

## **WHY 9/11 WAS GOOD FOR HUMAN RIGHTS**

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### **ABSTRACT**

On the standard view, the events in New York of 9/11 2001, and subsequent US-led invasions of Afghanistan and Iraq marked the beginning a of “moral slide” in which internationally recognized human rights norms, for instance, concerning torture, arbitrary imprisonment, and fair trial, came increasingly under attack from democratic states seeking to protect their citizens and to prosecute the “War on Terrorism”. On this view, 9/11 was very bad for human rights and the security policies that were adopted by the Bush administration and some other governments threaten the integrity of the entire post-WWII human rights framework. Against this standard view, I will argue that the last few years have witnessed a reassertion and strengthening of human rights paradigm. The policies of the Bush Administration with regard to torture of detainees, arbitrary indefinite detention, and secret prisons, rather than de-legitimizing the human rights framework, have themselves been de-legitimized by it. While this may indeed be a bad thing from the point of view of “brand USA” it is a good thing from the point of view of the global human rights movement because it demonstrates the robustness of the current global consensus on human rights and opens the space for non-Metropolitan countries to take on leadership roles in advancing the global human rights agenda. Because of the abdication of leadership on human rights by the USA and some other Western governments, the possibility now exists for human rights to be less of an elite Western-led initiative, and for it to become a more truly cosmopolitan project.

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March 19, 2008 marked the fifth anniversary of the beginning of the US war in Iraq. Later this month we will mark another grim anniversary; it was on April 28, 2004 that *60 Minutes II* first broadcast images of piles of naked Iraqi prisoners guarded by leering American soldiers in Abu Ghraib prison. The image of a hooded detainee standing on a box attached to electrical wires has become the iconic symbol of the Bush administration's record of egregious human rights violations. But 2008 marks another important anniversary, the sixtieth anniversary of the Universal Declaration of Human Rights. In order to gauge the impact of post-9/11 developments on the progress of the human rights it is useful to view the post-9/11 period in historical perspective.

In a recent issue of the *Columbia Human Rights Law Review* dedicated to the life and work of the great scholar of human rights law, Louis Henkin, Harold Hongju Koh, Dean of the Yale Law School, outlined four phases the development of modern international human rights law has passed through since the end of World War II:

(1) In the early years, an era of 'universalization' of human rights norms; (2) in the second phase, an era of 'institutionalization,' in which human rights institutions were created: governmental, intergovernmental, and nongovernmental; (3) a third era of 'operationalization,' starting roughly with the Helsinki Accords in 1976, whereby a human rights compliance process became operationalized and the institutions and norms began to work together to produce results; and (4) the era in which we now live, the

age of ‘globalization.’ The first period of this current era—running from the fall of the Berlin wall to the fall of the Twin Towers—was a period of global optimism, where we saw that globalization could be a tool for the transformation of the economy, rights, and global governance. But then five years ago, with the dawn of the War on Terror, we commenced an era of global pessimism that stays with us today.[\[1\]](#)

Before commenting on Koh’s characterization of the current post 9/11 period, I want to emphasize a few points about the first three phases, those of universalization, institutionalization, and operationalization. Human rights have arisen as normative responses to historical experiences of oppression. The human rights system as a whole is a historically-evolved, socially-constructed ethico-legal paradigm whose primary purpose is to ameliorate and prevent widespread, systematic or institutionalized forms of oppression. Human rights norms begin as moral claims advanced by a few people of conscience which are then picked up and carried forward by social movements, such as the anti-slavery movement, the women’s movement, the anti-colonial movement, and the trade union movement. In some cases these social movements succeeded in legitimizing their ethical claims by turning them into law.[\[2\]](#) Enactment and codification of human rights norms as national and international law marks an important milestone on the path to creating a mature human rights system because it recruits the sovereign law-making authority of states, along with their executive and police powers, and their power of judicial review, to the cause of protecting human dignity by preventing oppression.

However, merely the act of state parties signing international treaties and covenants, or even passing domestic laws that mirror the provisions of these international standards, does not by itself actually fulfill the promise of human rights. In order to do that it is necessary to develop effective institutions at the local, national, and international levels of governance to discharge the obligations and responsibilities required for the effective protection of human rights, and to make these institutions operational by providing them with adequate funding and resources with which to effectively to fulfill their respective roles in protecting and operationalizing human rights. While the latter half of the 20<sup>th</sup> century was indeed a Golden Age in terms of norm creation and universalization, it was rather disappointing with respect to the challenge of operationalizing human rights norms and values.

Since 1948 we have witnessed some massive failures of the international human rights system to function as intended: the Soviet gulag, apartheid in South Africa, death squads and disappearances in Latin America, widespread repression of political dissent, continuing persecution of religious and ethnic minorities, arbitrary arrest and imprisonment, torture, and genocides in Cambodia, Bosnia, Rwanda, and Darfur – and numerous other major violations of human rights took place despite the existence of a

set of universalized human rights norms embodied in the declarations, treaties, and covenants that make up the canon of international human rights law.

