
and domestic spheres by calling specifically for an “Economic Bill of Rights”
in the United States.29

We cannot be content, no matter how high . . . [the] general standard of living
may be, if some fraction of our people—whether it be one-third or one-fifth or
one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure. . . .

We have come to a clear realization of the fact that true individual freedom
cannot exist without economic security and independence. “Necessitous men
are not free men.” People who are hungry and out of a job are the stuff of
which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We
have accepted, so to speak, a second Bill of Rights under which a new basis of
security and prosperity can be established for all—regardless of station, race, or
creed. . . .

America’s own rightful place in the world depends in large part upon how
fully these and similar rights have been carried into practice for our citizens.30

This 1944 State of the Union message made explicit Roosevelt’s view that,
without adequate food, shelter, employment, or housing, a person’s ability to
pursue and enjoy the right to vote or the freedom to exercise religious or
political conviction, is curtailed or unattainable. Further, in Roosevelt’s view,
U.S. “exceptionalism” should take the form of an enthusiastic embrace of all
human rights in order to set a worldwide example. It was particularly remark-
able that “new” economic, social, and cultural rights were to be recognized as
an integral part of this early embrace of international human rights at home.

Roosevelt was clear that this call for a “second Bill of Rights” was in U.S.
national security interest. A complete failure to protect and ensure such rights
and freedoms might well lead to social and political unrest and even violence.
The Great Depression, in which millions in the United States (and abroad)
were unemployed and barely able to provide subsistence for themselves and
their families, highlighted the importance of economic security as well as
political and military security. While not explicitly rights-based, many of the
administration’s New Deal policies were aimed at addressing the growing
needs of the poor and working class and to respond to actual or potential
unrest among displaced workers and veterans.31

One of the most challenging aspects of Roosevelt’s 1944 speech, for some,
was the assurance that socioeconomic rights should be extended to all “regard-
less of station, race, or creed.” Many African Americans, for example, survived
(or did not) “at the bottom of the well,” while a culture of racial violence and discrimination acted to regulate and limit their ability to participate in organized resistance. Rather than seizing the opportunity to make the new international human rights vision meaningful for all at home, some in the U.S. Senate and subsequent administrations came to see human rights as exacerbating “the race problem” and a potential cause of embarrassment. Indeed, this marked contradiction between the articulation of human rights values in American political rhetoric about leadership in rights and freedoms and the realities faced by Americans of color ultimately poisoned FDR’s lofty aspirations of U.S. leadership in human rights by the beginning of the Eisenhower administration of the early 1950s.

Roosevelt also recognized that economic, social, and cultural insecurity and abuse were linked inextricably to the violence and horrors of war itself. He also embraced a pro-business stance in which trade and markets figured prominently, arguing in the 1944 State of the Union speech for “rights” to free trade and the protection of business interests. Thus, even early on, modern human rights policy was linked to domestic and global economic agendas. The human rights effects of international economic policies and corporate activity has only grown more significant today, but so far has not served the majority of the world’s peoples in the positive ways that Roosevelt imagined.

The links between economic security and political security later reappeared in the preamble to the UDHR. The “four freedoms” approach to rights was both a domestic and an international strategy. An important force behind the founding of the United Nations, Roosevelt hoped that the new organization would promote the kind of international peace and security that had eluded the League of Nations. Roosevelt was unable to see the culmination of this vision having passed away in 1945. It was left to Eleanor Roosevelt, a civil rights activist and humanitarian in her own right, to move U.S. policy forward with regard to international economic and social human rights.

Mrs. Roosevelt’s record as a social justice activist stirred hope in many, including African American leaders, that she would be a strong advocate for guaranteeing the full range of human rights protections within the United States as well as abroad. As chair of the Commission that drafted the Universal Declaration of Human Rights and that helped shepherd it to adoption, Eleanor Roosevelt’s place in history as a human rights leader is self-evident. Unfortunately, however, Mrs. Roosevelt’s approach to economic and social rights (along with Truman administration policy) became increasingly circumscribed and cautious as Cold War concerns took priority.

Because of her status as the former First Lady, as well as because of her internationally renowned commitment to bettering the lives of the poor, workers, and women, President Harry S. Truman appointed Mrs. Roosevelt to lead the U.S. delegation to the UN and to act as the first chair of the newly created Commission on Human Rights (now the Human Rights Council). The discourse in the UN’s founding instruments suggested that the protection of human rights was a high priority on the agenda of the UN and its member states, and that the Commission’s work would be central to the UN’s mission.
The Charter of the United Nations specifies in its preamble and in Article 2 that the promotion and protection of "human rights and fundamental freedoms" is an important purpose of the organization. Articles 55 and 56 together create a legal obligation with regard to human rights on all member nations. Article 55 requires the new organization to promote

(a) higher standards of living, full employment, and conditions of economic and social progress and development;
(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
(c) universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.\(^{36}\)

However, despite their inclusion among the founding purposes of the UN, the protection of human rights was not initially a high priority on the agenda of the UN or its member states.\(^{36}\) The most powerful states following the end of World War II built in to the structure of the Charter a seemingly strong provision protecting state sovereignty over internal affairs in Article 2(7):

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII [Security Council consideration and authorization of action with regard to matters deemed to be a threat to international peace and security].

Thus, the Charter's text reflects a continuing tension in the international legal system, including the human rights system. On the one hand, governments understood that it was in the interest of most states to cooperate across borders and to make collective arrangements to ensure international peace and security. By doing so, they hoped to prevent future global wars and to address issues—such as poverty and socioeconomic development—that are of an international character. At the same time, both dominant and developing states also feared that the new organization would interfere with the political or economic policies considered internal to each country—creating an unacceptably strong form of "world governance." Under contemporary analysis, the notion that human rights might be a solely domestic matter has been strongly rejected by most governments and international legal scholars. During the early days of the UN's existence however, and for decades to follow, the paper shield of "sovereignty" concerns was used by some to argue against more effective international approaches to human rights violations—including violations of economic and social rights.

United States administrations, beginning with that of President Harry S. Truman, were not exceptions with regard to the overprotection of sovereignty. The United States resisted UN actions and policies—including language and interpretations of the international human rights instruments that might allow other major powers (or coalitions of small countries) to interfere in U.S. "domestic" policies. Of course, this position on sovereignty did not
prevent the United States from adopting foreign policies throughout its subsequent history that interfered politically, economically, or militarily in the domestic affairs of other nations. 37

Representatives of some smaller developing countries also feared that the new UN organization would be dominated by the major powers or that human rights might be used as an excuse for colonial or neocolonial military and economic interventions. The latter fear turned out to be prophetic.

Nevertheless, in the period shortly after World War II, a grassroots movement for international human rights was starting to flourish. Ordinary people around the world hoped that a new international organization, and the worldwide recognition of fundamental human rights, could be helpful tools in struggles against government abuses, racism, ethnic oppression, and colonialism. Those abuses included economic exploitation and social privations that killed many along with the civil and political abuses implemented at the point of a gun.

Once the Commission on Human Rights was created, many saw the UN, and its new Commission, as a potential protector of the range of human rights against the powerful. Activist groups, including some within the United States, filed petitions alleging widespread human rights violations in their home countries. Delegates from some developing countries argued that the protection of human rights, including economic and social rights, must be taken seriously as a principal purpose of the new UN; they helped raise the profile of the issue. 38 Mrs. Roosevelt’s own commitment to humanitarian causes also made human rights advocacy a high-profile matter.

**Drafting Socioeconomic Rights Standards**

The first task assigned to the Commission on Human Rights, therefore, was to draft an “International Bill of Rights”—a statement identifying and elaborating what the “human rights and fundamental freedoms” described in the UN Charter were to consist of. It was to be no easy task. Among the concerns initially raised was whether it was even possible to identify a set of rights norms that were common to all peoples, including those from different political and economic systems, cultural traditions, and racial and ethnic make-up.

Further, sovereignty concerns in the Truman administration and among other governments delayed the development of implementation and enforcement mechanisms for the new human rights framework. Instead of a binding treaty, a statement of (initially) non-binding principles, was deemed an achievable first step to allay fears about the potential impact of a legally binding instrument on the domestic affairs of powers like the United States and the Soviet Union.

