"A WORK IN PROGRESS?"
THE UNITED STATES REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

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I. HUMAN RIGHTS IN THE UNITED STATES
BECOME A GLOBAL CONCERN.

A symbolic step forward in the contemporary history of human rights occurred at the end of March 1995. Virtually unnoticed by the rest of the world, the United States presented its first-ever human rights report to the Human Rights Committee (HRC), a treaty body of eighteen experts from around the world charged with the mission to monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR).

Here was a Nation which promoted the famous "Four Freedoms" enunciated by President Roosevelt, a Nation which sculpted respect for human rights in the United Nations Charter and indeed of the ICCPR and its companion (The International Covenant on Economic, Social and Cultural Rights) presenting itself as amongst the last ranks of nations ratifying the ICCPR.

Here was a residuary, solitary Super Power, with a painfully meandering history of over two centuries in the accomplishment of human rights equally painfully reconstituting its own historic public and official memory through the Report, as we shall see, is a tormenting and tormented text, a testimony to a proud, and often arrogant Nation, struggling to submit itself to the gaze of the human rights world.

And it does so clumsily and with a great deal of discomfiture. Presented by a team of senior officials whose numbers exceeded the membership of the HRC, the Report, at the end of the day, offers an account of how the United States Constitution and the law have shaped many an enunciation of the ICCPR rather than how the American attainments and shortfalls may be measured by the text and the context of the Covenant. Not surprisingly, the Report is marked by caveats and contradictions which the United States Congress annually refuses to condone in its invigilation of human rights records of other sovereign states. The awkwardness is perhaps inevitable to a proud Nation making a belated entry into the world human rights community. Indeed, the discomfiture was honestly manifested in the acknowledgment by the Assistant Secretary of State that the United States was itself "a work in progress" and that the American history of "racism, slavery and racial segregation had among other factors posed obstacles to the optimal enjoyment by all Americans of the rights reflected in the Convention."

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I remain indebted to Ms. Shulamith Koenig, Executive Director, People's Decade of Human Rights Education, Organizing Committee and World morehouse. President, International Council for Public Affairs, for making available certain primary documents, vital to the analyses offered here.
The caveats and contradictions arise from four "understandings," five "declarations," and five "reservations." The caveats and contradictions are, as we shall see, a disgrace; "(r)arely has a treaty been so abused" with resultant "serious dishonour to the United States." The dishonor becomes aggravated when we recall the pivotal role played by the United States in the enunciation of these two Covenants. And the Report celebrates its own jurisprudence of embarrassment. John Shuttuck, the Assistant Secretary for (no less!) Democracy, Human Rights and Labor, had no choice but to describe the Report as a "sweeping narrative displaying cruelty and injustice alongside vision and courage" (1994: vi). It certainly required vision and courage to be among the last of nations of the world to ratify a treaty which it was among the first to shape. And the reservations and understandings represent yet again a failure of the political will to combat "cruelty" and "injustice" in the future history of the United States.

For close to two decades, the American public opinion was relatively quiescent. From 1978 when the Covenant was first submitted to the Senate till 1993 there was no strong public opinion movement in America for an expeditious ratification of the Covenant. But public opinion came alive with the progress of ratification and the presentation of the Report. The custodians of the precious self-images of America as the guardian angel of human rights worldwide came alive both in the media (especially through a lead article in the powerful Wall Street Journal questioning the daring of the U.S. Report) and on the Capitol Hill. On the other hand, human rights communities all around, renewed in their hope, prepared extensive peoples commentaries on the Report. They found in it a special platform for taking their own government and political leadership to task before an international body, an experience unfortunately routine for many an activist group throughout the globe. Their endeavours now marked a commonality with human rights NGO movements throughout the world. The face of discontent turned out to be as wrinkled; the unmasking of power, in all its perversions, now truly became a common ground between the American NGOs and their counterparts in the less fortunate parts of the planet.

Thus, in a curious irony, the Report achieves a wholly unintended effect of reinforcing a global human rights movement by locating it powerfully within the Disneyland structures of the United States policy, law and adjudication. Moreover, human rights observance in the United States now becomes a legitimate global concern in two ways. First, many States Parties to the ICCPR (including Belgium, Denmark, France, Finland, Germany, Norway, Portugal, Spain, and Sweden) have filed objections to reservations to ICCPR made by the United States, raising thus a crucial question which would need to be publicly resolved. Second, the United States will have to periodically file its reports before the HRC; already, the line of

interrogation inaugurated in the first round will, on later occasions generate more pressing and encompassing issues of the international accountability of the United States observance of the treaty provisions. The system of General Comments, through which the HRC has generated its own jurisprudence of competence, will also weigh on the United States, as it already does with other State Parties, in years and decades to come. All this naturally augments the agenda not merely of the American NGO community but for the human rights communities worldwide acting in international solidarity to promote human rights, in their full enjoyment everywhere.

II. THE UNREST OF UNDERSTANDINGS AND THE DEVASTATION OF DECLARATIONS

Not merely has the United States subjected its ratification to many explicit reservations but it has innovated treaty practice by lodging a considerable number of "understandings" and "declarations". At strict law, the latter may not claim any valid existence but in fact they exist in a manner, as it were, of pro-choice ratification of a human rights treaty. Generalization of this technique, its widespread diffusion, becomes now a real prospect. On this ground alone, human rights communities in the United States should be enabled by their counterparts all around to wage relentless struggle against this nascent but alarming tendency.

