

# Howard J. Trienens Visiting Scholar Program

## INTERNATIONAL HUMAN RIGHTS AND THE ROLE OF THE UNITED STATES

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My topic this afternoon is international human rights, by which I mean rights that are considered by the world community, by unanimous or near-unanimous agreement, to be rights that ought to be fostered and enforced in any decent society. I begin with two passages separated by 2400 years.

The first is from the fifth century B.C. During the decades-long Peloponnesian Wars from 431 to 404 B.C., Athens and its empire fought the Peloponnesian League, led by Sparta.<sup>1</sup> In 415 B.C., the Athenians came to the small island of Melos with over thirty ships and over 3000 soldiers.<sup>2</sup> In what has come to be known as the Melian Dialogue, reported by Thucydides, the Athenians tried to persuade the Melians to surrender. Thucydides wrote that the Athenians said to the Melians, “[Y]ou know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”<sup>3</sup> The Melians refused to surrender.<sup>4</sup> The Athenians then killed all the adult males on the island and took the women and children into slavery.<sup>5</sup>

The second passage is from the end of the twentieth century. Professor Jack Goldsmith wrote in 1998:

The United States constantly urges nations of the world to embrace international human rights standards. And more than other nations, it uses military and economic leverage to force compliance with these standards.

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<sup>1</sup> See generally THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR (Richard Crawley trans., Read Books 2007) (431 B.C.).

<sup>2</sup> *Id.* at 300.

<sup>3</sup> *Id.* at 301.

<sup>4</sup> *Id.* at 305.

<sup>5</sup> *Id.* at 306.

The problem is that the United States does not embrace the international human rights standards that it urges on others. The United States systematically declines to apply international human rights law to its domestic officials.

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We can now better understand how and why the United States perpetuates the double standard. The explanation is not subtle. *The United States declines to embrace international human rights law because it can.*<sup>6</sup>

With those two passages in mind, I begin my narrative. In the last several centuries, there have been two great periods of human rights development. The first was in the late eighteenth century.

The American Declaration of Independence was written in 1776. Its first words are familiar to all of us: “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”<sup>7</sup>

In the late 1780s and early 1790s, after we won the Revolution, we implemented some of the Declaration by including certain specified rights in the Bill of Rights attached to our Constitution. Such rights include, for example, the right to freedom of expression and free exercise of religion; the right to be free from unreasonable searches and seizures; the right to due process of law, to be free from coerced confessions, and to be free from the taking of property by the government except for public purposes and upon the paying of just compensation; the right to the assistance of a lawyer and the right to confront witnesses in criminal cases; and the right to be free from cruel and unusual punishment.<sup>8</sup> Eventually, after the Civil War, we got around to incorporating into the text of our Constitution the Declaration of Independence’s aspiration of equality,<sup>9</sup> although we did not get around to implementing, in actual judicial decisions, the guarantee of equal protection until after World War II.<sup>10</sup>

In 1789, the year we ratified our Constitution, the French National Assembly adopted the Declaration of the Rights of Man. The Declaration preceded by several years the devolution into chaos and killing that came to be known as “the Terror.” Let me read to you selected passages from the Declaration of the Rights of Man, so that you may see the parallels to our Declaration of Independence and Bill of Rights.

<sup>6</sup> Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 365, 366, 371 (1998) (emphasis added).

<sup>7</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>8</sup> See U.S. CONST. amends. I–X (the Bill of Rights).

<sup>9</sup> See *id.* amend. XIV (amending the Constitution to include provisions emphasizing the equality of all men).

<sup>10</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregation in public schools violates equal protection of the laws).