Thus, the Commission began to draft a “Universal Declaration of Human Rights” with the ambitious agenda of setting forth a fundamental set of human rights standards common to all peoples everywhere. And although it is in the form of a “declaration” of principles, the instrument has proved to have significant moral and political influence. 39

Mary Ann Glendon describes in some detail the drafting process and the often complex relationship between official government policies and the
individual visions and personalities of the delegates involved. From the beginning, the make-up of the Commission ensured that both civil and political rights traditions (associated, arguably, with the U.S.-Western European bloc) and economic, social, and cultural rights traditions (associated, arguably, with the Soviet Union and Eastern bloc countries) were to be included in the UDHR. Latin American states also were important supporters of the inclusion of economic and social rights, some having already recognized such rights in domestic contexts.

The influential Four Freedoms appear in the preamble to the UDHR, which notes "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want" as "the highest aspiration of the common people."

Such a "world made new" was to include civil and political rights, economic and social rights, and, as specified in Article 28, an entitlement to "a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

The Scope and Influence of the UDHR

The most highly regarded and widely recognized of the international human rights instruments, the UDHR can be broadly divided into a list of civil and political rights (Articles 1–21) and economic, social, and cultural rights (Articles 22–27). As noted above, Article 28 places this rights regime for individual human beings in the broader context of the society and the international community. Finally, Article 29 recognizes that, for such an individual rights regime to be effective, individual duties to the community and lawful limitations on rights are to be provided for.

Setting the stage for important nondiscriminatory language common to all of the major international human rights instruments to follow, the UDHR provides that "everyone" is entitled to the enumerated rights without discrimination as to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Among the economic and social rights elaborated are the right to own property (Article 17), labor rights—rights to work and to free choice of work, just working conditions and remuneration, and the right to form and join trade unions (Article 23), the right to rest and leisure (Article 24), the right to free primary public education (Article 26), and intellectual property rights and to "share in scientific advancement and its benefits" (Article 27).

Articles 22 and 25 set out some of the most significant general provisions on socioeconomic rights. Article 22 provides that: "Everyone, as a member of society, has the right to social security, and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of the State, of the economic, social and cultural rights indispensable for the dignity and the free development of his personality."

Article 25 (the right to an adequate standard of living) lays out what were to become some of the most controversial socioeconomic rights for many in part because they may require substantial resource expenditures: "Everyone
has the right to a standard of living adequate for the health and well-being of
himself and of his family, including food, clothing, housing, and medical care
and necessary social services, and the right to security in the event of unem-
ployment, sickness, disability, widowhood, old age or other lack of livelihood
in circumstances beyond his control."

Since the Declaration was intended to be a statement of principles rather
than a legally binding treaty, its substantive provisions are phrased in passive
terms, in most cases without identifying a specific duty-bearer ("Everyone
has the right to . . ."). The major drafting powers, including the United
States, the United Kingdom, and the Soviet Union, all had significant inter-
ests in beginning the elaboration of international human rights in a form that
was not legally binding. They were still suspicious of the potential implica-
tions of legally enforceable rights on their own policies. Such concerns also
resulted in the lack of specificity as to the duty-bearer of most rights listed.
With regard to the inclusion of economic and social rights, however, the
Soviets and Eastern bloc countries argued that the state should be clearly
identified as having primary responsibility for the protection of such rights.44
This view dovetailed with the Soviet Union's prioritization of economic and
social rights over civil and political rights.

The UDHR was to become the primary statement of international human
rights as well as the most widely disseminated and respected instrument on
this issue. After much intense debate over its content, the final version of
the UDHR was adopted by unanimous vote of the UN General Assembly
on December 10, 1948, with very few states abstaining.45 Subsequently, the
newly independent states that entered the UN system in the postwar period
have, at least rhetorically, embraced it as an authoritative statement of funda-
mental rights and freedoms to be promoted and respected by all.

With President Truman's support, the United States adopted the UDHR
in 1948 and agreed, at least as a moral and political matter, to respect its prin-
ciples, including its provisions on economic and social rights.46 Nevertheless,
Eleanor Roosevelt expressed the United States's discomfort with a strong form
of economic and social rights protection. Shortly before adoption, Roosevelt
stated that ESC rights did not "imply an obligation on governments to assure
the enjoyment of these rights by direct governmental action."47

For the human rights movement, for the peoples of developing countries,
for the poor and racial, ethnic, and religious minorities in the United States,
1948 marked a unique moment of hope and possibility. The UDHR repre-
sented the utopianism of Eleanor Roosevelt's prayer for a "world made new."
Although that dream continues to have strong significance and commitment
among many today, the realities of political and economic struggle also
revealed the limits of rights discourse.48

The years following the adoption of the UDHR saw the outbreak of a
full-blown Cold War and the devolution, in some circles, of human rights to
the status of political football. Nothing illustrates this retrogression on effective
human rights protection more clearly than the U.S. role in the creation and
ultimate bifurcation of the legally binding Covenant on Human Rights that
was intended to complete the International Bill of Rights.
A DIVIDED WORLD: COLD WAR POLITICS, THE THREAT OF SOCIOECONOMIC RIGHTS, AND THE BIFURCATION OF THE HUMAN RIGHTS COVENANT

The U.S. relationship with the international human rights framework, including that for economic and social rights, played a key political role at the height of the Cold War. The battle for power and influence between East and West took many forms; human rights debates were no exception.

Race was often at the center of such controversies. The UN's international human rights–related instruments, reflecting as they did the closely felt experience of recent European genocide, all had clear nondiscrimination, equality, and cultural protection provisions with regard to race, ethnicity, and religious difference.

The American legacy of racism in all aspects of civil, political, economic, and social life, however, made the international recognition of such equality and nondiscrimination principles particularly troublesome for U.S. policymakers. In addition to the perceived threat of rising internal expectations among African Americans and other racially subordinated groups, the United States was beginning to be subject to external criticism from the newly (or soon to be) decolonized nations of the Global South and the stinging criticism of the Soviet Union as the Cold War intensified in the 1950s.

The Soviet Union used media reports about race riots, lynchings, and racial segregation in the United States very effectively as evidence of U.S. human rights hypocrisy. How could the United States claim moral superiority if it countenanced the political and economic subordination of millions within its own borders?

The Race Petitions

This Cold War context created greater political risk for those domestic groups hoping to use the new UN system and the UN Charter to expose human rights violations and promote social justice. Even prior to the adoption of the UDHR, African Americans and U.S. civil rights organizations were among those submitting complaints and petitions to the newly created UN Commission on Human Rights. The National Negro Congress filed a petition with the UN Economic and Social Council in 1946 asking that the United Nations examine, and take corrective action on, patterns of racial abuse in the United States. In addition, leading intellectual, internationalist, and civil rights leader W.E.B. Du Bois co-authored an influential petition on behalf of the National Association for the Advancement of Colored People (NAACP) titled, "An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and An Appeal to the United Nations for Redress." The petition, presented by Du Bois to the UN in October 1947, described in book form a panoply of human rights violations against blacks—discrimination in housing, education, health care, and employment, lynchings and other forms of violence, and the legacy of slavery itself.
Although Eleanor Roosevelt, herself a board member of the NAACP, initially seemed supportive of efforts to include racial injustices in the United States on the UN agenda, the petition’s biting analysis and broad foreign support raised the stakes beyond what U.S. officials could bear in the Cold War context. Du Bois had garnered the support of numerous other domestic civil rights organizations. Perhaps even more significantly, peoples in the emerging nations of South Asia, Africa, and the Caribbean saw the petition as additional moral and political support for an end to colonialism and the promotion of self-determination of peoples on an international scale. India, which had placed South African apartheid on the UN agenda, was supportive of the petition’s racial equality goals, but feared that formally bringing the matter for debate might mean “participating in functions which deal with controversial domestic politics or with sectarian affairs.”

Because neither the United States nor India were willing to take the ultimate step of sponsoring the Du Bois petition for debate before the Commission on Human Rights, it was the Soviet Union that formally placed it on the Commission’s agenda. In the tense international political atmosphere, Soviet support for the petition was treated as a political betrayal by U.S. officials and some in civil society as well. The organizations and individuals who filed the petition were subject to suspicion. Some within NAACP leadership, as well as conservative African American commentators, argued that African American criticism of the United States on the world stage was disloyal. Du Bois, in contrast, criticized Eleanor Roosevelt for bowing to State Department concerns about the political effect of the petition. Ironically, however, the furor surrounding Soviet involvement arguably hastened or led to some actual or attempted civil rights reforms under the Truman administration.

Keenly aware of the growing foreign and domestic criticism of civil rights and U.S. vulnerability to charges of human rights hypocrisy, Truman’s legislative agenda attempted to blunt the criticism. Such efforts focused primarily on outlawing overt civil and political public discrimination (such as segregation within the military) rather than the equally devastating impact of racism on housing, education, working conditions, and health care, however.

