

Prospects for Human Rights Advocacy in the Wake of September 11, 2001

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"All told, more than 3,000 suspected terrorists have been arrested in many countries. Many others have met a different fate. Let's put it this way—they are no longer a problem to the United States and our friends and allies. (Applause)"¹

Introduction

More than two years after the terrorist attacks on New York and Washington, there is now more clarity about what to expect of their effects on the struggle for human rights worldwide. We are immersed in a "war-without-end against terrorism,"² which includes an assault on international human rights law. This assault is sometimes rhetorical, but it also includes specific policies and practices that threaten to undermine the normative and ethical bases of the human rights movement.³ Within the United States and allied countries, we witness the weakening of legal safeguards for the exercise of civil liberties, as well as some more flagrant violations of individual human rights.⁴ We run the clear risk of a permanent erosion of basic norms on personal liberty, due process, personal integrity, and even the right to life.⁵

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1. President George W. Bush, State of the Union Address (Jan. 28, 2003), at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> (last visited Jan. 26, 2004).

2. Michael Ignatieff, *The American Empire*, N.Y. TIMES, Jan. 5, 2003, § 6 (Magazine), at 22. See Floyd J. McKay, *9-11 is No Reason to Suspend the Constitution*, SEATTLE TIMES, Jan. 21, 2004, at B7.

3. *Infra* notes 129-134 and accompanying text.

4. *Infra* notes 113-128 and accompanying text.

5. For an analysis of the United States response with regard to International

In international relations, major pressure is brought to bear on the United Nations and various governments, perhaps as never before, to attain the aims of the current United States administration.⁶ Different reactions to the phenomenon of terrorism cause the United States government to apply a Manichean logic of friend or foe, in a discourse that is contemptuous of governments that oppose more the means than the ends of the anti-terrorist campaign, such as those of the "old Europe."⁷ The projection of United States power abroad carries with it all kind of threats, from conducting two wars at once to cutting economic assistance.⁸ The unilateral use of force against Iraq caused a major division among the permanent members of the Security Council: China, Russia, and France, on the one hand; the United States and United Kingdom on the other.⁹ The case of France is symptomatic, because, along with Germany (which also opposed United States designs in Iraq), it is an important partner in the Western alliance.¹⁰ The "unilateralism"¹¹ and "exceptionalism"¹² that mark United States foreign policy are the most recent and most important threats to the future of international human rights law.¹³

Those who defend Washington's policy will protest that unilateralism and exceptionalism do not make the United States government an enemy of human rights. To the contrary, they will argue, taking military intervention to places where the most fundamental rights are denied and which also pose a threat to their neighbors, is the most effective way to promote democracy

Human Rights Law see Douglass Cassel, *International Human Rights and the United States Response to 11 September*, in *LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE* (C. Fijnaut et al. eds., Martinus Nijhoff Publishers 2004, forthcoming 2004) (manuscript at 251, on file with author).

6. *Infra* notes 104-105 and accompanying text.

7. Reda Benkirane, *Editorial Analysis: The Cultural Dimension of the Current Crisis*, *World Council of Churches*, Feb. 14, 2002, at <http://www.wcc-coe.org/wcc/behindthenews> (last visited Jan. 26, 2004).

8. *Infra* notes 54-63 and accompanying text.

9. Julia Preston, *Threats and Responses: Diplomacy*, *N.Y. TIMES*, Feb. 16, 2003, at A16.

10. Richard Bernstein, *Bush Visit Will Lift Poland to Status of Special Friend*, *N.Y. TIMES*, May 29, 2003, at A11.

11. See Geoffrey Wheatcroft, *A Superpower Goes Its Own Way, at its Peril*, *N.Y. TIMES*, June 25, 2003, at E6 (reviewing CLYDE PRESTOWITZ, *ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS* (2003)).

12. See William Safire, *The Way We Live Now*, *N.Y. TIMES*, Dec. 21, 2003, § 6 (Magazine), at 24 (describing "exceptionalism" as setting one's own philosophy "apart from comparison with others").

13. *Infra* notes 69-139 and accompanying text.

and the values of human rights worldwide.¹⁴ Strictly speaking, the Bush administration has not publicly announced that human rights would be of less concern than terrorism (as the Reagan administration did, through his first secretary of state, Alexander Haig).¹⁵ Nonetheless, Bush's statement quoted in the epigraph of this essay¹⁶ symbolizes, in our view, his administration's attitude on the subject: that assassinating external enemies has ceased to be taboo in Washington. This fact also reflects a permissive position with respect to policies and practices that violate the essence of human rights as restrictions on the means by which power is exercised, no matter how compelling the ends.¹⁷

In contrast, it is encouraging to see the efforts of some states that support the "war on terrorism"¹⁸ while insisting on respect for both basic human rights and international humanitarian law standards.¹⁹ There is also room for optimism because of pronouncements by international organizations and actions by civil society organizations that represent an organized and coherent response to the attack on human rights that underlies the best-known expressions of the "war on terrorism."²⁰ Similarly hopeful expressions have been the peace demonstrations held practically everywhere in the world, especially in societies which, along with their governments, consider the war as the worst of evils.²¹ Even among the Bush administration's allies (United Kingdom, Italy, and Spain) majoritarian public opinion markedly opposes the policies of their governments.²² The same is true of

14. Patrick E. Tyler, *Blair Tells Commons That Results in Iraq Are More Important Than Faulty Intelligence*, N.Y. TIMES, Feb. 5, 2004, at A15.

15. Tamar Jacoby, *The Reagan Turnaround on Human Rights*, 64 FOREIGN AFF. 1066, 1069 (1986); Neil C. Livingstone, *Terrorism: Conspiracy, Myth and Reality*, FLETCHER F. WORLD AFF., Winter/Spring 1998, at 1, 2.

16. Bush, *supra* note 1 and accompanying text.

17. See *infra* notes 112-127 and accompanying text (arguing that certain United States policies violate human rights).

18. *Terror Fight on G.O.P. List for Election*, N.Y. TIMES, Dec. 29, 2002, at A26.

19. The first major difference between the United States and other Western powers, in this case with France and Great Britain, in relation to the campaign in Afghanistan, was the denial of the legal status of prisoners of war guaranteed by the third Geneva Convention of 1949 to the detainees transferred to the military base at Guantánamo. See GEOFFREY ROBERTSON Q.C., CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE 495 (2d ed. 2002); Thom Shanker & Katharine Q. Seelye, *A Nation Challenged: Captives*, N.Y. TIMES, Feb. 22, 2002, at A12.

20. *Infra* notes 157-160 and accompanying text.

21. Alan Cowell, *1.5 Million Demonstrators in Cities Across Europe Oppose a War Against Iraq*, N.Y. TIMES, Feb. 16, 2003, § 1 (Magazine), at 20.

22. Lizette Alvarez, *Blair, in Surprise Return to Basra, Praises Efforts by Troops*, N.Y. TIMES, Jan. 5, 2004, at A11; Frank Bruni, *Thousands of Italians in Tribute to*

broad segments of the U.S. public.²³

The wars in Afghanistan and Iraq pose major dilemmas to the human rights movement, especially due to its normative reliance on a set of principles that are an integral part of international law. The military actions of the United States and its allies in both conflicts constitute a new and radical conceptualization of the legitimacy of the use of force in international relations.²⁴ Some practices carried out in those conflicts, moreover, are radical reinterpretations of the international law of armed conflicts and are against previously well-settled policies and practices of the United States.²⁵ Should these regressive trends be affirmed, the legal foundation of human rights work will be seriously called into question. Though ultimately the basis of the human rights movement is a universally shared set of ethics, the possible fragility of peremptory legal norms would deprive us of important aims, such as the objective basis and the critical standard by which to judge the conduct of states.

This is the framework, simplified in the extreme, in which this Essay debates the prospects for the work of the human rights movement. Two clarifications are in order. First, this is being written just as the so-called war on terrorism is unfolding, at a moment when the conflict is escalating at full throttle, thus it is not possible to see the top or what lies beyond. Second, this Essay is directly related to the development of international political events. In addition to our inherent personal limitations, forecasting such events is always risky. As has been noted, after all, the "[s]ocial science utterly failed to predict virtually all of the most momentous developments of our century, from the rise of fascism and the gulag to the . . . demise of communism."²⁶ With

the 19 Lost, N.Y. TIMES, Nov. 18, 2003, at A12; John Tagliabue, *A Region Inflamed: Madrid*, N.Y. TIMES, Dec. 1, 2003, at A13; see also Cowell, *supra* note 21; Alan Cowell, *Around the World, Thousands Protest the War*, N.Y. TIMES, Mar. 23, 2003, at B1; Richard W. Stevenson, *Antiwar Protest Fail to Sway Bush Plans for Iraq*, N.Y. TIMES, Feb. 19, 2003, § 1 (Magazine), at 1; Fawn Vrazo & Daniel Rubin, *Bush's Image in Europe Takes a Negative Turn*, MIAMI HERALD, Feb. 24, 2003, available at <http://www.miami.com/mld/miamiherald/5253268.htm> (last visited Jan. 27, 2004).

23. Leslie Eaton, *On New York's Streets and Across the Nation, Protestors Speak Out*, N.Y. TIMES, Mar. 23, 2003, at A14; Adam Nagourney & Janet Elder, *Support for Bush Surges at Home, but Split Remains*, N.Y. TIMES, Mar. 22, 2003, § 1 (Magazine), at 1; Patrick E. Tyler & Janet Elder, *Poll Shows Most in U.S. Support Delaying War*, N.Y. TIMES, Feb. 14, 2003, § 1 (Magazine), at 1.

24. *Infra* notes 105-112 and accompanying text.

25. *Infra* notes 105-112 and accompanying text.

26. MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* ix (1997).

this, we wish to highlight that while there is greater clarity in some respects, the most important characteristic of the current moment is uncertainty. This factor should be borne in mind when it comes to proposing, discussing, and implementing lines of action. The starting point for our exploration of the prospects for human rights work will be a characterization of certain aspects of the foreign and domestic human rights policy of the United States,²⁷ to be followed by an analysis of the importance of these responses within and for the human rights movement,²⁸ and the challenges they pose. Finally, some ideas for possible actions or strategies that may help improve the current situation, or at least limit its most pernicious effects, will be suggested.²⁹

I. United States Human Rights Policy In A Unipolar World

A. *The Inclusion of Human Rights in United States Foreign Policy*

It is commonly accepted that the interest and initiative of the United States Congress for a more active human rights based foreign policy came about as a response to Vietnam, due to disillusion with the Nixon-Kissinger-Ford foreign policy, and pressure from the United States civil rights movement.³⁰ With the election of President Carter, human rights were institutionalized as an element of United States foreign policy.³¹ While in his inaugural address President Carter argued that the commitment to human rights should be absolute, it was in his June 1977 speech at the University of Notre Dame that he spelled out in greater detail and presented his principles on foreign policy and human rights to the United States public.³²

27. *Infra* notes 30-160 and accompanying text.

28. *Infra* notes 161-190 and accompanying text.

29. *Infra* notes 192-198 and accompanying text.

30. David Carleton & Michael Stohl, *The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan*, 7 HUM. RTS. Q. 205, 206 n.2 (1985).

31. *Id.* at 214.

