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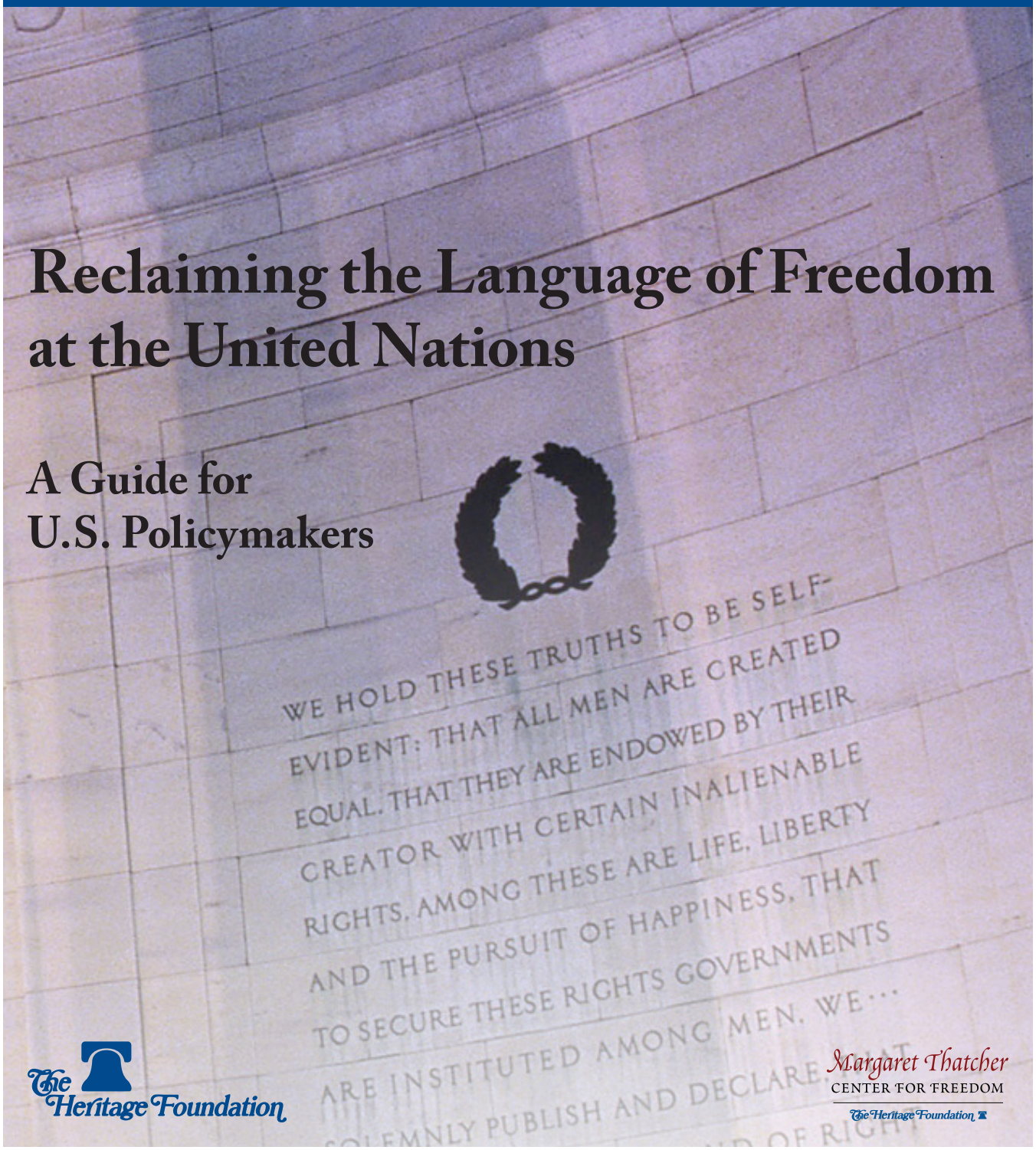
Reclaiming the Language of Freedom at the United Nations

A Guide for U.S. Policymakers



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Reclaiming the Language of Freedom at the United Nations

Produced by the Margaret Thatcher Center for Freedom

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Introduction

The American tradition of promoting and protecting freedom and human rights is long, going back to the first colonists who came here seeking religious freedom. A strong spirit of individual freedom and responsibility, of human rights and civil rights, imbues America's founding documents and laws. From their recognition of inalienable rights to life, liberty, and the pursuit of happiness to their guarantee of freedom of speech, worship, and assembly and even the right to have a say in how they are governed, these documents are a historic affirmation of the inherent dignity of every man, woman, and child.

Americans' long record of upholding this tradition is rooted in the understanding that the issues of freedom that invigorate their lives are not solely American. People from every nation assimilate here because our tradition of freedom speaks to them. As Freedom House's annual surveys show, these "universal aspirations of the human heart" are being embraced by millions more people around the world each year.

Yet at the United Nations—an organization established to enshrine this universal understanding of freedom and human rights—the very idea of freedom is being vigorously challenged and even discouraged. A just-released U.N. report on trade and development tells the developing world that policies promoting the freedom to trade have failed them. An international convention adopted in 2005 declares that states can limit their citizens' freedom to access and experience other cultures, and a treaty on children's rights establishes that parents do not have the right to monitor and control what their children do or are exposed to.

This topsy-turvy view of freedom and rights not only has put the United States at a distinct disadvantage at the United Nations, but also has undermined the credibility of the U.N. itself with the American public. The American idea of freedom is more and more poorly understood, not just by foreign countries and diplomats, but by some Americans as well. For years, the U.S. has been on the defensive as others have asserted a monopoly on what terms such as "security," "rights," and "freedom" mean in U.N. activities.

The erosion of this venerable tradition of freedom at the U.N. and other international organizations has increased rapidly since the fall of the Soviet Union. Today, even talking about freedom is discouraged in the halls of the United Nations, described in private conversations with foreign diplomats as being too ideologically loaded and somehow "pro-American." The language of freedom is getting lost in the debate, and rights of people around the world are suffering because of it.

This is a tragedy. Freedom is fundamental to everything the United Nations hopes to do. Without freedom, there can be no lasting peace, no sustainable economic growth, and no respect for human rights. The loss of the language of freedom at the U.N. has reduced its political and social agenda to a hodgepodge of demands on governments to provide social services and protect manufactured "rights" of groups. While the demands always exceed the abilities of governments to meet them, the ensuing confusion over what rights are and what governments should properly do to protect them has wrecked the U.N.'s effectiveness and credibility.

As the leader of the free world, the United States must reinvigorate the American tradition of freedom at the U.N. and other international organizations, with everything this implies. It is a strong historical and universal tradition that must be preserved, because it has given people in every region of the world the best workable definition of freedom in action for the past century.

Properly understood, freedom is indivisible. It is economic, political, *and* social freedom. You cannot restrain freedom in one sphere and hope to secure it forever in another. But freedom—or, more properly named, liberty—is not license. Rather, it encompasses a broad spectrum of rights and responsibilities. And national sovereignty is critical to achieving and protecting those rights.

The U.S. must make every effort to reclaim this proper understanding of freedom in its diplomacy if it hopes to spread freedom abroad. American diplomats, policymakers, and civil society stakeholders must make every effort to promote a clear idea of what America means by freedom and all of its associated virtues—whether the issue under

deliberation at the U.N. is human rights, civil rights, social justice, human security, sustainable development, or a matter of international law.

This Special Report is designed to assist them in that endeavor. Its chapters address four areas in which we believe that America's tradition of freedom is most at risk.

In "International Law and the Nation-State at the U.N.," lawyers Lee A. Casey and David B. Rivkin, Jr., map the growing chasm between America's understanding of freedom, sovereignty, jurisdiction, and international and humanitarian law and interpretations being advanced at the U.N. and by many Europeans. International law, they explain, is fundamentally different in conception and application from domestic law. It is made by agreements, not by legislation. There is no inherent legislative authority in the entity known as the international community. Nor is sovereignty some abstract concept that can be redefined by that inchoate community. For these reasons, states are free to enter or leave international agreements as they perceive it in their national interest to do so. And no state can be legally bound by treaties it has not ratified.

In "Economic and Political Rights at the U.N.," Helle C. Dale, Director of our Douglas and Sarah Allison Center for Foreign Policy Studies, describes and defends the principles of economic and political freedom that have proven themselves time and again—from the development of free-market economies to the spectacular failure of socialist and centrally planned systems. Yet elites who supported those systems refuse to acknowledge defeat. They use forums like the U.N. to achieve what their systems could not. In this context, getting the terminology of economic and political freedom right in our discourse with other nations at the U.N. is crucial for correcting that socialist bias.

In "Human Rights and Social Issues at the U.N.," Jennifer A. Marshall, Director of the Richard and Helen DeVos Center for Religion and Civil Society at Heritage, explains how American culture has influenced our understanding of freedom. Our heritage of strong civil society institutions—family, religious congregations, and private associations—reinforces the country's founding ideas about liberty and human dignity. Other nations, however, do not share this heritage. That is why so much of what the U.N. is doing is no longer preserving peace and good relations, but building an international administrative "state" and giving it the authority to rule on a wide range of social issues, from education to health, that traditionally have been the domain of states. Protecting that domain from social policymaking at the U.N. requires a deeper understanding of the principles of federalism, individual freedom and rights, and sovereignty.

Finally, in "The Muddled Notion of 'Human Security' at the U.N.," National Security Fellow James Jay Carafano and Janice A. Smith, who worked in the Bush Administration on international organization affairs, expose efforts to wrest sovereign decision-making authority on security away from states. Human security is touted as superior to national security in meeting the needs of the world's peoples. The new agenda seeks to "guarantee" everything from a minimum income, access to food, and protection from diseases and disasters to protection from violence and the loss of traditions and values. Yet the expansion of the very definition of security undermines the fundamental principles of sovereignty, accountability, and national security that undergird not only freedom for Americans, but freedom around the world. International efforts should help states to become better guarantors of security and liberty for their citizens, not undermine them.

We believe this Special Report will be a useful guide for American diplomats and policymakers across the U.S. government as they engage other countries on matters before international forums. We also believe it will be useful for non-governmental organizations that work with and at the U.N.; for policy advocates who are working to promote freedom and human rights and protect U.S. interests; for policy experts who want a better understanding of how to view the "soft" issues of human rights and freedom generally; and for journalists and reporters who seek a better understanding of U.S. decisions at the U.N.

Americans understand that freedom is neither freely gained nor guaranteed and that its triumph in history is not inevitable. We must all remain vigilant in protecting freedom, for as President Ronald Reagan advised, it is never more than one generation from extinction.

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Vice President of Foreign and Defense Policy Studies
The Heritage Foundation
September 2006

Chapter 1
International Law and the Nation-State at the U.N.

Lee A. Casey and David B. Rivkin, Jr.

Introduction

Americans have pretty much always felt entitled to make law for themselves. As Virginia royal governor Alexander Spotswood complained 60 years before the Declaration of Independence, "by their professions and actions they [the colonials] seem to allow no jurisdiction, civil or ecclesiastical, but what is established by laws of their own making."[1] That position was vindicated by the Revolution and remained unchallenged in any serious way for two centuries. Today, however, there is an advanced and determined movement afoot that—through the mechanisms of international law and super-national institutions—does challenge the right of the United States to define its own legal obligations as an independent and sovereign nation-state.

The Founding Generation, of course, knew international law and recognized its importance in facilitating relations between states. They readily accepted that, as an independent sovereign, the United States was bound by international law to the same extent as were the other "powers of the earth." This much was made clear by the Declaration of Independence itself, which explained why it had become "necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them."

In 1776, international law was considered, philosophically at least, to be a species of Natural Law: the "law of nations." Such law could be discovered or discerned in the practice of states, but it could not be "made" in the manner of domestic or municipal legislation. Then, as now, there was no global body politic and no global legislature. Consequently, as was necessarily implied by the inherent equality of every independent state, no state or league of states had the right to establish the legal obligations of any other state. All were equally competent to determine and interpret international law for themselves. As a result, and in no small part because international law did not purport to govern any state's internal affairs, American democracy flourished in this world despite being virtually alone in its republican institutions.