In a devastating declaration, the United States maintains that the provisions of Article 1 to 27 are not self-executing. This means that "as a matter of domestic law, the Covenant does not, by itself, create private rights directly enforceable in the U.S. courts." Why so? Because, the Report says, the "fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of the U.S. law, either by virtue of constitutional protections or enacted law" (p.32) but if this were truly the position, not a single understanding, declaration or even reservation would be justified! Indeed, the corpus of the Report is replete with instances where the ICCPR sets a higher standard of protection than available at the American constitutional or legislative frameworks. Clearly, the intention of this declaration is to inhibit or prevent the United States judiciary from taking account of treaties already declared as the supreme law of the land. And to undertake treaty obligations this way, without any serious commitment to transform domestic law and adjudicatory practices, is in the harsh words of Professor Louis Henkin (albeit in related but earlier context) "ignoble", "outrageous" and even "fraudulent". Eminent American jurists have, indeed, suggested that the declaration is an attempt to "rewrite the [American] Constitution". This declaration constitutes a pathetic evasion of the human rights responsibilities and the reasons proffered in its support testify comprehensively to the paucity of the state intellect.

Even so, the declaration was not enough for the ratifiers of the ICCPR. It had to be reinforced by an "understanding" that the Covenant shall be implemented


4. Pautz, note 1, pp. 1257, ff. and opinions cited there.
by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein" and that the Federal Government "shall take measures appropriate to the Federal system" such as would enable local and state authorities to take "appropriate measures for the fulfilment of the Covenant." Even the authors of the Yes, Minister (a highly popular satire on the legalese of the British Civil service) could not match the imagination of this formulation!

Clearly, even the authors of the Declaration realized that it flies in the face of Article 50 of the ICCPR which categorically states.

The provisions of the present Covenant shall extend to all parts of the federal states without any limitation or exceptions.

Clearly, a reservation to Article 50 will be invalid, being contrary to the object and the purpose of the treaty itself. Somewhat ingeniously, the Report states.

This provision is not a reservation and does not modify or limit the international obligations of the United States under the Covenant. Rather, it addresses essentially the domestic issue of how the Covenant will be implemented within the U.S. federal system. It serves to emphasize domestically that there was no intent to alter the constitutional balance of authority between the federal government on the one hand and the state and local government on the other, or to use the provisions of the Covenant to federalize the matters now within the competence of the States (p.32)

Ratification of international treaties has never been before used for domestic inter-governmental communication in this way. But the report, equally disingenuously deploys the "understanding" to notify other State Parties that the United States will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any inhibition to the abilities of the constituent states to meet their obligations in this regard (p.32)

Only medieval specialists in casuistry can make full sense of this "understanding!" It provides a good tool for human rights education in America, especially as Assistant Secretary of State John Shuttuck expresses the hope that the "wide circulation" of the report will "foster human rights education" in the country (1994:vi)

The Report encodes many more understandings, each one of which problematic in its own right! In what follows we underscore only a couple of these which would warrant intensive human rights education effort by the time of the filing of the next report.

Thus, the not too demanding and a wholly justified human rights obligation contained in Article 9(5) of the ICCPR entitling the victim of an unlawful arrest or detention to a right to compensation stands subjected to an understanding that victim redress is subject to"reasonable requirements of domestic law." This
"understanding" is filed in the broad daylight awareness of the fact that "few, if any, states actually provide an absolute right to compensation" (Report:90)

If a less developed society had filed such an understanding, it would have been undoubtedly severely criticized, even as an aspect of human rights diplomacy, by the United States Congress in its annual invigilation of the human rights situation by the aid-recipient country. And undoubtedly such criticism would have been fully justified. It should not be open even to the least of the less developed societies to maintain that it cannot afford to compensate victims of unlawful arrest or detention or to argue that such compensation would divert from resources needed to promote and protect other civil and political rights as well as social, economic and cultural rights. What would be a specious position for a least developed country can, by no exercise in imagination, be said to be justified when enunciated by one of the most, if not the most, affluent society in the world. If the American States do not provide for an absolute right for compensation for intransigent behavior of state agents, the ratification should have provided an opportunity for leadership, as a matter of treaty obligation, to the federal government to set things right; after all, it cannot be any part of public policy rhetoric of any political party in America which would assert that the violation of the ICCPR is a superior norm!

Another "understanding" relates to the issue one had thought was long settled by the adoption, about half a century ago, of the United Nations Standard Minimum Rules for the Prisoners. Article 2(a) of the ICCPR did not intend any derogation from this customary norm of human rights in the administration of criminal justice when it referred to "exceptional circumstances" which may justify departure from the norm. The United States "understanding" expands this category to allow desegregation of undertrial "prisoners" from convicted criminals "in the light of the individual's "overall dangerousness". This puts the human rights clock back. In conditions of overcrowded prisons, the characterization of "overall dangerousness" is often a function of prison architecture and management rather than of any regard for the security, well-being, dignity and human rights of the inmates. Even otherwise, such determinations (almost always suspect in closed and total institutions) provide no sound justification for aggravating contamination of undertrials.

The "understanding" aggravates itself when it further subjects the discipline of the ICCPR to the right of waiver by the undertrial to a right to segregation! The ICCPR does not provide for such a waiver; nor can an individual act of choice, under constraint, possibly release a state party from its treaty obligations, much less from the customary international law norms of human rights in the administration of criminal justice.