32. Hauke Hartmann, *U.S. Human Rights Policy Under Carter and Reagan, 1977-1981*, 23 HUM. RTS. Q., 402, 405 (2001). Among other statements, then-President Carter said:

Because we know that democracy works, we can reject the arguments of those rulers who deny human rights to their people. . . . [T]hroughout the world today, in free nations and in totalitarian countries as well, there is a preoccupation with the subject of human freedom, human rights. And I believe it is incumbent on us in this country to keep that discussion, that

Some criticisms have highlighted the ambivalent aspects and contradictions of the Carter administration when implementing this policy, for example, that the test of respect for human rights was not applied consistently to economic aid decisions.³³ It has been argued that human rights were just one additional element of foreign policy, but not an integral part, and that his leadership was not sufficient to surmount the rejection or inertia of the bureaucracy.³⁴ Methodologically, the case-by-case work towards which Carter himself was inclined made human rights issues more a question of personal initiative than institutional policy; accordingly, the results would vary, depending largely on the work and commitment of whatever officials happened to be in office.³⁵

For his part, Reagan leveled harsh criticism at Carter's foreign policy, first, for supposedly having a double standard, since he condemned minor violations by regimes friendly to the United States while ignoring the most important violators, i.e. the communist countries.³⁶ Second, Reagan condemned it for being ineffective.³⁷ Worse still, according to Reagan and his advisors, public criticism reduced the real influence and capacity of the United States to bring pressure to bear on that country, impeding improvements in the human rights situation.³⁸ The Reagan camp not only condemned the policy as ineffective, but also as counterproductive; criticizing a friend of the United States deprived that friend of legitimacy and weakened him, at a time when that circumstance could only strengthen opponents who were generally foes of the United States.³⁹ Fourth, it was argued that the human rights policy was contrary to the self-interest of the United States because weakening imperfect, but at least pro-

debate, that contention alive. No other country is as well-qualified as we to set an example.

President Jimmy Carter, Commencement Speech at Notre Dame University (June 1977), at <http://usinfo.state.gov/usa/infousa/facts/democrac/55.htm> (last visited Jan. 26, 2004).

33. Carleton & Stohl, *supra* note 30, at 215.

34. See Hartmann, *supra* note 32, at 416 (describing the regional bureaus of the State Department's use of "their bureaucratic experience and strength to resist any fixed obligations").

35. Hartmann, *supra* note 32, at 417-18; see Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 246 (1982) ("[T]he success of implementation will depend on . . . institutional and personal considerations of the officials concerned.").

36. Carleton & Stohl, *supra* note 30, at 205.

37. *Id.*

38. *Id.* at 209.

39. *Id.*

Western, regimes were seen as a threat to American interests.⁴⁰ Carter's policy was viewed as utopian, overly principled, and single-issue-oriented.⁴¹

In response, Reagan's foreign policy would be *realistic* and would be based on two fundamental interests: fighting international terrorism, as a violation of human rights, and highlighting the *moral* difference among political regimes.⁴² Both operated so as to redirect attention to the Soviet Union and its bloc.⁴³ Jeanne Kirkpatrick, who became Reagan's ambassador to the United Nations, expressed the administration's ideology that support for dictatorships was justified because authoritarian regimes did not break down all forms of social organization. While totalitarian regimes interfered in all social institutions (politics, religion, family, education, and economy), authoritarian regimes merely meddled in politics.⁴⁴ For the Reagan administration, determining who was authoritarian and who was totalitarian was simple: the authoritarian regimes were aligned with the United States, and the totalitarian ones with the Soviet Union.⁴⁵

As has been said, neither of the two positions could be upheld with solid arguments.⁴⁶ The very powerful and feared phantom of communism was incapable of ending religion in Poland, the (black) market in Cuba, or the continuation of strong political dissent in Nicaragua.⁴⁷ The same could be said with respect to the virtues of the non-totalitarian regimes: it is not possible to argue that the *scorched-earth* policy of Guatemala was not destroying all social, family, and economic relations of the thousands of persons who

40. *Id.* at 205.

41. Carleton & Stohl, *supra* note 30, at 209.

42. *Id.* at 209-11.

43. *Id.* at 211.

44. Jeanne Kirkpatrick, *Dictatorships and Double Standards*, COMMENT., Nov. 1979, at 34, 44.

45. Carleton & Stohl, *supra* note 30, at 210. On this point, former Secretary of State Alexander Haig said "the 'first imperative' of a human rights policy is to strengthen the United States, its allies and friends, the main safeguard against totalitarian aggression" and that "[i]nternational terrorism will take the place of human rights in our concern, because it is the ultimate abuse of human rights." *Id.* at 208-10 (citing *Excerpts from Haig's Speech on Human Rights and Foreign Policy*, N.Y. TIMES, Apr. 21, 1981, at A6; *Talk of the Town*, NEW YORKER, Feb. 16, 1981, at 31). Haig repeatedly condemned the Soviet Union for training, financing, and equipping international terrorists, arguing that there was a relationship between terrorism, understood as opposition to pro- United States governments, and the Soviet Union. *Id.* at 208.

46. *Id.* at 219-24.

47. *Id.* at 220.

were its victims.⁴⁸ The consequences of repressive actions by authoritarian pro-United States governments were enormous.⁴⁹ Those governments consistently and grossly overreacted to whatever harm was done by their opponents.⁵⁰

Beyond its unsustainable rhetoric, in practice the Reagan administration proposed for Assistant Secretary of State for Human Rights and Humanitarian Affairs a person who was well known for rejecting an active human rights policy.⁵¹ When Congress rejected that nomination, Reagan left the position vacant for a time, and purportedly sought congressional support to dismantle the human rights bureau.⁵² His administration fostered the removal of restrictions on aid to Chile, Argentina, Paraguay, and Uruguay, and lifted the embargo on arms sales to Guatemala.⁵³

A study on the relationship between amount of economic aid and human rights record shows that the Carter administration was less single-minded than Reagan and his acolytes had claimed.⁵⁴ Government assistance was interrupted, only partially, in eight countries of Latin America, in large measure continuing the policy of economic and military assistance.⁵⁵ There was a major difference between rhetoric and practice.⁵⁶ The Democratic administration did not significantly withdraw military aid from repressive regimes; it often invoked special powers that would enable it to keep the aid flowing, alleging that the violations were not systematic, and arguing that there were improvements.⁵⁷ For both administrations, however, security interests trumped human rights concerns when they were seen to clash.⁵⁸

The foreign policies of Carter and Reagan have been characterized by the major difference in the rhetoric employed by each, but also by a marked distinction between the rhetoric and practice of each administration; the distribution of economic aid

48. *Id.* at 220; Alan Riding, *Guatemalans Tell of Murder of 300*, N.Y. TIMES, Oct. 12, 1982, at A3.

49. Carleton & Stohl, *supra* note 30, at 220.

50. *Id.*

51. Hartmann, *supra* note 32, at 424.

52. *Id.* at 425.

53. Carleton & Stohl, *supra* note 30, at 224.

54. *Id.* at 215.

55. *Id.* at 215-16.

56. *Id.* at 216.

57. *Id.* at 222.

58. *Id.* at 224.

was similar.⁵⁹ Neither administration acted strictly in keeping with the human rights legislation.⁶⁰ The decisions on distribution of economic aid were made with other interests in mind, beyond human rights.⁶¹ Nonetheless, as has been acknowledged, there was at least one major difference: especially in Latin America and from the standpoint of the victims, the Carter administration called international attention to human rights violations, gave hope to the victims, and mitigated their solitude.⁶² Reagan offered no hope whatsoever.⁶³

The same desperation can be expected from the current Bush administration, judging not only by its actions to date,⁶⁴ but also by the fact that veterans of those policies in the Reagan administration are in key posts in the White House and State Department today.⁶⁵ No doubt, the tactical mistake of *proclaiming* the end of the human rights policy was not made.⁶⁶ Yet the absence of human rights in foreign policy, beyond the manipulation to justify the war in Iraq, is significant. Indeed, the office of the Assistant Secretary of State for Human Rights, Democracy and Labor has been relegated to such an obscure role that very few people in the media or in the human rights movement can identify its occupant.⁶⁷

59. *Id.* at 227.

60. *Id.*

61. *Id.* at 224.

62. *Id.* at 226.

63. *Id.* at 226. On the influence of United States human rights policy, see e.g., Aryeh Neier, *Presidential Leadership: An Essential Ingredient*, 46 ST. LOUIS U. L.J. 405 (2002).

64. *Infra* notes, 30-160 and accompanying text.

65. See David Corn, *Elliott Abrams: It's Back*, Media Transparency, July 2, 2001, at http://www.mediatransparency.org/people/elliott_abrams.htm (last visited Jan. 26, 2004) (Elliott Abrams, former Assistant Secretary of State for Inter-American Affairs, currently Senior Director for Democracy, Human Rights and International Operations for the National Security Council); U.S. Dept. of State, *Biography: John R. Bolton*, May 22, 2001, at <http://www.state.gov/r/pa/ei/biog/2976pf.htm>, (last visited Jan. 26, 2004) (John Bolton, former Assistant Secretary for International Organization Affairs at the Department of State, currently Under Secretary of State for Arms Control and International Security); U.S. Dept. of State, *Biography: John Negroponte*, Nov. 27, 2002, at <http://www.state.gov/r/pa/ei/biog/4952pf.htm> (last visited Jan. 26, 2004) (John Negroponte, former Deputy Assistant to the President for National Security Affairs, currently United State Representative to the United Nations).

66. *Supra* note 15 and accompanying text.

67. The current Assistant Secretary, Lorne W. Craner, was appointed in June 2001. U.S. Dept. of State, *Biography: Lorne W. Craner*, June 11, 2001, at <http://www.state.gov/r/pa/ei/biog/3404pf.htm> (last visited Jan. 26, 2004). From 1995 until his appointment, he was the president of the International Republican Institute. *Id.* Before 1995, he was Director for Asian Affairs at the National

Many elements of the "Reagan debates," such as terrorism as the central concern of foreign policy and the distinction between totalitarian-enemies and authoritarian-friends,⁶⁸ have come back to the discussion today. The Soviet threat to United States interests, used as a justification in the 1980s, has been replaced neatly by the terrorist threat to the security of Americans as a justification for a policy equally disdainful of human rights principles and values.

B. United States Exceptionalism and International Human Rights Law

Against the overwhelming trend among the majority of democracies in the world, the United States has rejected the most important and recent normative developments of international human rights law. Two months after his inauguration, President Bush announced that he would not implement the Kyoto Protocol on global warming, arguing that the obligations contained in that instrument were prejudicial to the United States economy, and focused on the emissions of industrialized countries without binding developing countries such as China and India.⁶⁹ Nonetheless, it would be a mistake to attribute the responsibility exclusively to President Bush. The so-called *pull-out* from the Kyoto Protocol was approved by the Senate in a 95-0 vote.⁷⁰ For its part, the European Union led the wave of criticism of the United States position but failed to have it changed.⁷¹

Even more hostile was the attitude towards one of the most important innovations in international human rights law, the Rome Statute for an International Criminal Court (ICC). In December 2000, before stepping down from the presidency, President Clinton signed the Statute, but did not send it to the

Security Council, and Deputy Assistant Secretary of State for Legislative Affairs. *Id.* He has a Master's degree in National Security Studies from Georgetown University. *Id.*

68. *Supra* notes 42-45 and accompanying text.

69. Alex Kirby, *U.S. Facing Climate Isolation*, BBC News, (Mar. 29, 2001) at <http://news.bbc.co.uk/1/hi/sci/tech/124944.stm> (last visited Jan. 26, 2004); *Anger at US Climate Retreat*, BBC News, at <http://news.bbc.co.uk/1/hi/sci/tech/1248278.stm> (Mar. 29, 2001) (last visited Jan. 26, 2004); *Dismay as U.S. Drops Climate Pact*, CNN, (Mar. 29, 2001) at <http://edition.cnn.com/2001/WORLD/europe/italy/03/29/environment.kyoto/> (last visited Jan. 26, 2004).

