8 International Human Rights

A SLAP IN THE FACE AT THE UNITED NATIONS

In March 2001, anger and consternation reigned among the members of the American delegation to the United Nations. In a routine election of the members of the U.N. Human Rights Commission, the main U.N. body concerned with human rights, the United States had just been replaced by Austria. This was an outrage, and the U.S. media picked up on the theme – a slap in the face for the new Bush administration at the United Nations.

Ironically, at the time, Austria was subject to intense international criticism on the grounds of its lack of attention to human rights. Austria had drawn fire from both the U.S. State Department and the European Union in late 1999 when Jorg Haider, the leader of Austria's Freedom Party, became a member of the country's governing coalition after his party received 27 percent of the vote in national elections. Haider and his party were notorious for their controversial, right-wing positions that many regarded as racist, anti-immigrant, and sympathetic to Nazism.

Regrettably, this state of affairs continues. The fifty-three members of the U.N. Human Rights Commission are studded with human rights offenders. In 2005, the members included the Sudan, a country that is accused of carrying out a campaign of mass murder, rape, and expulsion against non-Arab Muslims in the Darfur region; Cuba, the last bastion of communism in the Americas; China, where thousands are in jail for political offenses; Russia, where a cruel war without end is ongoing in Chechnya; and Zimbabwe, where the government is confiscating white farmers' lands.

The U.N. High Level Panel that reported to U.N. Secretary-General Kofi Annan in December 2004 minced no words in advocating reforms: "The Commission on Human Rights suffers from a legitimacy deficit that casts doubts on the overall reputation of the United Nations." This is too mild

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a denunciation; in truth, the U.N. Commission on Human Rights as it is presently constituted makes a mockery of the entire U.N. system of protection of human rights.

THE UNITED STATES: PROTECTOR OF HUMAN FREEDOMS

International human rights is a much-discussed topic that is poorly understood. One misunderstanding is that the United States plays the leading role in ensuring the observance of human rights around the world. U.S. presidents often lecture other nations on human rights and freedoms. The U.S. State Department publishes annual country reports on human rights practices around the world – "report cards" grading countries on their performances. Like a stern parent, the United States issues warnings to those with unsatisfactory grades; sometimes these warnings are followed up by trade sanctions – the equivalent of requiring the nation to stand in a corner and contemplate how it can do better.

The reality is that the United States, after leading the world to recognize international human rights immediately after World War II, has largely abandoned the field to others – mainly the Europeans – and retreated into exceptionalism and unilateralism. In the last forty years the United States, with few exceptions, has been either an innocent bystander or has tried undermining the international system of human rights. It further lost the high ground as far as human rights is concerned because of its policies after 9/11 in Afghanistan, Iraq, and Guantanamo Bay; the U.S. Patriot Act provisions; and the revelations of torture at Abu Ghraib prison. The United States does not fully participate in multilateral efforts to protect human rights; it has not ratified the American Convention for the Protection of Human Rights (1969) that has been accepted by twenty-five members of the Organization of American States, and it largely ignores the human rights efforts at the United Nations.

A SYSTEM THAT IS BROKE

The system that protects international human rights is bankrupt. The end of the Cold War, despite the collapse of numerous repressive regimes, did not increase respect for international human rights. On every continent there are abuses of human rights and oppressive governments. According to the 2004 survey of *Freedom in the World* conducted by Freedom House, only 88 of 191 U.N. members are rated "free," 55 are "partly free," and 49 countries are

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"not free" – in this last category are 35 percent of U.N. members with a total population of 2.2 billion.

The largest deficit of human freedom is in Muslim countries. Of the forty-one predominately Muslim countries in the world, not one is considered genuinely "free" or fundamentally respectful of political rights and civil liberties. Only eight, led by Turkey, are considered even "partly free." Many Muslim states are in the category of "most repressive," including Saudi Arabia, Sudan, Syria, and Turkmenistan. Nevertheless, the African-Muslim block at the United Nations, demonstrating its disdain for Western sensibilities, makes sure that Sudan retains its seat on the U.N. Human Rights Commission while in the midst of committing what has been termed "genocide" by former U.S. Secretary of State Colin Powell.

Yet, Islam is the fastest-growing religion in the world, and Muslim countries lead the way in population growth. So if one of the root causes of Islamist terrorism is deprivation of human rights in Muslim countries, the problem is going to increase unless international human rights are made a priority concern. The United States alone cannot bring democracy and civil and political rights to the Muslim world. This can only be done through multilateral solidarity – working with other states, particularly the Europeans, to rebuild and invigorate multinational institutions.

We should not overlook the many voices of concern in the Muslim world itself. Here are examples:

1. After the horrible massacre of schoolchildren in Beslan, Russia in 2004, Nazrine Azimi[1] wrote,

> Where, I ask my fellow Muslims, do we turn when so many atrocities are committed under the banner of our faith? Most extremisms arise when people don't know where to turn: the gross vulgarities that pass for freedom in Western democracies may have irredeemably frightened many moderate Muslim societies into the arms of more dogmatic nonsecular movements. Still, Muslim countries must start questioning why so many of their sons and daughters go about claiming an Islamic inspiration for murderous acts. Who are those who perpetrated the Beslan tragedy in the name of Islam and where, pray, are Muslim politicians and commentators to condemn, unequivocally, their cruelty?

2. Yousiff M. Ibrahim[2] writes of fear choking the Arab world:

> Fear is deeply ingrained in the Arab mind. . . . There is a fear to speak, write, read, or even hear truth. . . . How many times have you read about presidents

[1] "The Anguish of a Faithful Muslim," *International Herald Tribune*, Oct. 26, 2004.

[2] "The Fear that Chokes the Arab World," *International Herald Tribune*, Oct. 30, 2004.

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who win new terms with 99 percent majorities? How many times have you read about "honor killings," . . . harrowing acts of bloody mayhem by a male who cuts the throat of his wife, sister, or distant female relatives, often on a rumor about her misbehaving or not marrying someone the family designated. . . . We say of countries where women are not allowed to vote, choose their life partners, drive, travel or run for office that they are preserving "Arab and Islamic tradition," when in fact they are committing flagrant violations of human rights for half their populations.

3. Muslim scholars are also beginning to look critically at the Qu'ran. Muhammad Shahrour[3] argues that Muslims will disentangle their faith from the violence committed in its name only if they reappraise their sacred texts. For example, he says that the ninth chapter of the Qu'ran, which advises "slay the infidels where you find them," should be relegated to its context, a failed attempt by the prophet Muhammad in the seventh century to form a state on the Arabian Peninsula.

Renewed efforts to establish international human rights in the world can counterbalance and defeat Osama Bin Laden and his followers, who began their campaign of terror 25 years ago and now have spread their message around the entire world.

ORIGINS

This idea of human rights comes from the European Enlightenment of the seventeenth and eighteenth centuries. The English philosopher John Locke (1632–1704) formulated the idea of natural rights – life, liberty, and property – from the natural law, a code of rules whose authority rested on human reason.[4] For Locke and the French social reformer, Jean-Jacques Rousseau (1712–78), these natural rights preexisted governments, and with their consent to form states (the mythical social contract), human beings did not surrender these rights, but only ceded the right to enforce them.[5] The ideas of Locke and

[3] Neil MacFarquahar, "Muslims Take a Hard Look at Islam," *International Herald Tribune*, Dec. 11, 2004.

[4] By contrast, Edmund Burke (1729–97) rejected the idea that natural rights existed outside society or before history; he maintained that all rights derive from the history of the society in which they are exercised. Edmund Burke, "Reflections on the Revolution in France," in Isaac Kramnick, ed., *The Portable Edmund Burke* (1994), 416–74.

[5] The originator of this idea of natural rights was Thomas Hobbes, who transformed the idea of natural law into a theory of natural rights. Hobbes claimed that a right of nature is "the liberty each man hath to use his own power for the preservation of his own nature, that is to say . . . of doing anything which in his own judgment and reason, he shall conceive to be the aptest means thereunto." *Leviathan*. I, p. 79 (Penguin edition 1968).

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Rousseau became fundamental to both the American Revolution and the French Revolution in the latter part of the eighteenth century. The natural and self-evident rights of mankind were embedded in the Declaration of Independence, the U.S. Bill of Rights, and the French Declaration of the Rights of Man and Citizen. For Thomas Jefferson, who participated in the drafting of all three documents, human beings are "endowed by their Creator with certain inalienable Rights, among them life, liberty and the pursuit of happiness."

In the twenty-first century, the concept of human rights is anchored in human dignity as well. Even those who dispute the divine or natural law origin of human rights accept the human rights tradition as obligatory. Two consequences flow from the affirmation of human rights: (1) Limits are placed upon the ability of governments and of majority decision making to encroach upon defined individual freedoms and (2) individuals and groups are recognized as having certain claims on society.