Despite these failures of implementation, however, the overall trajectory of the human rights movement and paradigm has been progressive over the past sixty years, and we have been moving steadily, if slowly, towards greater inclusiveness and greater effectiveness in realizing the promise of “All human rights for all.” There have been many victories and successes in those nations where human rights have been taken seriously, internalized into domestic law, and effectively implemented. Human rights played an important historical role in bringing down the Berlin Wall, and in ending apartheid in South Africa. Another major achievement took place in July of 2003 with the establishment of the International Criminal Court in the Hague with jurisdiction to try persons accused of war crimes, crimes against humanity, and genocide. So the overall picture over the past sixty years is not really all that bleak and there is still reason to believe that the human rights idea is making progress in the world. As Koh notes, the period from the fall of the Berlin Wall to the fall of the Twin Towers was a period of relative optimism. The forces of economic globalization gave hope that billions of people in the Global South might be lifted out of poverty and that their governments would acquire the resources and develop the capacities needed to create effective national human rights implementing institutions. But since 9/11/2001 this mood of optimism has been replaced with a sense of fear and insecurity, both because of the upsurge in international terrorism, but also because of the counter-terrorism policies and practices of many nations. In this discussion, while I focus on the impact of counter-terrorism policies on human rights, I need to make it clear that acts of terrorism, which I define as the deliberate targeting of civilians in order to induce fear in a larger population, is one of the most egregious violations of human rights that exists. Terrorist acts that are widespread and systematic constitute crimes against humanity and deserve universal condemnation. Nothing that I say here should be interpreted as in any way condoning such acts.[\[3\]](#)

The policies and practices of the Bush administration’s self-declared “War on Terror” have been widely regarded as setting back the cause of human rights in the United States, and unfortunately its security and counter-terrorism policies have been used as an excuse by some other states to emulate its bad example. The list of human rights violations and abuses that can be laid at the feet of the Bush administration is long and includes: the “disappearance” of suspected terrorists into CIA-run secret prisons, the denial of the right of habeas corpus of detainees, the use of ‘enhanced’ interrogation methods, otherwise known as torture, such as water-boarding, sleep deprivation, and auditory stimulus overload by military interrogators and the CIA, the indefinite detention without charges or trials of suspected terrorists at Guantánamo, the construction of the concept of “unlawful enemy combatants”, the use of Predator drones to assassinate suspected terrorists, the detention of an American citizen, Jose Padilla, without charges or trial for more than three years, the irregular renditions of persons such as Maher Arar to countries such as Syria, Egypt and Yemen where they have been

tortured, the torture of persons such as Khalid Al Masri in secret CIA prisons, ill-treatment and deaths of detainees held at Baghram airbase in Afghanistan, the secret eavesdropping on American citizens by the National Security Agency in violation of the Foreign Intelligence Surveillance Act, the criminal neglect of the victims of Hurricane Katrina, use of country of origin as a surrogate for racial profiling, ill-treatment of undocumented immigrants at federal detention centers, rape and mistreatment of women in US prisons, the highest incarceration rate in the world with blacks 6 times more likely to be in prison than whites, refusal accept the jurisdiction of the International Criminal Court, and failure to do much of anything to halt the genocide in Darfur, among others.

A number of these human rights abuses have been the subject of several high-level special reports on US human rights violations prepared by the charter-based bodies of the United Nations. In the most recent of these reports, dealing with respect for civil and political rights while conducting counter-terrorism, the Special Rapporteur for the Mission to the United States of America, Martin Scheinin, identified, "serious situations of incompatibility between international human rights obligations and the counter-terrorism law and practice of the United States. Such situations include the prohibition against torture, or cruel, inhuman or degrading treatment; the right to life; and the right to a fair trial." He has also identified deficiencies in United States law and practice pertaining to "the principle of non-refoulement; the rendition of persons to places of secret detention; the definition of terrorism; non-discrimination; checks in the application of immigration laws; and the obtaining of private records of persons and the unlawful surveillance of persons, including a lack of sufficient balances in that context."[\[4\]](#) This report and many others dealing with the human rights record of the Bush administration, both by the United Nations and by private nongovernmental human rights organizations, both in the US and abroad, demonstrate beyond a shadow of doubt that under the Bush administration the United States has systematically flouted its international human rights obligations. [\[5\]](#)

The conventional view held by most members of the international human rights community is that the Bush administration's response to the events of 9/11 has been a very bad thing for human rights. This is true, of course, if one judges this in terms of the number and kinds of human rights violations committed by the government of the United States. There is no doubt that these American human rights violations and abuses have been very bad for their victims, and nothing that I say here should be interpreted as suggesting that these violations are not serious, systematic, and inexcusable. It is also true that many other countries have emulated America's bad example and have adopted security and counter terrorism measures that limit or invade the civil liberties of their own citizens.[\[6\]](#) It also is fair to say that there has been a general weakening of the rule of law worldwide as the result of 9/11 and that civil rights and liberties in many nations are in a more precarious position now than they were before the terrorist attacks on New York and Washington, London, Madrid, Istanbul, and other cities. So there has been a crossing of moral boundaries, a moral slide, in

which solemn commitments designed to prevent the abuse of government powers have been abrogated.[7]