70. *Dismay as U.S. Drops Climate Pact*, *supra* note 69 (reporting Ari Fleischer's statement that "[g]iven the fact that it was voted 95-0 against in the U.S. Senate, it's a clear sign that there is little support, if any").

71. *Supra* note 69 and accompanying text.

Senate for ratification.⁷² His reason for signing was that the United States was in a better position to improve and strengthen it, as necessary, from within.⁷³ Senator Jesse Helms, chairman of the Senate Foreign Relations Committee, lambasted the signing of the Rome Statute and welcomed the new administration saying:

Today's action is a blatant attempt by a lame-duck President to tie the hands of his successor. Well, I have a message for the outgoing President. This decision will not stand. I will make reversing this decision, and protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress.⁷⁴

In addition to the pressures during the ratification process, which included sending envoys from the Pentagon to warn the governments who ratified the treaty that their military assistance would be cut off, the day after the entry into force of the Rome Statute, Secretary of Defense Rumsfeld aggressively warned that the United States would not send forces on future peace missions if they were not guaranteed absolute immunity from the ICC.⁷⁵ Two days earlier, the United States had put its threats into action, vetoing the Security Council resolution that extended the mandate of the peace mission in Bosnia, sparking criticism from Great Britain and other allies.⁷⁶ In turn, administration spokespersons indicated what the new strategy would look like: it would include (1) seeking a Security Council resolution guaranteeing immunity for Americans on peacekeeping missions; (2) signing bilateral agreements on immunity, the so-called "Article-98 agreements;"⁷⁷

72. See U.S. Department of State, Office of International Information Programs, Clinton Announces U.S. is Signing International Criminal Court Treaty (Dec. 31, 2000) (stating that President Clinton would not submit the treaty to the Senate for ratification until concerns were satisfied), available at <http://usinfo.state.gov/topical/pol/usandun/00123101.htm> (last visited Jan. 26, 2004).

73. *Id.*

74. Press Release, Helms on Clinton ICC Signature: This Decision Will Not Stand (Dec. 31, 2000), cited in Michael P. Scharf, *The United States and the International Criminal Court: A Recommendation for the Bush Administration*, 7 J. INT'L & COMP. L. 385, 385 (2001).

75. See Thom Shanker & James Dao, *U.S. Might Refuse New Peace Duties Without Immunity*, N.Y. TIMES, July 3, 2002, at A1.

76. *Id.*

77. These immunity agreements arguably violate the Rome Statute. See Human Rights Watch, *United States Efforts to Undermine the International Criminal Court*, (arguing that agreements guaranteeing immunity violate the Rome Statute and create a two-tiered system of law) at <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm> (last visited Jan. 30, 2004); AMNESTY INT'L, INTERNATIONAL CRIMINAL COURT: U.S. EFFORTS TO OBTAIN IMPUNITY FOR GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES, (Aug.

ensuring that Americans in their territory would not be transferred to the Court, and (3) making changes in the pacts with those nations that accept United States soldiers on their soil.⁷⁸

The Security Council eventually yielded to pressure from the United States, in order to keep the mission in Bosnia out of danger, and resolved to give twelve months of immunity to all cases related to peacekeeping personnel from countries that had not ratified the Rome Statute.⁷⁹ The resolution could be renewed indefinitely by the Security Council.⁸⁰

The next strategy was to strengthen the bilateral immunity agreements⁸¹ by using the threat to withdraw military aid to countries that did not sign them, and, less openly, the threat to hold back its support for countries that might want to join NATO.⁸² Actually, the concerns of the current administration became apparent soon thereafter. The Bush administration revealed to its European allies that the main reason for seeking immunity was to protect not only members of the military, but most importantly, United States political leaders from the jurisdiction of the Court.⁸³

The argument to reject the ICC on the grounds that it violates a country's sovereignty is specious, as it deliberately ignores that the principle of complementarity is a cornerstone of

2002), *available at* [http://web.amnesty.org/aidoc_pdf.nsf/Index/IOR400252002ENGLISH/\\$File/IOR4002502.pdf](http://web.amnesty.org/aidoc_pdf.nsf/Index/IOR400252002ENGLISH/$File/IOR4002502.pdf) (arguing that countries who enter into impunity agreements will violate obligations under Article 86 of the Rome Statute) (last visited Feb. 6, 2004).

78. *Supra* note 77 and accompanying text.

79. Felicity Barringer, *U.N. Renews U.S. Peacekeepers' Exemption from Prosecution*, N.Y. TIMES, June 13, 2003, at A18.

80. S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg., U.N. Doc. S/RES/1422 (2002); see Human Rights Watch, *Closing the Door to Impunity, Human Rights Watch Recommendation for renewing Resolution 1422*, at <http://www.hrw.org/campaigns/icc/docs/1422legal.pdf>.

81. Christopher Marquis, *U.S. Seeking Pacts in a Bid to Shield Its Peacekeepers*, N.Y. TIMES, Aug. 7, 2002, at A1 (reporting that bilateral agreements provide safeguards to avoid extradition of U.S. citizens once the one year exemption expires).

82. See Elizabeth Becker, *U.S. Issues Warning to Europeans in Dispute Over New Court*, N.Y. TIMES, Aug. 26, 2002, at A10; Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers Immunity*, N.Y. TIMES, Aug. 10, 2002, at A1 (reporting that the Bush administration warned that nations could lose military assistance if they become members of the ICC without entering into a bilateral agreement with the United States); see Coalition For the International Criminal Court, *Bilateral Immunity Agreements: Breakdown of Countries* (stating that as of Nov. 24, 2003, seventy-one countries signed Bilateral Immunity Agreements with the United States) *at* <http://www.iccnw.org/documents/otherissues/impunityart98/BIAWaiversWICC24Nov03.pdf> (last visited Jan. 24, 2004).

83. Elizabeth Becker, *On World Court, U.S. Focus Shifts to Shielding Officials*, N.Y. TIMES, Sept. 7, 2002, at A4.

the treaty. It is also a condition for the operation of the ICC, reinforced with many safeguards written into the treaty.⁸⁴ In the diplomatic words of one foreign minister, "democratic, law-abiding states . . . have nothing to fear."⁸⁵ The other argument about the special role of the United States in the world is no more than an unpersuasive claim to exceptionalism and impunity. Under this perspective, the Court affects this role more than that of any other nation. The threat to end the peace mission in Bosnia bore little relationship with the integrity of United States military forces in peacekeeping missions, since the United States makes a minimal contribution to the U.N.'s presence in Bosnia.⁸⁶ Amazingly, the United States willfully risked a humanitarian nightmare in Bosnia to make a show of strength based on a bad faith argument.

It should be noted, however, that this policy also received strong backing from the legislative branch. At the same time, Congress approved the American Servicemembers' Protection Act, which blocks United States participation in peacekeeping missions in countries that have ratified the Statute, cuts military aid to states that have ratified the treaty unless they promise that they will not transfer United States citizens to the Court, and authorizes military actions to free United States citizens and allied citizens in the custody of the Court.⁸⁷ This law was rightfully ridiculed as the "Bomb The Hague Bill."⁸⁸ In any event, the active opposition of the United States did not keep ninety-two countries from ratifying the Rome Statute, nor did it stop the

84. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 37 I.L.M. 999 (entered into force July 1, 2002). See, e.g., *id.* at arts. 15, 53 (stating as an example, the Prosecutor has discretion not to initiate investigations or prosecutions if it would not serve the interests of justice); *id.* at art. 17 (explaining that there are strict conditions of admissibility of cases binding on the prosecutor and the Court); *id.* at arts. 18-19 (explaining that countries that state a claim to jurisdiction superior to that of the ICC can use a procedure to challenge the jurisdiction of the Court and force termination or deferral of the proceedings); *id.* at arts. 18, 19, 54, 57 (stating that a pretrial chamber reviews prosecutorial actions and rules on such challenges and its decisions are binding on the prosecutor); *id.* at art. 72 (stating that the national security interests of countries are protected through a special procedure).

85. Julia Preston, *U.S. Rift With Allies on World Court Widens*, N.Y. TIMES, Sept. 10, 2002, at A6.

86. Paddy Ashdown, *Collateral Costs in Fighting a New Court*, N.Y. TIMES, July 2, 2002, at A21. In Bosnia the United States collaborated with 46 of the 1,500 persons of the United Nations Peacekeeping Mission. *Id.*

87. See Jamie Mayerfeld, *Who Shall Be Judge?: The United States, The International Criminal Court and Global Enforcement of Human Rights*, 25 HUM. RTS. Q. 93, 95 (2003), (analyzing the United States position and the advisability of multilateralism in applying international human rights law).

88. ROBERTSON, *supra* note 19, at 528.

Court from starting up its operations in March 2003, much sooner than expected.⁸⁹

The current Bush administration also opposed the Protocol to the Convention Against Torture. In this case, the argument against adopting the Convention Against Torture was that the mechanism of international visits provided for should not be financed from the regular budget of the United Nations, even though that is how all the treaty-based organs and other mechanisms are funded, but only by the state parties.⁹⁰ The United States opted to actively oppose it and once again ended up aligning with China, Iran, and Cuba.⁹¹ According to Human Rights Watch, while the United States position complained of the possible cost and the incompatibility with constitutional requirements, Washington's opposition appeared to reflect a profound aversion to efforts to apply international human rights law.⁹² As a positive aspect, and in any event as in other cases, United States hostility did not keep the Protocol from being overwhelmingly adopted by the majority of democratic countries. There were one hundred and four votes in favor, eight against, and thirty-seven abstentions.⁹³

In general, this administration has attacked human rights instruments instead of committing to seek possible solutions to the supposed errors. The pattern of conduct shows that the next step was to wage a strong campaign against the instruments, using all types of pressures, including the threat of removing economic aid.⁹⁴ Setting aside momentary and limited exceptions, the policy of rejecting international human rights law is not new. Fifty years ago, in 1951, Senator John Bricker, Republican of Ohio, displayed the same sensitivity as the current administration in response to

89. Human Rights Watch, *International Criminal Court a Reality* (Apr. 11, 2002), at <http://hrw.org/press/2002/04/icc041102.htm> (last visited Jan. 30, 2004) (reporting that "[t]he 60th ratification has come after less than four years, sooner than even the Court's staunchest advocates expected. Diplomats had previously predicted that it would take eight to ten years to obtain the 60 ratifications").

90. Association for the Prevention of Torture, *USA Putting Price on the Prevention of Torture*, at <http://www.ap.t.ch/un/dop/usa.htm> (last visited Mar. 14, 2003).

91. See Human Rights Watch, *New Treaty Against Torture*, at <http://www.hrw.org/un/cat1102.htm> (last visited Jan. 30, 2004).

92. *Id.*

93. *Id.*; Human Rights Watch, *U.S. Moves to Undermine New Torture Treaty* (Jul. 20, 2004) at <http://www.hrw.org/press/2002/07/torture-treaty.htm> (last visited Jan. 30, 2004).