UNIVERSALITY

The modern conception of human rights is European in origin. Despite this, are human rights universal? Some say that human rights must be subject to cultural and religious traditions. For example, certain Islamic states have made reservations to key provisions of the 1979 Convention on the Elimination of Discrimination against Women. Female genital mutilation is widely practiced in certain African states. State practice differs with respect to such matters as the imposition of the death penalty, corporal punishment, freedom of the press, and the rights of unborn children. Many developing countries stress economic development and a right to development, rather than traditional human rights, political rights, and civil liberties.

Yet, the U.N. system is committed to the universality of human rights. The 1993 Vienna World Conference on Human Rights declared, "All human rights are universal, indivisible, and interdependent." The solemn commitment of all states to fulfill their obligations to promote universal respect for human rights was reaffirmed. The promotion of human rights was termed a "priority objective" of the United Nations. Is this just rhetoric?

Oppressed peoples never make denials of the universality of human rights; it is always their oppressors who do so. Human rights are universal because the fundamental aspirations and needs of people everywhere are the same: to have food, shelter, and the security of family life; to be able to think, talk, and meet freely; to live free, creative lives; to practice a religion or to

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demur; to be free from arbitrary arrest and punishment; and not to suffer discrimination because of race, gender, religion, or ethnic status. States may behave differently, but people are the same. Human rights are universal in the sense that they transcend political, economic, and cultural differences.

This is not to deny that there are differences at the margin with respect to certain rights: for example, whether the death penalty should be an exception to the right to life, whether hate speech should be prohibited, or the scope of the rights of unborn children. The 1993 Vienna World Conference on Human Rights admitted, "The significance of national and regional peculiarities and various historical, cultural, and religious backgrounds must be borne in mind." So although human rights are universal, they may not be uniform. For example, some states may emphasize economic and social rights; others may place primary importance on cultural rights. But there is an undeniable core of human rights and values applicable all over the world.[6]

AN AMERICAN BLACK EYE

The sensational photo of Pfc. Lynndie England pointing a finger of ridicule at the genitals of a hooded Iraqi prisoner at the Abu Ghraib prison in Iraq flashed all over the world in the spring of 2004. The photographs that came to light about the treatment of prisoners in Iraq told the truth and more: The Bush administration carried on systematic violations of domestic and international human rights laws after 2001. New details emerged nearly every week for the rest of the year. Not only in Iraq but also in Guantanamo, Afghanistan, and elsewhere, prisoners were subject to what can only be termed torture. In March 2005 the *New York Times* reported that at least twenty-six prisoners died while in U.S. custody in what U.S. army investigators have concluded were acts of criminal homicide. In Guantanamo "enemy combatants" were subjected to a variety of forms of physical and mental torture, including grabbing prisoners by their genitals, forcing them to masturbate, chaining them to the cold ground, depriving them of sleep, playing loud constant music, and "water-boarding," repeatedly submerging a naked, manacled prisoner in water until he begins to lose consciousness. The Pentagon also admits using a technique known as "rendition" – if particularly nasty techniques are needed, a prisoner can be turned over, in secret, to a friendly country where torture can be carried out with impunity.

[6] See the persuasive article by Amartya Sen, "Human Rights and Asian Values," *The New Republic*, July 14, 1997, pp. 33–40. It concludes, "The authoritarian readings of Asian values that are increasingly championed in some quarters do not survive scrutiny."

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"Where has America Gone?" read a headline in English in a Japanese newspaper that was typical of the reaction around the world. Critical voices were raised in countries friendly to the United States. "Europe fears that U.S. contempt for human rights is not just confined to a few soldiers but represents the ethos of the Bush administration,"[7] wrote Ambassador Hugh Cortazzi, a former British career diplomat.

Independent investigation[8] has determined why this abuse occurred: lawyers who were both ignorant of and hostile to international law responded positively to the Office of White House Counsel's call for legal justification to subvert long-standing rules on the treatment of prisoners of war. The objections of lawyers at the State Department and the Pentagon were ignored, and senior officials in the government turned a blind eye to what was going on.

The architect of the scandal was White House Chief Counsel (now Attorney General) Alberto Gonzales, who put a team of hand-picked lawyers – people who could be trusted to come up with the right answers – to work on the standards of interrogation of prisoners taken in the War on Terrorism. Assistant Attorney General Jay S. Bybee, working closely with his deputy, John Yoo, produced a Memorandum of Law that was issued in final form on August 1, 2002.

The memorandum advised President Bush that the International Convention on Torture and U.S. law[9] only forbade "acts inflicting, and that are specifically intended to inflict, severe pain and suffering. . . . Those acts must be of an extreme nature to [violate the Convention and U.S. law]. We further conclude that certain acts may be cruel, inhuman and degrading, but still not produce pain and suffering of the requisite intensity to fall within the [legal] proscription against torture."

The memorandum went on to say that if executive branch personnel engaged even in torture out of "necessity" or in "self-defense [of the country]" they would not be subject to punishment:

Even if an interrogation method violated [the law], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct an military campaign. . . . It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be interrogated for information concerning the enemy, its strength and its plans.[10]

[7] *London Observer*, June 19, 2004.

[8] *The Abu Ghraib Investigation: The Official Report of the Independent Panel and the Pentagon* (2004).

[9] The U.S. law forbidding torture is 18 USC secs. 2340–2340A.

[10] This memorandum was withdrawn only in December 2004 when it was clear that it would become an embarrassment in Gonzales's confirmation as Attorney General.

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INTERNATIONAL HUMANITARIAN LAW

The Justice Department memorandum was a green light that neither international law nor U.S. law limits the authority of the president in any way. It ignored the fact that even in war and its aftermath there are standards under international law that must be upheld. These rules are known as the *laws of war* and *international humanitarian law*. The purpose of laws of war is to minimize cruelty and suffering even in this most extreme of human pursuits. The development of rules to minimize human suffering in war goes back to the nineteenth century and to reforms advocated by such persons as Florence Nightingale, who heroically sought to improve conditions during the Crimean War (1853–6), and Francis Lieber, who drafted a code of standards for treatment of prisoners during the U.S. Civil War. These rules became the subject of international law through a series of treaties, the most important on which are The Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949.[11] These laws of war deal with such matters as treating the wounded, sick, and shipwrecked; minimizing civilian casualties and the destruction of civilian property; outlawing certain types of weapons (chemical and biological weapons, for example); and treating prisoners of war.

The right of all human beings to be free from torture applies both in war and in peace. There are no legal justifications for torture or exceptions to its prohibition. The U.N. Convention on Torture (1985)[12] requires that states adopt measures to prevent torture within their jurisdictions and ensure that torture is a criminal offense.

Torture is defined under the Convention as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of a public official or other person acting in an official capacity.

This definition has been applied by the European Commission on Human Rights to include failure to provide food, water, heating in winter, proper washing facilities, clothing, and medical and dental care to prisoners.[13] The U.N. Human Rights Committee holds that torture includes such techniques as punching, kicking, forcible standing for hours, electric shocks, hooding for prolonged periods, malnutrition, and mock executions.[14]

[11] For the text of these and other conventions, see A. Roberts and R. Guelf, *Documents on the Laws of War* (3d ed. 2000). In 1977 there were two additional protocols to the Geneva Conventions, but these were not accepted by the United States.

[12] 23 ILM 1027 (1985).

[13] Denmark et al v. Greece, ECHR Yearbook XII 1 (1969).

[14] The cases are summarized by Javaid Rehman, *International Human Rights Law* 415 (2004).

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The United States has pledged to adhere to these rules and normally takes them seriously. After World War II, the United States and its allies conducted war crimes trials of German and Japanese officials, and several hundred were convicted and executed or imprisoned. U.S. military training normally includes extensive instruction on the laws of war.

The U.S. military has long adhered to international standards forbidding torture so the question of which interrogation techniques are proper for prisoners should never have arisen. The U.S. Army has long experience in conducting interrogations, and its techniques and training programs fully comply with international standards. Army Field Manual 34–52, the instruction book used since 1992 as the basis for U.S. Army interrogations, expressly forbids mental and physical torture as illegal, morally wrong, and counterproductive. Beatings; forcing an individual to sit, stand, or kneel in an abnormal position for prolonged periods; threats and insults; and other inhumane treatment are not allowed. Instead, the field manual outlines seventeen permissible interrogation techniques, including psychological ploys, tricks, and nonviolent ruses, to get a prisoner to talk.