“Men are born and remain free and equal in rights.”<sup>11</sup> “The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.”<sup>12</sup> “Law . . . must be the same for all, whether it protects or punishes.”<sup>13</sup> “No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law.”<sup>14</sup> “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.”<sup>15</sup> “The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”<sup>16</sup> “Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.”<sup>17</sup>

I invite you to notice two similarities between our Declaration of Independence and Bill of Rights and the French Declaration of the Rights of Man. First, and most obviously, many of the rights are essentially the same—the right to freedom of expression, the right to freedom of religion, the right to due process of law, the right to property. Second, and perhaps a little more subtly, the rights are largely what we may call negative rights. That is, they are rights specifying what the government may *not* do to affect people adversely. They are not affirmative rights. They are not rights that impose obligations on the government to provide benefits, such as a right to education, health care, or the means to earn a living.

The late eighteenth century was an exhilarating period both here and in Europe. Many of those who participated in or observed the declaration and creation of rights in the United States and France understood and celebrated what was being accomplished. I take as my example Wordsworth, who in 1805, in his autobiographical poem “The Prelude,” described his reaction to the early years of the French Revolution before it disintegrated into the Terror. “Bliss was it in that dawn to be alive, But to be young was very heaven!”<sup>18</sup>

Those few years at the end of the eighteenth century were a magical period. The stars were aligned so that the good angels of our natures could

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<sup>11</sup> DECLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] art. 1 (1789) (Fr.).

<sup>12</sup> *Id.* art. 2.

<sup>13</sup> *Id.* art. 6.

<sup>14</sup> *Id.* art. 7.

<sup>15</sup> *Id.* art. 10.

<sup>16</sup> *Id.* art. 11.

<sup>17</sup> *Id.* art. 17.

<sup>18</sup> WILLIAM WORDSWORTH, *The Prelude* (1850), reprinted in WILLIAM WORDSWORTH—THE MAJOR WORKS 375, 550 (Stephen Gill ed., 2000).

come to the fore. Those good angels spoke to us and for us, and they spoke to the rest of the world.

We had a similar magical period in the immediate aftermath of World War II. After World War I, President Wilson had tried, without success, to create in the League of Nations a vehicle for peace and the furtherance of individual human rights. But in 1946, in the immediate aftermath of World War II—after the horrors of the Holocaust and of the war itself, and before the Cold War began in earnest—the nations of the world, including Russia and its satellites, came together in San Francisco to create the United Nations.

In 1948, two years later, under the extraordinary leadership of Eleanor Roosevelt, the United Nations adopted the Universal Declaration of Human Rights.<sup>19</sup> In spirit, the Universal Declaration resembles our own Declaration of Independence. In detail, it resembles the French Declaration of the Rights of Man. In form, it resembles them both—that is, it was a declaration, without the force of law. It was an aspiration, a statement of ideals. In substance, it goes beyond our Declaration of Independence and Bill of Rights, and beyond the French Declaration of the Rights of Man. Not only does it specify negative rights, certain things that a government may not do *to* its people. It also specifies affirmative rights, obligations of a government to do certain things *for* its people.

Let me read to you some of the provisions of the Universal Declaration of Human Rights. Note that we are now in an explicitly ungendered world—these are no longer the Rights of Man, but rather Human Rights. The Declaration begins: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .”<sup>20</sup> “All human beings are born free and equal in dignity and rights.”<sup>21</sup> “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>22</sup> “Everyone has the right to life, liberty and the security of person.”<sup>23</sup> “No one shall be held in slavery or servitude . . .”<sup>24</sup> “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>25</sup> “All are equal before the law and are entitled without any discrimination to equal protection of the law.”<sup>26</sup> “Everyone is entitled in full equality to a fair

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<sup>19</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>20</sup> *Id.* pmb., ¶ 1.

<sup>21</sup> *Id.* art. 1.

<sup>22</sup> *Id.* art. 2.

<sup>23</sup> *Id.* art. 3.

<sup>24</sup> *Id.* art. 4.

<sup>25</sup> *Id.* art. 5.