94. See Becker, *U.S. Ties Military Aid to Peacekeepers Immunity*, *supra* note 82, at A1 (reporting that the threat to remove military aid included training, education, and financing for equipment and weaponry).

another of the most important instruments of international human rights law, the International Covenants on Civil and Political Rights: "my purpose in offering this resolution is to bury the so-called covenant on human rights so deep that no one holding high public office will ever dare to attempt its resurrection."⁹⁵

An interesting analysis of the content of the Senate hearings shows that arguments against the ratification of human rights instruments have not varied substantially in the last fifty years.⁹⁶ Another conclusion this study reaches is that the content of the treaty is not considered determinant in its ratification.⁹⁷ What is important is the perception, not the content.⁹⁸ In general, the members of the Senate and executive branch staff had not read the treaties. This has not varied much over the last fifty years.⁹⁹ These staff members were not familiar with the contents or objectives of the treaties.¹⁰⁰ The staff members' reactions to the human rights treaties are based on the perception of controversy they bring, the lack of a large electorate interested in them, and the lack of presidential support, not on what the document says.¹⁰¹

Even before the 9-11 attacks, in 1997, Thomas Buergenthal, referring to the United States practice with regards to human rights treaties, had said: "the U.S. once had a legal system that was international-law friendly, this is certainly no longer true today."¹⁰² Now, the temptation of unilateralism and hostility

95. 97 CONG. REC. 88,263 (1951), quoted in Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309 (1988); see Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995) (arguing that the reservations, understandings, and declarations that the United States attaches to ratifications echo the "Bricker Amendments").

96. See Kaufman & Whiteman, *supra* note 95, at 330 (stating that based on an analysis of the content, the leading indicator of consistency is that 93.5% of the arguments in the 1979 hearings were essentially the same as those put forth in 1953).

97. *Id.* at 334.

98. *Id.*

99. At the respective press conference, presidential spokesperson Ari Fleischer was asked whether President Bush had read the Kyoto Protocol that he so staunchly opposed: Q: "Has he read the treaty?" Mr. Fleischer: "I'm not aware of anybody in government who reads every page of every treaty except for a very, very few people. But the President is well aware, of course, of what's in the treaty." Press Briefing by Ari Fleischer, at <http://www.whitehouse.gov/news/briefings/20010328.html#KyotoTreaty> (last visited Feb. 19, 2003).

100. Kaufman & Whiteman, *supra* note 95, at 334.

101. *Id.*

102. Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 212 (1997).

towards international law, and especially international human rights law, is notable and has been reinforced today perhaps as never before. One would have to ask whether it is a contingent phenomenon, related to the dominant ideology in the current administration and therefore passing, or whether this is a longer-term trend. If one bears history in mind, it might be thought that it is a question of degree; that despite some notable efforts in the opposite direction, there is a history of strong rejection of human rights in different areas of government.¹⁰³ That history teaches, in any event, that such rejection may be more or less enthusiastic depending on who is in the Executive branch and who controls the Congress.

C. *United States Exceptionalism and the War in Iraq*

The fall of the Soviet Union brought not only the end of the bipolarity associated with the Cold War, but also a profound economic, political, and military distancing of the United States from every other center of power in international relations. Over time, that distance became ever more pronounced. Ten years after the fall of the Berlin Wall, the United States is the only superpower in the world, the most powerful nation in history. In economic and military terms, and therefore also in political terms, it is much more powerful, alone, than the sum of several of the other powerful nations of the world.

Even so, the first reaction of the United States immediately after the attacks of September 11, 2001, was not to respond as a humiliated and vengeful superpower, but to seek consensus and launch several diplomatic initiatives. With good judgment, in those first weeks Washington took advantage of the marked solidarity of the rest of the world with its status as victim of terrorism to shape a broad alliance to defeat it. Examples of this policy were the effort in the U.N. Security Council to come up with resolutions identifying these attacks as a threat to the peace and security of nations, and the pronouncement in similar terms of the organs of various security treaties to which the United States is a party.¹⁰⁴ Nonetheless, the first tendency towards *multilateralism* appeared to have run its course very soon. Only a few traces are left today. Although the administration sought a Security Council

103. See Cohen, *supra* note 35, at 246-49 (explaining that entrenched bureaucracies may resist implementing human rights laws even with sympathetic administrations such as Carter's).

104. Juan E. Méndez, *Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS U. L.J. 377, 387 (2002).

resolution with regard to Iraq, throughout this process it was clear that the United States would attack Iraq independent of what the Security Council might resolve, or even against the veto of some of the permanent members. Finally, the United States proceeded to attack Iraq unilaterally, without the approval of the only body under international law authorized to decide on the use of force.¹⁰⁵

The discourse on Iraq in Washington, New York, and elsewhere became even more dangerous to the future of human rights than in 2001 with respect to Afghanistan. Although one may take issue with the need or advisability of the war against the Taliban, at least as long as Al Qaeda was operating from Afghan territory, there was a defensible *casus belli*, given the need to destroy a possible center of new terrorist attacks. With respect to Iraq there was no credible argument on the real threat it might present, either to its neighbors or the rest of the world. Rather, Iraq and its regime were *contained*, to use international relations terminology, by the devastation of the previous Persian Gulf War, by international sanctions, and by the inspections to detect possible weapons of mass destruction.

Accordingly, the aggressiveness of the United States position adds at least three arguments that are relevant and at the same time dangerous to the future legitimacy of human rights work. The first of these addresses the need for "regime change."¹⁰⁶ In Latin America we know all too well that, not so long ago, the United States arrogated to itself the right to promote regime change in other countries, by covert or overt means.¹⁰⁷ Nationally and internationally, however, the language of regime change was abandoned long ago. The fact that it is being discussed once again, and without the need for any explanation, at least weakens an essential principle of the international legal order under which we live, that of the legal equality of all states, and its corollary, non-intervention.

105. See U.N. CHARTER art. 2, paras. 3-4, arts. 39, 42, 48, 51 (establishing authority of United Nations regarding the use of force).

106. *Regime Change: From Building Ties to Saddam to Removing Him from Power* (Sept. 30, 2002), at <http://www.cnn.com/2002/US/09/30/sproject.irq.regime.change/> (last visited Jan. 29, 2004) [hereinafter *Regime Change*].

107. See, e.g., STAFF OF SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, COVERT ACTION IN CHILE 1963-1973 1-56 (Comm. Print 1975), available at <http://foia.state.gov/Reports/ChurchReport.asp#I.%20Overview%20and%20Backgro> und (last visited Feb. 8, 2004); *Documents Reveal U.S. Funding for Chile Coup* (Nov. 13, 2000), at <http://www.cnn.com/2000/ WORLD/americas/11/13/cia.chile.02/> (last visited Jan. 29, 2004).

The second ingredient of United States policy that has possible repercussions for our tasks is the notion of the use of force as "preventive self-defense."¹⁰⁸ This line of argument, postulated as the right of the United States to use force against Iraq with or without Security Council resolutions, or even against them. There are profound implications for what has been understood as legitimate use of force since 1945, as well as for the future of the United Nations as guarantor of peace and as a forum for peaceful dispute settlement.¹⁰⁹ The "hawks" in the United States propose that the United Nations is now irrelevant because it is not useful for accompanying their designs for the rest of the world, when the test of its relevance should be whether it is capable of preventing war and promoting peace with justice.

The third worrisome element of the new international reality is the rhetorical use of democracy and human rights to justify military action.¹¹⁰ Clearly, nobody within the human rights movement wishes to defend the regime of Saddam Hussein against accusations that it was a dictatorship that practiced torture and even genocide. Yet it is useful to recall that such conduct was characteristic of the regime for many years, including when Saddam Hussein's presence in the Middle East was in the United States' interest.¹¹¹ In addition, the insistence on "liberating" the Iraqis from this yoke as an ethical basis for war rings hollow because it is clearly used to take the place of the reasons invoked earlier, such as the existence of nuclear arsenals or weapons of mass destruction. The human rights and democracy rationale was presented only after those other reasons were shown to be unprovable.¹¹²

108. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, 15 (2002) (outlining preemption doctrine), available at <http://www.whitehouse.gov/nsc/nss.pdf>, (last visited Mar. 12, 2004). For a critique, see Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 619-20 (2003) (arguing that the N.S.S.'s preemption doctrine "exponentially" expands the range of preemptive action allowed by the U.N. Charter).

109. See Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFFAIRS 16, 30-33 (2003) (arguing that the 2003 U.N. votes on Iraq showed the weakness of international regulation of use of force). But see Franck, *supra* note 108, at 610-14 (arguing that United States actions acknowledge the power of the U.N. Charter).

110. Bush, *supra* note 1.

111. *Regime Change*, *supra* note 106.

112. Long before the invasion, the nuclear threat had disappeared from Washington's rhetoric, when it was shown to be based on an outright falsification. See Seymour M. Hersh, *Who Lied to Whom?*, NEW YORKER, Mar. 31, 2003, at 42-43 (describing consensus that claims regarding Iraq seeking uranium were fabricated).

The erosion of these organizing principles of the international legal order looms as a threat, as well, to the very doctrine of human rights. This is so because the moral and political legitimacy of the human rights movement stems from an ethic shared by all cultures, and enshrined in legally binding instruments. The norms contained in human rights instruments, though based on principles that predate the State and therefore also predate the community of states, are an integral part of the legal architecture enshrined in the United Nations Charter. Accordingly, principles de-legitimizing non-intervention and limitations on the use of force can also undercut the legitimacy of human rights.

D. Exceptionalism at Home: The Erosion of Public Liberties in the United States

Within the United States, the current administration, arguing that the situation is exceptional, reacted to the attacks of September 11, 2001, by sharply eroding public liberties. In recent reports, the Lawyers Committee for Human Rights (LCHR) has documented and analyzed the government's reaction to the attacks.¹¹³ As indicated in the first of the series:

Viewed separately, some of these changes may not seem extreme, especially when seen as a response to the September attacks. But when you connect the dots, a different picture emerges. The composite picture outlined by this report shows that too often the U.S. government's mode of operations since September 11 has been at odds with core American and international human rights principles.¹¹⁴

In terms of the transparency of the government, the report shows the major trend toward secrecy in the conduct of public affairs. Beyond not revealing even the names or number of the detainees after the attacks, the Bush administration has refused to give information to the public, the Congress, and the federal courts in several areas, and has restricted federal laws that guaranteed the transparency and integrity of government acts, such as the Freedom of Information Act and the Whistleblower Protection Act.¹¹⁵

113. LAWYERS COMM. FOR HUM. RTS., *ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* i-v (2003); LAWYERS COMM. FOR HUM. RTS., *IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW AND POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES* i-viii (2003); LAWYERS COMM. FOR HUM. RTS., *A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11* i-v (2002) [hereinafter *A YEAR OF LOSS*].

114. *A YEAR OF LOSS*, *supra* note 113, at iv.

115. *Id.* at i-v, 1-5, 19-21.

The report also shows the erosion of privacy rights since September 11th. The USA PATRIOT Act¹¹⁶ is a statute that, among many other things, allows federal agents secretly to enter homes and workplaces.¹¹⁷ In summary, police officers can secretly enter a house or office while a person is out, and investigate one's private belongings, delaying the notice that such a measure is being taken for as long as necessary.¹¹⁸ While this law is a response to the attacks, most of its regulations are not limited to anti-terrorist activities, but can be applied to any federal investigation. In May 2002, Attorney General Ashcroft announced substantial changes in domestic spying.¹¹⁹ The new regulation, as in the good old days, allows the FBI to carry out surveillance of civic, religious, and political groups in the United States.¹²⁰ To this end, it is authorized to participate covertly in religious or political meetings, gain access to commercial databases, etc., without even showing any suspicion of criminal activity.¹²¹ Some of these activities, such as compiling information in commercial databases, are allowed as part of an investigation already under way or just beginning.¹²² Nonetheless, the fear is that these activities can now be used to generate (more than respond to) suspicions of criminal activity.¹²³ The report reveals just how far the government is willing to go. Operation TIPS (Terrorism Information and Prevention System) is the name of the initiative to recruit one million informants in ten cities, among persons whose everyday activities put them in touch with people in their homes or workplaces.¹²⁴ The informants could be the plumber, the gas person, the telephone repairperson, the cable TV installer, the postal carrier, and so on.¹²⁵

The LCHR report also describes the treatment accorded immigrants, refugees, and members of minority groups. The government closed the refugee program, deported foreigners for minor breaches, and held many others incommunicado, in secret,

116. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

117. *Id.* at § 213.