Even Truman’s efforts at securing basic civil and political rights for African Americans, however, were sometimes stymied by a conservative and segregationist Congress, leaving the United States open to international and domestic criticism on racial (in)justice. For some in the Truman administration and the U.S. delegation to the UN, external criticism only underscored their call to circle the wagons. Fears about communist influence overrode even the brutality of American apartheid.

In December 1951, William Patterson of the Civil Rights Congress (CRC), a radical civil rights organization, and W.E.B. Du Bois submitted an even more incendiary communication to the UN titled “We Charge Genocide.” Patterson argued that the violations occurring against African Americans met the definition in the recently adopted Convention on the Prevention and Punishment of the Crime of Genocide. Particularly embarrassing for a Truman administration facing elections in 1952, the communication highlighted specific cases of racial brutality, segregation, and discrimination already being
discussed in the press. Foreign delegates began to ask members of the U.S. delegation about domestic conditions facing blacks and other minorities. The Convention defines "genocide" broadly to mean "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" including killing or committing other forms of physical or mental violence against the group. In a phrase that is most telling for the socioeconomic rights violations experienced by blacks, genocidal acts were also defined to include "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Adopted by the General Assembly and opened for signature on December 9, the Genocide Convention was signed by President Truman almost immediately—on 11 December 1948.

Although it was criticized by Eleanor Roosevelt and others as exaggerated in light of the genocide that had just killed millions in Europe, the CRC stimulated significant interest throughout the world. A petition describing the historical atrocities and continuing legacies of American racism—an evil that had resulted in the murders, abuse, and social dislocation of millions—was finally being heard on the world stage. Individuals, indigenous peoples, and oppressed ethnic groups began to see the petition process as an effective route through which to bring publicity to long-ignored causes. Such grassroots efforts and public attention could not easily be ignored and helped pressure the Commission to begin drafting several of the long-anticipated legally binding human rights treaties. The possibility that the new Commission, and the UN itself, would be inundated with individual or group petitions, and perhaps, the power of some of those petitions to persuade others of a cause, prompted renewed efforts to create and define legally binding, if deliberately circumscribed, mechanisms for human rights monitoring and review.

The economic and social status of African Americans and other subordinated groups was highlighted in the petitions and the African American and foreign press as well. The majority of African Americans lived and worked in segregated communities and were relegated to the poorest quality housing, schools, and other public accommodations; most suffered the effects of unemployment or underemployment, poverty, and lack of access to adequate health care. The Eastern bloc’s emphasis on the state’s role in improving economic and social conditions was a key point of rhetorical distinction to be drawn between U.S. and Soviet policies. Soviet and U.S. communists made the most of U.S. failure to protect the rights of its own minorities, while hiding the Soviet Union’s own atrocities against ethnic and religious minorities.

The United States was an eager participant in the propaganda wars. Anti-communist African American leaders were brought into UN fora to condemn the Soviet and U.S. communist reports on the racial situation as hyperbole. Officials at both executive and congressional levels had recognized the country’s potential vulnerability on charges of racial discrimination and abuse early on—even during the drafting of the UDHR. However, Mrs. Roosevelt, among others, defended against Soviet and other countries’ critiques of the United States by arguing that lynchings and other forms of racial violence, were at least prohibited under U.S. law and, presumably, punishable by criminal sanctions. By contrast, she argued that the religious and political
persecution and executions occurring in the Soviet Union were matters of official policy and therefore of a different character. U.S. critiques of Soviet programs, political and religious persecution, and travel restrictions were valid subjects of human rights condemnation. Nevertheless, Roosevelt’s defense of the United States masked the legally and culturally enforced apartheid under which many civil, political, economic, and social rights were denied to African Americans and other groups. Even those protective laws on the books were only haphazardly enforced to protect African Americans in many jurisdictions.

The racial atmosphere and conditions in the United States also played a considerable role in Congressional opposition to U.S. application of the international human rights regime in general. U.S. ratification of international treaties under Article II of the Constitution requires a two-thirds majority vote of the Senate after presidential signature before the treaty can become U.S. law. Isolationist opposition in the U.S. Senate to the Treaty of Versailles had previously stymied President Woodrow Wilson’s efforts to build and sustain a strong League of Nations in the aftermath of World War I.

The shadow of that failure strongly influenced U.S. administrations thereafter, including State Department officials. U.S. delegates to the UN were therefore wary of possible Senate opposition to international human rights treaties. The Senate’s formal rejection of an important human rights treaty supported by the administration would send a strong negative signal to the world community. In the Cold War context, such a failure would both embarrass the administration on a world stage and might well undermine the impact of the United Nations human rights system as a whole.

Cold War opposition to the ratification of human rights treaties was led by Senator John Bricker (a Republican from Ohio) and Southern segregationist senators. Their opposition was said to be based on isolationism, federalism, and concerns about potential violations of U.S. sovereignty, but the question of race lay at the heart of the matter.

If existing and proposed international human rights treaties became U.S. law, racist senators feared that African Americans, Asian Americans, Native Americans, Latinos, and other disfavored minorities would use the law’s non-discrimination provisions to attack the system of segregation that the senators so dearly cherished. Indeed, U.S. litigants and courts had already begun to cite to the Charter of the UN in civil rights litigation. Conservative fears about the meaning of international human rights in the United States certainly included the extension of economic and social rights to African Americans, who were particularly disadvantaged with regard to housing, employment, education, and health care. Senator Bricker and his supporters therefore sought to put a halt to efforts to establish human rights in the United States by introducing a series of proposed legislative initiatives (known as the “Bricker amendments”) that would amend the U.S. Constitution so as to prevent international human rights treaties from having significant internal impact in the United States. The Truman administration was concerned that increasing support for such measures might have disastrous consequences for U.S. foreign policy overall.

After the election of Republican President Dwight D. Eisenhower in 1952, Secretary of State John Foster Dulles attempted to nullify the threat to
presidential powers and foreign policy flexibility posed by the Bricker amend-
ments. He proposed a "compromise." Dulles conveyed to the recalcitrant
senators the administration's position that it would not seek further ratifica-
tions of international human rights treaties in return for the withdrawal of the
Bricker amendments. This capitulation to racial animus effectively under-
mined the formal application of international human rights to the significant
racial, ethnic, gender, and economic challenges facing the United States for
many years.68

Cold War brinksmanship occasionally had a salutary effect on domestic
human rights struggles even during this period of early pessimism for the
internal application of international human rights standards. Mary Dudziak
argues, for example, that the 1954 Supreme Court case legally ending educa-
tional segregation, Brown v. Board of Education, was influenced by U.S. gov-
ernment attempts to counter Soviet propaganda about official U.S. racism.69
And, as noted above, Truman's earlier domestic civil rights agenda was in-
vigorated, in part, by the fear that the Soviet propaganda mill could influence
African Americans (and developing nations that were closely observing prog-
ress on race relations in the United States).

Dividing the Covenant on Human Rights

Despite the failure to formally recognize some of the civil and political
rights of blacks and other minorities in the United States until the 1960s and
1970s, the Truman and subsequent U.S. administrations were at least relatively
more comfortable with the civil and political provisions of the UDHR and a
proposed UN Covenant on Human Rights. They, like many in the U.S. legal
community saw international civil and political rights as more reflective of U.S.
constitutional and liberal law and values than economic and social rights. Some
such civil rights were already elaborated in the Constitution in the Bill of
Rights, and the U.S. civil rights movement of the 1940s and early 1950s
seemed to be making some headway toward the end of legal segregation.

On the other hand, the United States was concerned that economic and
social rights provisions might be drafted so as to require the kind of centrally
planned forms of government established by the Soviets and other communist
countries. The historical U.S. commitment to the right to private property, a
(seemingly) laissez-faire economic policy, and its democratic traditions, it
argued, were inconsistent with a strong form of "positive" economic and
social rights obligations imposed on the state. Less explicitly stated, of course,
was the perceived threat that the legal recognition of economic and social
rights in U.S. law might lead to fundamental changes in the socioeconomic
order. Such rights, after all, might lead to the redistribution of wealth from
small powerful elites to millions of poor or subordinated Americans. The
implications seemed revolutionary.

By contrast, the Soviet Union feared the implications of a strong civil
and political rights regime providing for freedom of political thought and
dissent, freedom of the press, freedom of religion, freedom of movement,
and the rights of asylum-seekers. They emphasized that their political and
economic system provided the majority of their people with access to free
public education, health care, housing, and collective agricultural and distributional systems for food security. Yet Soviet officials refused to acknowledge the contradictions of their claims toward a utopian society—why was political dissent and freedom of expression considered such a threat if socioeconomic needs were appropriately provided for?