<sup>26</sup> *Id.* art. 7.

and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>27</sup> “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”<sup>28</sup> “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. . . . Marriage shall be entered into only with the free and full consent of the intending spouses.”<sup>29</sup> “Everyone has the right to freedom of opinion and expression . . . .”<sup>30</sup>

Now begins the enumeration of affirmative rights—rights to the provision of affirmative benefits by the government: “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”<sup>31</sup> “Everyone has the right to rest and leisure . . . .”<sup>32</sup> “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . . Motherhood and childhood are entitled to special care and assistance.”<sup>33</sup> “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.”<sup>34</sup> “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”<sup>35</sup>

When the Universal Declaration of Human Rights was adopted, there was uncertainty about whether it would be anything more than a bare piece of paper. It did not purport to create rights in the sense of rights having the force of law. Nor did it create mechanisms by which such rights could be enforced. But as it has turned out, the Universal Declaration has been enormously influential. It has been a beacon—or, to use the familiar metaphor, a shining city on the hill<sup>36</sup>—to which the peoples of the world can aspire, much like the Declaration of Independence and the Declaration of the Rights of Man had been 150 years before.

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<sup>27</sup> *Id.* art. 10. I understand the use of “him” and “his” to have been intended by the drafters as synecdoche.

<sup>28</sup> *Id.* art. 12.

<sup>29</sup> *Id.* art. 16.

<sup>30</sup> *Id.* art. 19.

<sup>31</sup> *Id.* art. 23.

<sup>32</sup> *Id.* art. 24.

<sup>33</sup> *Id.* art. 25.

<sup>34</sup> *Id.* art. 26.

<sup>35</sup> *Id.* art. 28.

<sup>36</sup> See Governor John Winthrop, Sermon to the Winthrop Fleet, A Model of Christian Charity (1630), available at <http://religiousfreedom.lib.virginia.edu/sacred/charity.html> (“For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us.”); see also *Matthew* 5:14 (King James) (“Ye are the light of the world. A city that is set on an hill cannot be hid.”); President Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29650&st=&st1=> (describing the United States as a “shining city upon a hill”).

There are three primary means by which aspirational rights (by which I mean such rights as described in the Universal Declaration) can be transformed into legal rights, enforceable by some institutional mechanism.

First, in the international arena, such rights may be included in treaties or conventions. A treaty is a signed agreement with the force of law entered into between or among countries. Convention, in this context, is another word for treaty. Second, also in the international arena, such rights may become part of customary international law. Third, in the purely national arena, such rights may become part of what international lawyers call municipal law—the law of an individual country, whether the constitutional law, statutory law, or judge-made common law of that country.

I will give examples of all three categories, and as I do so, describe the manner in which these examples apply to the United States.

First, treaties or conventions. I will divide this category into two subcategories. First, the convention establishing a European system of rights, and, second, all other human rights treaties.

Here is the first subcategory. In 1950, two years after the adoption of the Universal Declaration of Human Rights by the United Nations, the countries of Western Europe agreed to the European Convention on Human Rights.<sup>37</sup> Unlike the 1948 Universal Declaration, the 1950 European Convention had, and still has, the force of law. It created real rights and authorized the creation of a real court—the European Court of Human Rights. That court opened its doors in Strasbourg, France, in the late 1950s.<sup>38</sup> The court has, ever since, interpreted and enforced the European Convention on Human Rights.

Let me read to you some of the provisions of the European Convention. You will notice marked parallels between the provisions of the Convention and the provisions of our Bill of Rights, the provisions of the French Declaration of the Rights of Man, and what I have called the negative provisions of the 1948 Universal Declaration of Human Rights. “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”<sup>39</sup> This article has since been amended, as I will discuss in a moment. “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>40</sup> “No one shall be held in slavery or servitude.”<sup>41</sup> “Everyone

<sup>37</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

<sup>38</sup> See The European Court of Human Rights: Some Facts and Figures 1959–2009, <http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresEN.pdf> (last visited Nov. 7, 2009).

<sup>39</sup> European Convention, *supra* note 37, art. 2.

<sup>40</sup> *Id.* art. 3.