Global politics have, of course, been transformed many times since the United States declared its independence. In the post–World War II era, and especially since the Cold War ended, a widening swath of world opinion has come to view international law and institutions as inherently superior to national ones, as the very font of legal and political legitimacy, and as a proper and appropriate means of achieving change even within national borders. The following quotation, from a German Foreign Ministry description of the newly established International Criminal Court (ICC), perfectly captures these attitudes:

> It is a monumental achievement in the field of international legal policy that individuals who have transgressed their obligations to the international community as a whole may be held responsible by an independent international judicial institution. The ICC thus symbolizes jurisdiction exercised on behalf of the community of nations.[2]

At the same time, it is also fair to say that, beyond a few academics and activists, most Americans do not look to international institutions or the "international community" for validation of their government's actions or their

1. Letter of Alexander Spotswood to the Lords Commissioners of Trade and Plantations, May 23, 1716, quoted in 2 Richard L. Morton, *Colonial Virginia: Westward Expansion and Prelude to Revolution 1710–1763*, 413 (Chapel Hill 1960).

2. For background on the ICC, see *www.auswaertiges-amt.de/www/en/aussenpolitik/vn/voelkerrecht/istgh/hintergrund_html* (last updated in June 2005).

own. One might well ask, in response to the German Foreign Ministry, what is the "international community"? Does it, for example, include China's Communist rulers or the Persian Gulf's divine right monarchs? And what obligations, exactly, might Americans have to them? Law, in the United States, is made by our elected representatives, and the measure of its legitimacy is the United States Constitution.

As a result, of course, international law has never been treated as a rigid and imperative code of conduct by U.S. policymakers. This attitude toward international law transcends political ideology and party label. Nowhere was it better displayed than in an exchange between then Secretary of State Madeleine Albright and her British counterpart, Foreign Secretary Robin Cook, during the run-up to NATO's 1999 intervention in Kosovo. As reported by Mrs. Albright's spokesman James Rubin, when Cook explained that British lawyers objected to the use of military force against Serbia without U.N. approval, she replied simply "get new lawyers."[3]

There is no global power or authority with the ultimate right to establish the meaning of international law for all. Every independent state has the legal right—and obligation—to consider and interpret international law for itself.

Mrs. Albright's suggestion was perhaps undiplomatic, but it revealed a firm grasp of the essential genius of international law: It is a body of norms made by states for states, and its content and application are almost always open to honest dispute. Moreover, and most important of all, there is no global power or authority with the ultimate right to establish the meaning of international law for all. Every independent state has the legal right—and the obligation—to consider and interpret international law for itself. In other words, when questions are asked about the meaning and requirements of international law, the answers will probably, and properly, depend on who the lawyers are.

This does not mean that international law is illusory or that it can or should be ignored by states in the day-to-day exercise of power. It does mean, however, that international law is best viewed as a collection of behavioral norms—some arising from custom and some from express agreement, some more well-established and some less so—that it is in the interest of states to honor. As Chief Justice John Marshall explained in 1812 in describing one important aspect of international law:[4]

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented [to certain legal norms].

The key, of course, is consent. Ultimately, the binding nature of international law is a matter of the consent of sovereign states. They can interpret that law in accordance with their understanding and interests, they can attempt to change it, and they can choose to ignore it—so long as they are prepared to accept the very real political, economic, and even military consequences that may result. This is the essence of sovereignty, which itself is the basis and guarantor of self-government.

This paper is designed as a short guide to international law for American policymakers. The topic area is, of course, vast—even when the inquiry is limited to what is commonly known as "public international law" (the rules governing the conduct of states) rather than international trade relations. As a result, the scope of the material treated here is necessarily limited and selective. An effort has, however, been made to discuss the most important tenets of international law as it is today applicable to the United States and to identify the current controversies over this law's interpretation and application that most profoundly divide the United States from its European Allies. In fact, the understanding of how the world's nations are, or should be, organized in their inter-relations and what role international law and judicial institutions should play in that great endeavor is one area where differences between the United States and Europe are growing rapidly and are likely to produce increasing future tension and diplomatic conflicts.

3. James Rubin, "A Very Personal War," *Financial Times*, Sept. 30, 2000, p. 9.

4. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

Definition of Terms

I. What Is International Law?

Perhaps the most important and vexing question about international law is whether or not it is "law" at all.[5]

Traditionally, international law existed as a collection of principles and practices—some based on custom and some based on treaties—that govern the interactions of sovereign states. As a theoretical matter, most commentators found the basis of this "law of nations" in some form of Natural Law. As noted by Emmerich de Vattel in the 18th century, "We must then apply to nations the rules of the law of nature, in order to discover what are their obligations, and what are their laws; consequently, the law of nations is originally no more than the law of nature applied to nations."[6]

All Sovereign states are equal in law, and none can claim the right to adjudicate—in a definitive legal, as opposed to political, sense—the actions of another.

Whether the actual practitioners of statecraft ever took the "divine" or "natural" foundation of international law very seriously, at least after the emergence of the "Westphalian" state system in 1648, is debatable.[7] Over time, most states have complied with these rules in accordance with their needs and interests, always keeping in mind that violations of accepted norms can carry significant consequences—up to and including war. However, from the perspective of current debates about the nature and role of international law as an organizing principle, the most important characteristic of the traditional international legal system is that there was no regular means of judicial enforcement. All sovereign states are equal in law, and none can claim the right to adjudicate—in a definitive legal, as opposed to political, sense—the actions of another.[8]

Changing this state of affairs has been one of the most important goals of "progressives" and "internationalists" since before the First World War. In particular, throughout the 20th century—and especially after World War II—determined and sustained efforts were made to establish some form of international judicial system under which states would no longer be the ultimate arbiters of their own international legal obligations. These efforts, which can fairly be said to include the League of Nations (and its Permanent Court of International Justice), the United Nations' International Court of Justice (ICJ), and the International Criminal Court (ICC), have always found favor with the United States at their inception but have always been rejected in the end. (The United States, of course, never joined the League, withdrew from the ICJ's compulsory jurisdiction in 1986, and "de-signed" the ICC treaty in 2003.)

The reason is simple enough. A genuine system of international law, comparable to domestic legal systems in its reach and authority, would require a universally accepted institution entitled both to adjudicate the conduct of states and, by extension, their individual officials and citizens and to implement its judgments through compulsory process with or without consent of the states concerned. Such a universal authority, however, would be fundamentally at odds with the founding principles of the American Republic. It would require the American people to accept that there is, in fact, a legal power that has legitimate authority over them but is not accountable to them for its actions.

5. For an excellent presentation of the arguments as to why international law is not "law," see Robert H. Bork, "The Limits of International Law," *The National Interest* (Winter 1989/90).

6. Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* 3 (Luke White edition, Dublin 1792).

7. The "Westphalian" system refers to the 1648 Peace of Westphalia, which ended Europe's Thirty Years War. As part of this general settlement, the Habsburg Holy Roman Emperor recognized the effective independence of various German states. It is a useful shorthand for the system of independent, sovereign, and legally equal states which characterize the global political organization—even though many of today's states had emerged as independent entities long before 1648.

8. As Vattel noted, "Nations being free, independent and equal, and having a right to judge according to the dictates of conscience, of what is to be done in order to fulfil its duties; the effect of all this is, the producing, at least externally, and among men, a perfect equality of rights between nations, in the administration of their affairs, and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that what is permitted in one, is also permitted in the other, and they ought to be considered in human society as having an equal right." Vattel, *supra* note 6, at 9.

Pending this revolution in American beliefs and principles, U.S. officials and diplomats should recall two basic points in their approach to international law:

- As an independent sovereign, the United States is fully entitled to interpret international law for itself. The views of international organizations, including the United Nations, other states, and non-governmental organizations (NGOs) may be informative, but they are not legally binding unless, and only to the extent that, the United States agrees to be bound.
- Any institution or individual invoking international law as the measure of U.S. policy choices is only expounding an opinion of what international law is or should be. That opinion may be well or poorly informed, but it is not and cannot be authoritative. There is no supreme international judicial body with the inherent right to interpret international law for states.

In short, the United States, like all other states, is bound by international law; but, like all other states, it is also entitled to interpret international law for itself. Whether the U.S. or any other state has been reasonable in its interpretation is ultimately a political determination.

II. Does the U.S. Constitution Acknowledge International Law?

Advocates of various international norms, real or imagined, are quick to assert that international law is part of American law and therefore binding on the United States government. This is true as far as it goes. There are, however, numerous caveats that must be taken into account in determining the extent to which international law considerations may, or must, inform American policymaking.

At the outset, it is worth noting that this rule is a judge-made doctrine that does not actually appear in the Constitution's text.[9] The Constitution does, of course, make treaties "the supreme Law of the Land," although not as a means of empowering the courts to oversee the formulation and execution of United States foreign policy. The entire text of the Supremacy Clause makes its purpose clear—the targets were the states and not the federal government:[10]

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

As Justice Joseph Story noted in his 1833 exposition of the Constitution:

> It is notorious, that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the states under the confederation. They were deemed by the states, not as laws, but like requisitions, of mere moral obligation, and dependent upon the good will of the states for their execution.[11]

The Supremacy Clause was designed to ensure that the United States spoke with one voice on the international level and that the states could not choose for themselves which federal treaties to honor and which to ignore.

Supreme law notwithstanding, however, treaties remain subject to the Constitution and to later federal action. Where there is a conflict between the Constitution and a treaty, the Constitution prevails.[12] Moreover, treaties can be applied directly by the courts only to the extent that they are "self-executing" (most are not) or have been the subject of implementing legislation.[13] Finally, Congress can modify or eliminate a treaty's effect, at least as a matter

9. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.").

10. U.S. Const. Art. VI, cl. 2.

11. Joseph Story, *Commentaries on the Constitution of the United States* 686 (Carolina Academic Press ed. 1987) (introduction by Ronald D. Rotunda & John E. Nowak). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004) ("The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'").

12. See *Reid v. Covert*, 354 U.S. 1 (1957); *De Geofrey v. Riggs*, 133 U.S. 258 (1890).

of domestic law, by a later statute.[14] American courts are bound to respect the plain meaning of such a law even if treaty partners claim that this would violate U.S. international obligations and the claim is accurate. In this regard, however, it should again be emphasized that such a claim may or may not be correct in any given case, since no other state, group of states, or international institution is entitled—absent specific U.S. consent—to interpret or adjudicate American international law obligations. A difference of opinion over the meaning of either a treaty or the requirements of custom does not automatically amount to a violation of international law by any of the parties involved.

In addition, treaties are subject to a number of presidential actions. The President is the "sole organ" of the United States in its external relations.[15] Although a President can "make" a treaty only after obtaining the Senate's consent (by a two-thirds vote), he can terminate a treaty (in accordance with its terms), or abrogate the agreement entirely, on his own authority. Similarly, the President can—as a lesser power—suspend American performance under a particular agreement as one means of achieving U.S. policy goals. Of course, all of these actions may be more or less controversial, depending on the circumstances.

In fact, arguments have occasionally been advanced that the President must obtain the consent of Congress—or at least the Senate—before fundamentally changing U.S. treaty obligations. However, these claims have not been successful, either with the executive branch or before the courts. The leading case is *Goldwater v. Carter*,[16] where a group of Senators and members of the House of Representatives sued to prevent President Jimmy Carter's termination of the Mutual Defense Treaty of 1954 between the United States and the Republic of China (Taiwan). The United States Court of Appeals for the District of Columbia Circuit ruled that the President, as "the constitutional representative of the United States with respect to external affairs," was within his constitutional authority to terminate this treaty.[17] For its part, the Supreme Court never reached the merits of this question. It vacated the D.C. Circuit's opinion and ordered the original complaint dismissed—an act strongly suggesting that this and similar questions are not subject to judicial determination at all.[18]

Finally, although international law is generally considered to be part of American law, the United States, like other sovereign nations, can derogate from the accepted rules. And, like other aspects of the nation's foreign relations, the exercise of this authority falls—at least in the first instance—to the President. The Supreme Court's ruling in *The Paquete Habana* is not to the contrary, although claims are sometimes made that it is. That case involved the U.S. Navy's capture, during the Spanish–American War, of fishing boats in Cuba's coastal waters. The Supreme Court was called upon to determine whether these vessels were lawful captures and concluded that they were not. Citing generally accepted rules of international law suggesting that coastal fishermen were not to be molested by belligerent forces, the Court ruled that the boats were not lawful "prizes" of war. However, in doing so, it specifically noted that "where there is no treaty and *no controlling executive or legislative act* or judicial decision, resort must be had to the customs and usages of civilized nations."[19] The suggestion is clear that, had there been a formal decision

13. See *Hamdi v. Rumsfeld*, 316 F.3d 468-69 (4th Cir. 2003) (Courts find a treaty self-executing only if the instrument, as a whole, evinces the intent to create a private right of action), vacated on other grounds, 542 U.S. 507 (2004).