Thus, despite the two superpowers’ evident failure to live up to their own grandiose public pronouncements about each system’s superior ability to protect the rights of their citizens, the two nations each pressed for their own set of prioritized rights in a planned Covenant on Human Rights. This conflict ultimately resulted in the bifurcation of the Covenant into two separate treaties. Between 1949 and 1951, the Commission on Human Rights worked to produce a single legally binding Covenant on Human Rights. But given growing pressure from the United States and other Western democracies, the Commission finally prevailed upon the General Assembly to authorize the creation of two separate treaties.70

There were both theoretical and practical reasons supporting division of the Covenant. At a practical level, some advocates of bifurcation hoped that the best way to get around the Cold War stalemate was to create separate instruments. One would provide largely for civil and political rights and another would address economic, social, and cultural rights. That way, each state could choose for itself which document was most consistent with its political and economic views and traditions. The goal was to achieve as widespread ratification as possible for at least one of the legally binding human rights treaties.

But there were deep-rooted ideological and philosophical reasons as well that continue to cause controversy about the indivisibility and implementation of the full range of rights to this day: According to annotations to the draft text of what was originally a single International Covenant on Human Rights:

Those in favour of drafting two separate covenants argued that civil and political rights were enforceable, or justiciable, or of an “absolute” character, while economic, social and cultural rights were not or might not be, that the former were immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual “against” the State, that is, against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote. Since the nature of civil and political rights and that of economic, social and cultural rights and the obligations of the State in respect thereof, were different, it was desirable that two separate instruments should be prepared.71

Arguments over the nature and implementation of economic and social rights, further complicated by Cold War competition for the loyalties of the newly emerging postcolonial states, delayed the drafting process considerably. Final texts for the binding instruments in the International Bill of Rights were not adopted by the General Assembly until 1966. The impact of the Bricker Amendment and the Eisenhower/Dulles compromise proved devastating to U.S. involvement in the drafting and negotiating efforts as well.

In announcing the Dulles compromise, the Eisenhower administration not only suspended plans for any future U.S. ratification of international
human rights treaties, it also "refused to reappoint Eleanor Roosevelt to the Commission on Human Rights, even though she still had two years remaining before the end of her term," thereby removing at least one strong U.S. advocate for human rights from the drafting process. The impact of this position was clear. Rather than have its sins and shortcomings exposed to scrutiny on the world stage, one of the most powerful actors had picked up its marbles and gone home.

Even after the formal adoption and opening for signature of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), it still took another decade before the two covenants received a sufficient number of ratifications for entry into force in 1976. Ironically, it was the adoption of another human rights treaty on racial discrimination that broke the international impasse on international human rights treaties.

The racial and ethnic context in which the UN itself was founded and which undergirded and lent false legitimacy to colonialism itself, led many newly emerging Third World states to a shared sense that an end to racial discrimination was of primary importance if the UN enterprise was to move forward. Therefore, the adoption of an International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965 occurred even prior to the adoption of the covenants. Significantly, ICERD includes the full panoply of socioeconomic rights as well as civil and political rights in its overall prohibitions on racial discrimination. It therefore creates legally binding international obligations with regard to economic and social rights. Predictably, however, the United States did not ratify ICERD until the 1990s, and then only with significant limitations on its domestic application.

Despite the hobbling impact of the Dulles compromise, U.S. silence on its own human rights responsibilities was undermined by significant domestic human rights–related unrest and political activism. The Kennedy, Johnson, Nixon, and Ford administrations presided over a time of unprecedented social justice activism in the United States, often in resistance to administration policies. The African American civil rights movement, the women’s rights and gay rights movements, anti–Vietnam War activism, labor unionism, and antipoverty and welfare rights efforts all contributed to a broader sense among the population (and among some policymakers) that a human rights analysis might be relevant to U.S. problems. Policymakers recognized that the Dulles compromise had limited U.S. effectiveness with regard to international human rights influence. In response to regrets about the foreign policy implications of the compromise, antiwar sentiments, and labor union pressures, Congress even enacted legislation in the early 1970s that linked various forms of U.S. economic foreign assistance to “internationally-recognized” human rights and labor standards.

Some of this popular activism focused on economic and social issues and linked domestic struggles to international contexts—including U.S. foreign policies affecting the poor and subordinated groups in other countries. This increased both internal and external pressure for the reestablishment of a more active official U.S. engagement with the international economic and social rights framework as well as human rights as a whole.
DOMESTIC HUMAN RIGHTS AS U.S. FOREIGN POLICY IMPERATIVE?: FLIRTING WITH (AND REJECTING) THE INDIVISIBILITY PARADIGM

Official U.S. passivity with regard to international human rights lasted until the 1970s, although there were attempts at reform under the Kennedy administration. However, President Jimmy Carter signaled an important shift in U.S. international human rights policy. Carter, at least in part because of concerns about the image and influence of the United States abroad, rejected the Dulles compromise legacy. He believed that U.S. foreign policy influence, including on human rights issues in other countries, would be undermined if the United States could be criticized for failing to ratify the International Bill of Rights. The administration was also influenced by significant congressional activism on human rights stimulated by opposition to the Vietnam War.

Carter, and other Democratic and Republican administrations in the decades to follow, recognized that the United States was open to charges of hypocrisy when it failed to ratify important international human rights treaties while attempting to impose human rights standards on others. Similarly, U.S. rejection of human rights treaty ratification might well undermine its efforts to hold the line, especially in the Third World, against communist influence. At first, it even appeared that Carter also appreciated the relationship between civil and political and economic, social, and cultural rights. In a famous articulation of administration policy on rights categorization, Secretary of State Cyrus Vance described “human rights as falling into three broad categories: rights that protect the integrity of the person; rights that guarantee fulfillment of basic economic, and social needs; and rights that protect civil and political liberties.” The administration promoted protection of all categories of rights as being complementary and mutually reinforcing.

Carter’s rejection of the Dulles compromise and limited embrace of the international human rights treaties created room for later administrations to support occasional U.S. ratification of some instruments. This process occurred over a period of decades and still continues (slowly) today. Unfortunately, U.S. ratification of the ICESCR has been one of the most difficult to obtain because of substantive divisions within the human rights community about its implementation as well as because of isolationist politics.

In 1977, President Carter signed the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the American Convention on Human Rights and submitted them to the Senate for advice and consent to ratification in early 1978. The ICESCR was included as the companion treaty to the ICCPR and as an important component of the International Bill of Rights.

Despite this promising development for U.S. human rights advocates, the administration, with the advice of the State Department, transmitted the treaties to the Senate with significant “reservations, understandings, and declarations” (RUDs) intended to clarify the supremacy of U.S. constitutional law interpretations and to limit the practical implementation of the human
rights treaties in the United States, including as a cause of action. In some sense, the package of RUDs, and the even more restrictive limitations to be imposed on subsequent treaties by later administrations were the lasting legacy of the Bricker amendments.

The most important such limitation, attached to all subsequent international human rights treaties, was a provision declaring even ratified human rights treaties to be "non-self-executing." In the administration's view, only implementing legislation passed by Congress would allow the treaties to be given full effect in U.S. courts.

In addition to the non-self-executing declaration, Carter attached substantive, and controversial, reservations and understandings to the ICESCR. The most significant of these made explicit the Cold War hardening of attitudes about the nature of socioeconomic rights: "The United States understands paragraph (1) of Article 2 [the general obligations provision of the ICESCR] as establishing that the provisions of Article 1 through 15 of this Covenant describe goals to be achieved progressively rather than through immediate implementation." 82

The transmittal letter then goes on to reject the international economic cooperation many in the UN system had contemplated as a necessary condition for the realization of socioeconomic rights: "It is also understood that paragraph (1) of Article 2, as well as Article 1), which calls for States Parties to take steps individually and through international cooperation to guard against hunger, import no legally binding obligation to provide aid to foreign countries." 83

The administration's interpretation of the ICESCR, apparently intended to make ratification more palatable to Senate decision makers, instead had the effect of reasserting American exceptionalism and undermining a strong interpretation of the ICESCR's requirements internationally. 84 But even the watered down version of the ICESCR created by the attachment of the RUDs was not enough to overcome significant opposition to its U.S. ratification. The ICESCR was, and is, still largely perceived to be a threat to "American values." This led some supporters of ratification to adopt a stealth approach that would argue strategically that ratification would have only a largely symbolic foreign policy effect. Such an approach resonated with the administration's view that the ICESCR's provisions were "for the most part in accordance with United States law and practice." 85 Philip Alston, a chair of the UN Committee that later administered the ICESCR, rejected such an approach by U.S. activists in subsequent years, arguing instead for a "robust" public debate on ratification. He argued that "the starting point for such a debate must be recognition of the fact that a significant range of obligations would flow from ratification." 86

Carter's transmittal of the treaties and subsequent congressional activities in human rights did reinvigorate the debate about the application of human rights to the United States and their role in U.S. foreign policy. Importantly, since the 1970s Congress has directed the State Department to collect data and publish annual "Country Reports" summarizing human rights violations in countries around the world. 87 The reports, often relied on by human rights activists and scholars, do not fully address economic, social, and cultural
rights violations, however. They contain a section on workers’ rights because of union advocacy for U.S. domestic law tying foreign aid to observance of labor rights protections. However, most economic and social rights violations are not included because of the U.S. ideological position treating them as somehow outside the panoply of human rights. Nevertheless, the existence of such official reports creates space for critique and supplementation on economic and social issues by NGOs and other members of civil society.

