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Anthony D'Amato
Northwestern University School of Law

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Are Human Rights Good for International Business?

*Anthony D'Amato**

When I take up the Nuremberg cases in my class in International Law, I find it quite difficult to convey to the students how radical those proceedings appeared to be in 1947. At that time, the contention that there should be individual accountability under international law seemed to constitute an unfounded and dangerous precedent. How could political leaders be made personally responsible for acts of state such as instituting a war (even an “aggressive” war) or engaging in wholly internal policies (the “final solution” against Jews and other minorities of their own citizens)? Indeed, the Nuremberg result seemed somewhat unprincipled to my teachers when I went to law school in the late 1950’s. But today’s students, an entirely new generation, find the Nuremberg decisions unremarkable. Of course, they say, the Nazi leaders were criminally guilty of mass murder and should not have been able to hide behind the instrumentality of the state or government.

As the Nuremberg result settles into commonplace international law, we can appreciate the great change that it wrought in the fabric of that law. The previous state system symbolized in the term *international* law changed to a conception of world law which includes individuals as well as states, and gives those individuals rights as well as duties. In 1947, the Soviet Union, which was by far the most aggressive of the victorious allies in demanding execution of all Nazi Party members, perhaps least realized the radical nature of the precedent they were setting at Nuremberg—that in holding individuals responsible under international law, the concept of collectivity that forms the basis of Soviet Marxism tended to be undermined. Of course Stalin probably did not care; he was himself quite immune from the reach of law, despite his genocidal purges of Soviet citizens in the 1930’s. But

* Professor of Law, Northwestern University; Executive Director, World Habeas Corpus. A.B., 1958, Cornell University; J.D., 1961, Harvard University; Ph.D., 1968, Columbia University.

the precedent he helped create at Nuremberg survived him. Its legacy is in part reflected by the sharp, hostile reactions of Soviet leaders whenever accusations are made against them that they are engaged in human rights violations within the Soviet Union or in satellite nations. The increasing sensitivity of the human rights issue attests to its perceived relevance in international law and international politics.

The shift of emphasis in international law from collectivity to individuality seems to be accelerating. President Carter's revealing remark that human rights is the "soul" of American foreign policy, and Pope John Paul II's espousal of the cause of human rights, signify that it is an idea whose time has come. Not surprisingly, the military-industrial complex in the United States has been one of the slowest to absorb the idea. Support for the Shah of Iran, to take the most recent example, was urged most vehemently by the Pentagon, major banks, and arms manufacturers, in the teeth of evidence that the Shah's brutal repression of Iranian dissidents and his total mental imperviousness to the concept of human rights was not only morally intolerable but also potentially explosive within Iran. The resulting revolution in that country, taking the military-industrial complex by surprise, resulted in many cases of total loss to American financial and commercial interests that had been doing business with the Shah of Iran.¹

Yet perhaps multinational investments were attracted to Iran because the Shah's regime seemed strong and stable. Could it be possible that the logic of international commerce is inconsistent with the disruptive ideas associated with the term "human rights"? We need only recall that fascism was the theory of the completely strong and stable state, one in which the government was indeed transformed into a business corporation. But even in today's rhetoric, international business persons might fear the "revolution of rising expectations" suggested by the various human rights conventions as posing a latent threat to multinational corporations. For instance, the Covenant on Economic, Social, and Cultural Rights, recently signed by President Carter and sent to the Senate for ratification,² contains not only the right to work but also the right to fair wages, equal pay for equal work, equal work conditions for women and men, and "rest, leisure and reasonable limita-

¹ See, e.g., *Business losses in Iran may get much worse*, Chi. Tribune, Feb. 23, 1979, § 5, at 7, col. 2.