14. See *Breard v. Greene*, 523 U.S. 371 (1998). This does not, of course, necessarily affect the United States' international obligations.

15. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

16. 617 F.2d 697 (D.C. Cir. 1979).

17. *Id.* at 705.

18. The courts do, of course, regularly interpret and apply treaties in the cases that come before them—so long as a treaty remains in force and assuming it created a private right of action so as to support a litigant's suit. Even in this context, however, it is well settled that the executive branch's interpretation of a treaty—even if not conclusive—is entitled to deference. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). Moreover, the meaning of treaties between states where the United States is not a party also is considered to be a political question and non-justiciable in the United States courts. See *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (interpretation of peace treaties between Japan and belligerents other than the United States non-justiciable political question).

19. 175 U.S. at 700 (emphasis added).

by the President (or by Congress through appropriate legislation) to ignore the otherwise applicable international rule, the United States courts would have been bound by that decision.

III. How Is International Law "Made?"

International law is made by and through the actions of states. This is true both with respect to customary international law and, since a treaty's meaning and continued efficacy greatly depend upon how the parties interpret and apply its provisions in actual practice, with respect to conventual or treaty law. However, for the sake of clarity, these fundamental aspects of international law will be addressed separately.

Customary International Law. Customary international law grows out of more or less consistent state practice over time. There is no hard and fast rule on how general a practice must be to be considered customary or on how long it must be followed. However, the "failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might became 'particular customary law' for the participating states."[20] Moreover, a rule cannot be imposed on a state that has objected.[21]

International law is made by and through the actions of states.

In this connection, it also is important to note that what are sometimes called the "sources" of international law are, in fact, merely *evidence* of what the law may be. This includes such authorities as (1) the decisions of international courts and arbitral bodies, (2) the decisions of national courts ruling on international law questions, (3) the writings of international law commentators, and (4) the statements of governments.[22] As the Supreme Court cautioned long ago with respect to the writings of jurists and commentators, "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[23]

Opinio Juris. *Opinio juris* is a critical element in transforming an international usage or practice into a binding norm of customary international law. Unfortunately, *opinio juris* can be as elusive as the Philosopher's Stone. The full term is *opinio juris et necessitatis*, and it refers to a belief by states that the practice at issue is legally required. In other words, however longstanding and widespread a practice may be, it is binding only if states comply out of a sense of legal obligation. As explained by Ian Brownlie, "The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality," is "a necessary ingredient" in turning general usage into a legal requirement.[24]

Derogation from International Law Rules. States can derogate from customary international law rules and from treaty obligations.[25] Such derogations are considered to be different from a repudiation of the rule or treaty and must also be distinguished from differences of opinion over the actual requirements of international law or the proper interpretation of a treaty. A genuine derogation involves one or more states acknowledging the force and effect of a particular rule or provision but nevertheless departing from it in limited circumstances. As such, openly admitted derogation is relatively rare. Most often, derogations involve states agreeing (expressly or by implication) to depart from a general rule in their own dealings with one another. These states generally are not considered to have violated international law.

20. *Restatement (Third) of the Foreign Relations Law of the United States* § 103 (1987).

21. This often is referred to as the rule of the "persistent objector." However, it is unclear on what basis a rule can be imposed regardless of whether a state has persistently objected, so long as it has made clear its opposition at some point during the rule's development.

22. See, generally, *Restatement (Third) of Foreign Relations Law*, *supra* note 20, § 103.

23. *The Paquete Habana*, 175 U.S. at 700. (The exceptions, of course, are the rulings of a court acting within its own recognized jurisdiction.)

24. Ian Brownlie, *Principles of Public International Law* 7 (4th ed. 1990).

25. As a result, certain treaties include specific provisions forbidding derogation from particularly important provisions. For example, Article 4(2) of the International Covenant on Civil and Political Rights states that certain of its provisions (largely dealing with critical human rights such as the right to life, due process, and freedom of conscience) are non-derogable. Whether this section, or similar provisions, are themselves subject to derogation is an open question.

A state can also choose to derogate from an otherwise applicable requirement on its own account. Depending on the rule in issue, however, it will risk prompting a negative response from its treaty partners or from the community of nations at large. Whether such a state can be said to have violated international law by its derogation, however, is almost always debatable. This is a function of the manner in which international law is made—based on the actual practice of states. Determining whether a particular state has violated its international obligations or has merely set out to promote and establish a new and different rule (or treaty interpretation) that, in its view, may be superior requires augurs of exceptional ability. As a result, and as a practical matter, the question is very much a political one—ultimately resolved by whether or not other states follow the new rule.

Jus Cogens. There are, of course, certain rules of international law from which, it is said, no derogation is permissible. These are generally referred to as "*jus cogens*" or "peremptory norms of international law." The application of either term to a particular rule or practice should sound alarm bells for any American diplomat, since the benefits of achieving *jus cogens* status for a preferred rule are substantial. In fact, the number of international norms that can honestly be characterized as *jus cogens*—based on long and consistent state practice—is small. Thus, the impermissibility of the oceanic slave trade is *jus cogens* not merely because it has been universally condemned, but also because the responsible maritime nations have, at least since the mid-19th century, acted seriously and effectively to suppress the activity under a generally acknowledged claim of right.

Moreover, like other aspects of international law, *jus cogens* is subject to the development of new norms. As one important commentator has explained, "They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formulation of a subsequent customary rule of contrary effect."[26] In short, the doctrine of *jus cogens* is subject to being formed and reformed by the actual practice of states. As a result, a principle that is claimed to be *jus cogens* but is widely ignored is probably not a peremptory norm of international law—however important the policy it may support or detestable the practice it purports to forbid.

Treaties and Other International Agreements. On the international level, any agreement between or among states can properly be described as a treaty. These instruments can be bilateral or multilateral and create binding legal obligations for the states that become parties to any particular agreement. Under international law, states are required to comply with their treaty obligations. The principle *pacta sunt servanda* ("keep your agreements") is often identified as *jus cogens*, and with some justice. All things being equal, over time, states have recognized the importance of compliance with their treaty obligations, and—in the absence of special circumstances—most at least attempt to do so. The unilateral abrogation of a treaty without sufficient legal cause is considered to be a violation of international law. Most recent treaties, however, contain a termination or withdrawal clause permitting a party to end its obligations by meeting a notice requirement.

Bilateral treaties are, of course, agreements between two states generally governing aspects of their relationship to one another. The interpretation and application of such treaties is a matter for the parties alone, although the agreement may well provide for a type of arbitration or adjudication in an international body—such as the ICJ—in case of dispute.

Multilateral treaties involve an agreement between more than two states, and these types of agreements have significantly increased in number and importance over the past century. They include such basic instruments as the United Nations Charter, the North Atlantic Treaty, and the Geneva Conventions, as well as a whole array of critical agreements governing all aspects of transnational commerce and relations. Examples of such agreements include the Vienna Convention on Consular Relations, the Convention for the Unification of Certain Rules Relating to International Transportation by Air (the "Warsaw Convention"), the agreements establishing the World Trade Organization, and the Berne Conventions for the Protection of Literary and Artistic Works.

Multilateral treaties usually establish a specific number of ratifications necessary before the agreement will go into effect among the parties (the Rome Statute of the International Criminal Court, for example, required 60 countries to ratify before it went into effect) and are often—although not always—open to accession by states

26. See Brownlie, *supra* note 24, at 513. As Brownlie also notes, "more authority exists for the category of jus cogens than exists for its particular content." *Id.* at 514–15.

that may wish to become parties at a later time. Like more recent bilateral treaties, multilateral treaties often provide for a formal mechanism—submission to the ICJ—for resolution of disagreements over the treaty's interpretation. States may or may not accept these provisions upon ratification. It is important to note, however, that there is no general principle of international law suggesting that an interpretation favored by a significant number of state parties to an agreement, even if this involves a substantial majority or near unanimity, must be accepted by all parties.

Treaties Purporting to Codify International Law. An increasingly important "source" of international law is treaties that purport to "codify" customary international law. These instruments must be treated with extreme caution, since they are very often much less than they appear. The codification of international custom is, in any case, a speculative business. States are far more likely to agree on general principles than on detailed provisions. Moreover, and more to the point, states are often much more willing to state a rule as internationally binding than they are to apply it in practice.

Nevertheless, in certain areas, serious attempts have been made to reach agreement not merely on principles, but on the details. Prime examples here are the Vienna Convention on the Law of Treaties, the Law of the Sea Treaty, and the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949. All of these agreements indisputably include some provisions that are, or can legitimately be argued to be, customary international law. Significantly, however, the United States has not ratified any of these agreements, and it is not bound by them—except to the extent that their provisions restate binding customary norms.

In assessing the effect of these and similar documents on the United States, it is critical to keep in mind that the mere fact that some provisions of a treaty restate binding norms of customary international law does not mean that the entire document enjoys that status. Each provision must be judged independently to determine whether there is sufficient state practice (that is, actual observance based on a sense of legal obligation and in relevant circumstances) to justify its identification as binding custom. Thus, although Geneva Protocol I Additional clearly restates certain customary rules, such as the rule against deliberately targeting civilians, it also includes many provisions that represent efforts to "move" the international law of armed conflict in a particular direction—specifically toward "privileging" guerrilla or irregular combatants. The United States rejected this treaty on that very account and cannot now be held to these provisions merely because other portions of Protocol I are binding custom.

Executive Agreements. Although all agreements between or among states can accurately be labeled "treaties" for international purposes, this is not the case with respect to American constitutional law. The President can make treaties for the United States only with the Senate's consent. However, he can also enter certain "executive agreements," which bind the United States internationally and also have the force and effect of law on the domestic level.[27] The full extent of the President's authority in this area is unclear, although executive agreements have generally been "of a routine character."[28]

Pre-ratification Obligations: Article 18 of the Vienna Convention on the Law of Treaties. One of the more vexing issues arises because of the practice, engaged in by both Democrat and Republican Presidents, of signing international agreements that have little or no chance of approval by the Senate and therefore will never be ratified by the United States. There are many reasons for this practice—it may appear prudent at the time to exercise "leadership" on a particular issue, or it may be an effort to drive international law in the direction an Administration favors. Regrettably, this practice often leads to claims that the United States is bound by a treaty that it has not ratified, at least to the extent that it cannot take action to defeat the treaty's "object and purpose."

This rule is drawn from Article 18 of the Vienna Convention on the Law of Treaties, which the United States has signed but has not ratified. Although it is often stated that the Vienna Convention "is largely a restatement of customary rules,"[29] emphasis must be placed in the word "largely." Article 18 is, in fact, a rule characteristic of civil law

27. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) ("prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.").

28. *Restatement (Third) of Foreign Relations Law*, *supra* note 20, § 303, cmt. g.

29. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000).

legal systems.[30] Whether it can be applied to common law countries without express consent is debatable. Moreover, its application by American courts would raise significant constitutional issues, at least in any instance where the President's own authority was insufficient to bind the United States to a particular obligation, since treaty obligations cannot be undertaken without the Senate's consent.

In any case, in construing Article 18, it is important to note that the obligation it imposes is emphatically not to comply with the terms of a treaty before the instrument is ratified. Rather, it requires only that a signatory "refrain from acts which would defeat the object and purpose of a treaty"—suggesting that only actions deliberately calculated to undermine a state's ability eventually to comply, including and especially any uniquely irreversible action,[31] are forbidden. Nevertheless, the potential application of Article 18 must always be considered and is one very good reason why any responsible President should not sign agreements he does not expect to be able to ratify.