The field manual makes several convincing arguments against torture. First, torture is usually unreliable because the prisoner will say almost anything he or she believes the interrogator expects or wants to hear. Second, it undermines public and foreign support for the U.S. military. Third, it increases the risk of abuse for captured U.S. military and civilian personnel, and fourth, torture violates the Geneva Convention (No. III).

The intervention of the White House and the Justice Department introduced politically motivated changes into what were settled military practices. It is not surprising that many of the people who were most disturbed when the new interrogation techniques were put into practice were uniformed personnel. As retired General Joseph P. Hoar testified to the U.S. Congress, the administration's decision to ignore the Geneva Conventions and the Convention on Torture "puts all American servicemen and women at risk that are serving in combat regions."

The Justice Department memorandum and its consequences also show a fundamental misunderstanding by government lawyers of the laws of war, particularly Geneva Convention (No. III). A prisoner who qualifies under this Convention has the rights of a prisoner of war (POW) under international law. POWs are neither criminals nor hostages and are detained solely for the purpose of preventing them from rejoining enemy forces. Their participation in hostilities is not unlawful, and they can be tried only for war crimes, not for deeds of war. POWs cannot be kept in civilian prisons, but must be detained in POW camps. Reprisals against POWs are not permitted, and they must

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be repatriated at the close of hostilities, not kept to extract concessions from the enemy. Although POWs are required to disclose only their name, rank, date of birth, and serial number, it is legitimate and customary to interrogate POWs. But they may not be tortured, mistreated, or subjected to public scorn or scrutiny.

A person who does not qualify as a POW, of course, cannot claim any of these Geneva Convention rights. He or she can therefore be tried merely for bearing arms, and the conduct of hostilities can be common crimes. However, a prisoner who does not qualify as a POW must still be treated humanely and cannot be subjected to torture.

Although humane treatment must be accorded to both POWs and non-POW enemy combatants, it is obviously important to make a determination of their status to see if the Geneva Convention applies. International negotiators in 1949 set the bar rather high for so-called irregular forces, such as those captured in Afghanistan: They must be a member of an organized force belonging to a party to a conflict, under responsible command, wear a distinctive emblem recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws of war. In 1977 a protocol was adopted lowering the bar substantially – irregulars can claim POW status even if they blend into the civilian population as long as they distinguish themselves during actual combat. However, the United States rejected this protocol, saying it undermines the protection of true civilians.

But the United States adopted an erroneous policy regarding the determination of POW status. In January 2002, White House Counsel Gonzales ruled that the detainees in Guantanamo were outside the protection of the Geneva Convention. In an apparent reliance on this opinion, President Bush signed an order on February 7, 2002 stating, "I accept the legal conclusion of the Department of Justice and determine that none of the provisions of the Geneva Conventions apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world." This blanket ruling goes too far. The law under Geneva Convention No. III is clear: Article 5 provides that "Should any doubt arise as to whether [captured] persons [are POWs], such persons shall enjoy the protection of the present Convention until their status has been determined by a competent tribunal." The U.S. interpretation of this language was that U.S. officials had the right to determine that captured prisoners were not POWs and that the United States alone could determine whether there was any doubt as to a person's status. This is manifestly incorrect. In warfare there is a presumption of POW status; it is rebuttable, but only on an individual basis. Only in the summer of 2005, after two U.S. Supreme Court decisions, was the U.S. policy on POW status partially reversed.

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In January 2005 the Justice Department formally renounced torture amid domestic and international furor: "Torture is abhorrent to both American law and values and to international norms." But in December 2004, the principal architect of the prisoner abuse policy, Alberto Gonzales, was named by the president to be Attorney General of the United States – in charge of the legal policies of the nation. One can only be deeply disturbed that someone guilty of incompetence and disregard of the law should be able to claim this role. It also casts extreme doubt on the sincerity of the administration's repudiation of its policy to condone torture. As the *Washington Post* declared in an editorial:[15]

It is indisputable that Gonzales oversaw and approved a decision to disregard the Geneva Conventions for detainees from Afghanistan, that he endorsed interrogation methods that military and FBI professionals regarded as illegal and improper, and that he supported indefinite detention of both foreigners and Americans without due process. . . . Senators who vote to ratify Gonzales nomination . . . bear the responsibility of ratifying such views as legitimate.

Clearly the pattern of abuse of prisoners was not an isolated occurrence; rather, independent investigations showed that it was widespread – in Iraq, Afghanistan, and Guantanamo, and elsewhere. It was also not caused by a few renegade soldiers who broke the rules; rather the blame lies with high-level Bush administration officials who either fashioned the policies or turned a blind eye to the abuse. The reaction of the Bush administration has also been a scandal. FBI reports document a cover-up operation by administration officials. Moreover, when the photos of the abuse forced some action to be taken, lower-level military personnel were sentenced to prison, whereas higher officials like Gonzales were promoted or given medals of appreciation.

One final important point – after September 11, President Bush declared a War on Terror on behalf of the United States. Is declaring "war" on terror a good idea? Perhaps not – declaring war may give terrorists rights they do not deserve. Declaring war may trigger the Geneva Convention, and terrorists may attempt to claim POW status. A better idea would be to maintain a distinction between war and terrorism so that terrorists may never have their "cause" dignified by international legal status. Terrorists, as opposed to those captured in the wars in Iraq and Afghanistan, should not be able to claim the privileges of the Geneva Convention, which can insulate conduct that is otherwise criminal from prosecution. Terrorists should remain subject to

[15] Editorial, *Washington Post*, January 16, 2005.

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the full force of national and international criminal law. The United States should not dignify domestic Islamist or other terrorist groups with the status of belligerents. Declaring a war on terror may be good politics, but it may also work to the advantage of the very terrorists who seek to disrupt American society.[16]

ENTER THE U.S. SUPREME COURT

A remarkable feature of the U.S. political system is the key role played from time to time by the courts in foreign policy decisions. The U.S. judiciary usually steers clear of international relations, but there is a limit to this forbearance. While being careful not to intrude on foreign policy prerogatives of the President and the Congress, the U.S. Supreme Court will not hesitate to consider controversial foreign policy issues if it determines that important constitutional principles are at stake.

In connection with the U.S. "war" on terror, President George W. Bush determined that prisoners accused of terrorist-related activities, including those captured in Afghanistan and held at Guantanamo Bay, Cuba, are not entitled to prisoner of war status under the Geneva Convention and are subject to trial by special U.S. military commissions.[17] In November 2005 the Supreme Court agreed to review the constitutionality of the President's determination, setting the stage for a possible landmark ruling on the legality of the military courts and the power of the President to hold almost 500 prisoners at Guantanamo for an indefinite period. The issue arose in the case of Salim Ahmed Hamdan,[18] a Yemeni citizen and self-confessed Al Qaeda trainee who was Osama Bin Laden's personal driver and bodyguard. Hamdan was captured in Afghanistan in late November 2001. He argues that trial by a U.S. military commission is illegal on the ground that he is a prisoner of war under the Geneva Convention.

The Supreme Court has recently rendered key rulings in other foreign policy-related cases, causing U.S. Attorney General Alberto Gonzales to chide by name Justices Stephen Breyer and Anthony Kennedy for citing foreign law principles in their court opinions.

[16] See Vaughn Lowe, "Clear and Present Danger: Responses to Terrorism," 54 *International and Comparative Law Quarterly* 185 (2005), arguing that terrorists should be treated as criminals and not as combatants.

[17] Military Order of the President, November 13, 2001.

[18] Hamdan v. Rumsfeld, Case No. 05-184 (Nov. 2005).

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Due Process for "Enemy Combatants"

Fortunately, the policy changes of the Bush administration attracted the attention of the U.S. Supreme Court. In June of 2004 the Court handed down three landmark rulings that required the government to change course.

In *Rasul v. Bush*,[19] the Court considered habeas corpus petitions filed on behalf of several of the aliens being detained as enemy combatants in Guantanamo. The Court ruled that the government could not hold people without charge, even at a military base outside the United States. Although they may be taken into custody as enemy combatants, they must be accorded an evidentiary hearing before an impartial tribunal that allows them to contest this status, and if they do so successfully, they must be released. The Court's ruling was on the basis of what is required under U.S. law, but it accords with the standards of the Geneva Convention (No. III).[20]

A second case, *Hamdi v. Rumsfeld*,[21] involved an American citizen captured in Afghanistan. No charges were filed against him, and he was not allowed any contact with outsiders. A plurality of the Supreme Court (four of the nine justices) ruled that Mr. Hamdi's indefinite detention without charge was illegal and as an American citizen he has the right to receive notice of the factual basis for being held as an enemy combatant and must be given a fair opportunity to rebut these facts before a "neutral decision maker." Four other Justices, in two different opinions held his detention to be squarely unlawful.