² President Carter signed the Covenant on October 5, 1977. See *Remarks on Signing International Covenant on Human Rights*, 13 WEEKLY COMP. OF PRES. DOC. 1488 (Oct. 5, 1977). He submitted it to the Senate for ratification on February 23, 1978. See 14 WEEKLY COMP. OF PRES. DOC. 395 (Feb. 23, 1978). More recently, President Carter urged ratification of this Covenant in a presidential proclamation. See Proc. No. 4609, 43 Fed. Reg. 56,009 (1978).

tion of working hours and periodic holidays with pay, as well as remuneration for public holidays.”³ Also included is the “right of everyone to an adequate standard of living,” including food, clothing, and housing.⁴ One of the most articulate, though less well-known, documents expressive of the third-world consensus on economic rights is the Cocoyoc Declaration of October 12, 1974.⁵ Consider this passage from that document:

Our first concern is to redefine the whole purpose of development. This should not be to develop things but to develop man. Human beings have basic needs: food, shelter, clothing, health, education. Any process of growth that does not lead to their fulfillment—or, even worse, disrupts them—is a travesty of the idea of development. We are still in a stage where the most important concern of development is the level of satisfaction of basic needs for the poorest sections of the population in society. The primary purpose of economic growth should be to ensure the improvement of conditions for these groups. A growth process that benefits only the wealthiest minority and maintains or even increases the disparities between and within countries is not development. It is exploitation.⁶

In the present essay I shall attempt to examine briefly whether any apparent first blush inconsistency between multinational investment and human rights is tenable. I shall consider four arguments. The first and simplest argument I will raise is one of enlightened self-interest. Second, I will attempt to examine what kinds of “rights” are being discussed in the term “human rights” and consider their implications for business investment. Third, I will take a closer look at the already mentioned conflict between human rights and Marxist collectivism. And finally, perhaps the least perceived but potentially the most impor-

³ International Covenant on Economic, Social and Cultural Rights, *entered in force* Jan. 3, 1976, arts. 6 & 7, G.A. Res. 2200 (Annex), 21 U.N. GAOR, Supp. (No. 16) 50, U.N. Doc. A/6316 (1967).

⁴ *Id.* art. 11. Of course, the term “human rights” most prominently includes political and civil rights, such as the right to a fair trial, habeas corpus, prohibition against ex post facto laws, freedom from discrimination, and prohibition against torture and cruel or degrading punishment. *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. 810, at 71 (1948); International Covenant on Civil and Political Rights, *entered in force* Mar. 23, 1976, G.A. Res. 2200 (Annex), 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1967). I am stressing in the present essay so-called “economic rights” since they give rise to the more difficult arguments in light of business interests. If my argument is correct with respect to “economic rights,” it should be an *a fortiori* case with respect to “political rights.”

⁵ For the text of this declaration, see BEYOND DEPENDENCY 170 (G. Erb and V. Kallab eds. 1975) [hereinafter cited as BEYOND DEPENDENCY]. Although the Cocoyoc Declaration was drafted by a group of individuals speaking only for themselves, included were prominent social scientists, natural scientists, and United Nations officials, chaired by Lady Barbara Ward Jackson, in a symposium organized by the United Nations Environment Program and the United Nations Conference on Trade and Development, in close cooperation with the government of Mexico.

⁶ *Id.* at 173.

tant issue, I will attempt to distinguish two strands that have become thoroughly confused in the human-rights rhetoric—the rights of individuals and national claims to self-determination—and the implications of that distinction to multinational business.

SELF-INTEREST

Left to itself, business is apolitical and perhaps amoral.⁷ The business goal of profit maximization encourages efficiency within the company structure but does not directly address the human needs of suppliers, workers, and consumers. Yet indirectly, as Robert Owen among others argued in the nineteenth century, human needs should figure into profit maximization: the more fully a worker's needs are provided for, the more loyal and efficient the worker becomes.⁸ In this sense, increasing the worker's standard of living—and concomitantly the worker's stake in industrial success—should be in the general interest of the business community.