IV. How Is International Law Interpreted and Enforced?

As states are the ultimate authors of international law, they also are the arbiters of its meaning. As suggested above, each nation, as an independent sovereign, has an equal right to interpret international law in general and its own international legal obligations in particular. The interpretation of one state—or group of states—is no better or worse than the interpretation of others. This does not, of course, mean that states can interpret international norms to a point where any actual obligation is illusory. They must act, especially in construing their treaty obligations, in good faith.[32] Moreover, all states must understand and accept that their interpretation of international legal requirements may carry consequences. As a legal matter, however, there is no state, group of states, international organization, or judicial authority with the paramount right—paraphrasing Chief Justice John Marshall's description of the federal judiciary's power in *Marbury v. Madison*—to say what the law is. There is no international Supreme Court.

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International Judicial Institutions. That said, there are numerous international judicial institutions that, depending on the circumstances, may well be entitled to issue binding judgments against states. The most important of these, of course, is the ICJ. The authority of these courts, however, is based on the consent of the states concerned—consent that can be withdrawn in appropriate circumstances. Thus, for example, the United States withdrew from the ICJ's "compulsory" jurisdiction in 1986. As a result, it is subject to the ICJ's rulings only to the extent that some independent treaty provision vests that court with the power to adjudicate a dispute between the United States and one of its treaty partners.

In addition, with the exception of the ICC and other, *ad hoc*, international criminal tribunals (which can issue orders directed at individuals), international courts have no direct means of enforcing their judgments. As a general rule, they must depend on the voluntary compliance of the relevant states or seek the assistance of appropriate political institutions. The extent to which duly entered international judgments (where jurisdiction was appropriate) may bind the courts of the United States remains an open question—even though the issue was before the Supreme Court, in the case of *Medellin v. Dretke*, in 2005.[33]

30. See *Restatement (Third) of Foreign Relations Law*, *supra* note 20, § 312 note 6.

31. See *id.*, § 312 cmt. i.

32. As noted by Professor Brierly, "It is a truism to say that no international interest is more vital than the observance of good faith between states, and the 'sanctity' of treaties is a necessary corollary." J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 331 (6th ed. 1963). That said, there are many circumstances in which the rights and duties undertaken by the parties to a treaty can and do change. *Id.*

33. 125 S.Ct. 2088 (2005).

This case involved the Vienna Convention on Consular Relations, a treaty to which the United States is a party. Among other things, this treaty requires that foreign nationals be permitted certain access to their country's consular authorities in case of arrest in the territory of another state party. A number of Mexican citizens have been convicted of capital crimes in the United States without having been granted this access—largely because it was unclear to local authorities either that the individuals were foreign citizens or that they wished the assistance of Mexican authorities. In any case, the Vienna Consular Convention does vest the ICJ with the authority to resolve disputes between parties, and pursuant to this provision, Mexico successfully sued the United States in that court. The ICJ issued its decision in 2004, determining that the United States had violated the treaty and ordering it to provide some means of reviewing and reconsidering the convictions of the affected individuals.[34]

The Supreme Court accepted *certiorari* to determine the extent to which this decision actually bound the federal and state courts and whether the ICJ's interpretation of the Vienna Consular Convention should, in any case, be given effect as a matter of judicial comity. In the meantime, however, President George W. Bush issued a memorandum indicating that the United States would comply with the ICJ's order by having the state courts "'give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.'"[35] In light of this determination by the President, the Supreme Court dismissed the case without deciding whether U.S. courts must implement properly entered ICJ decisions.

International Political Institutions. Although states are entitled to interpret their own international obligations, all members of the United Nations have agreed to abide by certain decisions of the United Nations Security Council—at least when that body acts in accordance with its power under Chapter VII of the U.N. Charter. Chapter VII vests the Security Council with the authority to "determine the existence of any threat to the peace" and to "decide what measures shall be taken."[36] These measures can include diplomatic or economic sanctions, up to and including the use of force. U.N. member states are required to "join in affording mutual assistance in carrying out the measures decided upon by the Security Council."[37]

Of course, the Security Council is a political, not a judicial, body, and it is far from clear whether— even exercising its Chapter VII authority—it can articulate or establish a member state's legal obligations. As a practical matter, however, the Security Council's political decisions may well be sufficient to impose a particular result on one or more states regardless of the legal principles at issue—assuming that all of the Council's permanent, veto-wielding members determine to act with a sufficient level of force. Moreover, U.N. member states do have a legal obligation to comply with properly entered Security Council Chapter VII resolutions as a matter of treaty.

Other Means of Enforcing International Law. In addition to international judicial and political institutions—both relatively recent innovations— the more traditional methods of enforcing international norms include diplomacy and force. It is clearly the case that, over time, most disputes over the meaning and application of international law have been resolved through diplomatic means. This is preferable to other means, since it generally preserves the dignity and sovereignty of the relevant parties. Force, of course, has always been the ultimate sanction, as it remains today. In the past, states have often considered a violation of international legal obligations to be a *casus belli*, and state practice suggests that this remains true today— even in light of the U.N. Charter's admonition that disputes be settled by peaceful means.[38] (Although practice over the past 50 years would also suggest that, apart from actions taken in self-defense, states are expected to seek U.N. assistance in resolving disputes before resorting to armed force on their own account. At a minimum, this certainly appears to be the Charter's fair import.)

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34. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31, 2004).

35. 125 S.Ct. at 2090.

36. U.N. Charter, art. 39.

37. U.N. Charter, art. 49.

38. U.N. Charter, art. 2(3).

V. Who Are the "Subjects" of International Law?

Once, and not so very long ago, this was the first and most easily answered question regarding international law: International law applied to states. In the past 50 years, however, various forms of international law have been applied to international organizations and, most significantly, to individuals. It is out of the application of international law norms to individuals, both in terms of state officials and in terms of ordinary citizens, that many of the most contentious current international law controversies have grown. The application of international law to individuals often, if not always, undercuts the sovereignty of states and lacks democratic legitimacy.

The Traditional Rule. Traditionally, states (or, more appropriately, sovereigns) were the only "subjects" of international law. As noted by Vattel, "Every nation that governs itself…without any dependence on a foreign power, is a *sovereign state*. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations."[39] Individuals had few rights or obligations under international law, which addressed itself to their conduct only in certain very specialized areas, such as the law of piracy. Moreover, even here, international law merely established the rights of states to prescribe rules applicable to such individuals, who were generally considered to be stateless. Domestic law governed the trial and punishment of any actual offenses. This began to change meaningfully only in the 20th century, mostly after the Second World War.

The application of international law to individuals often, if not always, undercuts the sovereignty of states and lacks democratic legitimacy.

International Human Rights and International Humanitarian Law. Today, international law does provide certain rights to individuals—rights that states are required to honor and vindicate. Some of these rights are based on custom, although, by far, treaties are the most important source of these rights. The United States is bound by some of these agreements, such as the International Covenant on Civil and Political Rights (which it has ratified) and not by others, such as the U.N. Convention on the Rights of the Child (which it has not ratified).

As in all other areas, claims that the United States is bound by agreements it has not ratified must be treated with great skepticism. Where a state has not ratified a convention, involving human rights or otherwise, it can be bound to its provisions only if they independently represent binding norms of customary international law. Each provision or requirement of a treaty must meet this test separately, on its own merit. The inclusion of some binding norms in an agreement does not—and cannot—vest the entire document with that status.

In addition, the simple ratification of a treaty by a significant number of countries does not transform its provisions into customary international law. There is no international legislative authority. This is a particularly acute problem in the human rights area, since many states, over time, have signed and ratified human rights treaties that they have not implemented (and probably had no intention of implementing) with respect to their own populations. For example, Saudi Arabia, Cuba, Pakistan, Libya, and North Korea are all parties to the Convention on the Elimination of All Forms of Discrimination Against Women, but all persistently violate the basic human rights of women guaranteed under that treaty. American policymakers and diplomatic personnel should be especially wary of claims of legality or illegality based on conventions that have been implemented by few, if any, of the parties in actual practice.

On a more technical level, there is a generally recognized distinction between international humanitarian law, which properly refers to the customs and treaties governing humanitarian issues in the context of an armed conflict, and human rights law, which is much broader and intrusive into the relationship of a state to its citizens. In this connection, it is important to recall that the U.N.'s 1948 Universal Declaration of Human Rights is a statement of principle and aspiration, not a codification or statement of international law. This was made clear by Eleanor Roosevelt (one of the document's chief architects) in 1948 when she stated that the Universal Declaration is "not a treaty" and "does not purport to be a statement of law or of legal obligations."[40]

39. Vattel, *supra* note 6, at 16 (emphasis in original).

Therefore, the United States does not, as is sometimes suggested, have to provide for or vindicate all of the "rights" identified in the Universal Declaration, including and especially the "rights" to social security, work, leisure, or an "adequate" standard of living. These claims, however, do serve to highlight one of the important problems with the international human rights law area. There are, throughout the world, fundamentally differing conceptions of the nature of a "right" as opposed to a social program provided by a government as a matter of policy. Under American law, "right" is normally used in referring to some individual entitlement or benefit that the government cannot interfere with, save in extraordinary circumstances, and that is legally binding and enforceable in the courts—such as the right to due process of law. Moreover, there are also very substantial disagreements over the nature and breadth of the rights that should be guaranteed and protected by law. Thus, for example, under the Constitution's First Amendment, Americans enjoy far broader rights to freedom of speech, press, and religion than do their counterparts in many other states, including the populations of other democracies.

Judicial Enforcement and the Alien Tort Claims Act. In the United States, international law "rights" are generally not enforceable through private lawsuits unless Congress has provided for such actions. However, there are certain circumstances when U.S. courts will enforce international law in a private suit, most notably under the Alien Tort Claims Act (ATCA). This law, originally enacted as part of the Judiciary Act of 1789, permits suits in federal court "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[41] Over the next 170 years or so, the ATCA supported federal jurisdiction in only one case. Beginning in the 1980s, however, there was a rush of litigation attempting to use the ATCA as a means of enforcing various international law norms in U.S. courts.

Nevertheless, the ATCA was and is a very limited jurisdictional grant. First and foremost, it contains no waiver of sovereign immunity and so cannot support a suit against United States government officials, and the Federal Tort Claims Act specifically does not waive immunity for claims arising in a foreign country. Second, the ATCA can support actions only for international "torts" that are universally recognized and established as such, and this is a very high bar to clear. The Supreme Court said this in *Sosa v. Alvarez-Machain*.[42] That case involved a claim, for arbitrary arrest and abduction, by a Mexican citizen who had been seized and brought into the United States on charges that he had assisted in the torture and murder of an American Drug Enforcement Administration agent. The Court rejected Alvarez-Machain's claim that his seizure was in violation of international law and therefore cognizable under the ATCA.

As Justice Souter wrote for the Court, "We have no congressional mandate to seek out and define new and debatable violations of the law of nations."[43] Only those violations recognized in 1789, involving the mistreatment of ambassadors or acts of piracy, are encompassed by the ATCA, along with those modern norms "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[44] Alvarez-Machain's claim for arbitrary arrest did not, the Court concluded, meet this exacting standard.

International Criminal Law. Probably more claims have been made for an "international criminal law," with less basis in fact, than have been made for any other single aspect of international law. Although the idea of internationally recognized criminal violations is ancient—at least with respect to piracy—the application of such norms to individuals acting on behalf of their state dates almost entirely to the post–World War II period. Efforts to prosecute and punish government officials for alleged violations of international criminal norms are increasingly seen, both by certain governments and by activists, as a desirable means of controlling policy on the international and domestic levels.

The Nuremberg Trials. Advocates of international criminal law invariably identify the war crimes trials, especially the proceedings of the International Military Tribunal (IMT) sitting in Nuremberg, Germany, as support for the

40. 19 *Dep't of State Bull.* 751 (1948) (remarks of Eleanor Roosevelt, United States Ambassador to the United Nations). See also *Sosa v. Alvarez-Machain*, 542 U.S. at 734 ("the Declaration does not of its own force impose obligations as a matter of international law.").

41. 28 U.S.C. § 1350.

42. 542 U.S. 692 (2004).