III. THE RIOT OF RESERVATIONS

The carnivalesque nature of the United States' ratification comes fully to fore when we dwell on some of the cardinal reservations. Reservations to, and derogations from, treaty usually allow state parties to accept a regime of asymmetrical treaty obligations with relation to those who ratify it without reservations. The scope and extent of treaty reservations or derogations, it is now well understood.
cannot simply extend to the erosion or nullification of the objects and the purposes of the treaty. Under the Vienna Convention on the Law of Treaties, this particular limitation on the sovereign power of the states has now come to acquire the status of a *jus cogens* or a peremptory norm of international law, noncompliance with which is tantamount to violation of international law. Of course, what constitutes the object and purpose (in singular or plural, the latter because a treaty can be conceptualized as several treaties rolled into one depending on the provisions which create specific, determinate obligations) is a matter of considerable hermeneutic craft and contention. One state party’s derogation may constitute for the other the bleeding heart of ratification. The hermeneutic openness, no matter howsoever indeterminate, does not authorize state with a carte blanche. We briefly illustrate this observation in what now follows.

A. Death Sentence for Juveniles

Juveniles (persons below eighteen years) cannot be sentenced to death under Article 6(5)(c), ICCPR. The United States reserves the right to impose capital punishment on juveniles under any “existing or future law.” The rationale for this reservation is that the issue of imposition of death sentence “at the age of 16 and 17 continues to be the subject of an open debate in the United States” (Report: 65). The purpose of the treaty provision, however, is to close such national debates on vital human rights.

And most of the states in the world have understood the treaty obligation precisely in this manner. As of 1993, 49 countries have totally abolished the death penalty and as many as 84 countries have abolished for juveniles. The fact that a nascent Constitutional Court of South Africa, by a striking judicial unanimity, constitutionally outlawed capital punishment almost around the same time that the United States was working out painful strategies for reservation on this aspect adds an unusual poignancy to the whole context. The United States by its reservation, resting on an “open debate,” now joins the ranks of Barbados, Bangladesh, Pakistan, Nigeria, Iran and Iraq.

The “Open debate” rests on no more than what Justice Scalia constructs as an American standard of “decency.” If that standard allows execution of a juvenile or imposition of capital punishment on her, it would be “dispositive” untouched by the world jurisprudence. One cannot agree more with Professor Ved Nanda’s observation that

Simply put, there is no justification for an “American standard” when the issue is human dignity. Holding out such a standard is an affront to even the terms “decency” and “dignity.”

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8. *In Stanford v Kentucky*, 192 US. 361 at p. 369.
The human rights offense of the reservation stands aggravated when we recall that the reservation extends to future laws as well.

B. Desegregation of Juvenile and Adult Offenders

The assimilation of juveniles into adults continues in an explicit reservation to Article 10(2) (b), (3) and 14(4) of the ICCPR. The reasons animating the reservation are not much different from the understanding on the segregation of undertrials and convicts noted a little earlier in this paper. The reservation explicitly reserves the right “in exceptional circumstances to treat juveniles as adults”. The reason for the reservation stand furnished not just by the category of “particularly dangerous juveniles” in the light of their criminal histories but, more importantly, by the need to protect other juveniles in custody. An additional reason for the reservation is that there is no separate system for juveniles in the United States Army, where they are eligible for recruitment at the age of seventeen.

Of course, as to this additional ground, there is no reason whatever why the Army may not provide for segregation of juveniles but for the “typical arrogant approach which places the obligations of the United States Uniform Code of Military Justice above an international human rights treaty! Note that this was one area at least where there existed no constitutional or federal inhibitions whatsoever; the Code could have been amended in compliance with the ICCPR.

As regards the argument that certain types of dangerous juveniles have to be treated as adults in the interests of other juveniles in custody, surely the “logic” of the reservation overlooks the consideration of rehabilitation so paramount to the ICCPR. Considerations of public expenditure in providing segregation of dangerous from other juveniles ought not to be allowed to detract from the civil and political rights guaranteed to them by the Covenant. And in any case such considerations remain astigmatic as society is bound to incur greater social costs by assimilation of juveniles into adults for purposes of detention or incarceration.

The real reason for the reservation is the backward-looking, conservative ideology towards juvenile offenders. The NGO critique, referring to the emergence of “boot camp” prisons for juveniles subjecting inmates to “military style discipline-through-humiliation”, is indeed that the “attitude of the United States is basically the same as it is towards the adults: the primary purpose of incarceration is punishment, deterrence, incapacitation. Rehabilitation is secondary” (Sherman, 1995:30). Overall, the reservations thus convert the category of “exceptional circumstances” into the normal destiny of juveniles in American institutions. Juvenile justice communities worldwide would find the situation qualitatively not much different elsewhere, indicating a global terrain of struggle for the achievement of ICCPR rights.

C. Reservation on Death Penalty

The assertion of the “right” of the United States, through a reservation to Article 6 of the ICCPR, is clearly extravagant because clause(2) of that Article does provide for capital punishment for “most serious crimes”. The reservation be-
comes intelligible only when we reach the mandate of Article 6(6):

Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

The reservation seeks precisely to delay and to prevent eventual abolition of capital punishment in the United States. No cogent ground is provided by the Report against the aspiration towards a stage of development of American society and culture free of the cruel and unusual as well as degrading capital punishment.

The arbitrary nature of capital punishment is evident from a disproportionate award to racially vulnerable individuals. As late as 1990 the United States General Accounting Office found (after a close examination of twenty eight studies) that in 82% of cases race of the victim had an impact on sentencing. By definition, the relationship between race and capital punishment awards cannot be proved beyond a reasonable (scientific) doubt. But there is sufficient circumstantial evidence that capital punishment, in practice, is discriminatory and therefore arbitrary. The much vaunted due process is not, nor can ever be, color-blind.