But the human rights issue today is more than a plea for calculation of long run self-interested profitability, as Owen might have argued. Rather, the increasing aspiration for human rights, reflected in the previously quoted Cocoyoc Declaration, is one that multinational business can only ignore at its own peril. For instance, the dictatorial regimes in Cuba, Chile, and Iran seemed eminently stable and businesslike until suddenly they were toppled by internal revolutions. Such revolutions seem increasingly likely in a world where the human rights idea has "caught on," in countries where the government ignores the human rights of the citizenry and allows too great an economic disparity between the favored elite and the masses. And when such revolutions occur, investment losses can be total. Indeed it may already have become more prudent for a multinational corporation to open up a new plant in a country that has a reasonable tax on profits and makes sure that the tax benefits the people, than to invest in a country that has an invitingly low tax but ignores the welfare of its citizenry. Although the return on investment in the former case may be less dramatic initially, it might continue for a long time; the latter case, on the other hand, could at any moment explode in revolution and total confiscation.⁹

⁷ According to Irving Kristol, "It is, in my opinion, as absurd to praise the profit motive—i.e., economic action based on self-interest—as it is to condemn it. The human impulse to such action is, like the sexual impulse, a natural fact." *No Cheers for Profit Motive*, *Wall St. J.*, Feb. 20, 1979, at 18, col. 4.

⁸ See R. OWEN, *A NEW VIEW OF SOCIETY AND OTHER WRITINGS* (G. Cole ed. 1927). Robert Owen (1771-1858) was a very successful businessman as well as a philosopher.

⁹ The same calculation should apply to foreign policy. The Dulles-Kissinger approach that

Hence, in terms of self-interest, international business must become increasingly realistic about the implications of what has seemed to many to be a "soft" issue, namely, the issue of human rights.

NATURE OF THE "RIGHTS"

Some observers have asserted that "human rights" such as the right to food, clothing, housing, medical care, and education, cannot be taken seriously since, unlike typical rights such as those found in the Bill of Rights, the so-called human rights require positive acts by others in order to be actualized. For example, the right to food depends upon farmers producing the food and shippers transporting the food to the claimant. The right to medical care requires that doctors be available and willing to provide it. In contrast, rights found in the Bill of Rights, such as freedom of speech and religion, and the right to due process of law, seem to exist as present realizable claims. Thus, Joel Feinberg contrasts human rights with actual rights, and says that

when manifesto writers speak of them [human rights] as if already actual rights, they are easily forgiven, for this is but a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of present aspirations and guides to present policies.¹⁰

But the contrast suggested by Professor Feinberg tends to be misleading. Every right, whether a human right or a Bill-of-Rights right, only makes sense if there is a corresponding duty.¹¹ Freedom of speech and religion imposes upon others the duty not to interfere with the exercise

emphasized personal friendships and commitments with national leaders, resulting in military alliances with dictatorial and repressive regimes, can result in enormous losses when these regimes are toppled. The new human rights approach, on the contrary, holds the promise of forging longer lasting ties with the peoples of foreign countries. In addition, it tends to create a world environment compatible with American values in which the United States may feel more secure. The Dulles-Kissinger rhetoric that we "need" military alliances with foreign governments has been persuasively advertised and sold within the United States, but apart from some segments of the business community which stand to gain directly from that program (arms manufacturers and bankers, for instance), the rhetoric has not persuaded most upon careful analysis. Our present nuclear stockpile—enough to incinerate the rest of the world several times over—is a more reliable deterrent and safeguard for our national security than nuclear weapons and missiles in the hands of foreign governments who have paper commitments to us.

Nor do we need their territories as "bases" for our missiles. Our nuclear submarines, under our direct control and at any given time dispersed under the oceans of the world, are all the "bases" we need. In addition, missile sites within the United States can reach any target on the planet with incredible accuracy.

¹⁰ Feinberg, *The Nature and Value of Rights*, 4 J. VALUE ENGINEERING 255 (1970).

¹¹ See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Sometimes duties are addressed to particular persons (*e.g.*, to the courts in the due process example) or to an indefinite class (*e.g.*, to all who are required to give food to a starving person). Professor Feinberg notes the latter possibility in a free speech example but does

of that freedom. The right to due process of law places upon courts and governmental officials the duty to take positive steps to provide due process to the claimant. Similarly, the right to work places upon others the duty to provide the work.