Unfortunately, the Senate Foreign Relations Committee, which held hearings in 1979 on the four human rights treaties transmitted by Carter, did not support them. Similarly, Carter’s signature of the newly adopted Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980 was allowed to quietly languish in the Senate Foreign Relations Committee until the 1990s. It was not until the Reagan and Bush (I) administrations that the Genocide Convention, signed by Truman in 1948, was finally ratified by the U.S. in 1989, signaling a new period of optimism that the U.S. would once again begin to engage with international human rights treaties in a domestic context.

Other ratifications of major human rights treaties followed in subsequent years as the Cold War ended and the United States fought for global influence among the newly emerging post–Cold War democracies. The ICCPR was finally ratified by the George H.W. Bush (I) administration in 1992; the International Convention for the Elimination of Racial Discrimination, the first major legally binding UN human rights treaty, was ratified by the Clinton administration in 1994, as was the Convention Against Torture. Notably, the ICESCR, CEDAW and the Convention on the Rights of the Child, although signed, have still not been ratified as of the time of this writing. Even though all four treaties transmitted by Carter suffered from Senate inaction and opposition, the ICESCR likely was the most controversial human rights treaty for the United States and remains so today.

As the Cold War drew to a close in the late 1980s and early 1990s, the world saw another shift in U.S. government attitudes toward international human rights. As the Soviet Union collapsed and relatively peaceful popular democratic movements asserted themselves U.S. officials and some political economists trumpeted the triumph of democratic and neoliberal political and economic systems as dominant in the new global economy. The Bush (I) administration’s ratification, for example, of the ICCPR was argued to be a strong signal to the rest of the world about the supremacy of U.S. liberal democratic values.

Nonetheless, that administration clung strongly to the philosophy of non-self-execution of international human rights treaties. After all, officials argued, the United States was a world leader in the protection of civil and political rights, already had significant federal and state laws on the subject, and should serve as a model for the rest of the world rather than be subject to its criticisms. Complaints by activists and some U.S.-focused NGOs about race and class discrimination in application of the death penalty, police brutality, voting rights abuses, and continuing discrimination in housing, health care, education, and employment fell on deaf ears with regard to the need for an international perspective on these issues.
THE CONTROVERSIAL NATURE OF ECONOMIC AND SOCIAL RIGHTS

Why were and are the rights outlined in instruments like the ICESCR so controversial within U.S. official and civil society circles? They seem so clearly to codify the “four freedoms” and the “second bill of rights” envisioned in the 1940s by President Roosevelt. Clues can be found in Mrs. Roosevelt’s statement in support of bifurcating the ICCPR from the ICESCR. Although at least rhetorically acknowledging that civil and political rights should have the same normative status as economic, social, and cultural rights, she accepted the view that the two categories of rights were different in nature and required different mechanisms of implementation. The Commission on Human Rights had failed to attach the kind of implementation machinery to economic and social rights that were included for civil and political rights provisions in a draft Covenant on Human Rights. Mrs. Roosevelt noted the following:

It was felt by those with whom I discussed the matter in the Commission that this machinery is not appropriate for the economic, social, and cultural rights provisions of the Covenant, since these rights are to be achieved progressively and since the obligations of states with respect to these rights were not as precise as those with respect to the civil and political rights. These members of the Commission thought that it would be preferable with respect to the economic, social, and cultural rights, to stress the importance of assisting states to achieve economic, social, and cultural progress rather than to stress the filing of complaints against states in this field.92

As she noted, Mrs. Roosevelt was not alone in the view that socioeconomic rights were to be treated differently in the international human rights legal regime. But the differences were sometimes exaggerated or misunderstood in order to protect the international or domestic balance of power. Both West and East feared the implications of strong economic, social, and cultural rights enforcement. The text of the ICESCR reflected such concerns, but it also reflected strong pressure from the peoples of the world to hold their governments and the international community accountable for poverty and social injustice. As discussed below, the U.S. ratification debate largely tracked the legal requirements of the ICESCR itself.

LEGAL OBLIGATIONS OF PARTIES TO THE ICESCR

Despite the early protestations about the indivisibility and interdependence of all human rights, whether civil and political, or economic, social, and cultural, the ICESCR reflected the controversial nature of ESC rights in its very structure. For example, the ICESCR, like the ICCPR, is a legally binding treaty. As such, states could choose (or not) to ratify the treaty and take on the legal obligations described. However, at first glance, the legal obligations created under the ICESCR seem vague and less immediate than the obligations of the ICCPR. This reflected the ideological divide, discussed above, not only between East and West, but also among those who questioned
whether economic and social rights could, or should, properly be called "human rights" at all.

Like the UDHR and the ICCPR, the ICESCR begins with a preamble, setting forth the purposes and rationale of the document, and general articles with legal principles such as the all-important self-determination of peoples provision in Article 1, and the equally important nondiscrimination provision in Article 2(2).

Such provisions caused official United States discomfort, not least because they might strengthen the cause of indigenous advocates for substantive fairness and equality, but also because of the long history of abuses against African Americans and other minority groups. Of course, the civil rights movement of the 1950s and 1960s had helped motivate changes in federal and state discriminatory laws and policies with regard to voting, desegregation of education and housing opportunity, and other civil rights. However, the potential for new obligations providing for legal rights to food, housing, education, health care, work and fair working conditions, and social security seemed to be another matter. But what, exactly, did the ICESCR require?

Article 2 of the Covenant sets forth the general legal obligations of the parties and serves as an interpretive guide to the other substantive provisions:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Unlike the ICCPR, provision was not made for the creation of a separate implementing body for the ICESCR. Rather, states parties were to submit initial and periodic reports on the status of ESC rights in their countries to the UN’s Economic and Social Council, the large UN political body that had responsibility for oversight of human rights as well as other broadly mandated social issues. This omission reflected the initial distrust among many, including the United States, about the implementation of ESC rights. Such misgivings about the potential role of human rights monitoring and implementation bodies had been expressed even during the drafting of the UDHR because of fears about the impact on traditional notions of state sovereignty. Although this resistance was overcome with the inclusion of a Human Rights Committee to implement the ICCPR, and the creation of other human rights bodies such as subcommissions, working groups, and special rapporteurs under the authority of the Commission on Human Rights, the implementation of the ICESCR was maintained in a second-class status at least until the 1980s.

REPORTING

Like most international human rights treaties, the ICESCR requires reporting by states parties under Article 16 of the Covenant to the UN Economic and Social Council (ECOSOC). The secretary-general of ECOSOC also may
disseminate the reports to the UN specialized agencies (such as the World Health Organization, UNESCO, the United Nations Development Programme, UNIFEM, and the United Nations Children's Educational Fund [UNICEF]) to the extent that they are relevant to the work of the agency. This reflects the understanding that the reporting process was aimed, in part, at providing information that would be helpful to the parties and to the UN itself in understanding and ameliorating problems of a socioeconomic or cultural nature. Article 17 indicates that the parties should submit such reports within one year after the Covenant entered into force for that party "in stages" in accordance with rules established by ECOSOC.

In and of itself, mere reporting would seem like a minor and non-threatening obligation for the United States to accept. U.S. officials from both parties had argued, after all, that the United States was a leader in the actual provision of socioeconomic goods such as public housing, health care, and public education. But "embarrassment" is likely the most potent weapon in the international human rights movement. Because the international human rights legal structures (excluding the Security Council) are unable to impose strong sanctions on violator states, the system relies heavily on public exposure of violations in the hope that states will take corrective action to avoid international or internal condemnation. Similarly, exposing abusive practices may also be supportive of the efforts of internally affected groups in opposition to government policies. Rather than a "violations" approach, however, the CESCR has tended to embrace a consensus-building and cooperative approach. 93 Such an approach emphasizes data gathering for the purpose of assisting the state in fulfilling its obligations. 94

What could the United States find objectionable in such cooperation and assistance? Even superpowers can be embarrassed. Accepting technical assistance or guidance from other states or an international body might, some believed, undermine U.S. status as a superpower and human rights model.