But I think it is not true that these responses to 9/11 have harmed human rights if one understands this claim as implying that the counter-terrorism policies of the Bush administration and other nations have undermined the legitimacy and authority of the contemporary international human rights paradigm itself. The security and counter-terrorism policies that the government of the United States has adopted and has attempted to justify as necessary to effectively prosecute its 'War on Terror' have not succeeded in delegitimizing the human rights paradigm. To the contrary, the international human rights paradigm has delegitimized the policies of the Bush administration. The contemporary international human rights paradigm has proven it is more robust than many people feared. In the confrontation between the policies of the United States of America -- world's sole remaining 'superpower'; the nation that liberated Western Europe from Nazi oppression in the Second World War; the nation which played a central role in the creation of the United Nations; whose former first lady, Eleanor Roosevelt, chaired the Human Rights Committee which produced the *Universal Declaration of Human Rights*; the nation based on the Enlightenment principles of liberty and equality for all, one whose constitution and Bill of Rights served as a model for many modern liberal democracies and which is the acknowledged leader of the 'free world' -- and the contemporary human rights paradigm, "brand USA" lost and human rights won.

In the first two years following the attacks of 9/11, once the outlines of the Bush administration's policies began to be apparent, and the invasion of Iraq occurred, there was good reason to be worried about the impact of the "war on terrorism" on the international human rights framework. Paul Hoffman, who was at the time Chair of the International Executive Committee of Amnesty International, wrote that Amnesty's view was that, "the way in which the 'war on terrorism' has been waged threatens to undermine the international human rights framework so painstakingly built since World War II." [8] He quite rightly pointed out in this article that it is possible for there to be effective security and counter-terrorism tactics that do not abuse of human rights; that the commission of human rights violations in the name of security against terrorism is counter-productive; and that Bush's policies distract attention from other serious human rights problems, like eradicating poverty, or stopping the genocide in Darfur, while diverting vast resources towards an ill-conceived "war" on terror. [9] Similar points have been made in scores if not hundreds of articles in the scholarly literature. The legal academy, in particular, has been vociferous in its condemnation of Bush's anti-terrorism policies, and even the US Supreme Court has rebuked the Bush administration in cases involving Jose Padilla and Guantanamo. Legal opinion both in the US and around the world has firmly rejected the specious arguments put forward by Bush administration lawyers such as David Addington, John Yoo, and Alberto Gonzalez, and by their apologists that the "inherent powers" of the President as commander in

chief of the armed forces justifies the violation of the Bill of Rights, and international human rights and humanitarian law.

The rejection of Bush's policies has not been restricted to elite opinion: in the past several years both editorial opinion in the press and world public opinion has turned sharply against the policies of the Bush administration. It is now commonplace to find editorials in newspapers from virtually every country in the world denouncing the human rights record of the Bush administration. For instance, the *Gulf News* published an Open Letter to George W. Bush on the occasion of his first official visit to Abu Dhabi, which included among other charges, the statement, "Mr. President; It has been reported that you are here to lecture us on democracy and human rights. But with a record like yours, you will not be very convincing. The people you are addressing have greater respect for human rights and dignity."<sup>[10]</sup> This example can be replicated with hundreds if not thousands of similar instances in which the world press has excoriated Bush and his administration for betraying human rights.

Such sentiments are not only found among liberal media elites. Public opinion polls conducted in Europe, Asia, Africa, Latin America, and in the United States itself, demonstrate that global public opinion has firmly rejected the policies of the Bush administration regarding human rights. For instance, a poll conducted by the BBC of more than 27,000 people in 25 countries found that a majority of the world's citizens believe that torture is not justified even if it is used to obtain information that could save innocent lives from terrorist attacks. Another poll found that two in three Americans say the United States should change the way it treats detainees at Guantanamo Bay as prescribed by the UN Commission on Human Rights.<sup>[11]</sup> Yet another poll found that a sizable majority of Americans oppose the rendition of suspects to countries that practice torture, and reject the argument that terrorists should not have the same due-process rights as US citizens.<sup>[12]</sup>

Negative attitudes toward Bush's policies are not simply derived from general anti-Americanism, although it is clear that these policies have reinforced a negative opinion of the US in many people's minds. Another poll conducted in 2006 showed that a large majority of Americans believe that the US is viewed more negatively by people in other countries as a result of the policies of the Bush administration.<sup>[13]</sup> This belief was confirmed by another poll in 2007 that found that in 20 of 26 countries surveyed the most common view is that America is having a mainly negative influence on the world. In his testimony before the House Foreign Affairs Committee in March 2007, Steven Kull, director of the Program on International Policy Attitudes at the University of Maryland, testified that during the 1990s similar polls were predominantly positive towards the USA, but in recent years, under the Bush administration, "favorable views of the United States have dropped in the UK from 83 percent to 56 percent, in Germany from 78 percent to 37 percent, in Morocco from 77 percent to 49 percent, in Indonesia from 75 to 30 percent, in France from 62 to 39 percent, from Turkey from 62 to 12 percent and in Spain from 50 to 23 percent. Only Russia has held steady."<sup>[14]</sup> Polling

data collected after Bush's re-election in 2004 suggests that negative attitudes toward the US, while significant, are not as strong as those for Bush and his policies. Doug Miller, President of GlobeScan, one of the leading global polling agencies, commented that, "Our research makes very clear that the re-election of President Bush has further isolated America from the world. It also supports the view of some Americans that unless his Administration changes its approach to world affairs in its second term, it will continue to erode America's good name, and hence its ability to effectively influence world affairs." [15] Clearly, the Bush administration has done no such thing in its second term.[16] The major US corporate-owned news media rarely report such findings, but even their pundits now generally acknowledge that under the Bush administration the US has lost its moral standing in the world. While this decline in the esteem with which America is regarded in the world is due to several factors in addition to the poor human rights record of the Bush government, e.g., the war in Iraq, its support for Israel, and its bellicose posture towards Iran, etc., it is clear that the flagrant disregard for international human rights norms has played a significant role.