The third case, *Rumsfeld v. Padilla*,[22] was decided on a technicality, but four of the justices joined an opinion of Justice Stevens that particularly objected to the practice of holding prisoners incommunicado in order to extract information:

> Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true

[19] 124 S. Ct. 2686 (2004).

[20] Regrettably, the Supreme Court did not say that the Geneva Conventions applied and largely ignored international law.

[21] 124 S. Ct. 2633 (2004).

[22] 124 S. Ct. 2698 (2004).

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to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist assaults by the forces of tyranny.

These three rulings of the U.S. Supreme Court forced the Bush administration to change its policy. Both Hamdi and Padilla were released, and the Guantamamo prisoners were granted evidentiary hearings on their status. Interrogation techniques were brought into line with accepted military practice.

Prohibiting the Death Penalty for Juveniles

On March 1, 2005 the Supreme Court decided, five votes to four, that the death penalty is "cruel and unusual punishment" prohibited by the Eighth and Fourteenth Amendments to the U.S. Constitution when imposed on a person who was under the age of eighteen at the time the crime was committed.[23] International law and the opinion of the international community were the principal reasons for this decision.

Although international law is not "controlling" when it comes to the U.S. Constitution, the Court, in an opinion authored by Justice Kennedy, found that it provides a "respected and significant confirmation" of the Court's view that the juvenile death penalty is wrong and should not be permitted. The Court relied on both treaty and customary international law for this conclusion.

A basis in treaty law was provided by the U.N. Convention on the Rights of the Child, Article 37, which expressly forbids the death penalty for crimes committed by juveniles under the age of eighteen. In an oblique criticism, the Court pointed out that "every country in the world save the United States and Somalia" has ratified the Child Convention, and none had entered a reservation concerning the juvenile death penalty provision. For good measure the Court also cited similar prohibitions against the juvenile death penalty in the American Convention on Human Rights and the African Convention on the Rights and Welfare of the Child.

Turning to international customary law, the Court declared that the fact that the United States is "the only country in the world" that employs the juvenile death penalty means that it is appropriate for it to embrace the world consensus on this issue. "It is proper that we acknowledge," said the Court, "the overwhelming weight of international opinion" against the juvenile death penalty.

Thus, the Supreme Court based a landmark interpretation of the U.S. Constitution on international treaty and customary international law.

[23] Roper v. Simmons, 125 S. Ct. 1183 (2005).

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Recovering Damages for Violations of International Law: The U.S. Alien Tort Statute

No one is exactly sure why, but the U.S. Founding Fathers thought it important to provide a cause of action allowing the recovery of damages for violations of international law. The U.S. Alien Tort Statute (ATS), passed in 1789 by the very first Congress, confers jurisdiction on the U.S. courts to hear any "civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States." In a 1980 case, *Filartiga v. Pena-Irala*,[24] a U.S. Court of Appeals applied this law to allow a father and daughter who had been subjected to torture in Paraguay to recover damages against the perpetrator. Regrettably, the Filartigas are still trying to collect on this judgment.

Nevertheless, the Filartiga case sparked a revival of the ATS, and two kinds of cases flooded into the courts. One kind of case was similar to Filartiga in which citizens of foreign countries filed suits against their foreign oppressors when they came to the United States. For example, Radovan Karadzik, the former president of the Republic of Serpsa, was sued in 1996 over his actions during the Yugoslavian civil wars.[25] Despite their undoubted merit and publicity value, these actions have been largely unsuccessful in obtaining real redress. Foreign defendants simply avoid the United States, and judgments either cannot be rendered or are uncollectible.

The ATS has also been used by foreign plaintiffs allied with U.S. environmental and civil rights groups who sue U.S. companies[26] over their alleged destruction of the environment and violations of human rights in connection with foreign investments. None of these cases has ended with judgments against the companies concerned, but the negative publicity has generated controversy, and companies have paid damages to settle out of court.[27]

The quixotic character of the ATS moved one judge, Henry Friendly, to call the ATS a "legal Lohengrin,"[28] a reference to the Richard Wagner opera, *Lohengrin*, and its main character, a knight of the Holy Grail, who appears out of nowhere coming down a river in a boat drawn by a swan.

In 2004, the U.S. Supreme Court, in the landmark case of *Sosa v. Alvarez-Machain*,[29] reaffirmed that the ATS furnishes "jurisdiction for a relatively

[24] 630 F. 2d 876 (2d Cir. 1980).
[25] Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).
[26] For example, Freeport-McMoran Co. of Louisiana was sued for its environmental abuses, human rights violations and "cultural genocide" activities in Indonesia. Beanal v. Freeport-McMoran, Inc., 197 F. 3d 161 (5th Cir. 1999).
[27] e.g., Doe v. Unocal Corporation, 202 U.S. App. Lexis 19263 (9th Cir. 2002).
[28] IIT v. Vencap, 519 F. 2d 1001, 1015 (2d Cir. 1975).
[29] 124 S. Ct. 2739 (2004).

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modest set of actions alleging violations of the law of nations, and might be applied to recover damages in cases of clear and egregious human rights violations."[30] The Supreme Court majority in the *Sosa* case reaffirmed that the United States and its judiciary are bound by international law norms, including customary international law, and that this is one of the narrow areas where federal common law continues to exist.[31]

The Vienna Consular Convention Cases

The Vienna Convention on Consular Relations is a multilateral treaty that protects foreign nationals from arbitrary arrest. Any American who travels abroad can appreciate the idea behind this treaty; it ensures some protection against arbitrary detention by foreign governments. The Convention on Consular Relations requires that the competent authority allow an arrested foreign national to communicate with his or her government's consulate, and any arrested foreigner must be promptly informed of this right. The consular authorities have the right to visit and correspond with the person under arrest and can arrange for his or her legal representation.

Although the United States has insisted on these rights for Americans, U.S. authorities have largely ignored them with respect to foreign nationals in the United States until recently. In thousands of cases, including over 100 cases in which foreign nationals were sentenced to death, no timely notification was given. When this issue was raised by defense attorneys, the courts routinely denied relief either on the ground that it was too late to raise the matter or that the Consular Convention only grants rights to state parties and not to the individuals arrested.

In frustration various states brought cases against the United States in the International Court of Justice (ICJ) in The Hague, arguing that the United States was violating the consular conventions with impunity. In 1998 the ICJ ordered preliminary relief – that the U.S. government take all measures at its disposal to ensure that a Paraguayan national, Angel Francisco Breard, would not be executed before the ICJ could render a final decision.[32] U.S. Secretary of State Madeleine Albright requested that the governor of Virginia delay Breard's execution, but this request was ignored, and the U.S. Supreme Court rejected Breard's petition for habeas corpus relief on the ground that the question should have been raised earlier and furthermore, "any rights . . . [under]

[30] Ibid. at 2753.
[31] Ibid. at 2764.
[32] Paraguay v. United States, 1998 ICJ Rep. 248.

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the Vienna Convention exist for the benefit of Paraguay, and not for [Breard] as an individual."[33]

Following *Breard* the ICJ decided two additional consular convention cases, one brought by Germany and the other by Mexico, on their merits. In the *LaGrand case*,[34] which involved two German nationals convicted of murder, the ICJ found a violation of the Convention on Consular Relations, but the U.S. Supreme Court refused to intervene and the violation was ignored. The LaGrand brothers were subsequently executed.

In 2004 the International Court of Justice again found that the United States had disregarded the consular notification requirement in the *Avena case*[35] involving fifty-one Mexican citizens who had been convicted of murder and were on death row awaiting execution. As a consequence of this failure, the ICJ found that Mexico was deprived of its right under the treaty to render assistance, and the individual defendants were deprived of their rights to communicate with their government and to arrange legal representation. This time one U.S. court had the courage to do something – the Oklahoma Court of Criminal Appeals[36] stayed the execution of one of the fifty-one prisoners, Osvaldo Torres, and required an evidentiary hearing on the remedy to be provided for the violation of international law by Oklahoma authorities. Oklahoma Governor Brad Henry subsequently commuted Torres's sentence, citing the international court's ruling.