118. *Id.*

119. A YEAR OF LOSS, *supra* note 113, at 10-11.

120. *Id.*

121. *Id.* at 11.

122. *Id.*

123. *Id.*

124. *Id.* at 12.

125. A YEAR OF LOSS, *supra* note 113, at 12.

and for an undetermined time,¹²⁶ among other violations of fundamental principles of international human rights law. Hundreds were detained under such conditions.¹²⁷ The LCHR also analyzes the detentions of United States citizens among the government responses to the attacks, and the creation by executive order of the infamous "military commissions."¹²⁸

E. The Dangers of the New Situation

1. Allies and Human Rights

Also in the international arena, the current administration has demonstrated that what is important in its "endless war against terrorism" is the ends and not the means. It doesn't matter if the ally violates human rights systematically, represses dissidents, or has come to power through a *coup d'état*. In the words of President Bush: "[m]y reaction about President Musharraf [head of Pakistan's military regime], he's still tight with us on the war against terror, and that's what I appreciate."¹²⁹ The same can be said of other allies such as Uzbekistan, whose government continues openly to persecute its citizens, does not respect freedom of expression, imposes major restrictions on the religious freedom of Muslims, convicts people in secret, practices torture and arbitrary detentions, and maintains inhumane prisons.¹³⁰ The United States State Department itself reports that the arbitrary detention of Muslims is common, describes the use of torture, and reveals that the police "plant" drugs, arms, or religious pamphlets to justify arrests.¹³¹ According to Human Rights Watch, 7,000 Muslims have been jailed arbitrarily in Uzbekistan in recent years.¹³² What matters is that this government opened up its air space and an air base to the United

126. *Id.* at 13-21.

127. *Id.* at 15.

128. *Id.* at 31-33, 35-39. See also Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 338-42 (2002) (arguing that commissions violate both U.S. and international law and undermine the United States' moral leadership).

129. Kenneth Roth, *Not the Way to Fight Terrorism*, INT'L HERALD TRIB., Jan. 15, 2003, at 8.

130. C.J. Chivers, *Alliance With U.S. Spotlights Uzbek Rights Abuses*, N.Y. TIMES, Oct. 30, 2001, at B1, B4.

131. U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICE: 2001 (2002), at <http://www.state.gov/g/drl/rls/hrrpt/2002/18400.htm> (last visited Jan. 31, 2004) [hereinafter COUNTRY REPORTS].

132. Chivers, *supra* note 130, at B4.

States, which made it an important ally in the war in Afghanistan.¹³³ The same can be said of China: the Bush administration has downplayed the importance of repression against Muslims in the province of Xinjiang, which had been justified by the Chinese government as part of fighting terrorism. Similarly, violations in Saudi Arabia are ignored, as are violations by the military forces in Indonesia.¹³⁴

2. The Repressive Example

The "new model" for war on terrorism has been extended to many parts of the world. Many countries that abuse human rights have received legitimacy, or have taken advantage of the situation to restrict fundamental freedoms, such as freedom of expression, privacy, and due process, and to repress minorities or dissidents. One example can be found in the expressions of Egyptian President Mubarak, who argued that the attacks had changed concepts such as democracy and human rights, adding: "[t]here is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual."¹³⁵ Commenting on the measures adopted in the United States for fighting terrorism, President Mubarak added that they "prove that we were right from the beginning in using all means, including military tribunals" to combat terrorism.¹³⁶

Human Rights Watch observed that there were "opportunistic" reactions in about fifteen countries.¹³⁷ The same response was documented by the LCHR report.¹³⁸ It is profoundly worrisome that many governments are citing the repressive example of the United States to suppress public freedoms and eliminate dissident movements in their own countries. Yet it is much worse that the United States Secretary of State says that Egypt is ahead of the United States in fighting terrorism and that it is a country from which there is "much to learn" in that area.¹³⁹

133. *Id.* at B1.

134. Human Rights Watch, *New Survey Documents Global Repression* (Jan. 14, 2003), at <http://www.hrw.org/press/2003/01/wr2003.htm> (last visited Jan. 29, 2004).

135. A YEAR OF LOSS, *supra* note 113, at 43.

136. *Id.*

137. Human Rights Watch, *Opportunism in the Face of the Tragedy: Repression in the name of Anti-terrorism*, at <http://www.hrw.org/campaigns/september11/opportunismwatch.htm> (last visited Jan. 29, 2004).

138. A YEAR OF LOSS, *supra* note 113, at 41-46.

139. Colin L. Powell & Ahmed Maher, Remarks by Secretary of State Colin L.

3. Other Expressions of the Deterioration in the Quality of Democracy in the United States

There are other signs that clearly show the deterioration of the quality of democracy in the United States in key areas such as freedom of expression, tolerance, and judicial independence, in which the United States, could, until recently, justifiably hold itself out as an example. With respect to freedom of expression, the restrictions range from preventing marches against the war, judicial decisions whose logic would have justified prohibiting the marches led by Dr. Martin Luther King Jr. in the 1960s,¹⁴⁰ to manipulation of information by the largest news networks.¹⁴¹ It was not easy to get radio or television news on February 15, 2003, in the United States about the massive demonstrations against the war. These demonstrations were taking place around the world, including in several cities of the United States. The largest television news networks practically ignored it until a few days later, when their coverage was tendentious, presenting the images of the marches with titles that indicated they were making Saddam Hussein happy.¹⁴² The Fox network labeled the huge number of protesters in New York as "the usual protesters or serial protesters," while the next day, the CNN web site included the title "Antiwar Rallies Delight Iraq" while showing images of protesters in Baghdad, but not in New York, Madrid, Rome, or London.¹⁴³

On March 15, 2003, in the city of Atlanta, there was a demonstration to *support the security of the United States and its*

Powell and Egyptian Minister of Foreign Affairs Ahmed Maher after their Meeting (Sept. 26, 2001) at <http://usinfo.state.gov/topical/pol/terror/01092610.htm> (last visited Jan. 29, 2004).

140. Anthony Lewis, *Marbury v. Madison v. Ashcroft*, N.Y. TIMES, Feb. 24, 2003, at A17.

141. See Paul Krugman, *Behind the Great Divide*, N.Y. TIMES, Feb. 18, 2003, at A23, (criticizing skewed television coverage of the February 15, 2003 protest marches).

142. *Id.*

143. *Id.* (contrasting the minimal coverage of the demonstrations of February 15, 2003 by television networks with the prominent coverage by the national-circulation daily newspapers). Interestingly, in terms of radio broadcasting, a major economic group, which thanks to the lifting of anti-trust prohibitions in recent years went from owning 43 to 1,200 radio stations, was pointed out to have organized demonstrations favoring the troops and the United States military action, in response to the peace marches. Paul Krugman, *Channels of Influence*, N.Y. TIMES, Mar. 25, 2003, at A17; see John Schwartz & Geraldine Fabrikant, *War Puts Radio Giant on the Defensive*, N.Y. TIMES, Mar. 31, 2003, at C1 (reporting on the seemingly pro-war posture of Clear Channel and its member stations).

troops.¹⁴⁴ Strikingly, even though it was much smaller in numbers than the New York demonstration against the war, television stations featured live coverage.¹⁴⁵ As indicated, the United States cable television networks appeared to be reporting what was happening on another planet as compared to the foreign media reports.¹⁴⁶ This is especially serious, since most people get their news from the television.¹⁴⁷

From the outset, the television networks generally have assumed a position clearly in favor of the "endless war on terrorism," and when not campaigning for the war, they assume non-critical positions on the government's actions.¹⁴⁸ The main television networks increasingly base their information on unidentified "official intelligence sources." The consequences of ignorance and misguided patriotism entailed in this manipulation were reflected in the growing support for the war by the people of the United States,¹⁴⁹ in contrast to what happened in most other democratic countries.¹⁵⁰

Another expression of the irresponsibility of some media is the debate on the usefulness of or justification for torture. Some journalists have argued the benefits of using not the instruments of grave torture, but "something to jump-start the stalled investigation of the greatest crime in American history,"¹⁵¹ such as having the judicial authorities administer sodium pentothal.¹⁵² Others have come out squarely in favor of its use: "torture is bad [but] some things are worse. And under certain circumstances, it may be the lesser of two evils."¹⁵³ For the human rights movement, this presents a dilemma: we accepted the debate, but at the same time that very debate can uphold torture as a possible

144. Jennifer Brett, *Speaking Out About An Iraq War: Thousands In Atlanta Rally for U.S. Troops, Bush*, ATLANTA J. CONST., Mar. 16, 2003, at 19A.

145. *Id.*; CNN *Saturday Morning News* (CNN television broadcast, Mar. 15, 2003).

146. Krugman, *supra* note 141.

147. *Id.*

148. *Id.*

149. See Adam Nagourney & Janet Elder, *More Americans Now Faulting U.N. on Iraq, Poll Finds*, N.Y. TIMES, Mar. 11, 2003, at A1 (reporting an increase in the percentage of people in the United States who support of going to war with Iraq).

150. Joe Humphreys, *Global Poll Shows Half Oppose War*, IRISH TIMES, Feb. 15, 2003, at 7 (reporting that majorities in most democratic countries surveyed opposed the Iraq war).

151. Jim Rutenberg, *Torture Seeps Into Discussion By News Media*, N.Y. TIMES, Nov. 5, 2001, at C1.

152. *Id.*

153. *Id.*

course of action, and may begin to legitimize its use.¹⁵⁴

One might conclude that the government is not fostering this debate openly. Nonetheless, on December 26, 2002, the Washington Post ran an article reporting that Al-Qaeda detainees had been tortured or abused under United States custody in Afghanistan, while others had been taken to certain countries knowing that they might be tortured there.¹⁵⁵ Since its publication, no United States authority has refuted this information or announced corrective measures.¹⁵⁶

There are many other expressions of the current Bush administration that show a rapid decline in the quality of democracy in the United States.¹⁵⁷ Many of the restrictions on fundamental liberties mentioned are being challenged by human rights organizations in the courts,¹⁵⁸ while the Department of Justice takes great pains to shield administrative action from judicial scrutiny.¹⁵⁹ These judicial battles are just beginning, and

154. *Id.* See Peter Maas, *If a Terror Suspect Won't Talk, Should He Be Made to?*, N.Y. TIMES, Mar. 9, 2003, at 4; Don Van Natta Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1.

155. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1. It is the authors' opinion that Justice Department lawyers have unofficially contended that the practice of transferring prisoners is legal, as recalled by the authors from the remarks of John Yoo and Steve Jacobs at the Symposium on the Changing Laws of War held at Notre Dame Law School on December 4, 2003.

156. Letter from Kenneth Roth, Executive Director of Human Rights Watch, to Colin Powell, U.S. Secretary of State (Feb. 3, 2003), available at <http://hrw.org/press/2003/02/powell-ltr020303.htm> (last visited Feb. 1, 2004).