If anything the policies of the Bush administration have put the final nail in the coffin of the image of the US as the world's champion of human rights. That the US had lost the mantle of moral leadership in this department was already apparent to most astute observers. Despite a brief and ineffectual attempt to make human rights the cornerstone of American foreign policy during the Carter administration, the trajectory of US policy since 1948 has been largely in conflict with the values, goals, and aspirations of the global human rights movement. American governments, whether led by Republican or Democrats, have placed US national security and economic interests above those of human rights, with few exceptions.[17] The erosion of the US's status as a leader of the global human rights movement began to be apparent as early as the 1950s with the "Brickerism" that took hold on American foreign policy during the first phases of the Cold War and which began the pattern of American exceptionalism and detachment from the international human rights system. Add to this the CIA-sponsored overthrows of democratically-elected but leftist governments in Iran, Indonesia, Guatemala, El Salvador, Nicaragua, Chile, and elsewhere; the illegal and immoral war in Vietnam; US support for repressive dictatorships in Africa, Latin America and Asia; support for the apartheid regime in South Africa up until nearly its demise, the failure to intervene in the genocide in Rwanda, and many other US policies that actively ignored the principles and values of the international human rights movement, and it is easy to see why informed opinion had already come to regard the US as a laggard rather than a leader with respect to human rights.

The Bush administration's open and willful disregard of major human rights and humanitarian obligations has removed what remained of the fig leaf that the US was still a champion of human rights in the world. People everywhere saw right though Bush's propaganda and millions took to the streets in February 2003 to protest the already planned invasion of Iraq which was conducted against the advice of some of our closest allies and without Security Council authorization, and, as it later became clear, was

based on distortions, deceptions, and lies. The brazenness with which the Bush administration has ignored international human rights standards and the rule of law in its pursuit of global hegemony has astonished even casual observers and has removed that last vestige of the carefully managed illusion that the US government is really interested in promoting and protecting human rights.

What these observations show is that the norms embodied in the contemporary human rights paradigm are not delegitimized by their being violated or ignored, even by the most powerful nation in the history of the planet. Human rights, particularly civil and political rights, function as a shield against tyranny and the abuse of power by governments. They are designed to thwart systematic or institutionalized oppression by state authorities, and as such, the fact that they are violated or ignored does not undermine their validity as moral norms, instead it highlights and reinforces the perception of why they are necessary and why the selective application of human rights standards by states must be firmly resisted.

What does undermine the legitimacy of the human rights paradigm is hypocrisy. For many people the gap between the rhetoric of human rights and the actual conditions of their lives as measured against accepted human rights norms leads them to dismiss human rights as false promises. But the loss of the US government as a credible spokesman for human rights helps avoid this sense of hypocrisy. If no one any longer seriously believes that when the US government talks about the importance of human rights it really means what it is saying, then its pronouncements on this subject are discounted as the propaganda they are. People quickly learn to pay attention to deeds rather than words, and the actions and policies of the Bush administration speak much louder than its rhetoric of freedom. While the full promise of human rights remains unfulfilled for billions of people, many are no longer able to believe that when American politicians talk about human rights they really mean what they say.

For many years the US government has invoked a double standard with respect to human rights. Compliance with international human rights norms is important when our adversaries violate them, but not when America's allies do. Under Bush "the United States flouts the very laws and norms of trade, international law, and human rights that it expects the rest of the world to follow. The most pressing priority for the next U.S. president will be to end the double standards that the United States believes its strength and stature afford it."<sup>[18]</sup> America's claim to be an "exceptional nation", one whose unique responsibilities as the leader of the free world and guarantor of international peace and security earns it the right to selectively ignore its international human rights obligations, has been roundly rejected in the court of world public opinion, as the previously cited polling data confirms. But even more, the world is growing uneasy with the idea of America as the sole superpower. A 2006 poll conducted by Germany's Bertelsmann Foundation in nine major countries found that sizable majorities in all of these countries, including in the USA, were uncomfortable with the idea of a world dominated by a single superpower, and preferred a multi-polar system to guarantee

international peace and security led by the United Nations, or by a group of regionally dominant powers, including the United States, the European Union, and perhaps China.<sup>[19]</sup> Public opinion among the nations of the European Union has of course, long rejected the idea of American exceptionalism with regard to human rights. The European attitude towards the ICC, towards the United Nations, and towards the best methods of defending themselves against terrorism, has been markedly different than that of the United States, even before the Bush administration took office. Indeed, respect for human rights, and the pursuit of international cooperation for their universal protection and enjoyment, has been a cornerstone of European policy, both foreign and domestic, since at least the signing of the Helsinki Final Act in 1975. European policy in the aftermath of 9/11 has disassociated itself from the Bush administration (with the notable exception of Great Britain), and public opinion in the EU has been consistently and strongly opposed to the human rights violations and abuses authorized by the Bush administration in its “war on terrorism.”