43. *Id.* at 728.

44. *Id.* at 725.

"international community's" right to investigate, prosecute, and punish individual state officials who have arguably violated applicable international norms. In fact, as a matter of law, the post-war trials—both in Europe and in the Far East— were not justified by some inchoate international right to punish individuals for bad actions, but upon the unconditional surrenders of the Axis Powers. As the IMT itself explained:

> The jurisdiction of the Tribunal is defined in the Agreement and Charter…[and] [t]he making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.[45]

In the absence of such a military conquest, the legal right of one state or group of states to criminally punish the leadership of a third is highly questionable.

The U.N. Ad Hoc Tribunals. In 1993, partially as a means of doing something—anything—about the atrocities then taking place in the former Yugoslavia, the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia. A year later, for similar reasons, the International Criminal Tribunal for Rwanda was created. The legality of these courts is certainly subject to challenge, since the Security Council does not itself have judicial authority. Nevertheless, as a practical matter, both courts have tried and sentenced a number of individual former state officials for offenses against the laws of war, crimes against humanity, and genocide. The United States has supported the efforts of both institutions.

The International Criminal Court. The United States has not supported the permanent ICC, established in 2002 pursuant to the 1998 Rome Statute of the International Criminal Court. As will be discussed more fully below, the ICC is principally a project of the European Union and claims jurisdiction over certain offenses committed anywhere within the territory of an ICC member state, whether or not the accused is an official or a citizen of one of these states. Because the Rome Statute is a treaty, its provisions cannot be imposed on the nationals of non-party countries, and this is one of the primary American objections to the court. The United States also has objected to the Rome Statute's lack of any meaningful check on the ICC prosecutor and its potential both for politically motivated prosecutions and to undermine the unique role of the U.N. Security Council.[46]

In fact, the most problematic aspect of the ICC is its ability to interpret and apply international law without regard to the views or consent of the state concerned and to enforce its opinion through criminal prosecutions against individual government officials. No international institution has ever claimed, or been permitted, such power—authority that is fundamentally inconsistent with the principles of sovereignty upon which the current international system is based.

International Law Immunities. The ICC also is particularly troubling because it purports to supersede the long-recognized immunity of individual government officials from legal action, either by the courts of another state or by international courts. These immunities developed from the basic rule that every sovereign was equal, and no sovereign, therefore, could claim judicial authority over any other sovereign. Today, especially with sovereign states often engaged in commercial or otherwise "private" activities, sovereign immunity is viewed by U.S. courts as a prudential matter and a question of comity. American sovereign immunity jurisprudence dates to Chief Justice John Marshall's opinion in *The Schooner Exchange v. M'Faddon*.[47] There, the Court ruled that the U.S. has unlimited jurisdiction over persons and things within its territory but that, like other sovereigns, as a matter of comity, "members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign."[48]

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45. *The Nurnberg Trials*, 6 F.R.D. 69, 107 (1946).

46. See Remarks of Mark Grossman, Under Secretary of State for Political Affairs, to the Center for Strategic and International Studies (May 6, 2002).

47. 11 U.S. (7 Cranch) 116 (1812).

48. *Austria v. Altmann*, 541 U.S. 677, 688 (2004).

International law, however, has long recognized certain immunities from judicial process for individuals, including heads of state, ministers of foreign affairs, and similar officials—both as a matter of principle and as a matter of practical necessity. Claims by one state to judge the official actions of another state's officials, especially when those actions took place within that state's own territory, undercut the very principle of territorial sovereignty explained by Justice Marshall in *The Schooner Exchange*:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[49]

Significantly, although many claims have been made—particularly since the Nuremberg trials— that these official immunities do not apply to "international crimes," state practice suggests that they continue to do so. This was, in fact, the conclusion of the ICJ in a 2002 case, *Democratic Republic of the Congo v. Belgium*.[50] In that case, Belgium attempted to prosecute (on a "universal jurisdiction" theory) the Congolese foreign minister for alleged offenses within The Congo. That state opposed the prosecution and did not waive the official's immunities. The ICJ noted that there was simply insufficient state practice suggesting that official immunity did not apply in these circumstances. In its opinion, the ICJ also usefully distinguished between the concept of immunity to judicial process, which The Congo's foreign minister enjoyed, and the right to violate the law, which he did not. It was not a question of his having any right to engage in criminal activity on account of his office, but that the courts of Belgium—absent a waiver of immunity by the Congolese government—could not adjudicate the case.

The ICJ's decision in *Congo v. Belgium* is important on a number of levels. First and foremost, however, it shows how necessary it always is to measure the received wisdom in international law against the actual practice of states. Before this decision, few would have argued that—assuming proper jurisdiction—governmental immunity would have prevented an official's prosecution for alleged offenses, such as the war crimes and crimes against humanity at issue in that case. When the ICJ actually set about examining the basis of this supposed rule in state practice, that basis was found not to exist.

Current Controversies

I. The Role of the United Nations in International Law

The proper role of the United Nations in the ordering of international affairs and, indeed, the nature of that institution itself continue to be a major subject of controversy—especially between the United States and Europe. Members of the European Union increasingly view the United Nations as the primary forum in which international problems must be addressed. The United States, by contrast, continues to support the United Nations, and to use its institutions when and where this seems sensible and appropriate, but does not treat the U.N. as a uniquely legitimizing body. This has certainly been the case under President George W. Bush. It was also the case under President Bill Clinton—who determined to intervene in Kosovo using NATO rather than the U.N.

The U.N. Charter as an International "Constitution." There is a widely held opinion (at least in certain international circles) that the United Nations Charter is more than a treaty. Because of the Charter's wide acceptance (nearly every independent state is now a member of the United Nations General Assembly) and important purposes, arguments have been made that it is more akin to an international constitution. This is not, and cannot be, the U.S. view, since the Senate approved the Charter as a treaty, subject to all of the normal rules and understandings that accompany treaty-making. In addition, despite the fact that the Charter has been ratified by almost all of the world's nations, there is little state practice (as opposed to rhetoric) supporting a transfer of sovereignty to the U.N. Indeed,

49. 11 U.S. at 135.

50. *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), 2004 I.C.J. No. 121 (Judgment of Feb. 14, 2002).

the Charter itself, which makes clear that the "Organization is based on the principle of the sovereign equality of all its Members," belies such claims.[51]

The Use of Force. A number of European countries and the European Union itself openly take the view that only the U.N. Security Council can authorize the use of military force between states—with the single exception of repelling an ongoing invasion of a state's territory. This, of course, is not the American view. At a minimum, the United States has taken a much broader approach to interpreting Article 51 of the U.N. Charter, which states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.[52]

Moreover, a careful reading of the Charter also suggests that the use of military force is specifically forbidden only in those instances where the purpose is to compromise the territorial integrity or political independence of a state.[53]

II. The International Criminal Court

The establishment of a permanent International Criminal Court is one of the most important and controversial developments of the past 60 years, ever since the founding of the United Nations. Although there are numerous and fundamental problems—constitutional, philosophical, and practical— with the ICC from the American perspective, the most important objection is that this institution is entitled under its founding document to interpret the international law obligations of its member states authoritatively and to enforce its opinion through the prosecution and punishment of individuals. In addition, in violation of long-accepted international law norms, the court claims jurisdiction over the citizens of non-party states in certain circumstances.

The U.S. Rejection of the Rome Statute. In 1998, the U.S. refused to sign the Rome Statute because—a largely European coalition of powers having rejected the Clinton Administration's efforts to link the ICC's jurisdiction to a resolution by the U.N. Security Council—there was no effective check on the court's power. This was especially so with respect to the ICC prosecutor. At the close of his term in office, however, President Clinton did sign the Rome Statute, ostensibly so U.S. representatives could continue to participate in the negotiations framing the ICC's rules of procedure and definitions of criminal offenses. However, at that time, President Clinton affirmatively recommended to his successor that the Rome Statute not be submitted to the Senate for its consideration because of that document's very fundamental flaws.[54] In 2002, shortly before the Rome Statute came into force (because of the 60th ratification), President George W. Bush withdrew the United States' signature from the instrument, making clear that the United States would not become an ICC state party.

The European Union's ICC Policy. The European Union has made the achievement of "universality" for the ICC a major component of its collective foreign policy. This is hardly surprising, since the EU dominates the ICC. All EU member states must be ICC members, as must any state aspiring to become an EU member. As a result, the EU is the largest (indeed, the only) voting bloc in the ICC's Assembly of State Parties, controlling a full quarter of the votes in that body (25 of 100). Of the ICC's 18 judges, 11 hail from EU states. Less understandable or acceptable is the EU's insistence that American efforts to protect U.S. citizens against the ICC's jurisdictional claims amount to demands for "impunity" under international law. EU officials know better.

Article 98 Agreements. Since the Rome Statute went into effect in 2002, the United States has sought and obtained dozens of agreements from ICC state parties that they will not hand Americans over to the court. These "Arti-

51. U.N. Charter, art. 2(1).

52. U.N. Charter, art. 51.

53. U.N. Charter, art. 2(4). For a longer discussion of this issue, see David B. Rivkin, Jr., Lee A. Casey, and Mark Delaquil, "War, International Law and Sovereignty; Reevaluating the Rules of the Game in a New Century: Preemption and the Law in the 21st Century," *Chi. J. Int. L.* 467 (2005).

54. See Statement of President William J. Clinton Authorizing the Signing of the Rome Statue of the International Criminal Court (Dec. 31, 2000).

cle 98" agreements, called after Article 98 of the Rome Statute, which, in fact, contemplates just such arrangements, were made necessary by the ICC's insistence that its jurisdiction could be applied to American citizens (in appropriate cases) regardless of whether the United States ratified the Rome Statute. Both the Clinton and Bush Administrations have made clear that this claim itself violates international law. Moreover, in 2002, Congress enacted the American Servicemembers Protection Act,[55] which authorizes the President to use "all means necessary" to free American servicemembers, officials, and others working on behalf of the United States who are held by ICC authorities.

Neither Article 98 Agreements nor other U.S. efforts to ensure that Americans will not be subjected to the ICC's power are directed at seeking "impunity" from international law for the United States or its citizens. The U.S. continues to acknowledge the binding effect of international law, as it has always done where it has recognized relevant and binding international norms, including applicable criminal norms. With respect to the ICC, it has simply rejected a new and revolutionary enforcement mechanism of dubious legal and practical merit. Moreover, the ICC is a treaty-based organization and can exercise no lawful authority over the United States or its citizens unless and until the Rome Statute has been ratified by the United States. Those who claim that, by insisting on its rights as an independent sovereign to protect itself and its people from the ICC's pretensions, the United States is seeking "impunity" have mistaken their own rhetoric for reality.

III. The War on Terrorism

At this time, the most confrontational international law differences between the United States and Europe involve the war on terrorism. By and large, Europe (at least the states of the EU) does not accept that there is a legally cognizable, ongoing armed conflict between the United States and al-Qaeda and its allies. The vast bulk of European opinion, both official and unofficial, views al-Qaeda as a law enforcement issue and (*sub silencio*) the American reaction to the September 11, 2001, attacks to have been disproportionate. As a result, many of the measures taken by the United States since September 11 are considered illegitimate, if not outright illegal, by much of Europe.

Guantanamo Bay. This is especially true of the U.S. detention facilities at Guantanamo Bay, Cuba, which have become a symbol in Europe for alleged U.S. overreaching. These facilities were established to detain the most dangerous individuals captured by U.S. and allied forces in Afghanistan. The United States has classified these prisoners as "unlawful" or "unprivileged" enemy combatants who are not entitled to the rights and privileges of prisoners of war under the Geneva Conventions but who may be held without criminal trial until hostilities are concluded. This classification has a long history in the laws and customs of war (describing individuals who fail to meet certain basic requirements, including a proper command structure, wearing uniforms, bearing arms openly, and eschewing direct attacks on civilians) and is fully recognized by the United States Supreme Court.[56] Nothing in the Court's 2006 *Hamdan v. Rumsfeld* decision, which invalidated the rules established for military commission trials, changed this.