157. See, e.g., Ruth Holladay, *FBI's Surveillance in Bloomington Stirs Big Brother Fears*, INDIANAPOLIS STAR, Mar. 4, 2003, at 1B (reporting the implementation at Indiana University of a policy adopted after September 11th to use the FBI to track and investigate foreign professors and students); Dan Eggen, *FBI Taps Campus Police in Anti-Terror Operations*, WASH. POST, Jan. 25, 2003, at A1 (reporting the FBI's use of campus police to further the policy of tracking and investigating foreign professors and students).

158. See *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, 14 HUM. RTS. WATCH 4(G) (2002), available at www.hrw.org/reports/2002/US911/ (detailing a number of challenges to INS detention practices and other policies by groups such as Human Rights Watch and the ACLU).

159. See INTER-AMERICAN COMM'N OF HUM. RTS., 2002 ANNUAL REPORT ch. 3, ¶ 78, (2003) <http://www.cidh.org/annualrep/2002eng/chap.3g.htm>. See also *Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba*, 41 INT'L LEGAL MATERIALS 1015 (2002) (requesting that the Inter-American Commission on Human Rights rescind its request for precautionary measures to protect detainees in Guantánomo Bay, on the grounds that no precautions are required or needed and that the commission has no authority to request them); see generally *supra* note 158 (discussing the Department of Justice's focus on secrecy and its arguments against judicial review of wartime administration actions).

the lawyers challenging the Administration obtained a major breakthrough when the Supreme Court agreed to hear the case of a group of Kuwaitis, two British, and two Australian citizens held for a year and a half without charges in Guantánamo Bay.¹⁶⁰

More broadly, the attempt to push through judicial appointees with a strong ideological agenda is a worrisome, though not a new, development.¹⁶¹ These actions constitute an attack on the independence of the judiciary and could also have a negative imitation effect in other countries with less of a tradition for separation of powers. A tendency to revert decades-old protections for civil rights (for example with respect to constitutional guarantees in criminal procedure, immigration, non-discrimination, and women's rights) is precisely what is intended, and that too is a bad example to set for other countries.

II. Conditions for the Success of the Policy of Promoting Human Rights as Part of United States Foreign Policy

Thus far we have pointed out some of the more worrisome expressions of the human rights policy of the current United States administration. They contrast sharply with what Harold Koh,¹⁶² in a recent essay, describes as the four principles that should guide United States human rights foreign policy in this century: (1) tell the *truth*; (2) promote *justice*; (3) make a *commitment*, internationally and domestically, for governments and private sectors to improve the human rights situation; and (4) use strategies of *prevention*: early warning, preventive diplomacy,

160. *The Court and Guantánamo*, N.Y. TIMES, Nov. 17, 2003, at A20; Linda Greenhouse, *Justices to Hear Case of Detainees at Guantánamo*, N.Y. TIMES, Nov. 11, 2003, at A1.

161. See Remarks of President Bush in Weekly Radio Address (Feb. 22, 2003) (calling for Senate confirmation of judicial nominees including controversial nominee Miguel Estrada) at <http://www.whitehouse.gov/news/releases/2003/02/20030222-1.html> (last visited Feb. 1, 2004); see also Neil A. Lewis, *Bush Seats Judge After Long Fight, Bypassing Senate*, N.Y. TIMES, Jan. 17, 2004, at A1 (reporting Bush's seating of controversial judge Charles Pickering during a congressional recess); *A Judicial End Run*, N.Y. TIMES, Jan. 17, 2004, at A14 (criticizing Bush's seating of Charles Pickering); Neil A. Lewis, *Judicial Nominee Gets A Rare Second Chance*, N.Y. TIMES, Mar. 14, 2003, at A24 (reporting on the second hearing of a socially conservative Bush nominee by the Republican controlled judiciary committee); *Hold Firm on Estrada*, N.Y. TIMES, Mar. 13, 2002, at A26 (discouraging the Senate from confirming Estrada because of questions about his positions on key social and constitutional issues); Adam Cohen, *Deborah Cook is Typical Bush Nominee—So Watch Out*, N.Y. TIMES, Feb. 25, 2003, at A28 (pointing out radically pro-business positions of a Bush nominee).

162. See Harold Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 294 (2002) (noting Harold Koh was the Assistant Secretary of State for Human Rights and Labor in the second Clinton term).

and democracy promotion.¹⁶³

This is not the place to discuss Koh's thoughts at length, yet it is appropriate to take up some of his principles, not only because he is one of the leading thinkers in the field of human rights law in the United States, but also because his ideas at least nominally reflect official policy at his former post at the State Department.¹⁶⁴ Based on those guiding principles, Koh outlined some ideas on the attributes a United States human rights foreign policy would need in order to be successful.¹⁶⁵

We agree that that the first and most important task of the United States is to tell the truth about the human rights situation in the world, however painful and unwelcome it may be. Nonetheless, it is not enough to tell the truth about human rights in other countries; it is equally important to tell the truth about the situation in the United States, especially in those areas where national practices fall below international standards.¹⁶⁶ This task is especially important at this time, when the truth should be told about human rights violations, no matter who commits them, be they terrorists, allies, or state agents.¹⁶⁷

It is not enough to have a human rights policy as part of United States foreign policy; it is imperative that promotion and protection of human rights occupy a position of *centrality* in the overall scheme of United States interests abroad. This means that one should promote or defend a human rights policy even when it endangers other interests in international politics. The human rights policy should not be used when convenient to do so and set aside when it clashes with other "more important" national interests, in a sort of manipulation that does not go unnoticed, particularly by the human rights movement, which is well trained in and sensitive to such games.

Another requirement, difficult to find in the history of the

163. *Id.* at 306-330.

164. See COUNTRY REPORTS, *supra* note 131, at xii-xv; see also U.S. State Department, Human Rights Policy Statement of State Department's Bureau of Democracy, Human Rights, and Labor, at <http://www.state.gov/g/drl/hr> (last visited Feb. 1, 2004) (stating that the fundamental principles of the Bureau of Democracy, Human Rights and Labor are: (1) to strive to learn the truth and state the facts; (2) to take consistent positions concerning past, present, and future abuses (accountability for past abuses, strategies for internal-external commitment to halt present abuses, and to prevent future abuses by the use of early warning strategies and preventive diplomacy); and (3) to forge and maintain partnerships with organizations, governments, and multilateral institutions).

165. Koh, *supra* note 162, at 306-44.

166. *Id.* at 309.

167. *Id.* at 343.

United States foreign policy on human rights, is *consistency*.¹⁶⁸ Consistency requires calling human rights violations by their name independent of who commits them. In addition, consistency is required in meting out awards and punishments in foreign policy, and in forming alliances.

Finally, *preaching by example*: A large part of world public opinion and the human rights movement reject what they call the "double standard" employed by the United States.¹⁶⁹ The United States highlights everyone else's domestic problems and preaches "what they should do" while doing nothing to improve its own domestic situation, or, worse still, maintaining a hostile or hypocritical attitude towards international human rights law.¹⁷⁰ To win respect based on example one must begin by what may be rarest among attitudes of the United States' foreign policy establishment, *self-criticism*.¹⁷¹ If, as the State Department affirms, there is an interest in telling the truth and being consistent with the past, the present, and the future,¹⁷² there is no option other than to begin with self-criticism.

These principles would confer legitimacy and credibility on American human rights policy and no doubt the United States would regain a position of leadership in affirming fundamental liberties in the world. Nonetheless, it seems unthinkable that these principles can be attained today or in the near future. There is great distrust of the United States abroad, where few believe that the war on terrorism has the objective of promoting "enduring freedom." It is not the Taliban or an Iraqi soldier who points out that "[t]o be sure, in defending its interests a great nation may end up promoting freedom. Such was the situation with the concentration camps. It will not be the case for the \$15 barrel of crude."¹⁷³ Nor is it enemy propaganda that points out the problems of the current administration:

As the justifications for invading Iraq come and go—Saddam is developing nuclear weapons; no, but he's in league with Osama; no, but he's really evil—the case for war has come

168. *Id.* at 295.

169. See Harold Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1486-87 (2003) (describing and criticizing double standards in U.S. policy).

170. *Id.*

171. See Mark Gibney & David Warner, *What Does it Mean to Say I'm Sorry? President Clinton's Apology to Guatemala and its Significance for International and Domestic Law*, 28 DEN. J. INT'L. & POL'Y. 223 (2000) (commenting on an example of self criticism, President Clinton's apology for the role of the United States in supporting the Guatemalan military during the Guatemalan civil war).

172. *Supra* note 164 and accompanying text.

173. Régis Debray, *The French Lesson*, N.Y. TIMES, Feb. 23, 2003, § 4, at 11.

increasingly to rest on credibility But credibility . . . [is] about honoring promises, and telling the truth Can we run a foreign policy in the absence of trust? The administration apparently thinks it can use threats as a substitute.¹⁷⁴

It cannot be said that the current foreign policy has yielded no results; it has, and immediately. The perception that the truth is not being told, that the administration is not being honest, and that it is being arrogant, has wrought a change worldwide that was unthinkable two years ago: there has been a swing from widespread solidarity with the United States to strong anti-American sentiment.¹⁷⁵ Recent polls in democratic countries show that for their citizens, the main threat to world peace is not Iraq or North Korea, but the United States.¹⁷⁶

III. The Shortcomings of the Human Rights Movement

A. *The Debate on the Relevance or Obsolescence of Human Rights*

Almost immediately after the attacks of September 11, 2001, the opinion began to circulate on the need to think of international law in terms that did not limit the tools societies need to defend themselves from terrorism. Of course, the argument that human rights only "tie the hands" of the guardians of order is well-known in the developing world. As this kind of thinking is brandished mainly by those who violate human rights and at the same time are often incapable of giving citizens security, it is not very persuasive.¹⁷⁷ Nonetheless, in the spheres of international relations and in the cities of the developed world, this position had not been put forth before September 11, 2001 and the reality of the insecurity one experiences in New York and European capitals gives this argument some appearance of credibility and persuasiveness that cannot be overlooked. It may be common to hear after September 11, 2001 that "we are all Israeli," in the

174. Paul Krugman, *Threats, Promises and Lies*, N.Y. TIMES, Feb. 25, 2003, at A29.

175. See Jane Perlez, *Americans Abroad Find Anger at U.S.*, N.Y. TIMES, Feb. 19, 2003, at A1 (discussing how Americans abroad coped with anti-U.S. sentiment).

176. See Nicholas Kristof, *Flogging the French*, N.Y. TIMES, Jan. 31, 2003, at A29 (discussing a survey from the European edition of *Time* where 84% of the 318,000 persons surveyed thought the United States was the main threat to world peace); *The Tune Changes—a bit*, ECONOMIST 22 Feb. 2003, at 47 (discussing a survey showing that 74% of Germans believe that the United States has "too much power" and is a greater threat to world peace than Iraq or North Korea).