However, I would also argue that the European Union, which regards itself as the true global champion of human rights, has had its own reputation tarnished to a considerable degree by its acting as an enabler to much of what is worst in American policy. I am not just talking about the use of some European airfields for CIA flights to secret prisons, or about military cooperation in the wars in Afghanistan and Iraq, but the deeper sense of disquiet caused by the realization that while Europeans often feel disappointed and betrayed in the behavior of their American ally, they have not been willing to prevent the worst excesses of American foreign policy. This is evidently true of Great Britain whose “special relationship” with the United States misled Tony Blair into believing that going along with Bush’s Iraq fiasco would allow him greater influence over decision-making in Washington. But the other major Western European powers, such as France and Germany, although they refused to take part in the invasion and occupation of Iraq, did little to prevent their British and American allies from invading a sovereign nation without just cause.<sup>[20]</sup>

European governments tend to look upon the US with the disbelieving eyes of a group of tolerant older sisters who cannot quite understand why their younger brother acts so badly so much of the time. In Europe there is still in some quarters a sense of gratitude for America’s role in defeating the Nazis, and also a kind of family loyalty based upon shared history, culture, and values, but these attitudes are tempered by the notion that “We wouldn’t act like that” with respect to their own human rights policies. But when it comes to actually reining in their wild brother and stopping him from hurting others, the sisters play dumb, throw up their hands, and say in effect, “Boys will be boys. Sorry, we just can’t control him.” Official criticism of US policies coming from the EU continues to be muted and ineffectual. The European powers would rather hide behind the United Nations and let it do the dirty work of telling the US that it is out of line, and also, thereby, letting it take the heat from the backlash among some segments of US public opinion. Few Europeans take seriously the notion that the EU should take on the role of a “Second Superpower” and use its political muscle to restrain the United

States from any more reckless misadventures. As a result, the EU can be seen as an enabler of the US misbehavior, standing passively by while its ally continues to play the role of a rogue nation.<sup>[21]</sup> Both the US and its European allies prefer the arrangement of dependence on American military power to ensure security because it enables the US to maintain its hegemony and it allows the Europeans and to escape their own responsibilities and dedicate more resources to their social welfare systems. But it also requires that they don't object too loudly about the direction that American leadership takes. One of the legacies of the Bush administration may well be that the EU will now be willing to chart a course that is more independent of the United States in its foreign policy.<sup>[22]</sup>

But if America can no longer be regarded as a champion of human rights, and Old Europe has been enabling its bad behavior, then which states will really stand up and defend the international human rights framework? Certainly not China, which has its own terrible human rights record, and quite pointedly refrains from making human rights a basis its foreign policies. Certainly not Russia, whose crimes in Chechnya go unpunished. Perhaps new leadership in the field of human rights will come from rising giants such India, Brazil, and Indonesia, or from medium-sized powers, such as South Africa, Chile, Mexico and Argentina.<sup>[23]</sup> But rather than just speculating where new leadership among states for human rights will come from, it is instructive to look at the formation and first two election cycles of the new UN Human Rights Council for clues as to which countries might now assume the mantle of global leadership for human rights.

When the old UN Human Rights Commission was replaced by the UN Human Rights Council in 2006 there were high hopes that doing so would inaugurate a new era in the protection and promotion of human rights within the UN system. Then UN Secretary General Kofi Annan noted that only the US, Israel, the Marshall Islands, and Palau voted against the creation of the Human Rights Council, and that the many other nations which supported it were determined to prevent it from become corrupted in the way the Human Rights Commission had been by allowing notorious human rights violators to gain seats on the Council and from that position shield themselves from international scrutiny.<sup>[24]</sup> Annan pointed out that there are a number of procedural safeguards on election to the Council that are designed to prevent this from happening, including that Council members must be elected directly and individually by secret ballot by an absolute majority of the members of the General Assembly, and that Council candidates are required to "uphold the highest standards in the promotion and protection of human rights" and must submit their own human rights record to the Council's scrutiny during their terms of membership. He believes that these provisions, as well as the universal periodic review of all member states, should "make it very hard for a notorious violator to win election, and should deter the worst offenders even from running."

So which countries were elected in the 2006 and 2007 election cycles and what were their credentials for applying for this office? Argentina applied for membership in

2006. The letter announcing their candidacy noted that, “Since the restoration of the democratic system in 1983, Argentina assumed the protection and promotion of human rights as a matter of principle and it has developed an ideological and effective presence in this area.” It goes on to describe Argentina’s commitment to work cooperatively with the treaty bodies, and the work it has done on the drafting of an internationally binding instrument against enforced disappearances. It was also the first country in Latin America to adopt a national plan to counter discrimination, and has worked for the adoption of the Declaration on the Rights of Indigenous Peoples. It is already a state party to nine out of twelve basic instruments of international human rights law and has accepted the compulsory jurisdiction of the Inter-American Court on Human Rights. It reiterates its commitment to the success of the new Human Rights Council and “wishes to contribute in a decisive way in this new phase in which the UN has decided to give institutional priority to human rights issues so as to continue to improve the protection standards for all the peoples in the world.” Argentina was elected to the Council by a large majority.