The capital punishment is cruel, unusual and degrading seems obvious to abolitionists. Those as yet unpersuaded by this reasoning could no better than attend to the careful discourse of the Constitutional Court of South Africa (referred to earlier). The American reservation to Article 6 not merely defies the treaty obligation but also seeks to assume the leadership of public opinion in favor of death penalty. In this the reservation impeded the grasp of the gnawing barbarism at the heart of the due process. As Jacques Derrida has observed, arguments against death penalty are superficial, and not by accident. For, they do not admit an axiom essential to the definition of law. Which? Well, when one tackles the death penalty one doesn't dispute one penalty among others but the law itself in its origin.

... If legal system manifests itself in the possibility of death penalty, to abolish the penalty is not to touch upon one dispositif among others. It is to confirm with Benjamin that there is something "rotten" at the heart of law. The death penalty bears witness to the fact that the law is violence contrary to nature.

Article 6(6) of the ICCPR constitutes a struggle against "something rotten at the heart of law". The American reservation seeks to reinforce, as perhaps befits a violent Nation, its right to the foundational violence of law. The terrain for the next report must register the might of progressive public opinion for the removal of the reservation in ways which empower the abolitionist position to gather momentum against the current wave of revival of capital punishment in the United States.

D. Reservation on War Propaganda

It is unusual for a treaty guaranteeing civil and political rights to seek to limit some of the vital rights it enunciates and enshrines. Article 20, for manifestly sensible reasons, mandates that "propaganda for war shall be prohibited by law" and further requires proscription of hate speech, that is "advocacy of national, racial or religious incitement to discrimination, hostility or violence." The United States reservation states:

Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech or association protected by the Constitution and the laws of the United States.

The reservation may be described as a monstrous conjugation of the Pentagon and the Ku Klux Klan "moralties". As to the first, the Report states:

Under the First Amendment, opinion and speech are protected categorically, without regard to its content. Thus, the right to engage in propaganda of war is as protected as the right to advocate pacifism (emphasis added; Report, 169).

This is clearly so under the theory and practice of the First Amendment. But the ICCPR is a global treaty based upon the Charter of the United Nations, which outlaws war except in self-defense or by way of collective security action by the United Nations. The ICCPR in proscribing war propaganda strikes a blow for world peace. It attacks at its very roots the militarization of practices of power. Whatever may be said about the robustness of the American First Amendment, the ICCPR regime modulates the right to free speech to "special duties and responsibilities" (Article 9(3)). Article 20(1) may seem undoubtedly overambitious. But it is not so from the standpoint of human rights human futures but from the perspective of power politics which ultimately constitutes the state as a "war machine".

The U.S. reservation preserves thus the Pentagon rationality, not the rationality of the United Nations Charter, its purposes and principles. For, war propaganda is rarely the pertinent effect of citizen free speech initiative. Rather, public opinion is created by professional war-mongers whose material interests of power or profit or both are enmeshed in the perpetuation of the state as a war machine. It does not matter much at the end of the day which combination of ideology and interest create propaganda for war, whether the Catholic, Hindu or Islamic notions respectively of just war, dharmayuddha or jehad or their secular variants [such as "wars of national liberation" for "making the world safe for democracy"] or the philosophical defense of war recently proffered by John Rawls in defense of "well-ordered" and "law abiding societies" who must exist in a state of nature with the "outlaw" societies.

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Propaganda for war certainly involves freedom of speech and expression; but it is speech, expression as propaganda, as advocacy for war against other nations and peoples; by definition, organized propaganda must serve organized interests. In this case, the special interests groups unleashing war propaganda include military establishments, armament industries, imperialist practitioners of power, war veterans, and distinct formations of hired propagandists whose function it is to create the necessary illusion that resort to war is the only rational and moral imperative. The invocation of the First Amendment can hardly obscure the role of special interests in shaping the reservation.\(^\text{14}\)

It is precisely the task of such groups to equate advocacy of pacifism with propaganda for war as realms of free speech, entitled to equal protection. The salient difference, however, between the two is that the advocates for peace do not serve their material interests by their articulation as the war mongers readily and growingly do. And the former, unlike the latter, rarely bear costs of the exercise of their 'free speech'. The advocates for peace are constantly attacked as lacking in integrity and 'patriotism' and bear, quite often, substantial material costs for enacting their convictions.

This equation of propaganda for war and advocacy for peace, both legitimated in full measure by the First Amendment, can only be understood dialectically as manifesting contradiction between the rule-of-law-state and the state as a war machine. The latter requires a right \textit{in rem} (available literally against the whole world) for war propaganda. But it is precisely this requirement which is morally at odds with the human right to peace, which alone makes sensible the prospect of exercise and enjoyment of all other human rights. As Emmanuel Levinas has memorably stated:

The state of war suspends morality; it divests the eternal institutions and obligations of their eternity and rescinds ad interim the unconditional imperatives. In advance its shadow falls over the actions of men. The art of foreseeing the war and winning it by every means-politics is henceforth enjoined as the very exercise of reason. Politics is opposed to morality, as philosophy is opposed to naivete.\(^\text{15}\)

The American constitutional jurisprudence of free speech is wholly innocent of this precious insight. In contrast, the ICCPR provision is pregnant with it. Article 20(1) seeks to contribute to the elimination of the 'scourge of war' and indeed to convert swords into ploughshares. The Covenant, in essence, facilitates the realization of the human right to peace; the reservation to it by the leading Nations of the North [besides the United States, many European states and Australia and New Zealand] testifies to the resilience of the First world states as war machines.