Most European states, however, have signed and ratified Protocol I Additional, an addendum to the 1949 Geneva Conventions. This treaty was particularly promoted by the International Committee of the Red Cross, and its provisions attempt to regularize the status of unlawful combatants, especially the guerrilla and irregular fighters who comprised so many of the "national liberation movements" in the post–World War II period. It was, in fact, for this very reason that the United States rejected Protocol I. It is not a party to that instrument and is not bound by Protocol I's requirements—except to the extent that they represent binding customary norms.

Opponents of American policy in the war on terrorism commonly claim that, in fact, Protocol I does constitute a binding statement of customary law and argue incorrectly that the United States has recognized as much. To support this point, proponents of this claim generally cite the 1987 remarks of Michael Matheson, then serving as Deputy Legal Adviser, Department of State. A careful examination of Mr. Matheson's remarks, however, reveals that he did not suggest that Protocol I constituted a restatement of customary international law, but merely that a number of its provisions might have that status.[57] In this connection, he noted that, because of the difficulty in determining which rules enjoy sufficient "acceptance and observation" to be considered customary norms, "we have not

55. 22 U.S.C. §§ 7421–7432.

56. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942).

attempted to reach an agreement on which rules are presently customary law, but instead have focused on which principles are in our common interests and therefore should be observed and in due course recognized as customary law." This is, of course, a critical distinction between principles and rules in assessing what are the actual legal obligations of the United States. The U.S. has not accepted either that the category of "unlawful enemy combatant" has been abolished or that such individuals must be treated as Geneva POWs or civilian criminal defendants.

The Use of Stressful Interrogation Methods. The EU governments, along with a large portion of European public opinion, reject the use of stressful interrogation methods by the United States, claiming that these "amount to torture." Whether stressful interrogation methods are appropriate as a means of obtaining intelligence from captured enemy combatants is a complex question of morality and expedience. As a legal matter, however, stressful interrogation methods are not inherently torture. In the relevant treaties (and U.S. federal statutes), torture is narrowly defined to encompass only the infliction of severe pain and suffering. Thus, the stress methods, such as isolation, sleep interruption, and standing, authorized by the United States for use on captured al-Qaeda and Taliban members are not "torture" *unless taken to a degree extreme enough to constitute severe pain and suffering*. Significantly, the European Court of Human Rights itself reached this conclusion in *Ireland v. United Kingdom* (1978), a decision construing very similar standards under EU human rights conventions.[58]

In fact, *Ireland v. United Kingdom* involved Britain's use of five stressful interrogation techniques—hooding, wall standing, subjection to noise, sleep deprivation, and reduced diet—in tandem against Irish Republican Army (IRA) members. The court ruled that these methods, even when used together, did not amount to torture. It did conclude, however, that when used together, these methods constituted cruel and inhuman treatment. This decision is, of course, not binding on the United States, but it does suggest that European claims that the United States has engaged in torture are ill-founded and that the U.S. could meet international standards simply by ensuring that the stressful interrogation methods employed at Guantanamo and elsewhere are not utilized together as done by Britain against the IRA. In any case, generic claims that "coercive" interrogation methods inherently amount to torture and that they are banned by international law are incorrect.

Other Controversial Policies. There are, of course, a number of other American policies in the war on terrorism that have been criticized or openly denounced in Europe. These include the claimed existence of "secret" U.S. detention facilities in Central and/or Eastern European countries, as well as the practice of "rendition"—transferring captured terrorists to other (usually their home) countries. There have obviously been abuses committed by Americans during the war on terrorism—although the U.S. record in this regard compares very favorably with previous conflicts and, especially, with that of other countries. In defending the American legal position, however, the first question must always be: Is the United States actually subject to the norm it has allegedly violated? The second question is whether the U.S. interpretation of applicable norms is simply different from the prevailing view in Europe and/or elsewhere. As explained above, the United States is an independent sovereign with the right and obligation to interpret international law for itself. It does not have to accept the views of any other state or group of states, save in those circumstances where it has consented to do so. That is the essence of sovereignty.

Universal Jurisdiction. One means of avoiding that sovereignty, of course, would be to punish individual American officials in the courts of other states (which may take a different view of the applicable legal norms and their meaning) on a theory of "universal jurisdiction." As a principle of judicial authority, universal jurisdiction has a long history. Before the 20th century, however, it was limited to offenses committed by non-state actors beyond the territorial limits of any state. Thus, all states were said to have the "universal" right to prescribe acts of piracy on the high seas, including the trans-oceanic slave trade. Even in this area, however, the right to prescribe did not automatically translate into the right to try and punish without some additional jurisdictional basis.[59]

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57. See Remarks of Michael J. Matheson: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 *Am. U. J. Int'l* 419, 421–424 (1987).

58. *Republic of Ireland v. the United Kingdom*, Series A, No. 25 (Judgment of Jan. 18, 1978).

59. For a more detailed discussion of this point and related authorities, see Lee A. Casey and David B. Rivkin, Jr., "The Dangerous Myth of Universal Jurisdiction," in Robert H. Bork (ed.) *"A Country I Do Not Recognize" The Legal Assault on American Values* 135, 138–42 (Hoover 2005).

Since the end of World War II, however, claims have been made for a universal jurisdiction over offenses such as war crimes, crimes against humanity, genocide, and crimes against peace. These claims have been based largely on the Nuremberg trials. In fact, as explained above, the International Military Tribunal never claimed to act pursuant to "universal" jurisdiction or even under international law or on behalf of the international community. Its authority was founded on the right of the victorious Allies to legislate for a conquered Germany. Nevertheless, increasingly extravagant claims have been made for universal jurisdiction, and in the 1990s, some European states actually enacted laws purporting to vest their courts with the power to try and punish universal jurisdiction offenses. The most notable was Belgium. The Belgian universal jurisdiction law was used to initiate proceedings against various Western leaders, including Israel's Ariel Sharon and U.S. Secretary of State Colin Powell, Vice President Richard Cheney, and General Tommy Franks. Belgium repealed the law after the United States made plain that NATO Headquarters could not remain in a country (in Brussels) where U.S. officials might face such judicial harassment.

In fact, there is little state practice, involving both a right to prescribe and punish "international" offenses, supporting universal jurisdiction. There are very few instances in which a country has attempted to punish an individual, let alone a state official, for offenses that did not take place on its own territory or against its own citizens. Moreover, and more to the point, there are even fewer examples—if any at all—in which a state whose citizen or official has been targeted for such a prosecution accepted the assertion of this judicial power based on a belief that it was legally required to do so because of some "universal" right to try and punish certain crimes. In short, universal jurisdiction is a theory of international law that has very little basis in reality.

IV. International Law as a Tool of Statecraft, and "Lawfare"

The lack of actual state practice establishing universal jurisdiction is hardly surprising. International law has always been used as a tool of statecraft, and the "legal" right to prosecute and punish another state's officials would be an especially dangerous addition to the toolbox. (This is, of course, exactly what the ICC states parties have contrived for themselves—although the authority is vested in a non-state institution—and only time will reveal whether they have made a mistake.) A state's view of international law generally, and of particular norms, often changes over time as its role in the world changes.

In particular, when assessing the requirements of international law, states usually do so in light of their national interests. For example, during the 16th and 17th centuries, the British often argued for a broad "freedom of the seas" principle as against the Spanish, whose maritime colonial and commercial interests were far greater and more developed than Britain's. By the 18th and 19th centuries, however, the British view about a number of key maritime law issues had changed dramatically because Britain had emerged as the leading—indeed, overwhelming—naval power. In considering claims by other states that the United States is violating international law, one eye should always remain firmly on this reality. (By the same token, in determining whether to use international law as a justification for a preferred U.S. policy, it should always be kept in mind that the hallmark of law, including international law, is neutral application. Supporting a particular view of international law in a given circumstance may, in short, prove to be a double-edged sword in another circumstance.)

This is especially true in light of the development of "lawfare." This term, first used in this connection by Brigadier General Charles A. Dunlap, Jr., U.S.A.F., means "the strategy of using, or misusing, law as a substitute for traditional military means to achieve an operational objective."[60] A practical, textbook example of this phenomenon is the al-Qaeda training manual (seized in Manchester, England, in 2001), which states that captured "brothers" should claim to have been tortured while in custody. There is little doubt that the United States is, at least currently, the primary target of lawfare and that this weapon can be an effective one if such claims are not forcefully and consistently challenged and rebutted.

There is little doubt that the United States is the primary target of "lawfare."

60. Charles J. Dunlap, Jr., "The Role of the Lawyer in War: It Ain't No TV Show, JAGs and Modern Military Operations," 4 *Chi. J. Int'l L.* 479, 480 (2003).

Conclusion

In approaching questions regarding international law and international institutions, there are a number of basic points that American policymakers, both in the executive branch and in Congress, should keep firmly in mind.

- As an independent and sovereign state, the United States is bound by international law, and it must especially respect its treaty obligations.
- International law, however, is fundamentally different, both in its conception and in its application, from domestic law. It is not made by legislation, nor is there any inherent legislative authority in the "international community," however that term may be defined.
- States alone can make international law by their own actions.
- Every independent state has an equal right and obligation to interpret and apply international law for itself. This is a fundamental and inherent attribute of sovereignty.
- There is no state, group of states, or international institution with the right to determine or adjudicate the legal obligations of states, save to the extent that the relevant state or states consent to be bound.
- In determining what a state's international legal obligations and rights may be, the critical factor is the actual practice of states. This is true both with respect to customary international law (where the practice of states prevails) and in discerning the proper interpretation and application of treaties (where practice can elucidate the treaty's proper scope and meaning).
- In assessing state practice, the key inquiry is whether states have observed a particular rule or norm, in relevant circumstances, out of a feeling of being legally bound to do so. Actions taken based on political or practical expedience, or from considerations of good will or courtesy, are not reliable indicia of what international law requires.
- The United States cannot be legally bound to treaties, however widely accepted by the international community, that it has not ratified. At the same time, the President should avoid signing treaties that he does not believe will be approved by the Senate, since this may result in (admittedly disputable) claims that the United States must avoid taking action that would defeat the treaty's "object and purpose" even where it is not a treaty party.
- Claims that a state has the right to exercise "universal jurisdiction" should never be accepted at face value. Although the concept of universal jurisdiction (the right of all states to proscribe and punish certain conduct of international interest, such as war crimes), has a long history, there is very little actual state practice supporting the right of one state to adjudicate and punish the citizens and/or officials of another state merely because the alleged offense is of a "universal" character or concern.
- In refusing to accept either the interpretation of international law adopted by other states or the authority of international institutions claiming the right to adjudicate international law claims, the United States is not violating its international obligations or seeking "impunity." It is merely exercising its indisputable rights as an independent sovereign.
- Sovereignty is not some abstract concept that can or should be redefined by an indeterminate and inchoate "international community." It is the right of the American people, and of all peoples, to govern themselves in accordance with their own institutions and by their own consent. It is the basis of our right to make law for ourselves.

Chapter 2
Economic and Political Rights at the U.N.

Helle C. Dale

Introduction

Freedom is one of the most powerful ideas in human history, but also one of the most elusive. Defining freedom and the set of human rights associated with it remains a profound challenge for crafters of national constitutions as well as international treaties.

The intellectual origins of this idea stretch back almost 800 years to the Magna Carta. Only in the 200 years since the American and French Revolutions has freedom become a major driving force for political development and the spread of democracy, the political system that to the greatest extent embodies the individual citizen's inalienable rights as a free moral agent. Today, the idea of expanding the reach of democracy is a central theme of President George W. Bush's "freedom agenda," but it remains as controversial as ever.

In this relatively short time span, countless political and intellectual movements have laid claim to the word "freedom." It has come to be associated with everything from the "right to life" to the "right to a state-funded standard of living." Accordingly, to understand properly the role that concepts like freedom and political and economic rights play in the governance of nations and international organizations, identifying the source of the different definitions of these same concepts is essential.

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Today, the United States is part of an international system of governance largely organized in the post–World War II era. Its institutions range from diplomatic institutions like the United Nations and its associated bodies to financial institutions like the International Monetary Fund and the World Bank to military organizations like NATO to more informal groupings like the G-8. Many others have been added in the intervening years, like the International Criminal Court, and some have been viewed unfavorably by various U.S. Administrations, particularly Republican Administrations.