The state of Texas, however, ignored the *Avena* judgment in the case of Jose Medellin, another one of the fifty-one Mexican nationals under sentence of death. In May 2004 the U.S. Court of Appeals for the Fifth Circuit denied Medellin's right to appeal the denial of his writ of habeas corpus, citing the legal rulings of the U.S. Supreme Court allowing disregard of the Vienna Consular Convention. But in December 2004 the Supreme Court decided to revisit the issue; the Court granted a petition to review the Court of Appeals' decision in the Medellin case.[37]

The United States placed great reliance on the Vienna Convention on Consular Relations in 1979 when Iran seized U.S. citizens and diplomats in their takeover of the U.S. Embassy in Tehran. At that time the International Court of Justice agreed with the United States, and ruled that its treaty rights had been violated by Iran. The ICJ decision was a factor in securing the release

[33] Breard v. Greene, 523 U.S. 371, 118 S. Ct. 1352 (1998).
[34] Germany v. United States, 2001 ICJ Rep. 7.
[35] Avena and other Mexican Nationals (Mexico v. U.S.), 2004 ICJ 128, 43 ILM 581 (2004).
[36] Osbaldo Torres v. State of Oklahoma, No. PCD-04-442 (Ct. Crim. App. May 13, 2004), summarized at 98 AJIL 581(2004).
[37] Medellin v. Dretke, 125 S. Ct. 2088 (2005).

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of the U.S. hostages in January 1980. One of Medellin's principal supporters was Ambassador Bruce Laingen, who was the charge d'affaires in the U.S. Embassy during the Iran hostage crisis.

After the Supreme Court's decision to review the *Medellin* case, the Bush administration apparently decided on a preemptive strike. Seeing the handwriting on the wall – that the U.S. Supreme Court might uphold the Consular Convention's notification requirement – President Bush on February 28, 2005 issued an executive proclamation that

> The United States will discharge its international obligations under the decision of the International Court of Justice . . . by having state courts give effect to the decision in accordance with general principles of comity.

The president had decided – reluctantly – that the United States must comply with the ICJ's decision and the clear international obligations of the Consular Convention. Yet, he pointedly refrained from stating that the United States is obligated to comply under international law; he merely cited "comity," a willingness to act *voluntarily*, not under legal obligation.

A few days later,[38] in order to make crystal clear his intent, President Bush informed Secretary-General Kofi Annan that the United States "hereby withdraws" from the Optional Protocol to the Vienna Convention that allows the ICJ to decide on violations of the Convention. Although the United States itself originally proposed this protocol in 1963, the Bush administration decided to insulate the U.S. criminal law system from oversight by the ICJ. So now the United States has repudiated an international principle of human rights it once fought to achieve.[39]

The problem with this approach is that, although America does not have to worry any more about international law protecting foreigners charged with crimes in the United States, Americans arrested abroad also lose their ability to appeal to international law if their rights are denied.[40]

[38] Presidential Communication, March 7, 2005.

[39] The Bush administration action was successful in avoiding a potentially embarrassing clash with the U.S. Supreme Court. On May 23, 2005 the Supreme Court dismissed Medellin's petition for review as having been improvidently granted. Medellin v. Dretke, 125 S.Ct. 2088 (2005). The Court stated that the state court proceeding could provide Medellin with review and reconsideration of his Vienna Convention claim as required by the ICJ, and that was sufficient. However, Justice O'Connor, joined by Justices Stevens, Souter, and Breyer, filed a dissenting opinion in which she stated that she would vacate the Court of Appeals decision to deny Medellin a certificate of appealability and remand for further proceedings.

[40] In November 2005 the Supreme Court returned to the sensitive issue of whether state courts and officials may ignore claims by foreign nationals of violation of the Vienna Consular Convention. The court agreed to hear two cases on this matter, *Sanchez-Llamas v. Oregon*,

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THE U.N. SYSTEM

Substantive Rights

First Lady Eleanor Roosevelt – Mrs. Franklin D. Roosevelt as she was known in that "pre-liberation" time – was the chair of the U.N. Commission on Human Rights that drafted the founding document of the U.N. human rights system, the Universal Declaration of Human Rights. One can imagine how she would be pilloried today for such noble service. Her work is largely forgotten amid the acclaim currently accorded to the more war-like deeds of the "greatest generation."

One of the purposes of the United Nations is the protection of human rights,[41] and the Universal Declaration of Human rights of 1948 was adopted by the U.N. General Assembly as the embodiment of the human rights guarantees that the U.N. was founded to provide. The Universal Declaration was adopted without a dissenting vote (the Soviet bloc and Saudi Arabia abstained) and is today regarded as the Magna Charta of international human rights, binding on all the states of the world.

The content of the Universal Declaration is remarkable; Mrs. Roosevelt envisioned what we now call three "generations" of human rights for all people. The first generation comprises traditional civil and political rights – freedoms guaranteed as well by the U.S. Bill of Rights. These are restrictions and limitations placed upon states on interference with freedoms of speech, movement, property, life, and personal security. They also forbid arbitrary arrest and detention and require a fair trial for those accused of crimes.

The second generation of rights guaranteed by the Universal Declaration are economic, social, and cultural rights that have gained recognition in the twentieth century. These include rights to education, to work, and to participate in cultural life.

A third generation of rights include recognition of certain group rights, such as the right to democracy[42] and the right to development,[43] the latter dear to the developing countries of the world (see "The Universal Declaration of Human Rights").

(Case No. 04-10566) and *Bastillo v. Johnson* (Case No. 05-51). The court's ruling is expected in June 2006.

[41] U.N. Charter, Articles 55–56.

[42] The right to democracy can be derived from the Universal Declaration of Human Rights, Articles 21 and 29, as well as from the International Covenant on Civil and Political Rights, Article 25, which references representative government. The right to democracy deserves to be better and more explicitly defined.

[43] This right was elaborated by a U.N. Declaration on the Right to Development (1986).

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THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 1 Recognition of being born free and equal in dignity and rights

Article 2 Right to equality

Article 3 Right to life, liberty, and security of person

Article 4 Freedom from slavery or servitude

Article 5 Freedom from torture or cruel, inhuman, or degrading treatment or punishment

Article 6 Right to recognition everywhere as a person before the law

Article 7 Right to equality before the law

Article 8 Right to an effective remedy by competent national tribunals

Article 9 Right not to be subjected to arbitrary arrest, detention, or exile

Article 10 Right to fair trial

Article 11 Presumption of innocence and prohibition of retroactive criminal law

Article 12 Prohibition of arbitrary interference with privacy, family, home, or correspondence

Article 13 Right to freedom of movement

Article 14 Right to seek asylum

Article 15 Right to a nationality

Article 16 Right to marry and found a family

Article 17 Right to own property

Article 18 Right to freedom of thought, conscience, and religion

Article 19 Right to freedom of opinion and expression

Article 20 Right to freedom of peaceful assembly

Article 21 Right to participate in the governance of the state and the right to democracy

Article 22 Right to social security

Article 23 Right to work

Article 24 Right to rest and leisure

Article 25 Right to a decent standard of living

Article 26 Right to education

Article 27 Right to cultural life

Article 28 Right to a social and international order suitable for the realization of human rights

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Taking their cue from the Universal Declaration, U.N. members concluded a series of multilateral human rights treaties in the second half of the twentieth century. The 1966 International Covenant on Civil and Political Rights elaborates protection of first-generation rights. Because neither the Universal Declaration nor the Covenant forbids imposition of the death penalty, an Optional Protocol[44] was opened in 1989 to encourage Covenant states to abolish capital punishment. An International Covenant on Economic, Social, and Cultural Rights was also adopted in 1966 to clarify the obligations regarding second-generation rights. Because economic rights in particular involve cost and other undertakings that may be impractical, many economic rights, such as provision of all with a decent standard of living, are considered "aspirational" or promotional rights, designated goals to be achieved progressively according to the capability of each state.

Elaboration of third-generation group rights was also addressed in more detail by specifying a right of self-determination in both covenants and in U.N. declarations on the rights of minorities[45] and indigenous peoples.[46] Although the right to self-determination does not require separate statehood, national minorities and indigenous peoples must be granted a measure of autonomy within the states in which they reside with respect to their educational, cultural, religious, social, and linguistic institutions. The right of self-determination can be fulfilled through the democratic process and through *internal autonomy* – a people's pursuit of its political, social, and cultural development within the framework of an existing state.[47]

The U.N. has also adopted separate detailed conventions addressing three particular issues: racial discrimination,[48] the rights of women,[49] and the rights of children.[50]

This U.N. system for the international protection of human rights has had a revolutionary impact on international relations. First, the right of national sovereignty is no longer absolute; a state cannot hide behind sovereignty if it is mistreating its own citizens. Thus, the traditional prohibition against

[44] Second Optional Protocol to the ICCPR, 29 ILM 1464 (1990).

[45] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (1992).

[46] A U.N. Sub-Commission on the Protection and Promotion of Human Rights has adopted a Draft Declaration on the Rights of Indigenous Populations (1994). See also International Labor Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries, 1989.

[47] See T. Franck, "The Emerging Right to Democratic Governance," 86 *American Society of International Law*, 46 (1992); See the opinion of the Supreme Court of Canada in the Quebec case, (1998) DLR (4th) 385, 437–438.