ARTICLE 2 AS LIMITATION AND OPPORTUNITY

As drafted, the text of Article 2(1) seems a masterpiece of bets-hedging. Rather than a more straightforward guide to the legal obligations of states parties, its phrasing incorporates the pressing concerns expressed both by developing countries and by the United States and other Western powers about the "different" nature of economic, social, and cultural rights.

"Take steps, individually and through international assistance and co-operation, especially economic and technical . . . "

This language makes a promising beginning to the article. The undertaking required obligates the parties to the Covenant to "take steps"—implying positive action by the states parties. Nevertheless, it also indicates that the drafters believed that all or some of the obligations set forth might require a multilevel process over time—steps on the way to some higher attainable standard. The phrase "individually and collectively" evidences the understanding
that economic, social, and cultural rights such as food and health care could not effectively be protected solely within national borders and through national measures—international cooperation along the lines contemplated at the founding of the UN itself, would be necessary.

Article 23 set forth language defining, but not limiting, what such international action could include:

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant include such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

The responsibility to provide international economic assistance and fair terms of trade, for example, remained a point of considerable controversy, and led, in the United States, to Carter's attempt, through an "understanding," to limit the interpretation of the provision. Newly independent Third World states, in the majority at the UN, had begun to make political and moral demands for a "New International Economic Order" (NIEO) and a "right to development" that surfaced the responsibilities of wealthy nations to developing countries.

"To the Maximum of its Available Resources"

This phrase evidenced a key concern and conflict that had arisen in the debate over social and economic rights at the UN. Developing countries, although smaller in number at the time of the UN's founding, had been quite vocal about the often vast differences in economic wealth among states between the industrialized and colonizing states and the developing states. If rights such as food, housing, free primary education, and health care were to be guaranteed by the state, it was argued that limits needed to be recognized based on differences in resources. On this point, the developing countries succeeded in building such a limitation into the Covenant. Western critics of social and economic rights also argued that the failure to recognize resource limitations would result in the rights provided for in the treaty being undermined as empty promises. Of course, the key interpretive question was, and is, the meaning of "available." Should this mean, for example, that if a state sets aside an amount for public housing in its overall budget, the maximum of that set-aside should be used? Or, does it mean that the state has an obligation to maximize and prioritize budget allocations to fulfill the enumerated rights?

U.S. critics on both the left and the right were concerned about resource and allocation issues. While it should seem self-evident that one of the wealthiest countries in the world would have less concern about the availability of resources to protect the rights of poor, homeless, or sick people within its borders, conservatives worried that a rights approach would lead to inappropriate expectations and a lack of initiative on the part of those seeking a "handout." Market-based or other private sector approaches, they argued,
would ultimately do the most good for the most people and do so more efficiently than could central government. Those on the left were concerned that the elevation of socioeconomic needs to “rights” might be misleading and divert attention and resources away from more effective strategies. Might not homeless or poor people simply be wasting precious resources or time by attempting long, complex, and expensive judicial remedies to which only a lucky few could gain access?

Similar concerns were raised about allocation. Once it was determined that health is a “human right” on the domestic level, for example, and judges had the discretion to interpret that right, might not judges abuse or misapply that power? How, for example, would a court’s decisions to direct allocation of public health resources between cancer treatments or diabetes prevention be constrained? Should that decision not be better left to a democratically elected legislature and executive?

Finally, some questioned whether “available resources” might not also include external sources such as international aid. Would such a requirement interfere inappropriately with a sovereign state’s decisions about how to use foreign aid?

“With a view to achieving progressively the full realization of the rights recognized . . . ”

The concept of “progressive realization” was intimately related to the resource problem discussed above. As the UN grew in membership with the progress of decolonization, newly independent developing states emphasized that time and resources were needed to adequately fulfill social and economic rights. Having become responsible in the postcolonial period for problems such as massive unemployment, trade imbalances, poverty, racial, ethnic, and religious conflict, and disease, many developing states argued that social and economic rights could not be implemented immediately in the same way as so-called negative rights (civil and political rights) which, it was said, only required the state to refrain from abusive actions against individuals under its jurisdiction.

Such a clear theoretical divide between “negative” and “positive” rights is subject to challenge, however. The right to political participation, for example, not only requires that the state refrain from creating roadblocks to voting, it may also require that the state create elaborate and expensive primaries, voting sites, accessible voting machines, ballots, counting systems, etc. By contrast, some could interpret a right to housing as a “negative” right in the sense that it could be narrowly interpreted only to prohibit the state from interfering with one’s own efforts to purchase or build a home, rather than the more expansive and “positive” obligation of the state to provide housing for those who cannot otherwise obtain it.

Still, the ideological divide remained strong and the limitation of “progressive realization” became an important aspect of the Covenant. Even wealthy Western states saw progressive realization as a pragmatic response to differences in economic status among states. Recognizing that fulfillment might take time, progressive steps might lend greater credibility to the legal status
and legitimacy of social and economic rights concepts. Both wealthy and developing states, however, tended to read the provisions as narrowly as possible, hoping to limit the extent of their potential economic obligations.

"... By all appropriate means, including particularly the adoption of legislative measures."

The final phrase in Article 2(1) raised the question of implementation of social and economic rights. Like all major international human rights treaties, the ICESCR relies on the states as sovereign powers to provide for the primary means of implementation and protection of the rights listed in the Covenant. This is a fundamental irony of the international human rights movement: that states, often the most egregious violators of human rights at the time of the drafting of the International Bill of Rights, were also to be relied on as the primary and most powerful protectors of human rights. The drafters of the UDHR avoided this question by focusing primarily on the rights and duties of individuals and groups rather than which entities, individuals, or groups bore responsibility for implementing and enforcing them. Article (2)1 clearly identifies legislation as an "appropriate means" of national implementation. But the underlying controversy, which was to remain the key question for promoters of social and economic human rights, was whether or not such rights were "justiciable."

If so-called rights could not be adequately or appropriately protected in courts and by judicial process, some argued, could they still legitimately be called "rights" at all? Was it not more appropriate to think of them as social goods or benefits that a state or other entity could choose to distribute if it had the resources? To the extent such benefits intersected with civil rights, it was said that they should be distributed in a nondiscriminatory way, but the United States largely rejected the notion that social and economic rights could or should be appropriately adjudicated in national or international courts or constitutionalized at the federal level.

The controversies inherent in the legal framework created for the ICESCR, and others, were all implicated in the internal debates over ratification of the ICESCR that occurred within the United States after the treaty’s submission to the Senate in 1978.

The Struggle Continues: New Realities and the Struggle to Make Space for the “Other” Human Rights in the United States

The disappointing history of U.S. encounters with the economic and social human rights framework so far evidences an important ideological barrier to the future recognition and implementation of socioeconomic rights in the United States. In addition, post-9/11 efforts to backtrack on the applicability of international law and especially international human rights and humanitarian law have contributed to an atmosphere in which the domestic status of human rights in general was thrown into question.

Yet, there are many signs of hope and progress. Particularly within civil society, these are groups and institutions operating outside of official U.S.
government policy and seeking to reflect the hopes and aspirations of many ordinary Americans. The catastrophe in the Gulf Coast of the United States during and after Hurricane Katrina in fall 2005 revealed the continuing reality of racial discrimination in housing, education, health care, and employment more than five decades after assertions of U.S. human rights exceptionalism that followed World War II. Grassroots and legal advocates have responded strongly through a variety of means, including the use of international human rights mechanisms. Opposition to the George W. Bush administration’s foreign policy and domestic human rights failures may also have led to a popular backlash and a more receptive atmosphere for the recognition of economic and social rights (as well as the reclamation of civil and political rights). This concluding section briefly outlines some of the areas in which such U.S. activism and advocacy around economic and social rights has been reasserted over the decades since Carter’s signing of the ICESCR. Subsequent chapters in this multivolume work discuss many of these human rights strategies in more detail.