E. Hate Speech and War Machine

The reservation insofar as it relates to hate speech (Article 20(2)) is wholly unnecessary because the United States jurisprudence celebrates not just the invention of the categories of ‘hate speech’ and ‘hate crimes’ but the apex court has upheld such laws against constitutional challenges on the ground that they punish thought (1994;161-162). The Report also candidly acknowledges that hate crimes proliferate:

Hate crime perpetrators are not limited members of organized groups. Cross burning, arsons (sic) and shootings involving the homes of Afro-American families have also been prosecuted in rural areas of Virginia and North Carolina against individuals who were not affiliated with any racist organizations.

If so, why this comprehensive reservation to Article 20? If hate crimes (including harassment, intimidation, vandalism) are on the increase and the available data is in sufficient despite the present Hate Crimes Statistics Act [as the NGO commentary demonstrates] an unreserved ratification of Article 20 on this count would have enhanced American law, policy and administration to move more resolutely ahead. Instead, the United States government adopts a posture which enhances the ugly potential for the manipulation of semantic and symbolic environment through impunity for hate speech, threatening the liquidation of the historic gains of the struggles led by Martin Luther King Jr. and his valiant associates. Only sustained human rights education initiatives within the United States, no doubt aided by progressive opinion abroad, can help reverse this determined bid to reverse the human rights history.

IV. NATIVE AMERICAN HUMAN RIGHTS: THE LOST FRONTIER?

It is undoubtedly a major achievement of the ICCPR requirement of reporting that the United States Report addresses the human rights situation of Native Americans in terms of Article 1 description of self-determination rights. The narrative shows that

(a) as of 1990, 1.9 million persons identified themselves as Native Americans [constituting thus 1.1% of the American population].
(b) 31% of Native Americans live below (arbitrarily defined from time to time) the poverty levels.
(c) Native Americans experience ”disproportionately high rates of mortality from tuberculosis, alcoholism, accidents, diabetes, homicide, suicides, pneumonia and influenza”. (Note the toggling of a whole variety here of public health, social and cultural factors as well as of the impression unwittingly, though perhaps not wholly so, created that ‘homicides’ are as it were a form of intra-species aggression!).

(d) "In terms of the legal status, Native American "tribes" possess "sovereignty... of a limited character," it is residual in nature, that is "sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status".

(e) Indian tribes (as of now 542 tribes are recognized, including 223 Alaskan tribes) are said to retain "considerable control over natural resources and wealth, with some added protection by the federal government through establishment of a trust."

(f) "Prior to 1930, federal policies had the effect of diminishing the Native American land base... between 1887 and 1934 the Native American landholdings declined from 138 million acres to 48 million acres; "as of 1990" tribes and individual Native Americans own between 50 and 60 million acres of trust or restricted land".

(g) Aboriginal legal interests in land depend on the Congressional power of recognition or extinguishment of any or all rights in land; when aboriginal title to land can be said to be not recognized by the Congress, there is no obligation to pay compensation for taking.

(h) Indian tribes have certain reserved water rights as well as limited hunting and fishing rights; they have full rights over timber located in reserve lands and distinct rights in Indian-owned lands over minerals (p. 36-46).

What lies concealed in this official narrative is the exercise of "plenary powers" over Native Americans who are treated as "wards" of the state rather than as citizens! Interestingly, the Report does not mention the fact that Native Americans became citizens only in 1924! As has been observed in the NGO commentary on the Report:

"the constitutional relationship between the Native Americans and the United States is not based on the democratic principle of government by the consent of the governed. The Constitution grants the Congress the limited authority to regulate commerce and enter into treaties with Indian tribes. On this limited authority the United States has asserted extraordinary broad powers over all Native American nations and tribes, without support in the text of the Constitution, without other legal authority and without the consent of the Native peoples."  

"Plenary power" means in practice extra-constitutional reach, held beyond any sustained judicial review. As the Report itself notes, the government has virtually absolute power to extinguish aboriginal title. This can, and has been, done "without due process and compensation" despite the human rights enshrined in the Fifth and the Fourteenth Amendment to the American Constitution. Indeed:

under the Constitution and the laws of the United States, no individual, group, corporation or association is subject to such devastating governmental powers over its members its resources and its very existence.  

18. Ibid. p. 35.
A detailed review of this devastating power is beyond the scope of this analysis. But it is clear that this vast formation of governmental powers over native Americans can in no way be justified by due process standards of American law and jurisprudence or by any existing human rights normativity. Indeed, the corpus of law and jurisprudence of the “Indian law” manifests, despite an occasionally benign turn of judicial, legislative and executive intervention, the largest and the most prolific measure of governmental lawlessness in American history.

Sadly, it also remains true that even today activist concern over the human rights situation of Native Americans remains minuscule as compared with say the human rights of gay men and lesbians or the rights of environment, especially the endangered species. As everywhere, both the state and civil society combine to produce a genesis amnesia in relation to the indigenous peoples.

But the rights of indigenous peoples constitute the last frontier of human rights. This stands recognized in a more than decade old endeavor, in the United Nations, to enunciate a Declaration, hopefully a treaty, on the Rights of Indigenous People.

V. SCIENCE, TECHNOLOGY AND HUMAN RIGHTS

Like most human rights instruments, the ICCPR does not fully cognize the potential for at times unredressable violation of human rights by the developments in science and technology. It would require considerable hermeneutical enterprise to suggest that the Covenant recognizes, outside the clear text of Article 7, the full significance of the many threats to human rights posed by the literally fantastic developments in science and technology. We may here indicate that at least two other provisions offer suitable sites for such interpretive efforts: Article 17 (human right to privacy) and Article 16 (the right of every human person “to recognition ... as a person before the law”).