<sup>41</sup> *Id.* art. 4.

has the right to liberty and security of person.”<sup>42</sup> “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>43</sup> “Everyone has the right to respect for his private and family life, his home and his correspondence.”<sup>44</sup> “Everyone has the right to freedom of thought, conscience and religion . . . .”<sup>45</sup> “Everyone has the right to freedom of expression.”<sup>46</sup> “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”<sup>47</sup> “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>48</sup>

Over the years, the European Court of Human Rights has rendered some remarkable decisions. One of particular interest to an American audience is its 1981 decision in *Dudgeon v. United Kingdom*,<sup>49</sup> in which the court held that the European Convention forbids a country to criminalize homosexual sexual acts between consenting adults. To give you a sense of comparison, five years later, in *Bowers v. Hardwick*,<sup>50</sup> the U.S. Supreme Court held that it does not violate our federal Constitution for an American state (in this instance, Georgia) to criminalize such homosexual sexual acts. Justice White, writing for the majority of the Court, traced the history of antisodomy laws in the United States. He wrote, “Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”<sup>51</sup> Chief Justice Burger, concurring, invoked “the history of Western civilization,” writing that “[c]ondemnation of th[e]se practices is firmly rooted in Judeo-Christian moral and ethical standards.”<sup>52</sup> He continued, “To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”<sup>53</sup> The European Court’s decision in *Dudgeon v. United Kingdom* had not been cited to our Supreme Court, and the Justices who decided *Bowers v. Hardwick* (including the dissenting Justices) seem to have been entirely unaware of it.

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<sup>42</sup> *Id.* art. 5.

<sup>43</sup> *Id.* art. 6.

<sup>44</sup> *Id.* art. 8.

<sup>45</sup> *Id.* art. 9.

<sup>46</sup> *Id.* art. 10.

<sup>47</sup> *Id.* art. 12.

<sup>48</sup> *Id.* art. 14.

<sup>49</sup> 45 Eur. Ct. H.R. (ser. A) (1981).

<sup>50</sup> 478 U.S. 186 (1986).

<sup>51</sup> *Id.* at 194.

<sup>52</sup> *Id.* at 196 (Burger, C.J., concurring).

<sup>53</sup> *Id.* at 197.

Turning from decisions of the European Court back to the provisions of the Convention itself, I will point out that the original provisions of the Convention have been amended by what are called, in the trade, protocols. Of particular interest to an American audience are two protocols concerning the death penalty. The first, adopted in 1983, provided that the death penalty violates the European Convention except in wartime.<sup>54</sup> The second, adopted in 2002, provides that the death penalty violates the Convention in all circumstances, even in wartime.<sup>55</sup> The United Kingdom had abolished the death penalty by statute in 1973 for all but exceptional crimes,<sup>56</sup> and France had done so by statute in 1981 for all crimes.<sup>57</sup> Both of those countries acted prior to the original 1983 protocol. Germany, acting in compliance with the 1983 protocol, formally abolished the death penalty in 1987.<sup>58</sup> In 1998, the United Kingdom, acting prior to the 2002 protocol, abolished the death penalty for all crimes.<sup>59</sup>

By contrast, in the United States, the death penalty is permitted by the federal Constitution. Thirty-five states and the federal government have the death penalty.<sup>60</sup> As of January 1, 2009, there were about 3300 people on death row around the country.<sup>61</sup> Just over 98% of them are male.<sup>62</sup> About 45% are white; 42% are black; and 11% are Latino.<sup>63</sup> Since 1976, we have had executions in almost all of the states with the death penalty.<sup>64</sup> Beginning with the American states with the largest number of executions since 1976 and working toward those with smaller numbers: Texas (423 executions); Virginia (102); Oklahoma (88); Florida (66); Missouri (66); Georgia (43); North Carolina (43); South Carolina (40); Alabama (38); Ohio—here

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<sup>54</sup> Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty, Apr. 28, 1983, 1496 U.N.T.S. 281, arts. 1–2, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201496/volume-1496-I-2889-English.pdf>.