177. *Supra* notes 151-154 and accompanying text.

sense that we understand what it is to live under the constant threat of terrorism. From there it is just a few steps to offering justifications for suppressing freedoms, making the prohibition on torture as a method of interrogation less than absolute, and giving free rein to the security forces.¹⁷⁸ It is argued that international human rights treaties are not a "suicide pact."¹⁷⁹

Of course the discourse is more complicated and subtle, and has nuances that cannot be adequately captured in these lines. At the risk of oversimplifying, however, we can summarize the most sharply opposing positions as follows: on the one hand, it is said that the norms of international human rights law and international humanitarian law still apply to the situations for which they were conceived. Nonetheless, the struggle against terrorism is a new arena and was not contemplated in those instruments.¹⁸⁰ Terrorism with international connections, operating transnationally, is radically different from the criminal or insurgent phenomena carried out within the confines of a state.¹⁸¹ And the war on terrorism is not a conventional war, with armies confronting one another in the battlefield and with identifiable uniforms and badges. In the face of this situation, insisting on meticulous compliance with each and every norm of both bodies of law ignores the new realities and exigencies of security. As the new situation that it is, over time the war on terrorism will generate its own set of rules, which will eventually arise from the concrete practice of states. In the meantime, one must think through those practices without being tied down by norms designed for other situations.¹⁸²

On the other hand, human rights and humanitarian organizations answer that international human rights law and international humanitarian law are complete bodies of law and that they do consider many different situations, including the possibility of suspending guarantees in times of emergency.¹⁸³ The

178. *Supra* notes 151-154 and accompanying text.

179. David Martin, a law professor at the University of Virginia who is generally supportive of the Bush administration on these issues, said that human rights obligations are not a "suicide pact" at a hearing of the Inter-American Commission on Human Rights, on State responses to terrorism, held in March 2002, when author Juan Méndez was presiding. See Inter-American Commission on Human Rights, IACHR Concludes its 114th Regular Session (Mar. 15, 2002) at <http://www.cidh.oas.org>.

180. Sources cited *supra* note 45 and accompanying text.

181. *Supra* notes 30-45 and accompanying text.

182. Carleton & Stohl, *supra* note 30 and accompanying text.

183. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 4, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); American Convention on

terrorist attacks on the Twin Towers in New York have not changed the nature, force, or applicability of the international obligations of states with respect to human rights and the rules of armed conflict, obligations that must be respected with or without a terrorist threat. The same is stated with respect to the norms of public international law on the legitimate use of force in international relations.

The second position is closer to our ideas, for we do not believe that international law, in its current form, contains any vacuum. We cannot fail to note, however, that firmly embracing that position without concessions poses major risks. To argue that nothing has changed since September 11th clashes with people's perceptions and intuitions, and with the insistent message of the media, especially television.¹⁸⁴ Accordingly, insisting on an intransigent position in this debate may lead the human rights movement to be marginalized and to lose influence. It is not, of course, a question of clinging to the possibility of influencing policy-making (which can be an illusion unless we achieve real political weight in decision-making) by sacrificing the principles and indeed the very identity of the human rights movement. Organizations of civil society influence decision-making only to the extent that they defend causes and do so consistently. When they bend or blur the principles they defend, they fail to offer differentiated proposals for the marketplace of ideas, and then their loss of influence is greater still.

At the same time, it is important to analyze calmly the risks that this debate poses for the human rights movement. It is necessary to think through the positions to be adopted in that debate in terms that are both immediate and strategic. One must be willing to lose some ideological battles at this time to preserve our capacity to exercise influence in the future, but also to figure out how the battles we lose can be limited in number, and, to the extent possible, not decisive.

B. Need to Enter the Debate

In view of the foregoing, we argue that the human rights movement, objectively speaking, has no option but to enter this debate. To be able to effectively carry out our mission of defending

Human Rights, Nov. 22, 1969, art. 27, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force July 18, 1978); The European Convention for the Protection of Human Rights and Fundamental Freedoms and Its Eight Protocols, signed Nov. 4, 1950, art. 15, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

184. *Supra* note 106 and accompanying text.

the present and future victims of the war on terrorism, we must strengthen our capacity to engage in dialogue with the powers that be, and especially our chances of being heard. Accordingly, participating in the debate cannot consist simply of repeating rigid and intransigent positions, since by engaging in such a style of debate we would be relegating ourselves to the margins.

Even before September 11th, some intellectuals influential in international politics questioned the human rights movement for what they considered its dogmatic and excessively rigid positions, especially on issues related to the effort to get peace processes launched and to succeed, or to so-called "humanitarian intervention."¹⁸⁵ Certainly, the attention these authors lend to positions of non-governmental human rights organizations is witness to the movement's growing influence. Such influence may not be great in policy-making circles, but it carries weight in establishing ethical and legal limits to the solutions proposed by the powers that be. That intellectuals pay attention to the human rights movement is also a sign of the capacity acquired by some organizations to shape worldwide public opinion. At the same time, some of the criticism leveled at the human rights movement is made from perspectives favorable to our principles and our mission, with which a sort of "organic criticism" is coming about that is also a sign of the movement's maturity and growth. In addition, the most distinguished human rights leaders have proven capable of using public debates to advocate the movement's positions very effectively.¹⁸⁶

After September 11th, some criticism of the human rights movement has become harsher and attacks on human rights NGOs, mostly coming from the Bush administration and its supporters, have increased in number. At the same time the attacks have diminished in quality and precision. Although it may appear that this presents an advantage to our movement, it actually seems to us that the opposite is true: the poor quality of the criticism is in direct proportion to the perception of the

185. See, e.g., David Rieff, *The Precarious Triumph of Human Rights*, N.Y. TIMES, Aug. 8, 1999, § 6 (Magazine), at 37 (asserting that the moral absolutism of human rights activists is causing the movement to lose mainstream support); Brad R. Roth, *Peaceful Transitions and Retrospective Justice: Some Reservations*, ETHICS & INT'L AFF., 45 (2001) (concluding that human rights standards are not a universal solution to resolutions of violent conflict); see also MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY viii-xxviii (Amy Gutman ed., 2003) (discussing the purposes and foundation of the human rights movement).

186. See ARYEH NEIER, TAKING LIBERTIES ix-xxxiv (2003) (providing a chronological analysis of forty years of the human rights movement).

movement's diminished influence over the great issues of the day. In other words, the human rights movement is criticized more superficially because the critics believe they can ignore it. Human rights advocates are minimized as the usual discontents who exercise the "right to throw a temper tantrum," which is also functional to the system, for it tends to legitimize the new practices, based on the argument that one can freely voice one's opinions against them. When human rights defenders begin to make some headway in public opinion, immediately their patriotism is called into question.¹⁸⁷

In this scenario, it is necessary to accompany the task of denouncing violations with an openness to engage in dialogue. Suppressing the debate is in the interest of the authoritarians and prejudicial to the human rights cause. Accordingly, one must be prepared to hear the points of view of those who affirm new realities and new legal rules, and to address their reasoning point by point. In addition, we should avoid the perception that we denounce violations just for the sake of denouncing them, which requires, in addition to publicizing and protesting violations, that we come forth with specific and reasonable proposals. In particular, there is a need to reflect on the question as to the current force of human rights instruments and the laws of war in the new scenario of the anti-terrorist effort. Although we can definitely argue that these international obligations should continue to apply, we must not skip the prior step of showing why that is so and should continue to be so.

C. *Starting Point: No Backsliding*

It must be recognized that the struggle against terrorism can, in certain circumstances, include approaches and actions that were not duly contemplated in the drafting of the instruments we apply. International human rights law addresses the guarantees that a state must apply within its jurisdiction, in peacetime and in emergency situations that endanger the life of the nation.¹⁸⁸ It

187. Hearings on Anti-Terrorism Policy before the Senate Comm. on the Judiciary, 107th Cong. (Dec. 6, 2001) (testimony of Attorney General John Ashcroft) ("[T]o those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends."), available at <http://www.usdoj.gov/ag/>.

188. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 4, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); American Convention on Human Rights, Nov. 22, 1969, art. 27, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force July 18, 1978); The European Convention for the Protection of Human Rights

generally does not contain provisions for going after transnational crimes, or cooperation among states to repress them. Similarly, although international humanitarian law has evolved from and applies to international and non-international conflicts, and in the latter recognizes some forms of irregular warfare, its norms may be imprecise when it comes to determining when a given action is an act of war. This is especially so in relation to transnational terrorist networks, in which organized groups operating clandestinely seek to sow fear among the civilian population.

Before accepting these supposed limitations of the codes we apply, we should insist that as a matter of principle, the law does not have gaps. It is one thing to be willing to accept the debate, and quite another to accept a premise which, in our view, has not been proven. For example, in terms of the supposed shortcomings that have been pointed out, one must note that other aspects of international law, such as the principles of extradition and international cooperation to fight crime, and the incipient but growing body of international treaties against terrorism, help to fill any gap one may find.¹⁸⁹ In any event, one must be prepared to unmask some of these positions for what they really are: not so much an effort to explore the limits and failings of the current state of international law, but an effort to re-write it to free it from restrictions based on respect for the human dignity of every person, including one's enemies.

In taking on this debate, we must be faithful to essential principles of our discipline, such as the principle on the progressive development of human rights.¹⁹⁰ We cannot proclaim that human rights are in constant progressive evolution and at the same time insist that they have a crystallized and permanent content. The *raison d'être* of the principle of progressive development is precisely that the law generally, and especially human rights law, must evolve to adapt to changing social and human realities. At the same time, the principle of progressive content presupposes that such adaptations occur as steps forward

and Fundamental Freedoms and Its Eight Protocols, signed Nov. 4, 1950, art. 15, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

189. See INTER-AMERICAN COMM'N OF HUM. RTS., ORG. OF AM. STATES, REPORT ON TERRORISM AND HUMAN RIGHTS 33-38 (2002) (discussing how international law against terrorism shapes the analysis of international human rights commitments in the context of terrorism violence).

190. Buergenthal, *supra* note 102, at 212. See generally PEDRO NIKKEN, INTER-AM. INST. OF HUM. RTS., *LA PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS: SU DESARROLLO PROGRESIVO* (1987) http://www.iidh.ed.cr/en_index.aspx.

and not as regressive movement, especially in terms of fundamental guarantees.

To this end, we must insist that terrorism be seen both in light of its new characteristics and in terms of what is familiar and known. The attack on the World Trade Center is a qualitative and not just quantitative change, but the sensation of insecurity New Yorkers feel is the same as many peoples have suffered and continue to suffer in other parts of the world. In particular, terrorism is a challenge to the creativity of societies and states, and it is likely that it will result in different ways of addressing the relationship between security and liberty. Yet it is essential that the challenge be addressed from past experiences, not as if we were starting from scratch.

In no case can new situations serve as an excuse for backwards movement in the area of human rights. If there are going to be changes in the law, we should accept and even promote them, so long as they are steps forward that build on what is already accepted as law. In terms of the content of the new norms, we cannot accept standards that either abandon or weaken basic principles that inform our discipline. As for the process of forming new norms, it is unquestionable that in international law the practice of states gives rise to norms that are eventually enshrined in treaties or other instruments. In that sense, the work of the human rights movement will consist of denouncing and criticizing those practices that represent rolling back the current state of human rights and international humanitarian law to prevent acquiescence in such practices from becoming universally applicable norms. Seen in a positive light, our contribution to policy-making should foster those practices which, though novel, are consistent with the effectively progressive development of norms, and which are steps in constructing norms deserving of our support.

IV. Prospects for Human Rights Work Abroad

We should accept that the outlook is somber for the possibilities of effective protection of human rights from civil society organizations and from inter-governmental agencies. First, it is not possible to count on the pressure that the State Department and United States Congress can bring to bear when it comes to fostering changes in repressive policies, amplifying condemnation of violations, or serving as a valid interlocutor vis-à-vis authorities responsible for human rights violations. In most cases, considerations of "realpolitik," the reluctance to criticize

friends of the United States, or United States national security interests will have precedence and will stand in the way of such pronouncements or actions.¹⁹¹ Even in those cases in which the United States is favorably predisposed, its influence will be diminished by lack of consistency and by subordination of its human rights policy to other foreign policy or security objectives. Indeed, in some cases the hostility of the United States will help give certain regimes an undeserved image as victims of imperialism, and an excuse for not improving their human rights performance. Moreover, repressive or authoritarian governments now have at hand a response for those who question their tactics: if the United States does it in the war on terrorism, we can do it too.