When South Africa presented itself as a candidate for the Council on 26 April 2007 its letter to the President of the General Assembly noted that, “South Africa by its very nature and for historical reasons is among the countries within the United Nations that takes the international human rights agenda very seriously.” The candidacy letter goes on to underline South Africa’s commitment to advancing the right to development and working towards the eradication of poverty. It had signed most international human rights instruments on December 10, 1995 and has ratified or is in the process of ratifying all of the major ones, along with their Optional Protocols. It is also a party to the African Charter on Human Rights, several other regional human rights agreements, and its citizens are serving as members of various Treaty Monitoring Bodies. South Africa was elected to the UN Human Rights Council on the first round with 175 votes.

Other nations that won election by large majorities to the Human Rights Council include: Madagascar, India, Indonesia, Philippines, Slovenia, Nicaragua, and Bolivia. These election results are heartening and suggest that the abdication of international leadership in the field of human rights by the United States (which has not presented itself for membership on the HRC) has opened up space within the international community for new leaders to step up. Those countries, like Argentina, South Africa, Indonesia, and Slovenia, which have legacies of serious human rights violations in living memory are accepting this challenge and are asserting their leadership in the UN Human Rights Council and other international fora. In many ways it is both appropriate and good that they do so. It is appropriate because the present governments of these nations came to power as the result of democratic transitions from periods of dictatorship and repression which left scars on the collective memory of their peoples. It is countries like these, whose citizens know the real value of human rights, which can best lead the international human rights movement in the twenty-first century.

It would be a good thing for the global human rights movement too if they do so,

because it would help to finally put to rest the notion that human rights are a form of Western cultural imperialism that the metropolitan powers are trying to foist on the rest of the world. Human rights are a cosmopolitan historical project designed to create legal and institutional safeguards that will function effectively to prevent the most common forms of systematic oppression.<sup>[25]</sup> The desire to live in freedom and dignity and be protected from oppression is not a peculiarly Western notion, but is the common aspiration of all peoples. The victorious powers at the end of the Second World War, including the United States, which did play an important role in the late 1940s, earned a huge amount of moral capital by having the vision to create the United Nations and commit it to the promotion (but alas not the protection) of human rights and fundamental freedoms, and nothing I say here should be taken to diminish that achievement. But the United States has squandered a great deal of that moral capital in the ensuing decades and can no longer rest on its laurels.

The time has come for the leadership of the global human rights movement to pass from the Western powers, whose leadership was critical in the first phase of the creation of the international human rights framework, to the emerging democracies. While the current governments of these countries do not have unblemished human rights records, they have a genuine and principled commitment to the international protection of human rights because they have benefited from such protection themselves. The same cannot be said of the nations of Old Europe, the former colonial powers, nor of America, whose own historical struggles against colonial oppression and slavery are now largely consigned to the history books, and whose lessons have largely been forgotten by recent generations of Americans who are more interested in retaining their wealth and power than they are in achieving social justice.

The global consensus on human rights is strong and indeed more robust than many of us thought, and there are still good reasons to think that the human rights agenda is progressing in this century. But this time the main agents of progressive change are likely to be different countries than those who led the development of the international human rights framework during the latter half of the twentieth century. The explanation for the robustness of the human rights paradigm is that it is the result of the progressive domestication and internalization of the human rights paradigm into the ethical cultures of many more societies. This domestication of human rights has been led largely by thousands nongovernmental human rights organizations and the 160 national human rights institutions, which have helped to bring the international human rights framework into the consciousness and discourse of civil society. The increased penetration and internalization of human rights norms and values within global society has helped to overcome the legalism and state-centricity of the United Nation's approach to human rights, which relies on state parties to enforce compliance of other state parties with their solemn treaty commitments. There has always been a problem with this approach in that it makes states, which are the main violators of human rights, also their main protectors. Any enforcement scheme that makes the poachers also the gamekeepers is inherently dubious.

The way in which the global human rights movement has overcome this problem is by “privatizing” certain crucial functions, like monitoring and documenting human rights violations and abuses, as is done, for instance, by Amnesty International and Human Rights Watch, and by working through national human rights institutions and legislatures to translate international human rights norms into domestic law.<sup>[26]</sup> These efforts to reinforce and internalize human rights norms and values within global civil society represent a crucial missing element in Professor Koh’s scheme for understanding the history of the contemporary human rights movement. The domestication of international human rights norms and values into the ethical cultures of diverse societies is the missing step in the process leading to the operationalizing of human rights. This process of domesticating human rights norms and values continues to progress and represents the silver lining shining brightly behind the dark cloud of fear that obscured hopes for a better world in the twenty-first century following the terrorist attacks of September 11<sup>th</sup> 2001. The ill-conceived policies of the Bush administration will, I believe, be seen one day as a temporary deviation from the arc of history, which as Rev. Martin Luther King Jr. believed, tends towards justice.