Article 7 prohibits “torture, ... cruel, inhuman degrading treatment and punishment” and non-voluntary subjection to medical experimentation. Although the Report clearly states that “[n]on-consensual experimentation” with human subject is illegal in the United States [with the exception of life threatening situations requiring even the use of a test drug when “time precludes consent from the subject’s legal representatives, and there is no comparative alternate therapy available”] it also, somewhat valiantly, acknowledges the wide gap between precept and practice.

The Report acknowledges that between 1944 and 1974 the United States government “conducted and sponsored a number of experiments involving humans to radiation” and an archive, open to public, holds now “270,000 records on nuclear testing and 7000 records on all types of human experiments” identifying at least 2500 records of human experimentation. In 1994 President Clinton has established an advisory committee to investigate “the propriety and ethic of all human radiation experiments conducted by the Government.” And the United States Congress is at last considering “appropriate” compensation for the victims (Report:73-74).

The Report also stresses that the government has “also undertaken substantial
efforts to diagnose and redress injuries that may have been caused by past exposure to potentially dangerous military agents "as a part of the ongoing effort to "resolve long terms scientific and medical uncertainty surrounding herbicides containing dioxin and to ionizing radiation" (Report: 73). And some measures towards compensation have occurred with the enactment of the Veteran Dioxin and Radiation Exposure Act, and Radiation Exposure Compensation Standard Act. 1984.

This is, indeed, a fairly articulate confessional statement, perhaps unlikely to be found in many report submitted to the Human Rights Committee under the Covenant. What the Report does not detail are a whole range of exposure from radioactive leakages or accidents, waste disposal and decommissioning of nuclear power plants or the decade long process in the dismantling of the nuclear warheads. 19 Nor does it mention a whole variety of biohazards entailed in the advancement of biotechnology, a subject of articulate concern by human rights oriented science practitioners.

The NGO comment on human experimentation maintains that despite this belated public acknowledgement of radiation research sponsored or conducted by the American state:

full disclosure of improper experimentation still has not taken place and the adequacy of safeguard to guarantee that these types of unlawful practices do not occur again is still very much an open question 20.

A related area of science and technology impact is visible in the emerging technologies of electronic surveillance. Already in the administration of criminal justice, the policy of deinstitutionalization has made legitimate implantation of certain electronic devices to monitor the movement of affected persons. Consensual arrangements of this type ( such as consensual videotaping) do not seem to pose any major problems justified as they are by the unscripted notion that human rights may be waived. It is the non-consensual mode of electronic eavesdropping which has raised serious problems in the United States jurisprudence, especially under the Fourth Amendment. As to privacy rights, a steady stream of national legislations have endeavored to negotiate permissible exceptions (The Fair Credit Reporting Act, the Video Privacy Protection Act, and The Right to Financial Privacy Act). However, on a reformist ideology of punishment, the practice " of maintenance and release of databases on all exonerated and arrestee’s criminal record " (Report: 146) does raise somewhat serious issues of human rights in the administration of criminal justice.

There has been very little commenation by the American NGO community on the potential of violation of privacy rights by modern methods of surveillance. The technology of satellite imaging, for example, aggravates the high potential for erosion of these rights. The lack of articulate public concern is not so much due to

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a state of satisfaction with exiting legal regimes; rather it betokens indifference to ways in which the fantastic pace of developments in science and technology threaten to render obsolescent the form and content of contemporary human rights and the images of human rights action.

VI. WOMEN’S RIGHTS AS HUMAN RIGHTS

At least six provisions of the ICCPR affirm gender equality [Articles 2, 3, 23, 25, 26]. Clearly, a most critical measure of achievement of gender equality is access to political system, signifying both access to participation in the processes of governance and to public service. Article 25 mandates the State Parties to ensure complete gender equality on both these counts. The Report ruefully concludes:

Women still do not hold more than one fiftieth of the available elective positions at any level of office, including the U.S. Congress, statewide elective offices, state legislatures, county governing boards, mayoralities and municipal and township governing boards. No women has yet been a speaker of the House or a majority or minority leader of the Senate (Report:198-199).

In public services, women represent "48% of the 1.5 million full time white collar workers in the executive branch of the federal government". Not merely are they "disproportionately represented at the lower grades, especially in clerical and secretarial jobs" but also an "average woman" receives an annual salary of $23,000, while an average man employee receives annual salary of $31,000. In two clerical grades (GS-9 and GS-11) which provide "gateways" to senior positions of responsibility, women "are promoted at a lesser level than men..." (Report, 200).

Perhaps, only at the level of judiciary, the situation appears a little more reassuring: 117 out of 746 members of the federal judiciary are women and the Supreme Court has two women Justices. About 10% of judges of the court of last resort, and of the trial judges, are women.

Clearly, the overall picture of women’s participation in governance and administration is unsatisfactory. It compares very unfavorably with nascent, and troubled, democracies in the Third World, especially in South Asia. It is also significant that NGO critique of the Report on this score does not perceive this underrepresentation as a critical issue [excepting as regards the participation ratio of women in the military services]21. However, it raises the question of unequal pay for equal work:

Women still earn only seventy one cents for every dollar earned by men. This pay inequality translates into individual losses of over $420,000 during a woman’s lifetime.... The Equal Pay Act fails to address the pay inequities created by occupational sex segregation22.