But here is where careful consideration is needed. Just as the right to speak implies the right to remain silent, so too the right to work implies the right not to work and the right to a paid vacation implies the right to skip that vacation. Let us analyze two of the human rights—the right to food and the right to work. If I am a poor farmer (and sixty-five per cent of the world's workers are peasant farmers existing in a subsistence economy),¹² I have the right to grow food for myself and my family or not to do so. I have the right to eat or not to eat, to work or not to work. Of course, at the subsistence level, these rights seem rather academic; surely I will work and naturally I will eat the food I produce. But now suppose I am capable of producing more food than I need. And suppose further that there is another person, perhaps in another country, who is starving and asserts a "right to food." If the surplus food that I can produce with my labor is enough to save that other person from starving, he might claim that he has a right to that food. But what, then, of my right not to work? Must I be coerced into working extra hours so that I can produce surplus food to feed someone else? If so, then my right to work is a sham, for in fact I am being forced to work. To be sure, I might recognize a moral right of that other person to some portion of my excess labor, but I would want to know more about that other person—is he simply being lazy, or is he working as hard as he physically can but with poor soil or in a poor climate? If he is simply lazy, I feel a lesser moral obligation to work long extra hours to feed him. And in any event, the extent to which I feel a moral obligation is a matter of my own judgment. I do not want to be coerced by the government into working extra hours so that the product of my extra labor can be distributed free to others. Or I could make a different argument which results in the same conclusion. I could work only the "extra" hours and have all the food I produce be distributed to others, leaving nothing for myself. Then I could claim that I, too, have a right to food, and therefore the food that others produce should be distributed to me.

In short, a *universal* system of human rights results in contradiction if the corresponding duties can only be achieved by coercion. This

not appear to carry through its general implications. See J. FEINBERG, *SOCIAL PHILOSOPHY* 95 (1973).

¹² Ferguson, *International Human Rights*, HARV. L. SCH. BULL., Winter 1979, at 16, 18.

conclusion has enormous implications for the free enterprise system. For the poor farmer is perfectly willing to produce excess food if he can trade it for other desired goods that he cannot efficiently produce for himself. For example, if in one year I can produce a thousand dollars' worth of surplus wheat, I would do so if I can sell that wheat and—even if the government takes half of the money for taxes—use the after-tax income to buy a television set.¹³ The television set makes the extra labor worthwhile, and in turn provides my surplus wheat to the entrepreneurs who designed the television set and the workers who constructed it. In sum, this simple example indicates that only through a free market mechanism can human rights be universalized. Any other system so far devised seems to require, to some degree, human slavery. Both political extremes of fascism and communism require forced labor to meet distributive ends fashioned not through individual choice but by the government.

Human rights can therefore only be actualized by a free market system that encourages producers to produce goods and services that they anticipate will be valued enough by other producers so that the latter will sell their surplus labor to get what they want. Thus, for example, the right to work and the right to a paid vacation are not at all impediments to international business. Rather, they call upon governments to provide the incentives to make international business work. If multinational enterprise grows, more jobs will be created, and the right to work will become actualizable.

HUMAN RIGHTS VS. COLLECTIVE RIGHTS

If the argument in the preceding section is correct, we can see that the idea of human rights is a threat to collectivist theories such as Marxism. Under Marxist theory two collectivities—the working class and the capitalists—fight an inevitable war in which the capitalists are ultimately destroyed.¹⁴ In the resulting single-class society, mass freedom can exist because the enemy has been removed. But history diverges from Marxist theory. Marx held that the government withers away, but in fact the state must become increasingly powerful in order to coerce those who are unwilling to do their share of the work. The

¹³ What ultimately counts is not the amount of after-tax dollars nor the rate of taxation, but rather whether material incentives (such as TV sets) exist that can be purchased by a certain amount of extra labor.

¹⁴ See K. MARX, *DAS KAPITAL* (1867), translated in K. MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (S. Moore and E. Aveling trans. 1906).

slogan “from each according to his ability”¹⁵ means that the government must first determine the ability level, and second must enforce a person’s labor at that level. Workers may not be given material incentives for greater productivity without the risk that differential wealth patterns will arise that lead to the reemergence of capitalists.