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## NOTES

[1] Harold Hongju Koh. "The Future of Lou Henkin's Human Rights Movement." *Columbia Human Rights Law Review*. 38, 459 (Spring 2007): 487.

[2] I have defended and elaborated this conception of human rights elsewhere. See Morton Winston. "Human Rights as Moral Rebellion and Social Construction." *Journal of Human Rights*, 6, 3 (July-Sept 2007): 279-305.

[3] I was in Manhattan on the morning of 11 September 2001 and witnessed the collapse of the twin towers with my own eyes. I have not forgotten what happened on that day.

[4] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. UNGA, Human Rights Council. A/HRC/6/1/Add. 3 9, November 2007, at 23. This report and the other produced by missions sponsored by the other treaty bodies can be retrieved at the site of the United Nations Office of the High Commissioner for Human Rights < <http://www.ohchr.org/EN/Countries/ENACARRegion/Pages/USIndex.aspx>>. Accessed January 13, 2008.

[5] Proving that these patterns of human rights violations are the direct result of policies of the Bush administration is a task beyond the scope of this paper. However, for specific abuses, like the mistreatment of detainees at Abu Ghraib the documentary evidence shows that these abuses were not just the actions of a few "bad apples" in the military, but the result of deliberate policies of the Bush administration. Documentary evidence for this claim can be found in sources such as Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib*. New York: HarperCollins, 2004; Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, New York: New York Review Books, 2004; and Karen Greenberg and Joshua L. Dratel eds., *The Torture Papers: The Road to Abu Ghraib*, New York: Cambridge University Press, 2005. It is clear to this author from review these and other materials that the Bush administration's torture policy was developed for use in Afghanistan and then migrated from there to Guantanamo and then to Iraq in the late summer of 2003. The motive for extending this policy was to gain "actionable intelligence" from captured insurgents in the hope of stemming the growing rebellion in Iraq. The abuses at Abu Ghraib were not at all isolated incidents, but rather, part of a concerted and deliberate policy by the US government designed to circumvent the Geneva Conventions in order extract 'actionable' intelligence.

[6] Amnesty International, Human Rights Watch and other human rights NGOs have documented many other nations who have adopted draconian national security laws after 9/11. The United Kingdom now grants law enforcement authorities greater scope

to detain suspects without timely or meaningful civilian judicial review. Belarus passed a law in December 2001 that could have been lifted from the Patriot Act which allows the authorities to search homes or other locations without notice and seize things without a judicially approved search warrant. Still other countries, like Malaysia and Sudan, resurrected old security laws to crack down on peaceful dissenters or journalists. Liberia, Zimbabwe and other countries have applied the U.S.'s 'enemy combatant' label in order to detain journalists and members of the political opposition. I am indebted to Chip Pitts for reminding me of these important points.

[7] The term "moral slide" comes from Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (New Haven: Yale University Press 2001).

[8] Paul Hoffman. "Human Rights and Terrorism." *Human Rights Quarterly*. 26 (2004) 932-955, p.932.

[9] Amnesty International's Secretary General, Irene Khan, drew a lot of flack when she called Guantanamo the "gulag of our times" in June 2005. Vice-President Dick Cheney stated that, "For Amnesty International to suggest that somehow the United States is a violator of human rights, I frankly just don't take them seriously." But many other people did and do.

[10] "Letter to George W. Bush," *Gulf News*, January 10, 2008. <<http://archive.gulfnews.com/articles/08/01/11/10180995.html>> Accessed January 14, 2008.

[11] World Public Opinion, "World Citizens Reject Torture, BBC Global Poll Reveals" (October 18, 2006), and "Americans Say U.S. Should Comply with U.N. Judgment and Change Treatment of Guantanamo Detainees." (May 11, 2006). These and other results or international opinion polling can be found online: <[http://www.worldpublicopinion.org/pipa/articles/btjusticehuman\\_rightsra/](http://www.worldpublicopinion.org/pipa/articles/btjusticehuman_rightsra/)> Accessed January 14, 2008.

[12] World Public Opinion, "American Support Full Due-Process Rights for Terrorism Suspects." ([http://www.worldpublicopinion.org/pipa/articles/btjusticehuman\\_rightsra/228.php?lb=brusc&pnt=228&nid=&id=](http://www.worldpublicopinion.org/pipa/articles/btjusticehuman_rightsra/228.php?lb=brusc&pnt=228&nid=&id=)) (visited 28 January 2008).

[13] The same poll found that 73% of Americans were somewhat or very worried that the US may be losing the trust and friendship of people in other countries. "US Role in the World." World Public Opinion ([http://www.americans-world.org/digest/overview/us\\_role/worldopinion.cfm](http://www.americans-world.org/digest/overview/us_role/worldopinion.cfm)) (visited 28 January 2008).

[14] America's Image in the World." World Public Opinion.org. ([http://www.worldpublicopinion.org/pipa/articles/views\\_on\\_countriesregions\\_bt/326.php?lb=btvoc&pnt=326&nid=&id=](http://www.worldpublicopinion.org/pipa/articles/views_on_countriesregions_bt/326.php?lb=btvoc&pnt=326&nid=&id=)) (visited 28 January 2008).