In international fora, ambiguities and downright disagreements over the meaning of the concepts of freedom and human rights can be significant stumbling blocks to the conduct of U.S. foreign policy. The American understanding of freedom—based on the right of the individual to "life, liberty, and the pursuit of happiness" as expressed in the Declaration of Independence—is often quite different from definitions embraced by other countries, particularly those from a Communist, Socialist, or even Continental European tradition.

In economic rights, the Anglo–Saxon and Continental European traditions tend to come into direct conflict. The Anglo–Saxon tradition of Adam Smith and John Stuart Mill asserts that economic and political freedoms are indivisible, that they adhere to the individual and his enlightened self-interest, and that one cannot exist without the other. Political freedom in the absence of economic freedom becomes a mere token and does not involve the exercise of real individual choice or power. Economic freedom in the absence of political freedom can exist only up to a point, beyond which it becomes a threat to the political leadership of the moment. Emphasis on one or the other tends to endanger both.

It is therefore beside the point to ask which precedes which—political or economic freedom—as the very same civil and governmental institutions guarantee the development and security of both. For instance, the right to own property, along with the judicial framework that protects it, is a fundamental political right without which economic development is severely hampered or even made impossible. Equally fundamental is the freedom to sell one's own labor or to trade the fruits of that labor without undue interference from centralized government. Allowing the individual the freedom to act in accordance with his enlightened self-interest is what causes market economies to thrive.

In the development of the free-market economies of the West, these principles of economic and political freedom have proven themselves time and again, and they have done so in the nations of the former Socialist bloc that have adopted democracy and free-market economics together since the end of the Cold War. Equally illustrative is the spectacular failure of the Soviet economic system of central planning and state ownership of enterprises and resources, despite the Soviet Union's enormous wealth in terms of labor force and natural resources.

Today, the argument over the primacy of economic or political rights is often couched in terms of the development of the Chinese economy and political systems. There is little doubt, though, that China will never fulfill its true economic potential until guarantees of political freedom are allowed to unleash the enormous creativity of the Chinese people.

Getting the terminology right in our discourse with other nations is crucial for correcting the Socialist bias, which is derived from a different understanding of rights that often dominates thinking in international institutions.

This paper explores the crucial distinctions between real and perceived human, political, and economic rights. Getting the terminology right in our discourse with other nations is crucial for correcting the Socialist bias, which is derived from a different understanding of "rights" that often dominates thinking in international institutions. It is time to change the ground on which international discourse takes place and to bring it back to the basic definition of human rights and freedom that serves as a cornerstone of conservative thinking.

Definition of Terms: Philosophical Underpinnings

Tracing the philosophical and intellectual origins of freedom reveals that a disparity has existed for centuries between the notions of individual freedom brought forth by the American Revolution and the collectivist overtones of the European philosophical tradition. Understanding these historical origins is key to understanding the use of freedom in contemporary usage.

The English liberal tradition and the American Revolution provided a crucible in which the ideas of John Locke, Edmund Burke, David Hume, and Thomas Jefferson were molded into the American concept of individual freedom. At its core, this tradition of freedom is rooted in the natural rights of man. Natural rights are derived from the idea of common human nature and, as such, are inalienable. They cannot be bought, sold, or taken away. The highest priority in this tradition is the right of life, liberty, and security of person.

Individual freedom is predicated on the right to life; therefore, that right should be equally protected before the law.

Arising from a Lockean interpretation of natural rights, the right to life, liberty, and security is acknowledged in the Declaration of Independence and is the basis for the U.S. Constitution. From this definition emerges a picture of freedom that seeks to liberate the individual's creative and intellectual capabilities. Additionally, the legacies of Voltaire, Jefferson, and the Magna Carta promote freedom of thought, consciousness, and religion, which are guaranteed by the First Amendment to the U.S. Constitution. The freedoms of opinion, expression, and assembly are the philosophical descendents of the English Bill of Rights of 1689 and were advocated by the likes of Voltaire, Thomas Paine, and Thomas Jefferson.

In addition to providing intellectual and creative freedoms, the individualist tradition sought to define freedom externally, in relation to society. Individual freedom is predicated on the right to life; therefore, that right should be equally protected before the law. Government is necessary to secure these rights, with the consent of the governed, and should do so with blind justice. These are ideas that can be traced to John Locke and the Magna Carta.[1]

The right to be free from slavery is a further extension of the natural rights of man and one of the core tenets of liberalism. As Locke, Montesquieu, Hume, and Jefferson pointed out, however, the individual must be free not only from enslavement to others, but also from enslavement to the government. They sought to preserve freedom by protecting individuals from arbitrary arrest, detention, or exile, as well as from arbitrary deprivation of property. These philosophies were given a legal foothold in the Third, Fourth, and Fifth Amendments to the U.S. Constitution.

A number of these individual rights have subsequently been enshrined in international documents, including the U.N. Universal Declaration of Human Rights, the Charter of the United Nations, and the European Convention on Human Rights. The Universal Declaration declares, "All human beings are born free and equal in dignity and rights,"[2] and the European Convention on Human Rights acknowledges the "right to liberty and security of person."[3] These rights are therefore easy to embrace from an American or Anglo–Saxon point of view, enshrined as they are in our constitutional tradition. "Human security" has made a recent reappearance in relation to the potential obligation of the international community to intervene in areas under the threat of genocide, such as in Darfur.[4]

The Anglo-Saxons see freedom as adhering to the individual (or individual nation) by right, while the Europeans look at the collective "greater good" or General Will, whether that means the greater good as defined within a national community or among the community of nations.

However, a second set of "rights" has grown out of the different philosophical tradition of Continental Europe, which gave birth to Social Democracy, Socialism, and Communism. To this day, they often epitomize the differences found between the diplomatic stances in international organizations that are taken by the United States and the European Union. In fact, there is a remarkable consistency in the ways that freedom rights have been viewed over the centuries by Anglo–Saxons on the one hand (including Americans) and Europeans on the other. The Anglo–Saxons see freedom as adhering to the individual (or individual nation) by right, while the Europeans look at the collective "greater good" or General Will, whether that means the greater good as defined within a national community or among the community of nations.

Arising subsequent to the notion of freedom as an individual concept in the 18th century was the notion of freedom in the collective. Rooted in the intellectual traditions of Jean-Jacques Rousseau, French labor organizer Louis Blanc, and Karl Marx, the collective conception of freedom is based on abstractions that seek the good of the whole over the good of the individual. Rather than being guided by the individual exercise of natural rights, collectivists more often look to the state to determine the best course of action and how to provide for individuals.

The preeminent forerunner of this thinking was the philosophy of Jean-Jacques Rousseau. Like the individualist tradition, Rousseau believed that man was born into a natural state of freedom. Yet, unlike the Anglo–Saxon philosophers, he rejected the idea that man's natural freedom was compatible with the restraints of society. Instead, he proposed that man's natural state and social restraints could be reconciled by submission to the General Will—a vague

1. See the Magna Carta, Clauses 17–22, at *www.constitution.org/eng/magnacar.htm* (August 21, 2006).
2. United Nations, Universal Declaration of Human Rights, Article 1, at *www.hrweb.org/legal/udhr.html* (August 21, 2006).
3. *Ibid.*, Article 5, and Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Section 1, Article 5, at *www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf* (August 21, 2006).
4. For further treatment, see Chapter 4 in this volume, "The Muddled Notion of 'Human Security' at the U.N."

concept that represents what the general community supposedly would do unanimously with perfect reasoning, unbiased judgment, and an inclination toward the common good.

While this may have been a noble aspiration in theory, in practice it became apparent that governments can justify any action by claiming it as a discernment of the General Will. According to this reasoning, the state becomes an omnipotent entity, usurping the rights of the individual in the name of the collective good. From this philosophy and the intellectual traditions of Louis Blanc and Karl Marx spring the modern notions of collective rights.

Based on nothing more than a vague abstraction of what constitutes the common good, collective rights form a seemingly endless string of entitlement claims on the state. For instance, the right to social security is essentially a claim on the state to provide for individuals and is a direct derivative of Rousseau's thought. The right to education and the right to a standard of health, while noble aspirations, are further examples of rights that are based on nothing more than what people feel they deserve from the state. In terms of international treaties, the International Covenant on Economic, Social and Cultural Rights[5] and the Constitution of the International Labor Organization are key sources of such insidious rights that more closely resemble entitlements.

Based on nothing more than a vague abstraction of what constitutes the common good, collective rights form a seemingly endless string of entitlement claims on the state.

A significant portion of the collective tradition is focused around the rights of labor. This focus is directly descended from the philosophies of Louis Blanc and Karl Marx, both of whom sought to protect laborers from the "exploitation" of capitalism through collective equality. The right to work, the right to equal pay for work, the right to organize trade unions, and the right to the prevention of unemployment are rights that speak to the direct influence of Marx. Further examples of Marxist influence include the right to a maximum working day and week, the right to a regulated labor supply, and the right to rest and leisure, including the right to periodic holidays with pay.

While it is not disputed that a certain amount of labor market regulation is necessary for a labor force to function well, these are not rights in the sense that they arise from the nature of man. They are entitlements that, when given the status of fundamental rights, replace individual choice and responsibility with a plethora of claims that result in a dependent society with a pervasive centralized state.

In recent years, the collective influence of Rousseau, Marx, and Blanc has transcended strictly material conditions. The notion that each individual has rights to state provisions for his welfare has given rise to spurious entitlements such as the right to be free from hunger, including provisions that ensure improved methods of production, conservation, and distribution, as well as the equitable distribution of food supplies in relation to need. The principle of consumption based on need is directly descended from Louis Blanc, and the emphasis on equitable distribution is characteristic of the Marxian inclination toward total equality. Increasingly vague notions of freedom include the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author. The latent influence of Rousseau's General Will is clearly visible as nearly anything can be claimed in the name of the common good.

Thus, the International Covenant on Economic, Social and Cultural Rights defines freedom as founded in equal and inalienable rights of all members of the "human family," based on the "inherent dignity of man." The rights that it lists range from the right of self-determination to the right to earn a decent living for oneself and one's family to paid holidays and the right to strike. Inherent in many of these rights is the notion that the state will facilitate their realization through programs, services, and monetary handouts. It even includes the "right of everyone to the enjoyment of the highest standard of physical and mental health."

5. U.N. General Assembly, International Covenant on Economic, Social and Cultural Rights, January 3, 1976, *www.unhchr.ch/html/menu3/b/a_cescr.htm* (August 21, 2006).

Equally wide-ranging is the Constitution of the International Labor Organization. Its preamble talks about establishing "universal and lasting peace" based on "social justice"[6] and the goals of regulating hours of work and labor supply, preventing unemployment, providing an adequate living wage, protecting the worker against sickness and disease, protecting the interests of workers in countries other than their own, protecting the worker against injury arising from employment, protecting children and women, providing for old people, guaranteeing freedom of association, and even providing technical and vocational education.

In the economic realm, natural rights and entitlement rights clearly run afoul of each other. Thus, the economic freedom to pursue a living or to trade according to individual choice and enlightened self-interest—the essence of the successful capitalist free-market system—has become suspect in many international contexts because it contradicts the postulated General Will to regulate labor markets and the associated social provisions and trade barriers that are erected to protect certain segments of the labor force. The right to seek enlightened self-interest and the "right" to employment are indeed sometimes in direct contradiction. In international fora, therefore, "economic freedom" sometimes becomes a deeply suspect term, despite its proven record as the way to lift nations out of poverty into continued prosperity.

Although some level of government spending is necessary to ensure that the basic structures of society function smoothly enough to facilitate economic activity, excessive government spending shifts resources from the private sector and impedes economic growth. Between these two principles lies an ocean of possibilities encompassing the small-government tendencies of Hong Kong, Ireland, New Zealand, Singapore, and the United States; the decidedly robust government philosophies of the countries of Western Europe; and the many developing countries that hope to use government spending to meet their development goals.

A Compendium of Rights in International Documents

The 10 individual rights and 15 collective "rights" listed below are enumerated in one or more of the following international documents:

- The U.N. Universal Declaration of Human Rights (UDHR);
- The International Covenant on Economic, Social and Cultural Rights (ICESC);
- The Constitution of the International Labour Organization (CILO); and
- The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, which is also called the European Convention on Human Rights (ECHR).