<sup>55</sup> Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, 2246 U.N.T.S. 112, arts. 1–3, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%202246/v2246.pdf>.

<sup>56</sup> See Amnesty Int'l UK, A Brief History of Abolition, <http://www.amnesty.org.uk/content.asp?CategoryID=10403> (last visited Nov. 8, 2009).

<sup>57</sup> See Amnesty Int'l, Abolitionist and Retentionist Countries, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Nov. 8, 2009).

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> See DEBORAH FINS, CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 1 (Winter 2009), available at [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Winter\\_2009.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2009.pdf); *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16.

<sup>61</sup> *Id.* at 1.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 10–11.

we have the first nonsouthern state on the list—(28); Louisiana (27); Arkansas (27).<sup>65</sup> I could continue down the list, but I will stop here.

At the beginning, in 1950, there were relatively few signatories to the European Convention on Human Rights. They were Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey, and the United Kingdom.<sup>66</sup> Now there are almost fifty, including a few predictable countries such as Spain and Portugal, but also, perhaps not predictably, many of the countries of the former Soviet bloc of Eastern Europe and central Asia.<sup>67</sup> The addition of these countries in one sense is wonderful—the regime of human rights is spreading across an enormous geographical expanse. But it poses practical problems, for under the terms of the Convention, each country that is a signatory to the Convention is entitled to—indeed, is required to—have a judge on the European Court at Strasbourg.<sup>68</sup> Further, the newly added countries of Eastern Europe and Asia do not have the same traditions of observing human rights as countries in Western Europe, which means that far more cases are coming to the Court than ever before, perhaps more cases than the Court can handle.<sup>69</sup>

Why have all of these countries—countries such as Albania, Azerbaijan, Romania, and Russia—signed onto the European Convention on Human Rights, thereby subjecting themselves, and their human rights practices, to the jurisdiction of the European Court? These are countries with deep traditions of violating rather than observing human rights. The central part of the answer is simple: Trade. They want access to the European common market, either as members of the European Union or as countries with some form of privileged access, and they believe—probably correctly—that signing on to the European Convention on Human Rights will help them achieve that goal.

The second subcategory—all other human rights treaties—is much more sprawling. There have been an enormous number of multilateral human rights treaties since 1948. The United States is a party to some, including the Geneva Conventions and the Convention Against Torture.<sup>70</sup> But we

<sup>65</sup> *Id.* at 10.

<sup>66</sup> See European Convention, *supra* note 37, at 257.

<sup>67</sup> Participants in the Convention for the Protection of Human Rights and Fundamental Freedoms, <http://treaties.un.org/Pages/showDetails.aspx?objid=080000028014a40b> (last visited Nov. 8, 2009).

<sup>68</sup> See European Convention, *supra* note 37, arts. 20, 22.

<sup>69</sup> See EUR. CT. OF HUM. RTS., COUNCIL OF EUR., SURVEY OF ACTIVITIES 2–3 (2007), available at <http://www.echr.coe.int/NR/rdonlyres/D0122525-0D26-4E21-B9D4-43AEA0E7A1F5/0/SurveyofActivities2007.pdf>.

<sup>70</sup> See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 778 (2001) (“In recent years, the United States has belatedly ratified a number of international human rights treaties: the Convention on the Prevention and Punishment of the Crime of Genocide (1948) . . . in 1986; the International Covenant on Civil and Political Rights (1966) in 1992; the Convention Against Torture and

have refused to join or have withdrawn from many others. For example, we have never been willing to submit to the jurisdiction of the International Criminal Court in the Hague, and we have withdrawn from the jurisdiction of the International Court of Justice.<sup>71</sup> Further, as to those treaties that we have signed and ratified, we have almost always done so subject to what are commonly called RUDs—reservations, understandings and declarations—that limit in some fashion the manner in which the treaty will be applied.<sup>72</sup> This has been, I should emphasize, a bipartisan effort. Both Democratic and Republican Administrations have been reluctant to sign and ratify human rights treaties over the last several decades.