[48] Convention on the Elimination of All Forms of Racial Discrimination (1966).

[49] Convention on the Elimination of All Forms of Discrimination against Women (1979).

[50] Convention on the Rights of the Child (1989).

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nonintervention in internal affairs of a state, which is contained in Article 2 (7) of the U.N. Charter, must now be balanced against the internationally recognized duty of a state to observe human rights. Although the principle of domestic jurisdiction over human rights matters is still valid, the international community has a clear interest in securing human rights and may intervene economically and even, in extreme cases, militarily when domestic enforcement is impossible.

Second, the U.N. system empowers individuals in a significant manner under international law, departing from the traditional idea that international relations is concerned solely with states. Individuals are now significant subjects of concern under international relations and international law.

Third, there is no right without a corresponding duty, and it is clear that under the U.N. system states have significant new duties to fulfill. Three separate duties of states with respect to their own citizens may be analyzed: (1) a negative duty to refrain from actions that may prevent the fulfillment of human rights, such as free speech, freedom of association, and privacy; (2) a positive duty to progressively improve educational systems, social welfare, and economic opportunity; and (3) a duty to ensure that private actors within their jurisdiction respect human rights (so-called horizontal enforcement).

There is an important duty as well that is owed by developed countries to developing countries of the world. Under the U.N. Covenant on Economic, Social, and Cultural Rights,[51] developed countries must provide "economic and technical assistance" to developing countries. The specific type and amount of such assistance are up to each developed country to determine for itself, but assistance and cooperation must be rendered "to the maximum of its available resources." Under the terms of the U.N. Millennium Declaration of 2000, signed with great fanfare by the United States and 188 other states, developed countries set a goal of giving 0.7 percent of their national incomes as development aid for poor countries.

These are international duties that are new to international relations in the last half-century. We are at the beginning of their realization. They hold promise for the establishment of a new international order in this century.

U.S. (Non)Acceptance of the U.N. System

A key indicator of U.S. recalcitrance and unilateralism is the fact that the United States ratified its first U.N. human rights treaty – the International Covenant on Civil and Political Rights – only in 1992. The Convention on the Elimination of All Forms of Racial Discrimination was ratified in 1994.

[51] Articles 2, 11, and 23.

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Only these two treaties are fully in force for the United States, and even with respect to these two treaties, the United States added a reservation that they are non-self-executing, which means they have no impact on U.S. domestic law and cannot be invoked in U.S. courts by citizens or residents.

It is not hard to imagine why the U.S. "holier than thou" rhetoric sometimes rankles other nations. Former U.N. Ambassador Charles Yost, in testimony to the U.S. Congress, succinctly summarized the adverse international reaction to the U.S. failure to participate fully in the U.N. system for the protection of human rights:

> There are, in my judgment, few failures or omissions on our part which have done more to undermine American credibility internationally than this one. Whenever an American delegate at an international conference, or an American Ambassador making representations on behalf of our Government, raises a question of human rights, as we have in these times many occasions to do, the response public or private, is very likely to be this: if you attach so much importance to human rights, why have you not even ratified the United Nations' conventions and covenants on this subject?
>
> Our refusal to join in the international implementation of the principles we so loudly and frequently proclaim cannot help but give the impression that we do not practice what we preach, that we have something to hide. . . . Many are therefore inclined to believe that our whole human rights policy is . . . merely a display of self-righteousness directed against governments we dislike.[52]

The United States could add immensely to its international standing and gain cooperation from other nations at a very cheap price simply by resolving to fully participate with other nations in the human rights structure that has been erected internationally over the last half-century.

Implementation and Enforcement of the U.N. System

The United Nations has no authority to directly implement or enforce its system for the protection of human rights; it depends upon states to do so. Nonetheless, there are important international mechanisms to put pressure on recalcitrant states.

The Office of the U.N. High Commissioner of Human Rights. In 1994 the U.N. General Assembly created the office of the U.N. High Commissioner for Human Rights (HCHR) to give a single individual the principal respon-

[52] Senate Hearings on International Human Rights Treaties, S. Comm. For. Rel. 96th Cong., 1st Sess. (1979), Statement of Charles Yost, Former Ambassador to the United Nations.

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sibility for the promotion and protection of human rights around the world. Outstanding individuals have served in this office, including Sergio Veira de Mello, who was killed tragically in the terrorist attack on U.N. Headquarters in Iraq in August 2003. The current High Commissioner is Louise Arbour, a former member of the Canadian Supreme Court.

The task of the U.N. High Commissioner is complex; it includes providing technical assistance to states to strengthen human rights institutions, to engage governments in dialogue to secure respect for human rights, to enhance international cooperation, and to call attention to human rights abuses in the world. For example, the Office of the High Commissioner in the ten years of its existence has worked with over forty states to train judges, lawyers, and police and to strengthen civil institutions with human rights responsibilities in various countries. The HCHR office is currently involved in both Afghanistan and Iraq to create a human rights culture of women's rights, justice, and human rights education.

The U.N. Commission on Human Rights. The U.N. Commission on Human Rights has been in operation since 1946 and is intended to be the principal U.N. body on the subject of human rights; it plays the leading role in drafting declarations and treaties. The U.N. General Assembly elects the Commission's fifty-three member states for three-year terms; decisions are debated and taken by states through their representatives. As a result, the Commission is highly political. In 2001, as noted previously, the United States was voted out of the Commission, an incident that made world headlines and sparked outrage in Washington.

The Commission's work – investigating, monitoring, and responding to violations – falls into three broad categories. First is what is termed the 1235 procedure (authorized by Resolution 1235 of the U.N. Economic and Social Council), which is a public examination of allegations of "gross violations" or a "consistent pattern" of human rights violations. This investigation is normally triggered by the complaint of a state, and a working group or a Special Rapporteur is appointed to prepare a report, which is then discussed at the Commission's annual meeting. If infringements of human rights are found, the Commission's powers are limited to persuasion, public criticism, or condemnation; no binding sanctions are possible.

A second procedure available to the Commission is known as the 1503 procedure (authorized by Resolution 1503 of the U.N. Economic and Social Council), which is used to examine in private allegations received by NGOs and individuals. Normally a subcommission of independent experts that may

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appoint a *rapporteur* to investigate and quietly make recommendations to the country concerned carries out this investigation.

A third procedure is to appoint a working group to investigate a particular problem or issue, rather than a country. For example, working groups have been appointed to investigate disappearances, violence against women, and religious intolerance. These working groups produce reports that serve as the basis for discussion by the Commission and call attentions to violations, frequently occurring in many states.

Unfortunately, the nature of the Commission means that politics frequently holds sway over the merits of the problems discussed. States that are the most egregious human rights offenders gain membership and then use their political influence to escape condemnation. For example, Cuba, China, the Sudan, and Zimbabwe line up their supporters to fend off tough resolutions. The Commission's usefulness and credibility would be enhanced by reforms that would allow independent experts to conduct investigations of abuses under more objective conditions.

Human Rights Committees. Each of the U.N. treaties on human rights is assigned a committee to monitor and secure its implementation. The most significant of these committees is the Human Rights Committee created under Article 28 of the International Covenant on Civil and Political Rights. It is made up of eighteen independent experts who are required to serve in their "personal capacity" (no instructions from governments allowed). The committee members have three principal duties. First, they examine, discuss, and offer "concluding observations" on the country reports that all parties to the treaty are required to submit periodically on their compliance and implementation of the Covenant. Second, the committee may issue General Comments on issues relating to the Covenant. For example, in a General Comment[53] in 1984, the committee expressed its concern about the administration of justice by military and special courts in many countries.

Third, the most important function of the committee is to examine and offer written "views" on individual complaints by persons alleging violations of human rights. Under an Optional Protocol signed by over 100 nations, persons who are the victims of violations can file a complaint with the committee, which then considers both the complaint's admissibility and its merits in private, considering also the explanation of the state concerned. The committee may suggest remedies and reparations to victims. Although the committee's views are not binding, many times the state will comply with them.

[53] Human Rights Committee (1984) Selected Decisions 673.

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For example, in the case of *Pratt and Morgan v. Jamaica*,[54] the committee successfully requested a stay of execution of the death penalty. In another case, the committee successfully upheld a woman's claim that she was denied a Social Security benefit on an equal footing with men.[55] This individual complaints procedure has worked fairly well; the committee has handled over 1,000 complaints, and views have been issued in almost 300, with a finding of a violation in 75 percent of cases.

Nongovernmental Organizations. The U.N. institutional structure is both weak and political; its inadequacies make imperative the role of NGOs in investigating and uncovering human rights violations and publicizing them. The U.N. system is designed in fact for NGOs to have a large role. They can file reports with the U.N. High Commissioner's office, help individuals file complaints, and criticize the behavior of states and their subsequent pronouncements and cover-ups.