UN ELABORATION OF THE CONTENT AND IMPLEMENTATION OF ESC RIGHTS: THE WORK OF THE COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The perception that economic and social rights are more vaguely defined than the civil and political rights with which they are more familiar remains a key sticking point for U.S. officials and some American activists. Commentators have pointed out that some civil and political rights are also broadly and vaguely defined in the texts of international instruments and in national constitutions as well, often resulting in years or decades of interpretive litigation. Despite those interpretive problems with regard to civil rights, many agree on their importance, if not their sufficiency in achieving social justice. However, for some time there was relatively little jurisprudence and formal interpretation by authoritative international bodies of the meaning and content of economic and social rights.

Perhaps no other international institution has done more to address this situation than the UN Committee on Economic, Social and Cultural Rights (CESCR). Although the ICESCR was deliberately created without a specific monitoring and implementing body, advocates for ESC rights and experts on such issues were able to prevail upon ECOSOC to create such a body in 1986. Such a body could review and provide Concluding Observations on the reports submitted by states parties to the Covenant, and, through the mechanism of “General Comments,” could provide authoritative interpretations of, and specificity to, the substantive provisions of the ICESCR.

International experts on economic, social, and cultural rights met in Limburg (The Netherlands) in 1986 to adopt unofficial recommendations with regard to the interpretation and implementation of the ICESCR. The groundbreaking “Limburg Principles” resulting from the meeting strongly influenced the CESC R’s interpretation of the nature and content of socioeconomic
rights and their implementation. A decade later in 1997, a similar expert consultation in Maastricht resulted in the highly influential “Maastricht Guidelines on Economic, Social, and Cultural Rights.” Among other things, the guidelines grappled with the thorny questions raised in U.S. objections and elsewhere about the indivisibility and relationship of socioeconomic rights to civil and political and collective rights, the justiciability of ESC rights, the legal obligations of states parties to the Covenant, minimum core obligations, immediate obligations of states versus the principle of progressive realization, creating benchmarks for the realization of rights, and addressing the question of resource limitations in fulfilling the rights.

Most significantly, the Guidelines and the “General Comments” issued by the Committee have specified the substantive and theoretical content of many ESC rights and state obligations to “respect, protect, fulfill and ensure” them. They therefore reveal that economic and social rights themselves have “negative” and “positive” aspects which may involve state action (or a requirement that a state refrain from acting) and the requirement that a state provide the legal and social circumstances in which a right can be fulfilled. It also reveals the actual or potential role of non-state actors such as private individuals and groups, corporations and other business enterprises, and international trade or financial institutions.

The Committee adopted a cooperative approach to administration of the ICESCR, working with states parties to recommend methods of improving compliance and collaborating with UN specialized agencies and other bodies to build expertise and technical assistance on specific issues such as the right to housing and the right to food. This growing body of interpretive material can act as an important response to the continued U.S. arguments about the vagueness and indeterminacy of socioeconomic rights. To be sure, all international human rights are elaborated at a certain level of breadth and indeterminacy; their meaning must constantly be contested in the political realm rather than through textual interpretation in isolation from political and historical context. But the process of working to define socioeconomic rights in practical and concrete contexts will likely contribute to their legitimization and ultimate protection. The danger remains, of course, that as the substantive obligations created by the fulfillment of economic and social rights are more specifically defined, resistance to their U.S. application might intensify in the U.S. Congress and in the administration.

THE INFLUENCE OF COMPARATIVE JURISPRUDENCE ON ECONOMIC AND SOCIAL RIGHTS AWARENESS IN THE UNITED STATES

One unfortunate consequence of official U.S. exceptionalism about socioeconomic human rights is that it has been “left behind” as other countries work to define and implement them in domestic context. Over the past decade, there have been increasing measures internationally to constitutionalize economic and social rights, or to interpret civil and political rights in ways that are protective of such concerns. U.S. legal scholars and some jurists, among
others, have taken note of this influential comparative jurisprudence in considering whether, and how, to apply such principles to U.S. law.

The post-apartheid jurisprudence of the South African Constitutional Court has been particularly prominent in this regard. The 1996 Constitution of South Africa enshrines economic, social, and cultural rights protections as well as civil and political rights in its text. It also explicitly acknowledges the interpretive relevance of international law and comparative law. The court has therefore engaged in (sometimes controversial) efforts to give meaning and substance to constitutional protections for economic and social rights. Leading decisions have included interpretations of the right to health and to emergency care and the right to adequate housing. The constitution provides for a “reasonableness” standard against which state action or inaction is to be measured with regard to the protection of some socioeconomic rights. In interpreting this standard, the court has struggled with the question of separation of powers and the appropriateness of judicial engagement with economic and social rights.

Courts in India, interpreting the “directive principles” approach of their constitution, have similarly responded to “social action litigation” strategies aimed at homelessness and other rights violations against the poor. European and Latin American courts and human rights bodies have interpreted rights traditionally identified as civil and political (such as the right to life) to have socioeconomic application as well. Such judicial analysis has undermined official U.S. arguments that economic and social rights are non-justiciable.

NGO STRATEGIES

As discussed above, some major international human rights NGOs based in the United States resisted application of ESC rights in the United States. Some feared that limited financial and staff resources might be diverted from monitoring and advocacy for important civil and political rights, which seemed much more attainable than the seemingly ill-defined and impractical economic and social rights. Others feared that the prioritization of economic and social rights might mask existing violations of civil and political rights. Still others remained unconvinced about the justiciability of socioeconomic rights in U.S. courts and the unfamiliarity of the general U.S. public with such rights.

With the end of the Cold War, this attitude among major U.S. human rights NGOs began to break down significantly. Leading human rights NGOs like Human Rights Watch, Amnesty International, and Lawyers Committee for Human Rights (now Human Rights First) reversed their original positions and began to monitor and document violations of economic and social rights, including violations in the United States. Such NGOs prepared reports on violations of the rights of U.S. workers in the meatpacking industry, violations of the rights of domestic workers, and violations of the rights of undocumented workers. In addition, grassroots activists began to focus on the abusive effects of welfare reform and lack of access to affordable and adequate housing and health care as human rights issues. Southern NGOs began to combine
traditional civil rights strategies with economic and social rights approaches to address racial violence, discrimination, and economic injustices against workers.113

These grassroots campaigns often avoid the legal barriers to U.S. implementation of socioeconomic rights by engaging in multilevel strategies involving documentation and monitoring, community organizing, popular education, direct action (protests, occupation of abandoned housing), publicity, and formal international and regional human rights complaints mechanisms alleging U.S. violations of economic and social rights.114

Many such projects build on the theory that many poor or otherwise disadvantaged Americans already have some sense that they have a "right" to food, health care, education, and other basic needs, but that they have not previously been exposed to the language and legal status of the international instruments outlining those rights.

Perhaps most encouraging, some NGOs were specifically formed to focus on economic and social human rights, such as the Center for Economic and Social Rights, EarthRights International, Physicians for Human Rights, and the National Economic and Social Rights Initiative. Such organizations contribute to the continuing effort to dispel the myths surrounding the undefined nature of economic and social rights by monitoring and identifying violations, advocating for social change, and educating the public and policymakers. Some work with international coalitions, such as the International Economic, Social, and Cultural Rights Network to create cross-border alliances. Coalitions of activists and NGOs, such as the U.S. Human Rights Network, prominently include economic and social rights in their literature and analysis. EarthRights International and the Center for Constitutional Rights have both attempted to push the boundaries of U.S. litigation under the Alien Tort Statute to hold multinational corporate actors accountable for violations of the rights of workers and communities adversely affected by corporate activity.

A recent colloquy between the executive director of Human Rights Watch (Kenneth Roth) and Physicians for Human Rights (Leonard S. Rubenstein) on the roles of NGOs in addressing economic and social rights revealed significant differences about approach, but it also revealed a shared sense that many human rights NGOs will have to take account of such issues in today's globalized world.115 The implications for U.S. policy at home and abroad are significant.

These NGO and grassroots movements are likely to have at least two important effects on the U.S. encounter with the international human rights framework in coming years: 1) They are likely to galvanize popular awareness of, and support for, an economic and social rights–based approach to U.S. economic and social problems in conjunction with existing approaches; and 2) they are likely to create pressure for, and lend additional legitimacy to, judicial interpretive efforts, legislative efforts, and administrative interpretations of the recognition and promotion of socioeconomic rights.

This overview of the U.S. encounter with the international economic and social rights framework argues that U.S. fears and misconceptions about the nature and legal implications of socioeconomic rights are largely misplaced. The protection and implementation of such rights is indeed complicated, and
will require careful democratic, judicial, and executive decision-making. The protection of civil and political rights has been equally complex. But the national commitment to the latter rights has made the continuing effort worthwhile. Until we see the reality of discrimination, homelessness, malnutrition, educational disparities, and lack of health care as of similar priority, we will not be willing to expend that effort. The inspiring and continuing activism, legal work, and international and comparative leadership in giving meaning to such rights are important indicators that future U.S. encounters with the ESC framework will be more positive.