The second mechanism by which aspirational rights might become enforceable legal rights is customary international law. Customary international law is the equivalent, in the international arena, to what the common law was in England in its heyday in the seventeenth and eighteenth centuries. It is a law formed out of the consistent practices of multiple actors, including but not limited to judges, over a sustained period. It is not dependent on any particular treaty or covenant. It is law that has, by the consistent and largely uniform practice of the countries and people of the world, come to be recognized as universally binding even if not the subject of a treaty or convention to which a particular country is a party. Examples of such customary international law include prohibitions against piracy, slavery, torture, genocide, and war crimes.<sup>73</sup>

After World War II, customary international law of human rights came to be applied in the domestic courts of many countries, particularly in Western Europe. For a time, beginning in 1980, we enthusiastically applied it. In *Filartiga v. Pena-Irala*,<sup>74</sup> survivors of a Paraguayan national who had been tortured to death in Paraguay found the torturer in New York.<sup>75</sup> They brought suit in federal district court under a federal statute that had been on the books since 1789, the Alien Tort Statute,<sup>76</sup> and served process in New York.<sup>77</sup> The Court of Appeals for the Second Circuit held that the customary international law of human rights forbidding torture was part of the federal common law.<sup>78</sup>

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Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) . . . in 1994; and the International Convention on the Elimination of All Forms of Racial Discrimination (1965) in 1994.” (footnotes omitted)).

<sup>71</sup> See van der Vyver, *supra* note 70, at 780, 793.

<sup>72</sup> *Id.* at 779–80.

<sup>73</sup> Cf. YITHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW 41 (2004) (“There are only five international customary crimes: piracy, war crimes, genocide, crimes against humanity and the crime of aggression.”).

<sup>74</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>75</sup> *Id.* at 878–79.

<sup>76</sup> 28 U.S.C. § 1350 (2006).

<sup>77</sup> *Filartiga*, 630 F.2d at 878–79.

<sup>78</sup> *Id.* at 878, 885.

In recent years, as defendants subject to customary international law are increasingly no longer South American torturers who happen to be passing through New York, but instead American companies accused of human rights violations as part of their overseas operations, we have become somewhat less enthusiastic about enforcement of the customary international law of human rights.<sup>79</sup> In 2004, in *Sosa v. Alvarez-Machain*,<sup>80</sup> the Supreme Court held that a few international human rights are part of our federal common law, but it imposed fairly strict criteria on the recognition of such rights.<sup>81</sup> However, our state courts—and to some degree our federal courts—remain free to recognize and enforce, either as a matter of customary international law or of state law incorporating international law, a broader range of rights than those recognized under federal common law.<sup>82</sup>

The third category of potential enforcement is domestic, or national, law. Although we have international human rights law, and some international organizations, including courts, for the declaration, creation, and enforcement of international human rights, as a practical matter most protection of human rights is provided by the institutions of the country itself. As Eleanor Roosevelt wrote:

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.<sup>83</sup>

Let me compare the domestic law of the countries of Western Europe to our own. In the aftermath of World War II, there was an extraordinary period of constitution-making in Western Europe. The constitutions of France, Germany, and other European countries now contain not only the negative rights that are familiar to us in our Constitution—that is, rights forbidding the government to do certain things that hurt people. They also

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<sup>79</sup> See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) (Peru); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005) (Burma); *Bowoto v. Chevron Corp.*, 2007 WL 2349343 (N.D. Cal. Aug. 14, 2007) (Nigeria).

<sup>80</sup> 542 U.S. 692, 724–25 (2004).

<sup>81</sup> *Id.*

<sup>82</sup> See William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 667–70 (2007).