This doesn't mean that we should completely renounce work in Washington on behalf of human rights in other parts of the world. Despite all the difficulties, the very might of the United States, the attention the world press gives to what goes on in Washington, and the still considerable potential to generate debates from there means it will continue to offer a propitious forum for our protests and proposals. There will also be cases in which the United States government is still willing to act on behalf of human rights, and in which it can do so with prospects for success. Those opportunities should not be disdained, though it will always be important to preserve the independence of human rights organizations and their role as a critical conscience vis-à-vis all the powers that be.

At this juncture, the multilateral scenarios, both political-diplomatic bodies and the universal and regional organs of protection, assume greater importance as a forum for human rights.¹⁹² Strictly speaking, for some time now the center of gravity of the international work has shifted to multilateral *fora*. This has happened, first of all, because the electoral regimes that have replaced many dictatorships are more susceptible to expressions of concern made in assemblies in which they feel they are "among their peers."¹⁹³ Second, the United States has considerably reduced its interest in Latin America and other regions for several years now.¹⁹⁴ In any event, the importance of

191. Mayerfeld, *supra* note 87, at 95 and accompanying text.

192. It should be acknowledged, however, that the multilateral fora are not free from the negative influence of unipolarity and exceptionality that we noted above.

193. This reflects, for example, the authors' experiences working with the Organization of American States.

194. See Jorge Castañeda, *The Forgotten Relationship*, FOREIGN AFF., May-June 2003, at 67 (discussing lack of involvement of the United States in Latin America

the multilateral initiatives will be accentuated, since the governments of small and weak nations feel more protected from United States pressures in multilateral bodies.

The work in multilateral organizations is frequently done through the governments that constitute them; accordingly, it will always be necessary to keep open the doors of dialogue with the State Department. At the same time, it is advisable to think of strategies for approaching the representatives of the other democracies. Whether those democracies have a tradition of engaging NGOs in dialogue or not, recent examples of fruitful relations in this area are initially encouraging.

In order to be able to generate human rights based foreign policy initiatives by old and new democracies, it will be necessary to insist on dialogue not only with international NGOs, but also with the civil society of each country. Unfortunately, the acceptance by the foreign ministries of the national NGOs as valid interlocutors is one of the aspects on which the least progress has been made since the beginning of the most recent transition to democracy. Even so, it is essential to continue making efforts along these lines. In addition, the human rights movement should generate ideas and proposals for two or more governments of each region to coordinate their policies on certain specific human rights problems, and implement them through joint multilateral initiatives.

A second aspect of the multilateral strategy refers to the action of the organs of protection, especially the regional ones, which enjoy growing legitimacy and prestige. A well thought out strategy should include the systematic use of the mechanisms of protection and promotion that they offer. In particular, it will be important to diversify the case law of the organs of protection by presenting novel cases and problems not yet sufficiently addressed by international law. One risk that is to be avoided is to demand that these organs provide responses to national or international problems that they are not in a position to give, either because of the limits to their jurisdiction or because of the relative political weight of their decisions. The strategy of bringing new cases should consider that the best outcome of the involvement of the international supervisory organs is feedback that bolsters national capacities to solve human rights violations. Accordingly, simultaneous with the presentation of cases, it is necessary to think of how interpretations rendered by the international organs

through their decisions will be incorporated into domestic law.

We should be realistic and recognize that the organs of protection do not have their own means to enforce their decisions. Therefore, their efficacy will also depend on the political will of the states, both the state directly affected by the decision, and all other state parties, which should assume the obligation of collectively guaranteeing the implementation of human rights obligations. With or without diversifying strategies, the tasks of human rights will always have to include a dialogue with the states to persuade them to comply in their own cases, and to incorporate concern for human rights in other countries into their foreign policy.

It is worth inquiring into whether it will be possible to replace, albeit partially, the influence of the United States as a tool for protecting and promoting human rights in our countries by the influence of other democratic governments and centers of power. The resistance of several European countries to the pressure of the United States on the Security Council in relation to the use of force against Iraq leads us to think that it is possible to conceive of a democratic power that tends to strike a balance with United States unilateralism. If this is indeed so, perhaps it is not illusory to think that such force, exercised today as a check on military adventure, could eventually be used positively to solve human rights problems in developing countries. Some time ago the members of the European Union made it explicit that human rights are part of the vital core of their common foreign policy;¹⁹⁵ accordingly, such a presence in the world would appear to have specific political and historical precedent. To date, however, that human rights policy clearly has not been as visible or effective as we would have liked, for a variety of reasons that are beyond the scope of this essay. Now, the sudden understanding of the need for balance in the unipolar world we live in may result in an advantageous diversification of factors of power and influence, so as to replace the ways in which the international human rights movement has been doing its work.

As in earlier stages, public opinion will continue to be of strategic importance to the human rights movement. Human rights defenders will be all the more effective in their struggle insofar as they can become true shapers of opinion. "World public

195. See Consolidated Version of the Treaty of the European Union, Dec. 24, 2002, Official Journal of the European Communities C325, art. 11.1 (stating that one of the objectives of the European Union is to develop respect for human rights), available at http://europa.eu.int/eur-lex/en/treaties/dat/EU_consul.pdf.

opinion" is becoming the second great power and the only one capable of balancing the weight of the sole remaining superpower.¹⁹⁶ Recent events indicate that mobilization and the decision to gain the streets are more relevant today than some of us had assumed.¹⁹⁷ Fortunately, many human rights organizations have a lengthy tradition of grassroots mobilization as a tactic for disseminating their mission. Although that may mean that our efforts have to continue to be aimed at shaping opinion by mobilizing, it will be important to understand the limits of this tactic if we are to use it prudently and at the most opportune times and places.

Shaping opinion requires not only being right, but being capable of disseminating a message with both ethical and programmatic content. To this end, one must be willing to answer, one by one, the positions that are at odds with the doctrine of human rights, using rational arguments that are principled and pragmatic at the same time. Language plays a key role here. It will not be enough to proclaim ourselves human rights activists for majority opinion to go along with us. It will depend on our ability to intervene when we have something to say, to offer responses that are not predictable, and to develop a systematic effort to gain access to the media. As in all policy-making areas, media access is not limited to being cited frequently in large circulation daily newspapers; even more important is that our information and opinions appear in outlets that help shape the opinions of decision makers.

Independent of the tactics and strategies we choose, the most effective thing we can do is to ensure coordination and a sound division of labor among the various organizations that make up the movement. Such coordination should not be limited to the action of any one organization, but should pursue the objective of maximizing the impact of each. Fortunately, despite some obstacles along these lines, the human rights movement has shown signs of a sound capacity to work in a coordinated manner at various levels.

One final consideration is necessary when speaking of future tasks. The movement should avoid by all means being cornered in

196. José Zalaquett, Address at the Seminar on the Implementation of International Human Rights Obligations and Standards Organized by the Inter-American Commission on Human Rights and the International Justice Center (Mar. 1, 2003).

197. See Robert D. McFadden, *From New York to Melbourne, Cries for Peace*, N.Y. TIMES, Feb. 15, 2003, § 1 (Magazine), at 1 (discussing global protests against the war with Iraq).

the political debate, characterized by knee-jerk opposition to the actions of the powerful. It is already quite difficult to distinguish our opposition to the over-simplistic recourse to force from our positions on the human rights performance of the regimes against which such force is sought to be applied. For us, it is clear that Saddam Hussein and the Taliban cannot be defended from the perspective of human rights. Nonetheless, it is difficult to get away from the false accusation that we defend those regimes when we oppose the use of force against them.

Related to the foregoing is the issue of the legitimate use of force. As stated above, international law has precise norms on this key issue in international relations.¹⁹⁸ Until the 1990s, the human rights organizations did not have to address this issue, but the cases of genocide forced a discussion on the topic.¹⁹⁹ Clearly, this essay will not attempt to resolve the highly complex dilemma of when and under what conditions the movement should come out in favor of the use of force. Yet it is necessary to be aware that the dilemma will come up again and again. The fact that one or more organizations favor the use of force under certain circumstances (*jus ad bellum*) is not tantamount to renouncing the monitoring of possible violations of international humanitarian law (*jus in bello*). The problem is not so much one of taking a position when what is at stake is saving thousands of lives, but of being able to distinguish human rights violations as grounds for military intervention from their use as a pretext for, or to give legitimacy to, interventions that are clearly carried out for other reasons. Some organizations will prefer always to assume a pacifist position, opposing the use of force under any circumstance. Others will prefer not to have to take a position, limiting themselves instead to monitoring the observance of the laws of war. Finally, there will be those who recognize the need to join their voices, accompanied by good information and analysis, to measured uses

198. U.N. CHARTER arts. 2.3, 2.4, 39, 42, 48, 50, 51; *supra* notes 189-189 and accompanying text.

199. See Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 A.J.I.L. 824, 825-26 (1999) (discussing whether NATO's military intervention in Kosovo was justified); Thomas M. Frank, *Lessons from Kosovo*, 93 A.J.I.L. 857, 858-59 (1999) (discussing the lessons learned from the NATO intervention in Kosovo). Just as an additional example, Human Rights Watch does not make judgments about the decision whether to go to war, about whether a war complies with international law, but it has made exceptions to its neutrality in cases of needed humanitarian intervention. Human Rights Watch: Current Events, Human Rights Watch Policy on Iraq (explaining Human Rights Watch's policy of publicly advocating for military intervention to avoid genocide or massive loss of life, as in Somalia in 1992, Bosnia in 1993, Rwanda in 1994, and so on) at <http://www.hrw.org/campaigns/iraq/hrwpolicy.htm> (last visited Apr. 9, 2004).

of force to save lives after exhausting all other possibilities. Perhaps the best thing is to maintain this plurality of visions on the issue, but in this essay we simply wish to say that it is important to maintain a serious and reflexive discussion on this point within the human rights movement.

Conclusion

The events of September 11, 2001, do not change the meaning or importance of the mission of the human rights movement in the world. Rather, they ratify the importance of insisting, if appropriate, with greater urgency, on respect for the fundamental principles that guide us, especially against the temptation of exceptionalism. Yet the new international situation created in the wake of these events presents us with important challenges that will test our ability to impact decisions. To get past the difficulties we face, we are well armed with our experience of recent years, and with our ability to influence consciences across nationalities and cultures. Nonetheless, it will be necessary to be creative in insisting on our principles and adapting them to new realities, without falling into mechanical repetition and without being marginalized and rendered obsolete.

This Essay has emphasized the role of the United States government as an important actor in promoting and protecting human rights, both in favor of and against these tasks, reflecting our view of the historical importance for the movement of having human rights as an explicit objective of United States foreign policy since the 1970s. This does not mean that we think that the tasks of human rights are limited to lobbying various institutions in Washington, or that the fate of the movement depends on the degree to which the United States government is receptive or hostile to us. Rather, it means that the new United States policy towards the rest of the world raises serious questions as to how to relate to an actor which to date had played a very important role in our mission. In addition, it makes all the more urgent the task of seeking new points of support for the movement; this is a strategic process of reflection that merits much more rigorous and concerted treatment.