The U.N. Security Council. We tend to forget that the U.N. Security Council (SC) has special responsibility for human rights under the U.N. system. As the "principal organ" of the U.N. with "primary responsibility" to maintain international peace and security, member states are pledged to "accept and carry out" SC decisions under the U.N. Charter.

The Council can act under Chapter VI of the Charter to investigate "any dispute . . . likely to endanger . . . international peace and security." It can recommend "methods of adjustment." If this is insufficient, the Council, acting under Chapter VII, can determine the existence of a "threat to the peace" and can call on member states to apply sanctions of various kinds, including boycotts and embargoes, or even authorize military action.

These powers must be put at the service of human rights violations – even within a single state – that endanger international peace. The link between human rights violations and international peace is apparent. Severe rights violations may prompt refugee flows into neighboring states, enrage people in other states who are ethnically related to the victims, and even threaten regional stability or lead to war. The Council has an important role in addressing certain human rights violations in tandem with other U.N. organs.

The Council has failed its responsibility for human rights several times in recent years. In the case of Rwanda in 1994, its failure to act led to the

[54] HRC Report, GAOR, 49th Sess., Supp. 40, Vol. I, p. 70.

[55] Broeks v. The Netherlands, HRC Communication No. 172/1984, available at http://secap174.un.org/search.

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death of almost one million Tutsi people; in Kosovo in 1998 the Council's failure to act in the face of manifest violations led to intervention by a NATO force.

The Council has also failed to take decisive action in Darfur, in western Sudan where, since February 2003, Sudanese-backed militia called the Janjaweed (bandits) have killed by some estimates 300,000 people and driven more than 1.8 million from their homes. After much delay the Council in 2004 and 2005 authorized an inquiry and passed sanctions. An inadequate force of peacekeepers from the African Union has not been sufficient to prevent the continuing killing, rape, and destruction. Seeking to curry favor in Africa, China long blocked stronger action in Darfur, and the United States has been wary of any resolution allowing prosecution by the International Criminal Court.

Reforming the U.N. System

The U.N. system for the protection of human rights is badly in need of fundamental reform. It is a confusing patchwork of committees, none of which has real power and all of which are highly bureaucratic and inefficient. The U.N. High Level Panel has made some helpful recommendations to get reform started:

- Expansion of the Commission on Human Rights to universal membership (all U.N. members): A better proposal for reform by Secretary-General Kofi Annan would replace the fifty-three-member commission with a smaller Human Rights Council, a "society of the committed" that "should undertake to abide by the highest human rights standards."
- Requiring that heads of delegations be prominent and experienced human rights figures;
- Appointment of an outside Advisory Council; and
- Preparation of an annual report on the status of human rights worldwide.

But much more should be done. The United States should take the lead in forming a caucus of democracies (about half the U.N. members) within the United Nations. This caucus under American leadership should formulate and implement reforms, such as the following:

- The U.N. Commission (or Council) on Human Rights should have objective criteria for membership that make clear that only those

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states with impeccable human rights records can be members. The criteria for membership should include ratification of the main human rights international conventions, completion of all reports, and compliance with all monitoring and implementation bodies. This would correct the present situation – at present the U.N. Commission on Human Rights is captive to some of the world's most abusive governments, including Sudan, Zimbabwe, Russia, Saudi Arabia, China, and Cuba. This must stop.

- The U.N. High Commissioner on Human Rights should be given central control over all U.N. human rights bodies.
- The work of examining the record of each country with respect to human rights compliance and the examination of individual complaints should be turned over in full to a U.N. Committee of Human Rights that functions within the Office of the U.N. High Commissioner of Human Rights.
- One committee whose head is appointed by the U.N. High Commissioner and reports to him or her should replace the present multiplicity of U.N. human rights committees. Subcommittees can handle the work of monitoring compliance with individual treaties.
- The U.N. High Commissioner should make regular reports and recommendations to the U.N. Security Council regarding the status of human rights violations in the world.
- Country reports on human rights filed with the United Nations should be publicly available, and individual complaints should be made public once they are determined to be admissible.

Reform of the U.N. Human Rights system is just as important (and perhaps just as difficult) as Security Council reform. At the 2005 World Summit of Heads of State and Government in New York, it was resolved to strengthen United Nations human rights machinery by creating a new Human Rights Council to address "violations of human rights, including gross and systematic violations, and make recommendations thereon."[56] Regretfully, this tepid idea does not address the real problems: the hypocrisies of the U.N. Human Rights Commission and the inadequate authority of the U.N. Human Rights Committees.

[56] United Nations General Assembly Doc. A/60/L, para. 159 (Sixtieth Session, 20 September 2005).

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THE INTERNATIONAL COURT OF JUSTICE MEETS THE ISRAELI WALL

The focal point of Muslim anger against the West, particularly the United States, is the condition of the Palestinian people. Islamist terrorism feeds off this anger and what is perceived as a U.S. double standard, turning a blind eye to violations of Palestinian rights. Nothing would help win the "war" on terrorism more than a just settlement of the Palestinian problem. With the death of Yasser Arafat, there is renewed hope for peace in the Middle East. But the outlook for peace is clouded by a new reality – the Israeli wall.

In response to terrorist attacks and suicide bombings during the Palestinian *Intifada*, the State of Israel is constructing a wall in the West Bank Occupied Territories (see accompanying map). The wall is located well inside the "Green Line" that marks the border between Israel and the occupied West Bank, which was conquered by Israel during the 1967 Six-Day War. The wall traces a sinuous path around and through many Palestinian communities; some villages are almost completely encircled and others are divided in two. The vicinity of the wall is designated a closed area. The wall is designed so that the great majority of Israeli settlements (with 80 percent of Israeli settlers) in the Occupied Palestinian Territories and East Jerusalem are on the Israeli side. Because access to Israel proper will be through designated checkpoints operated by the Israeli army, the wall will be *de facto* the Israeli border.

In July 2004 the International Court of Justice (ICJ), the U.N.'s principal judicial organ, issued an advisory opinion[57] at the request of the U.N. General Assembly on the legality of the wall. After unanimously upholding its jurisdiction, the ICJ ruled by fourteen votes to one (American Judge Thomas Buergenthal was the sole dissenter) that the building of the wall violates several human rights obligations incumbent upon Israel, the wall must be dismantled immediately, and Israel must make reparation for any damage caused. Israel was found by the court to be violating the major U.N. human rights treaties, including both international covenants and the Convention on the Rights of the Child. In addition, Israel was in violation of the laws of war (international humanitarian law) relating to occupied territories: the Fourth Geneva Convention of 1949 and the 1907 Hague Regulations.

The starting point of the court's reasoning is the fact that the entire West Bank east of the green line (the 1948 armistice line marking the Israeli border)

[57] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 ILM 1009 (3004). For scholarly comment, see Agora, *American Journal of International Law* (2005): 1–141.

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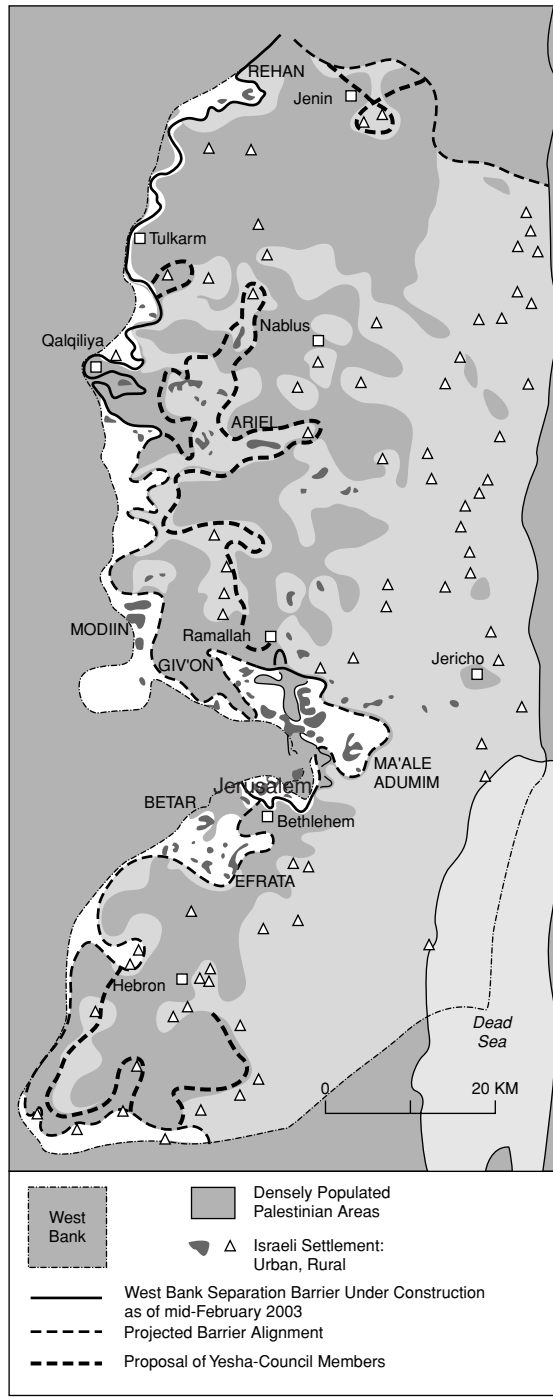

West Bank separation barrier – under construction and projected alignment.