<sup>83</sup> The Universal Declaration of Human Rights: A Magna Carta for All Humanity, <http://www.un.org/rights/50/carta.htm> (last visited Nov. 8, 2009). Roosevelt chaired the United Nations Commission on Human Rights in its early years, and the Commission's principal objective under her leadership was to prepare the Universal Declaration of Human Rights. She made this statement in connection with that work. *Id.*

contain affirmative rights—that is, rights commanding the government to do certain things that help people, such as providing education, health care, and the means to earn a living.<sup>84</sup> Our Constitution, as I have already indicated, contains only negative rights, telling our government what it may not do to hurt us rather than commanding our government to do things to help us.

By comparison to those modern post-World War II constitutions, ours is an old-fashioned Constitution, a creature of the eighteenth century Enlightenment. Several years ago, Secretary of Defense Rumsfeld disdainfully referred to “old Europe.”<sup>85</sup> If he had been speaking of human rights, he should have referred to the “new Europe” and the “old United States.”

In the United States, we do have many affirmative rights. Please do not mistake me on this point. But these rights are contained in federal statutes and in state law rather than in our federal Constitution. For example, we have systems of free public education through secondary school in all of our states, but this is a creature of state law. We have some government-provided health care, but we all know that our health care system, considered as a whole, is expensive, cumbersome, and far from universal.<sup>86</sup>

Stepping back, how should we assess the United States’ overall record in human rights? I will start by saying that there is much to be proud of. Our Declaration of Independence and our Bill of Rights were, and are, magnificent achievements. They are still important beacons of hope for the rest of world.

Our Equal Protection Clause, adopted as part of the Fourteenth Amendment after the Civil War at the cost of so many lives, is a similarly magnificent achievement. We had to wait almost another one hundred years, until after World War II, for our courts to take it seriously, but today they take it very seriously indeed.

The decisions of our Supreme Court, beginning in earnest with those of the Warren Court, have done much to advance human rights. The most notable achievements of that Court were in equal protection law, beginning with *Brown v. Board of Education*<sup>87</sup> in 1954, and in due process law, in numerous cases in the 1950s and 1960s.

<sup>84</sup> See, e.g., LA CONSTITUTION 1958 CONST. pmb1. (Fr.) (French constitutional provision confirming the validity of rights described in the preamble to the 1946 Constitution, which included rights to education and employment); GRUNDGESETZ [GG] [Constitution] art. 6(4) (F.R.G) (German constitutional provision entitling mothers “to the protection and care of the community”); GRONDWET [GW.] [Constitution] (Neth.) art. 19 (provision of the Constitution of the Netherlands providing citizens with a right to subsistence).

<sup>85</sup> Steven R. Weisman, *U.S. Set to Demand that Allies Agree Iraq Is Defying U.N.*, N.Y. TIMES, Jan. 23, 2003, at A1 (“‘You’re thinking of Europe as Germany and France,’ Mr. Rumsfeld told foreign journalists . . . ‘I don’t. I think that’s old Europe.’ He added: ‘You look at vast numbers of other countries in Europe. They’re not with France and Germany on this. They’re with the United States.’”).

<sup>86</sup> Please recall that this lecture was delivered on January 22, 2009.

<sup>87</sup> 347 U.S. 483 (1954).

There has been much criticism of the Supreme Court's human rights record in recent years—some of it, in my view, justified. But I want to point out three recent cases, one concerning homosexual rights and two concerning the death penalty. The homosexual rights case is *Lawrence v. Texas*,<sup>88</sup> decided by the Court in 2003. In *Lawrence*, the Court reversed its 1986 holding in *Bowers v. Hardwick*,<sup>89</sup> now holding that the Constitution forbids a state to criminalize a homosexual sexual act between consenting adults.<sup>90</sup> In its 2003 decision, the Court somewhat belatedly acknowledged that the European Court of Human Rights had so held, under the European Convention, in the *Dudgeon v. United Kingdom*<sup>91</sup> case in 1981.<sup>92</sup>