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NOTES


11. As chair of the commission drafting the Universal Declaration of Human Rights (UDHR), Eleanor Roosevelt expressed the “wholehearted support” of the United States for its socioeconomic rights provisions. “The United States did not, however, consider them to ‘imply an obligation on governments to assure the enjoyment of these rights by direct governmental action.’” Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (New York: Random House, 2001), p. 186.

12. “Since neither the U.S. Constitution nor international law have yet been construed to create federal minimum welfare guarantees, we must go back to the original protector of the poor- state law. Historically, state and local governments have played the primary role in assuming responsibility for those unable to care for themselves. This continues to be the case today. The language of state statutory and constitutional law often contains explicit intentions to provide minimum welfare guarantees. These have frequently provided the basis for court decisions upholding state economic rights.” Deale, “The Unhappy History,” p. 320.

“New” HUMAN RIGHTS


21. The Treaty of Versailles (1919) drafted by the victorious powers at the end of World War I, imposed massive reparations obligations on Germany, among other things. The economic dislocations resulting from World War I, the Great Depression, and ethnic and religious intolerance set the stage for the rise of fascism and nationalism in Europe and Asia and ultimately the catastrophe of World War II. See Versailles Treaty (June 28, 1919). (See especially, Articles 227–230 [Penalties] and 231–247 [Reparations], available online at history.sandiego.edu/gen/text/versailles treaty/vercontents.html, accessed March 27, 2007).


27. Sunstein, Second Bill of Rights, pp. 1, 18–19 (describing FDR's call for a second bill of rights as linked to the experiences of the Great Depression and New Deal policies).


30. Sunstein, Second Bill of Rights, pp. 75–77. See also more extended excerpts in Appendix.


32. The UDHR acknowledges the fear that the failure to protect international human rights might lead to civil unrest: "It is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Preamble, Universal Declaration of Human Rights, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, p. 71 (1948).


34. Article 56 requires member states "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." As a UN member state, the United States was, and is, therefore under such a general obligation, however vaguely defined in the Charter's text. Because its human rights provisions are so vaguely stated, legislators and courts in the United States subsequently treated the Charter as non-self-executing; it therefore could not serve as the sole basis for a cause of action in U.S. courts absent implementing legislation. Bert B. Lockwood Jr., "The United Nations Charter and United States Civil Rights Litigation: 1946–1955," Iowa Law Review 901 (1984): 69. See also Sei Fujii v. State of California (1952) 38 Cal.2d 718, 729 [242 P.2d 617] (finding that the human rights provisions of the UN Charter are non-self-executing and therefore do not automatically void conflicting U.S. law despite the status of duly ratified international treaties as part of the supreme law of the land).


38. Glendon, "Sources of 'Rights Talk,'" in Woods and Lewis, Human Rights, pp. 84–85 (noting involvement of delegates from Lebanon, the Philippines, and China, among other non-Western countries in negotiation and drafting of UDHR).


40. See, generally, Glendon, A World Made New. Among the influential members of the first UN Commission on Human Rights were Chair Eleanor Roosevelt of the

41. The legacy of Franklin Roosevelt’s Four Freedoms speech, a draft submission by the American Law Institutes, and the support of Mrs. Roosevelt helped ensure the inclusion of economic and social rights in the UDHR. Steiner and Alston, *International Human Rights in Context*, p. 244. “Egypt, several Latin American countries (particularly Chile), and . . . the (Communist) countries of Eastern Europe” also supported socioeconomic rights provisions during the drafting of the UDHR. Australia, the United Kingdom, and South Africa were opposed, “arguing that such rights represented desirable goals, rather than rights as such.” Further, they expressed the fear that the level of state control necessary to ensure the fulfillment of such rights would lead to totalitarianism. Ibid.


44. “All of the Communist countries gave priority to social and economic rights, wanted them to be accompanied by corresponding civic duties, and insisted that the state should be the primary enforcer.” Glendon, *A World Made New*, p. 43.

45. The UDHR was adopted by the UN General Assembly on December 10, 1948. Forty-eight states voted in the affirmative, eight states abstained (Byelorus, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, Ukraine, and Yugoslavia),” Lauren, *Evolution of International Human Rights*, p. 345, n. 129. See also ibid., pp. 238–239 (discussing concerns raised by the abstaining states as primarily related to the protection of sovereignty). But see Steiner and Alston, *International Human Rights in Context*, p. 138 (discussing South Africa’s stated concern that the inclusion of economic and social rights might lead to totalitarianism).


67. Art. VI of the U.S. Constitution provides that international law, along with federal law, is the “supreme law of the land.” In addition, a leading U.S. Supreme Court decision (with the Court sitting as a prize court) states that “international law is part of our law.” In cases of conflict, the Constitution itself is supreme, with federal statutes and ratified international treaties sharing the same level of priority. Federal courts have taken the view that federal statutes and U.S.-ratified international treaties should, as far as possible, be interpreted consistently, but in case of unavoidable conflict, the “later in time” instrument prevails. Detlev F. Vagts, “The United States and Its Treaties: Observance and Breach,” American Journal of International Law 95 (2001): 313, 320.
   “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, [...] as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.” Paquete Habana, 175 U.S. 677 (1900), excerpted in Woods and Lewis, *Human Rights*, pp. 67, 70.
68. The desire to preserve U.S. racialism at almost any cost even went so far as efforts to promote the exclusion of African Americans and other U.S. religious or ethnic groups from the international human rights mechanisms aimed at the protection of minority rights. Gay J. McDougall, “Shame in Our Own House,” *The American Prospect* (October 2004): A22.
71. Ibid.; See also “Statement by Mrs. Franklin D. Roosevelt,” Department of State Bulletin, pp. 1059, 1064–1066 (December 31, 1951), excerpted in Woods and Lewis, *Human Rights*, pp. 85–88 (accepting the equal importance of socioeconomic rights, but elaborating her views with regard to the distinct nature of states obligations with regard to economic and social rights).


76. See, e.g., Malcolm X, February 21, 1965 speech to the Organization of Afro-American Unity (OAAU). Available online at www.malcolmx.org/docs/geneaau.htm (advocating for placing the status of African Americans on the UN human rights agenda and linking with the struggles of other subordinated groups cross-culturally).


78. Just prior to Martin Luther King’s 1968 assassination in Memphis, Tennessee, he was working in support of a local garbage workers’ “I am a Man” campaign for decent wages and working conditions. Most of the workers were African American. See, e.g., “I Am a Man: An Exhibit Honoring the 1968 Memphis Sanitation Workers’ Strike” (available online at www.reuther.wayne.edu/man/intro.htm). In addition to civil rights, King began a “Poor Peoples’ Campaign” in which he echoed FDR’s calls for a “second Bill of Rights.” Martin Luther King Jr., “The Time is Always Right to do Right,” (speech presented at Syracuse University, New York, July 15, 1965), available online at students.syr.edu/osp/drkingaddress.html.


83. Ibid.


89. Ibid. sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and section 504 of the Trade Act of 1974, as amended.

90. For the current State Department articulation of U.S. foreign policy on international human rights, see, Bureau of Democracy, Human Rights, and Labor, United States Department of State, “Human Rights,” available online at www.state.gov/drl/hr/ (accessed March 9, 2007).


97. Ibid.


100. Schwartz, “Welfare Rights.”

101. See, e.g., Statement of Jeanne M. Woods and Hope Lewis Prepared for the Hearings of the United Nations Special Representative on Extreme Poverty, Dr. Arjun


104. Limburg Principles.

105. Maastricht Guidelines.

106. A recent attack on the idea of economic and social rights in the pages of the U.K. magazine The Economist (March 22, 2007) illustrates the kind of retrenchment and debate that is already happening in Europe. Despite the provenance of economic and social rights and significant recent global activity on them, articles criticized Amnesty International’s decision to further highlight such rights. This caused a significant response among the large network of activists, academics, and international diplomats who champion international economic and social rights. For the original articles and a range of responses to them, see, e.g., Amnesty International, “Economic, Social and Cultural Rights are Human Rights,” available online at web.amnesty.org/pages/economist-response-index-eng (regularly updated Web site).


113. See, e.g., Mississippi Worker's Center for Human Rights, available online at www.msworkerscenter.org/.


115. Roth, "Defending Economic Rights"; Rubenstein, "A Response to Kenneth Roth."