[15] See "21 Nation Poll on Bush's Re-Election." (January 19, 2005). <[http://www.worldpublicopinion.org/pipa/articles/views\\_on\\_countriesregions\\_bt/117.php?nid=&id=&pnt=117](http://www.worldpublicopinion.org/pipa/articles/views_on_countriesregions_bt/117.php?nid=&id=&pnt=117)> Accessed January 14, 2008.

[16] In its World Report 2008 Human Rights Watch found there was no improvement in the human rights situation in the United States despite attempts by the democratically-controlled Congress to end abuses carried out in relation to its war on terrorism. It also upbraided the EU for tolerating sham elections, stating, "It seems Washington and European governments will accept even the most dubious election so long as the 'victor' is a strategic or commercial ally." Human Rights Watch. *World Report 2008*. (January 2008). Summary online: (<<http://hrw.org/englishwr2k8/docs/2008/01/31/usint17940.htm>>) (visited 1 February 2008).

[17] To cite just one example, shortly after the death of Indonesian strongman Suharto in January 2008 the National Security Archives made available declassified documents obtained through a Freedom of Information Act request showing that the US did not use its leverage to curb Suharto's vicious human rights abuses during the entire 32 years of his rule. The only time the US government leaned on Suharto was in 1998 during the Asian financial crisis, when President Clinton pressed him to comply with the demands of the IMF. "US propped up Suharto despite rights abuses." AFP 30 (January 2008).

[18] Jorge I. Dominquez "Unrepentant Power" Foreign Policy (January/February 2008) 78.

[19] "Poll of 9 Major Nations Find All, including U.S., Reject World System Dominated by Single Power in Favor of Multipolarity." World Public Opinion.org. ([http://www.worldpublicopinion.org/pipa/articles/views\\_on\\_countriesregions\\_bt/208.php?nid=&id=&pnt=208](http://www.worldpublicopinion.org/pipa/articles/views_on_countriesregions_bt/208.php?nid=&id=&pnt=208)) (visited 28 January 2008).

[20] In weighing the human rights impacts of the Bush administration one must also consider the impact of the war in Iraq. After the rationale for the invasion based upon the alleged existence of weapons of mass destruction was revealed to be baseless, the Bush administration began relying more heavily on the humanitarian argument, claiming that the invasion was justified to remove a brutal tyrant from power. This cynical distortion of the notion that there is a responsibility to protect people from massive human rights catastrophes has helped to discredit one of the most important innovations in international law in the 1990s. There is now a danger that the idea that there is a responsibility to protect will be cast aside as too subject to abuse. This would be very unfortunate in my view. On the problems with the humanitarian justification for

the Iraq war see: Morton Winston. "The Humanitarian Argument for the Iraq War." *Journal of Human Rights*. Vol 4, No 1 (June 2005): 1-7.

[21] Admittedly this characterization turns on its head the usual view under which America acts as big brother to Europe and Japan. Clyde Prestowitz writes that, "The term 'adult supervision' has been used to describe America's relationship with Europe and Japan," with "these countries living in an artificial paradise that enables them to indulge in empty posturing and selfish cossetting because they leave to Americans the burdens of dealing with the real world." (*Rogue Nation: American Unilateralism and the Failure of Good Intentions*. New York: Basic Books, 2003, p.279).

[22] There are some indications that the EU is beginning to take this course. "In Europe's capital, Brussels, technocrats, strategists and legislators increasingly see their role as being the global balancer between America and China." Parag Khanna. "Waving Goodbye to Hegemony" *New York Times Magazine* (27 January 2008), p. 36. There is also evidence of an emerging trilateral alliance among China, Russia, and India, which if it develops into a closer strategic partnership, will significantly alter the global balance of power. Conn Hallinan. "The End of the American Century is Here" *Foreign Policy in Focus* (30 January 2008)

[23] It is worth noting that America's closest neighbors, Canada and Mexico, wanted nothing to do with the invasion of Iraq and have also distanced themselves to some degree from the Bush administration's counter-terrorism policies.

[24] Kofi Annan. "Wise Council." *Wall Street Journal*. (20 March 2006). Available online: (<http://www.un.org/News/sg/stories/>) (visited 14 Jan 2008).

[25] I use the term "cosmopolitan" in order to indicate the perspective under which all human beings are regarded as members of a single moral community and the claims of individual persons derived from human rights constitute the moral basis for both national and international legal obligations.

[26] On the importance of human rights NGOs, see William Korey, *NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine"*, New York: St. Martin's Press, 1998, and also Claude E. Welch, ed., *NGOs and Human Rights: Promise and Performance*, Philadelphia, University of Pennsylvania Press, 2001. On the role of national human rights institutions, see Anna-Elina Pohjola, *The Evolution of National Human Rights Institutions: The Role of the United Nations*, Copenhagen: The Danish Institute for Human Rights, 2006. I am indebted to Morten Kjaerum, Director of the Danish Institute for Human Rights, who has done more than anyone to build the network of national human rights institutions, for suggesting to me this important point.