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was conquered by Israel and is therefore Palestinian Occupied Territory under international law, because it is illegal to acquire territory by force or conquest. This status of the West Bank was confirmed in Resolution 242, adopted unanimously by the U.N. Security Council after the 1967 Six-Day War, which requires Israeli withdrawal from occupied territories in exchange for ensured peace and recognition by all Arab governments.

The court did not question Israel's right to administer the Palestinian Occupied Territories, but said it must be done in accordance with international humanitarian law – the Geneva Conventions and the Hague Regulations that deal with the conduct of war and its aftermath. These require the occupying power to take all necessary measures to restore public order and civilian life within the occupied territory. Residents within occupied zones must be allowed, insofar as possible, freedom of movement, the right to work, and the right to choose where to live, as well as access to education, health care, and normal civil liberties. The Israeli wall, particularly in the way it is built – encircling, dividing, and requiring the demolition of communities – violates these norms. The creation of enclaves and the closed area seriously hampers freedom of movement and makes difficult or impossible access to health services, educational establishments, water sources, and agricultural production.

Most important, an occupying power is forbidden to compel demographic change, and the court found that the wall, by including Palestinian areas in what will now be *de facto* Israel proper, is seeking demographic change. In effect, the wall will become the new border, a *de facto* annexation, and Israel will gain substantial territory at the expense of the Palestinians. The court found that the wall's construction "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" as guaranteed by the two international covenants.

The court accepted the right and indeed the duty of Israel to defend itself from terrorists and suicide bombings, but found that self-defense does not justify building a wall located entirely within the Palestinian Occupied Territories.

What about the Israeli settlements within the Occupied Territories? Israel has located Jewish settlers in enclaves throughout the West Bank, and the reason for the sinuous course of the wall through Palestinian communities is to protect as many of these settlements as possible.

The unspoken assumption of the court is that these settlements are illegal under international law. The 1949 Geneva Convention (No. IV) Relative to the Protection of Civilians in Time of War prohibits actions by the occupying power to annex the occupied territory in whole or in part. This should come as

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no surprise because U.S. policymakers have long regarded the settlements as the single most difficult issue preventing peace in the Middle East. President Jimmy Carter has written[58]

It has been recognized that Israeli settlements in the occupied territories were a violation of international law and the primary incitement to violence among the Palestinians. Our most intense arguments at Camp David (meetings held in 1978 which led to a peace treaty between Israel and Egypt) were about their existence and potential expansion.

During the administration of President George H. W. Bush (Bush I), Secretary of State James Baker said, "I don't think there is any greater obstacle to peace than settlement activity that continues not only unabated but at an advanced pace."

Yet during the past two American administrations, the United States has largely turned a blind eye to the Israeli government's policy to lure Jewish settlers into the Occupied Territories with massive financial and political incentives, and recently the number of settlers has skyrocketed. In March 2005 the Israeli government approved the construction of 3,500 new housing units in Ma'ale Adumim, a community of about 30,000 Jews located in the West Bank ten kilometers east of Jerusalem. Although this is a clear violation of the "road map" set out by the United States for peace in the Middle East, this settlement expansion drew only a quiet rebuke from the American government.

The Israeli wall case demonstrates that the settlements issue remains at the heart of the Israeli-Palestinian dispute. As President Jimmy Carter has said: "No matter what leaders the Palestinians choose, how fervent American interest might be, or how great the hatred and bloodshed might become, there remains one basic choice, and only the Israelis can make it: *Do we want peace with all our neighbors, or do we want to retain our settlements in the Occupied Territories*?"[59]

It is a sad irony that the State of Israel, founded to provide a refuge after the Holocaust, a homeland for Jews brutally and despicably deprived of their most fundamental human rights, should itself be guilty of human rights violations. But the Israeli wall also poses an important challenge for the United States and the rest of the world. There is no more important action that can be taken to quell Islamic terrorism in the world than to broker a peace between Israel and the Palestinians.

[58] *Washington Post*, Sept. 27, 2003.

[59] Jimmy Carter, "The Choice," on the occasion of the 25th Anniversary of the Camp David Accords. *Washington Post*, 23 September 2003.

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President Harry Truman created the State of Israel in 1948 through a unilateral action of recognition on the advice of his political operatives, who wished to improve his chances for reelection. At the time, Truman's Secretary of State, George Marshall, was conducting sensitive negotiations to partition the territory of Palestine between the Jews and the Arabs. Truman's action surprised and angered Marshall, who was not informed in advance and was in the midst of negotiations with both parties to create two states, Israel and a Palestinian state. Jerusalem was to be an international city, sacred to all – Muslims, Jews, and Christians. Because of Truman's precipitous act, instead of two states as there should have been in 1948, there has been continuing conflict.

Now after almost sixty years of bloodshed, it is possible to agree through multilateral diplomacy on the two-state solution that was on the table in 1948. As President Carter has said, the key is Israeli willingness to give up its West Bank settlements. Israel has wisely decided to relinquish its settlements in Gaza, and to implement the peace with Egypt, Israel gave up all its settlements in the Sinai; it must be willing to do the same in the Occupied Territories. All other issues between Israel and the Palestinians are soluble if the settlement issue is resolved. But without agreement on this issue, conflict will continue without end.

A final irony is that only the creation of a Palestinian state can ensure Israel's survival as a Jewish state. Within and outside Israel itself, demographic trends make it clear that it is only a matter of time before Arabs constitute a majority of the population between the Jordan River and the Mediterranean Sea.

SUMMING UP

Human rights must be used as a weapon against Islamist terrorism. Islamic countries are among the most repressive regimes in the world. Multilateral institutions and human rights law should be enlisted in the campaign against terror.

The flouting of U.S. and international law of human rights after 9/11 has severely harmed U.S. interests and has reduced the effectiveness of the anti-terrorism effort. The official policy of the U.S. government to allow torture in the interrogation of prisoners has done great harm. By using torture, the United States has relinquished the ideological high ground – the values of democracy, freedom, and human rights – and Americans are transformed into the villains and hypocrites the terrorists proclaim them to be. Torture is a self-defeating strategy of weakness.

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The extensive prisoner abuse documented in the press and in official reports did nothing to aid the War on Terror; in fact, it was counterproductive as it became a potent propaganda weapon for terrorists and Muslim extremists. Guantanamo has become the face of America for millions of Muslim people.

Americans believe their country is in the forefront of protecting human rights in the world, but the reality is somewhat different. The U.S. government's arrogance, ignorance, and unilateralism have severely compromised its ability to exercise leadership in this important area of international relations. Amnesty International in May 2005 accused the United States of condoning "atrocious" human rights violations, thereby diminishing its moral authority and setting an example of abuse for other nations.

A legitimate question is why is there such a furor over American violations of human rights standards when these pale in comparison with the terrible deprivations of human rights elsewhere – in Darfur where hundreds of thousands are driven from their homes and subjected to murder, rape, and torture; in Myanmar, where there is documented slave labor, conscription of child soldiers, systematic rape, massacres, and destruction of whole villages; and not to mention other countries such as China, and Cuba, where violations are also rife. Are human rights violations worthy of international attention only when committed by Americans?

The reason the spotlight is on the United States is that it is the most influential nation in the world, and rightly or wrongly, it sets the standards for other nations. A second reason is that the United States was founded upon the principle of human rights and has always claimed special moral authority in that area. The United States, which was the leader in creating the system of international human rights, is now compromised, and this gives comfort to other nations and leaders that may find it in their interest to violate human rights.

Since World War II, imposing structures of international human rights law and institutions have been created under the aegis of the United Nations and international regional organizations. Although this system is highly political, weak, and immature, it is a global system of standards for the protection of human rights for the first time in the history of the world. If this system can evolve in the next fifty years at the rate of the last fifty years, the twenty-first century can mark the time when the human race finally triumphs over centuries of inhumanity and discrimination. The United States by embracing multilateralism can exercise the leadership to rejuvenate this global system and realize its promise.

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