21. Yolonda Wu and Martha Davis, "Discrimination Based on Sex" in Joint Working Group, note 10, p. 41 at p. 50.
22. Ibid., p. 44.
Women's career advancement is notoriously hindered by family responsibilities of which men stand usually liberated. Unpaid leave up to 12 weeks (under the Family and Medical Leave Act, 1993) applies to employers with more than 50 employees, excluding "women who work in small businesses." A large number of women "continue to pay a penalty in workplace for fulfilling family responsibilities." 23

The U.S. Report does not go beyond the details of law and judicial decisions to the economic condition of women in real life. Its short two paragraph statement, for example, is wholly silent on alimony and child support. There is growing evidence of vulnerability of women to divorce or separation. The pioneering study by Lenore Witzman demonstrates that for "most women and children, divorce means precipitous downward mobility- both economically and socially"; in contrast, the economic status of men improves substantially upon divorce or separation. 24 As Susan Moller Okin has cogently argued, the reason for grave hardship to women (and children) lies in courts "treating divorcing men and women as more or less equal" and because "typical gender-structured marriage makes women socially and economically vulnerable." 25 Indeed, alimony support payments are becoming progressively meager and transitory (the average amount being $350 a month for a median length of twenty five months) and shorter duration of marriages reduces the amount and the period; paucity of access to means of support is among the most cruel trends now emerging throughout the United States 26. And with the current cutbacks proposed on Capitol Hill on welfare and aid to women with dependent children, the trend will be further aggravated.

This paper is not the place to fully explore all, or even the salient, impacts of these trends. But even a rudimentary glance at this sorry situation suggests that primary obligations of gender equality are not fulfilled in the United States as in many other parts of the world. Unfortunately, too, the NGO movements concerned with women's rights as human rights have such heavy agenda [violence against women, sexual harassment, reproductive rights, rights to sexual orientation] that issues of alimony and child support tend not to be perceived as critical areas of international human rights concern. But the ICCPR agenda does compel attention to this.

VII. HUMAN RIGHT TO SEXUAL ORIENTATION

An important question arises in relation to the right to privacy enshrined in Article 17 of the Covenant. It is eminently arguable that this right entails recognition of a human right to sexual orientation. Policies embodied in law which make same sex intimacy or relation a criminal offense would constitute an "arbitrary" and, therefore, "unlawful" intrusion on the right to privacy. Indeed, this

23. Ibid., p. 44.
was the view proffered by the Human Rights Committee in Toonen v Australia [No. 488/1992, 50th Session, H. R. Comm., March 31, 1994] the Committee declared that the Tasmanian criminalization of "sodomy" violated Article 17. After an initial outcry at the intrusion on national sovereignty, Australia agreed to comply and ensure that the law is repealed. In spite of this view, and perhaps even because of it, the United States' Report maintains that the right to privacy must be "limited to traditional American conceptions of the family" (at p. 142). This view emphasizes Article 23 of the Covenant which affirms that the family is a "natural and fundamental group unit of society" entitled to "protection by State." Should a mother with lesbian relationship be entitled to custody of a child? At least in one case, an American Court has ruled that in such a situation the custody must be given to the grandmother of the child (Bottoms v Bottoms, unreported judgment cited in Tongi & Browning, op. cit at p.65).

In particular, the Report refers to the sharply divided Supreme Court decision (5:4). In Bowers v Hardwick the Court concluded that the U.S. Constitution does not "confer a fundamental right upon homosexuals to commit sodomy." Consensual same sex intimacy is, apparently, ruled out as being in the zone of protection of the American Bill of Rights.

But the position taken in the Report can by no means be justified thus. It may as the majority said in Bowers that proscription of same sex intimacy or union is "deeply rooted in this Nation's history and tradition" but, surely, cultural particularity or relativism may not be allowed to frustrate the universality of human rights. Even a random research will reveal that this has been the consistent view of the United States in considering human rights violations by other Nations.

In addition, the marriage of Article 17 privacy rights with Article 23 rights of the family as a unit is not quite legitimate, unless one makes heterosexuality the sovereign norm of human orders of intimacy. And privacy within the family constitutes a cluster of limitations on the power of the state may well be different than the content of the rights to privacy of individuals.

The Human Rights Committee's views in Toonen do perceive this difference accurately, unlike the American Report. Moreover, the Committee's views have, in principle, the implication that any discrimination on the ground of sexual orientation may be violative of Articles 2 and 26 of the ICCPR. Equality before the law and non-discrimination may not be defeated on the ground of sexual orientation. All that we learn, on this aspect, from the Report is the fact that the American law offers little or no protection to the human right to sexual orientation. This is unenlightening as well as unenlightened and what is more wholly beside the point, the point being that the Report has to be directed to compliance with human rights obligations under the Covenant and not to a narcissistic narrative of American law and jurisprudence.

VIII. THE OPTIONAL PROTOCOL AND THE UNITED STATES

The belated ratification of the ICCPR is still not complete; the United States has yet to ratify the First Optional Protocol. The Protocol has been ratified by a considerable number of states and is in force since 1976. It authorizes the Human Rights Committee (HRC) to receive and consider communications from individuals "claiming to be victims of violations of the rights set forth in the Covenant." Such individuals have to exhaust "available domestic remedies" in order to petition to the HRC. Anonymous communications are not entertained. Nor those which might be held to be abusive of the right to petition. The HRC procedure is detailed by Articles 4, 5, and 6 of the Protocol. And all that the HRC can accomplish, with the cooperation of the State Party is to forward its views, based upon investigation, to the communicant and the State, besides, of course, including a report on its work as a part of its annual report under Article 45 of the ICCPR.