The two death penalty cases are, first, *Atkins v. Virginia*,<sup>93</sup> in which the Court held in 2002 that it is unconstitutional to execute a mentally retarded person,<sup>94</sup> and second, *Roper v. Simmons*,<sup>95</sup> in which the Court in 2005 held that it is unconstitutional to execute someone who was a juvenile at the time of the commission of the crime.<sup>96</sup> Although its decision in *Roper* was based on our domestic law—the Cruel and Unusual Punishment Clause of the Eighth Amendment<sup>97</sup>—the Court recognized the degree to which we had been out of step with the rest of the world. The Court wrote, “Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18.”<sup>98</sup>

The foregoing may sound like faint praise; I do not intend it as such. There are countries in the world with truly awful human rights records—for example, Germany during World War II, Rwanda in the recent past, and Sudan in Darfur as I speak. We are not and never will be such a country.

But, despite the foregoing, I have to say that our human rights record is mixed. If there is a single word that may be applied to our approach to human rights, it is the word often applied to the French: “Exceptionalism.” We think that we are, and should be, different. American exceptionalism is behind our refusal to sign and ratify most human rights treaties since World War II. It is behind our refusal to submit to the jurisdiction of the International Court of Justice and the International Criminal Court. We do not

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<sup>88</sup> 539 U.S. 558 (2003).

<sup>89</sup> 478 U.S. 186 (1986).

<sup>90</sup> *Lawrence*, 539 U.S. at 578.

<sup>91</sup> 45 Eur. Ct. H.R. (ser. A) at 20–22 (1981).

<sup>92</sup> *Lawrence*, 539 U.S. at 573.

<sup>93</sup> 536 U.S. 304 (2002).

<sup>94</sup> *Id.* at 312.

<sup>95</sup> 543 U.S. 551 (2005).

<sup>96</sup> *Id.* at 578.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 576.

conform to the human rights standards now followed in Europe and some other parts of the world because we do not have to do so.

Further, and I now talk about all-too-recent events, in the conduct of the Iraq war and the so-called war on terror, we have engaged in practices that do not accord with human rights standards. Some of our behavior has violated not only general norms of human rights; it has also violated some of the treaty obligations that we have undertaken under the Geneva Conventions and the Convention against Torture. We have held men at Guantánamo with no access to trials; we have permitted, even authorized, torture and near-torture in prisons under our direct control; and we have shipped prisoners to other countries, in the practice called “rendition,” so that they may be tortured there.<sup>99</sup>

I compare our behavior to that of the French in the long and bitter Algerian war for independence. It is now commonplace for students of history to compare the Algerian war to the Iraq war by pointing out that the French lost, and that we may lose, too. For present purposes, I am not interested in the debate over whether we will win the war in Iraq, or what would constitute winning. I want to make a different point. In the conduct of the Algerian war, the French engaged in practices, including torture, that violated fundamental standards of behavior to which the French themselves subscribed.<sup>100</sup> A tragedy of that war, like a tragedy of the Iraq war and the war against terror, is that France betrayed its own human rights ideals, just as the United States has done.

Why do we do this? Why do we refuse to join treaties that would require us to change our human rights practices at home and abroad? Why do we behave as we have in the Iraq war and the war on terror? In Professor Goldsmith’s words, “because we can.” In the words of the Athenians, spoken to the Melians, “[t]he strong do what they can and the weak suffer what they must.”

Shortly after the Athenians massacred the Melians—because they could—they undertook a disastrous military expedition to Syracuse on the island of Sicily. There they suffered a military defeat from which they never recovered. They were never again the strong who could do unto others as they did not want done unto themselves.

I do not see in our future a defeat comparable to the defeat of the Athenians at Syracuse. We are likely to remain, for many purposes and for many years, the strong. To the degree that we wish for or expect improvement in our human rights record, we cannot, for the most part, look to external compulsion. We must look to ourselves. In the words of the doctor in *Macbeth*, “Therein the patient must minister to himself.”<sup>101</sup>

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<sup>99</sup> See JANE MAYER, *THE DARK SIDE* (2008).

<sup>100</sup> See ALISTAIR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954–1962*, at 232–34 (2006).

<sup>101</sup> WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 5, sc. 3.