Indeed, communism requires that workers remain a homogenous group. The logic of collectivism works toward individual *equality in fact*, in contrast to human rights theory which works toward individual *equality under the law*. Equality in legal rights means that the person who chooses to work harder will reap greater material rewards than the person who takes it easy (although the latter is certainly free to regard non-work as a reward in itself). Differences in material wealth constitute the essence of free enterprise. Only in a system of such factual differences are profit-making and profit-retention meaningful.

But history has also shown that when wealth differences are perceived to become intolerably great, a mass revolution will occur that brings about sudden wealth redistribution. The free enterprise system seems incapable of sufficient self-regulation to avoid such extreme differences in wealth; indeed, the internal motor of capitalism seems to accelerate as profits increase, as attested by the “robber baron” legacy of nineteenth century United States. To avoid revolution, capitalist societies have had to enact—often against the bitter opposition of the business sector—wealth transfer payments in the form of progressive taxation. Such redistribution of wealth through taxation saves the free enterprise system against the excesses of its internal logic. In other words, successful participants in the free enterprise system must submit to taxation so that transfer payments may be made to unsuccessful participants, enabling the latter to have some of the material rewards of the system (food, clothing, shelter, etc.). The human rights conventions reach the same conclusion, although the focus is upon the recipients rather than upon saving the free enterprise system. The general duty to provide each person with food, clothing, shelter, etc., necessarily calls for a taxation system that results in transfer payments to the poor.

However, one might well ask what is special about taxation? If taxation becomes too onerous, is it any different from communism? Doesn’t taxation involve coercion? My reply is that taxation might very well become onerous if we view it as an end in itself. But if we adopt the perspective of the human rights conventions, we see that what is substantively essential is not taxation per se but rather maxi-

¹⁵ KONSTITUTSIĀ (OSNOVŌI ZAKON) SOŪZA SOVIETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS) art. 14.

mizing transfer payments so that everyone may receive the basic necessities of life and have a stake in the system. Yet as soon as we focus upon maximization of transfer payments—and hence maximization of tax revenues—a limiting mechanism naturally occurs. If the level of taxation is pushed too high, disincentives to produce will result, and tax revenue decreases. To illustrate, an increase in the level of taxation from ten to twenty percent might very well increase tax revenues, but an increase from seventy to eighty percent might decrease total revenues.¹⁶ At the higher levels, non-work becomes marginally preferable to work since it is marginally worth so little in after-tax money to do the extra work. By fine-tuning the taxation rates to maximize revenues over a long period of time, governments will be furthering the cause of human rights and, incidentally, removing the preconditions for socialist revolution.¹⁷ Concomitantly, the government is not coercing labor. A tax on income can be avoided if a person chooses not to work at all. By setting a tax rate such that enough people have an incentive to produce even if their income is taxed at that rate, individual choices whether to work or not to work will in fact determine the tax level. It would be distorting language to call this kind of taxation “coercive”; in fact, it is fully consistent with, if not required by, a theory of universal human rights.

HUMAN RIGHTS VS. NATIONAL SOVEREIGNTY

If there is something antithetical between human rights and collectivism, may there not also be a clash between human rights and national prerogatives? Third-world rhetoric would have us believe that

¹⁶ The “Laffer curve” illustrates this phenomenon of taxation. At either extreme—0% or 100% of income—the government will realize no tax revenues. Somewhere in between revenues will be maximized. Of course, governments often take a long time to realize that high tax rates are operating as a disincentive to work and production since the immediate effect of a tax increase is usually to increase revenue (in the short run) until more people and industries realize that extra work doesn’t “pay.”

¹⁷ Perhaps the twentieth century’s most important contribution to the analysis of social justice, J. RAWLS, *A THEORY OF JUSTICE* (1971), reaches the same result through a posited mechanism of disinterested individuals bargaining among themselves for the optimal distribution of societal wealth. In that scheme, Rawls sets up transfer payments from the most advantaged members of society to the most disadvantaged, but only to the point at which the latter do not become marginally worse off because of production disincentives upon those who are taxed leading to an aggregate decline in the benefits received by the disadvantaged. However, the result of the disinterested bargaining is to create a just society, a result coincident with the human rights thesis. Interestingly, before he gets to the redistribution scheme, Rawls requires that a just society foster the maximum liberty of each individual consistent with aggregate liberty. In this manner, his result accords with that reached in the second section of the present article, in that coerced labor would violate the “liberty” principle.