The reluctance of the United States to ratify the Protocol detracts substantially even from the symbolic significance of its ratification. The right to communication is severely circumscribed; so are the powers of the HRC. Given the high rhetoric of how well advanced the American jurisprudence is in terms of protection and promotion of human rights, the disinclination to ratify the Protocol is indeed puzzling. The argument from sovereignty, never a cogent one in relation to human rights, does not apply to treaties in general; any and every ratification of a treaty signifies a measure of willing auto-limitation on sovereign powers of the state. Nor can it be said that the ratification of the Protocol would in any way constitute infringement of the provisions of the United States Constitution. In any case, the plethora of caveats and reservations would tend to limit the range of petitions under the Protocol. Indeed, the much stronger requirement to subject states to dispute resolution procedure in the GATT/WTO treaty did not prevent its "fast track" ratification by the United States towards the end of 1994. A modest right of individuals to petition cannot be perceived, by any reasonable person or entity, as a necessary acknowledgment of shortfalls in accomplishment of human rights by a Nation not wholly unreasonably proud of its human rights traditions. Indeed, recourse by a few individuals, from time to time, under the Protocol will afford potential for the enhancement of human rights in the United States. One hopes that progressive public opinion will espouse the cause of ratification of the Protocol by the United States much before the occasion of the next Report, thus removing an extravagant inadequacy in its compliance with minimum standards of international human rights law.

IX. THE HRC AT WORK ON THE "WORK IN PROGRESS"

It is somewhat premature to construct a narrative of how the HRC approached the American Report on the basis of contemporaneous reportage. But it remains important to identify some principal concerns and comments.

The Report was welcomed by every member of the Committee, but with different nuances. Some merely described it as "good initial report" (Elizabeth Evatt, Australia). Some members were more lavish: the Report met the "high
expectations" the world had from the United States (Omran el-Shafei, Egypt), it was "exceptionally useful and informative" (Rosalyn Higgins, U.K.), "extraordinary" and "valuable" (Eckert Klein, Germany) and "remarkably comprehensive and useful" (P.N. Bhagwati, India).

But as the German expert stated: "Where there was light, there was much shadow" too. And another expert was emphatic in saying "there was little interplay in the report between the 'facts in the field' and the analysis" and he went on to express the hope that the ratification will "usher in a new era" of humility as in the past "the leaders of United States had 'taken jobs' at other countries on human rights issues" (Laurel Francis, Jamaica). A.V. Mavrommatis (Cyprus) was categorical: the Report "did not focus on the consonance of human rights in the United States but instead on the consonance of the domestic and constitutional laws in the Covenant." Similarly, the expert from Japan (Nisuke Ando) lamented the fact that the Report "favored the explanation of the framework of the United States Constitution and not necessarily in the context of the [United Nations] Charter."

Articulate anguish greeted the caveats and reservations, expressed at various levels of diplomacy. The most ruthless, but wholly accurate, comments emanated from Julio Prado Vallejo (Ecuador): the United States, he said, "had made no great commitment to the Covenant, or to the changing of domestic legislation" in situations of "conflict between the domestic norms and the Covenant norms." P.N. Bhagwati (India) questioned, although mildly, the assumption writ large on the Report that the United States need not "change any of its laws because the existing quality of its human rights standards" and he expressed the hope that the "current dialogue would lead to a change in that attitude and that it would withdraw its reservations." Amen!

The HRC expressed deep shock and disappointment at the reservation on capital punishment. Dropping diplomatic niceties, Marco Tulino Burni Celi (Venezuela) bluntly stated: "The United States should not end up being the last country to ensure the fundamental right to life..." Similarly, the expert from Cyprus pointedly asked: "Why should the United States deprive its citizens of the protection of the Covenant" in so vital a matter as the right to life?

The reservation on death sentence to juveniles caused much justified anguish in the HRC. Some members also raised the issue of racial bias in the award and implementation of capital punishment. The ambiguity in the presentation of aboriginal sovereignty and title to land drew the following comment from Rosalyn Higgins:

The Report stated that a tribe's authority to regulate land use within its territory has been found to vary "depending on the character of that territory." What was meant by that? The Report said Congress could either recognize or extinguish aboriginal right. What was the implication of that statement?

What guarantee was there that such a federally recognized status was not passing or ephemeral...?
The HRC was legitimately concerned with human rights education. Some members noted the difficulties NGOs had in obtaining a copy of the Report! Rajsoomer Lallah (Mauritius) found that "not much was being done in the United States to create a general awareness of the Covenant." Nor, specifically, 

judiciary has been acquainted with the obligations under the Covenant. The United States Constitution was not sacrosanct... The judiciary must be made aware of the evolving legal standards coming out of the application of the Covenant.

Elizabeth Evatt (Australia) endorsed the theme of "judicial education ... to raise the level of judge's awareness." She was also, coming from a strong federation, concerned about human rights education of the constituent units of the American federation: she asked if any educational steps or measures were taken to educate states and local self-governments "to consider the implications of the Covenant with regard to matters which must be implemented at that level?" Had the states, she asked, been consulted in the preparation of the Report? Should law reform processes and initiatives not be imbued with human rights education?

Predictably, the official response to all these anxious articulations and interrogations was in the same genre as the Report. The playful observation of David Kretzmer (Israel) recalling the lawyer's quip: "Don't confuse me with facts" apparently fell on severely hearing-impaired State Department's ears! Obviously, it is too early to say how nettled was the American delegation at some of the "politically incorrect" observations of some members of the HRC. Nor is it easy to say how far this encounter may have contributed to self-learning for the highly placed U.S. officials. But human rights oriented civil servants (and this is by no means an oxymoron) and human rights groups should find in the Human Rights Committee's performance a whole array of further initiatives to secure an authentic future compliance by the United States with the Covenant.