there is no such clash. The language of the previously cited Cocoyoc Declaration shifts ambiguously between rich nations and rich individuals, and between poor nations and poor persons. In talking about "reliance primarily upon one's own resources,"¹⁸ the Declaration does not make clear whether "one" is a third-world nation or an individual laborer, although it mentions in the same context the need for "increased national self-reliance."¹⁹ The document calls upon the powerful nations to keep "hands off" third-world countries, to allow them to "find their own road to a fuller life for their citizens."²⁰ In affirming the idea of national sovereignty over natural resources, the Declaration aligns itself with earlier United Nations resolutions on "permanent sovereignty" over natural resources.²¹ In these positions, the Declaration is typical of claims that are heard daily. Industrialized nations are admonished for having "exploited" the natural resources of third-world nations, such as the oil in Iran or the copper in Chile. The United States is blamed for consuming a disproportionate amount per capita of the world's natural resources.

Yet if the industrialized nations feel any "guilt" over such charges, their feelings may be traced to the success of the propaganda in mixing the human rights moral issue with the claims of national sovereignty. For, in the first place, nations such as the United States have paid for the natural resources that they have imported from the third-world. If third-world countries had a better use for them than selling them to the industrialized nations, they should have kept them. But in fact the minerals in the ground were of little use to the developing nations, and therefore the decision was made to sell them at the going market price. If as a result the people of many of those nations remain poor, their poverty is not the fault of the buyers of their mineral wealth, for without such buyers they would be even poorer. Perhaps for this reason the sales of such minerals continue today despite the rhetoric.

Secondly, we might ask by what human right do the people in mineral-rich areas claim ownership of those mineral resources. If we can sort out claims of national sovereignty over natural resources from human rights claims, we find that the two are entirely different from each other. As a matter of human rights, we certainly should give a worker the product of his labor consistent with the claims of others to

¹⁸ BEYOND DEPENDENCY, *supra* note 5, at 174.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 803, 17 U.N. GAOR Supp. (No. 17) 15, U.N. Doc. A/5217 (1962). See Charter of Economic Rights and Duties of States, art. 2, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9631 (1974).

some portion of that labor. But why should we assign to any person or group of persons the vast wealth that by an accident of nature happens to be located within the physical territory that they claim is a nation? From a human rights standpoint, it would be far more defensible to allocate all underground mineral wealth to every human being regardless of the location of that wealth. It should be a matter of common ownership available to all, like the high seas in international law. Of course, a person who extracts mineral wealth has commingled her labor with the minerals, and is entitled to some portion of the worth of the extraction. But she should receive no more than the market price for such labor, which would be fixed by open competition for the job. Any proceeds above that amount should be distributed to the people of the world in the priority given by the human right conventions—food first, then clothing, shelter, and so forth.

Yet we await in vain any statement by a mineral-rich third-world nation that its underground wealth should be distributed to poor persons in foreign countries. Instead, we receive rhetoric that subtly blends human rights with national sovereignty claims of right.²²

Generalizing the preceding argument, I would contend that a universal system of human rights would tend toward the dissolution of all national claims to special rights or privileges of the citizenry. For a nation, upon analysis, is a collectivity. Its boundaries are artificial, for the purposes of universal human rights. To the extent that human rights makes any inroad at all into national sovereignty claims, the effect will be to protect international business against expropriation or confiscation. In this respect, there is a fundamental affinity between the goals of multinational business enterprise and the goals of human rights.

²² Although certainly not third-world rhetoric, J. RAWLS, *A THEORY OF JUSTICE* (1971) much more subtly involves the same confusion between social rights and the boundaries of nations. Professor Rawls' goal is to work out a justice system for a given society. But there are significant conceptual problems in relating a society patterned on his model with other nations of the world, particularly poor nations. For further analysis of this point, see D'Amato, *International Law and Rawls' Theory of Justice*, 5 *DEN. J. INT'L L. & POL'Y* 525 (1975).