Individual Rights. These 10 rights are *a priori* human rights that adhere to each individual, regardless of nationality or social status.

All human beings are born free and equal in dignity and rights (UDHR, Article 1). This essential human right is recognized in the preamble of the Universal Declaration and speaks to the equal worth of all humans, regardless of any differences in race, class, religion, or country of origin. It arises from the Lockean tradition of *a priori* rights and is also acknowledged in the Declaration of Independence.

Right to life, liberty, and security of person (UDHR, Article 3; ECHR, Article 5). These fundamental rights are similarly derived from the Lockean influence of *a priori* rights, which Locke specifically defined as "life, liberty and property."

Everyone has a right to life that should be protected by law (ECHR, Article 2). Every human being has a right to his life, which should be legally protected. The right to life is identified as an *a priori* right by Locke and cited in the Declaration of Independence. The notion that individuals have a right to the legal protection of their lives is additionally assumed by Locke at the point of social contract, as the government is formed solely for the protection of the people.

Right to recognition everywhere as a person before the law, and all are equal before the law and are entitled without any discrimination to equal protection of the law (UDHR, Articles 6–7). These rights make the law an impartial judge of all

6. International Labour Organization, Constitution, May 10, 1944, at *www.ilo.org/public/english/about/iloconst.htm* (August 21, 2006).

persons, requiring that everyone must be held to the standard of personhood and treated fairly and equally. In its constitutional form, this right can be traced to Clauses 17– 22 of the Magna Carta. It is the essence of the legal systems of free societies.

No one should be held in slavery or servitude (UDHR, Article 4; ECHR, Article 4, Part 1). All people have a right to be free from all forms of slavery. This right is additionally put forth by the Thirteenth Amendment to the U.S. Constitution. In its basic form, the right to be free from servitude has been with man since he first began to enslave others. This notion is one of the most central tenets of liberalism—man is to be free from enslavement to others and to the government.

No one should be subjected to arbitrary arrest, detention, or exile (UDHR, Article 9; ECHR, Article 5). This set of rights limits the government's use of force and detention by placing the burden of proof on the government, which must show just cause for arrest and detention. Freedom of this type emerges from the idea of limited government, emphasized by Locke, Montesquieu, Hume, Paine, and Jefferson. Additionally, this type of freedom is encapsulated in the Third and Fourth Amendments of the U.S. Constitution.

Right to be presumed innocent until proven guilty at a public trial (UDHR, Article 11, Paragraph 1; ECHR, Article 6, Paragraph 2). The right to be proven guilty ensures a fair trial, as the preponderance of evidence must be weighted on the side of guilt for the accused to be convicted. The presumption of innocence has been a part of the democratic tradition for centuries and can be traced back to the laws of Sparta and Athens. While not stated explicitly in the U.S. Constitution, the presumption of innocence is widely held to follow from the Fifth, Sixth, and Fourteenth Amendments.

No one shall be arbitrarily deprived of his property (UDHR, Article 17, Paragraph 2). This right limits the government's power over individuals, requiring it to show adequate evidence to seize property. The protection of property derives most directly from Locke, who believed that the government's sole function was to protect property, and thus a substantial amount of just cause must be shown to justify its seizure. This right is recognized in the Fifth Amendment to the U.S. Constitution.

Freedom of thought, conscience, and religion (UDHR, Articles 18; ECHR, Article 9, Paragraph 1). This right includes the right to change religion or belief and the freedom to worship alone or with others. Freedom of religion is a basic individual right that originated in its embryonic form in the first clause of the Magna Carta. It came to modern fruition during the Enlightenment, when it found staunch advocates in Voltaire and later in Thomas Paine and Thomas Jefferson. This freedom is additionally guaranteed by the First Amendment to the U.S. Constitution.

Freedom of opinion and expression, and freedom of peaceful assembly (UDHR, Part I Articles 19–20; ECHR, Article 11, Paragraph 1). This set of rights includes the freedom to hold and impart opinions without interference and the right to assemble without compulsion. Freedom of speech is a fundamental right that originated in ancient Greece and Rome, became a philosophical cause in the English Bill of Rights, and later found advocates in Voltaire and John Stuart Mill as well as Thomas Paine and Thomas Jefferson. Both of these rights are recognized in the First Amendment to the U.S. Constitution.

Collective Rights. These 15 "rights" are derived from the collectivist tradition and are more entitlements or goals than *a priori* rights of the individual.

Right to social security (UDHR, Article 22; ICESC, Part III, Article 9). As a member of society, each individual is guaranteed a state-facilitated, worker-funded pension in his old age. In addition to social security, the International Covenant on Economic, Social and Cultural Rights includes the right to social insurance. The idea that the state should provide for the common good is a direct derivation of Rousseau and was also noted in the works of Louis Blanc, who believed that "each [should] consume according to his need."[7] The proletarian revolution, as envisioned by Karl Marx, would create a worker's paradise that aimed at production for the common good. However, despite the appealing rhetoric, every attempt to create such a social and political system has failed miserably. This is no less true in international treaties than it has been in individual nation-states.

7. Louis Blanc, *Organisation du Travail* [*Organization of Work*], 1840, quoted at *www.bartleby.com/65/bl/Blanc-Lo.html*.

Right to work and right to equal pay for work (UDHR, Article 23, Paragraphs 1–2; ICESC, Part III, Articles 6–7; CILO, Preamble). The fundamental right to work includes free choice of employment, just and favorable working conditions, and the protection against unemployment. This concentration on the worker can be traced directly to Louis Blanc and his predecessor Karl Marx, both of whom believed in the equalization of wages and in protecting the worker from the "dangers of competition." François Fourier, additionally, emphasized the repayment of workers according to their contribution. Again, the right to work in this particular context exemplifies only provisions of a failed social system.

Right to just and favorable remuneration to ensure a standard of living for his family and right to a standard of living adequate for the health and well-being of himself and his family (UDHR, Article 23, Paragraph 3, and Article 25, Paragraph 1; ICESC, Part III, Article 7 and Article 11, Paragraph 1; CILO, Preamble). According to the Universal Declaration, this "just and favorable remuneration" may come from either the employer or the state. The Universal Declaration defines an acceptable standard of living as including food, clothing, housing, medical care, and the right to security "in circumstances beyond his control." The idea that each individual is guaranteed a standard of living stems from the Blanc and Marxian traditions of total equality. The latent influence of Rousseau is also evident in the move toward laws for the common good. While this is a desirable condition, this "right" is an example of an entitlement, something enacted by law in individual nation-states.

Right to the regulation of working hours and the establishment of a maximum working day and week (CILO, Preamble). The ILO states that the absence of the right to the regulation of working hours would create an unjust environment that would imperil the peace and harmony of the world. The principle behind regulated work hours—that labor must be protected from the exploitative powers of employers—is a Marxian concept. The subsequent set of rights relating to the labor force embodies principles that adhere to social organization in individual nation-states, primarily those of a Socialist or Social Democratic nature. As such, they cannot be considered human rights.

Right to the regulation of the labor supply (CILO, Preamble). The right to a regulated labor market entails the right to stable growth, a minimum wage, and union benefits. Again, the concepts of worker protection, rights, and benefits are derived directly from the Marxian need to protect the worker from exploitation by the bourgeoisie and the woes of capitalism.

Right to the prevention of unemployment (CILO, Preamble). The right to the prevention of unemployment is stated in broad general terms. There are no caveats or provisions listed as to what constitutes "prevention" or whether employment can be lawfully terminated under this right. As such, it can be taken to mean that once hired, an employee cannot and should not be fired without the prospect of further employment.

Right to form and join trade unions for the protection of his interests (UDHR, Article 24, Paragraph 4; ICESC, Part III, Article 8; CILO, Preamble). This right allows workers the freedom to organize in protection of their individual and collective interests. Furthermore, the International Covenant provides the right to strike. The notion of organized labor first appeared in Louis Blanc's 1840 book *Organization of Work*, in which he proposed the establishment of "social workshops" where the workmen in each trade would unite their efforts for the common benefit. Karl Marx picked up on the power of organized labor a few years later, believing that the organization of the proletariat would foment the workers' revolution.

Right to protection of the worker against sickness, disease, and injury arising out of his employment (CILO, Preamble). While employed, the worker has the right to be protected from any illness or injury that may result from his term of employment. This need to protect the worker from any sort of hazard that he may encounter is again a derivative of the Marxian need to shield the worker from the oppressive bourgeois tactics of employee exploitation.

Right to rest and leisure (UDHR, Article 24). The right to rest and leisure includes a reasonable limitation of working hours and periodic holidays with pay. This focus on pampering the worker is truly Marxian, in the sense that a worker's paradise would include such entitlements, solely in the name of the common good. While rest and leisure are certainly desirable ends, they are aspects of the relationship between employer and employee. They are not essential rights based on the human condition. This takes the concept of a "human right" to an almost absurd level.

Fundamental right of everyone to be free from hunger (ICESC, Part III, Article 11, Paragraph 2). The right of everyone to be free from hunger includes provisions that ensure improved methods of production, conservation, and distribution, as well as the equitable distribution of food supplies in relation to need. The principle of consumption

based on need is directly descended from Louis Blanc, and the emphasis on equitable distribution is characteristic of the Marxian inclination toward total equality. Freeing the world from hunger is, again, something that is a goal of worldwide organizations as well as international donors. It is an entirely worthy goal, but not a human right. Furthermore, regulation of the world's production and distribution of food by international organizations is only likely to create failures similar to those that beset the centralized Soviet and Chinese economies under Communism. The result would be less food, not more.

Motherhood and childhood are entitled to special care and assistance (UDHR, Article 25, Paragraph 2; CILO, Preamble). During these vulnerable times, the state should provide extra assistance for mothers and children, whether the children were born in or out of wedlock. The ILO Constitution extends the scope of this right to providing for old age and injury. The idea of a state-funded entitlement can trace its roots to the collective submission to the state, as championed by Rousseau. These ideas have led to the establishment of the "nanny state," particularly in Europe, and have prompted the emergence of an entitlement complex in which individuals feel that they no longer need to provide for themselves and that the state should provide for them.

Right of everyone to enjoy the highest attainable standard of physical and mental health (ICESC, Part III, Article 12). The right of everyone to a standard of health includes state-funded provisions for reducing infant mortality and for healthy development of the child; improvement of hygiene; prevention and treatment of epidemic, endemic, and occupational diseases; and creation of conditions that would assure medical attention to all. The entitlement to health care is another consequence of the trend toward collective submission to an omnipotent state. In the name of the General Will (and welfare), the state collectivizes individual responsibility and becomes the ultimate provider. Again this is an entitlement, not a right.

Right to education (UDHR, Article 26, Paragraph 1; ICESC, Part III, Article 13; CILO, Preamble). According to this right, elementary education should be free and compulsory, and secondary and higher education should be available to all. The importance of education as an entitlement can similarly be viewed as a consequence of Rousseau's nanny state.

All are entitled to a social and international order in which the rights and freedoms set forth in this Universal Declaration can be fully realized (UDHR, Article 28). Every person deserves a world in which all of his or her basic rights and entitlements are provided for. The idea that people deserve something better is a tribute to the collectivist impulse to perfect "flawed" societies. This discernment of the route to perfection—first embodied in Rousseau's General Will—has had disastrous consequences throughout the past two centuries. The quest for the perfect human social order has been the justification for egregious acts of terrorism, genocide, and homicide—all in the name of a more perfect freedom.

Right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author (UDHR, Article 27, Paragraph 2; ICESC, Part III, Article 15). To ensure the full realization of this right, the state should create an environment of freedom in which science and culture flourish. This is as vague a notion of "freedom" as may be imagined and cannot be described as a right or even as an entitlement. It is more of a general social goal that is derived from Rousseau's amorphous General Will. All things done in the name of freedom fall under its definition, and the state is its vanguard, supposedly representing the best and most free wills of the people. However, once freedom is expressed as the General Will and not an attribute of the individual human being, the person who holds the key to defining it intellectually also holds the power. This is why the semantics of freedom and rights remains so extraordinarily important.

Current Controversies

Change in the perception of the beneficial role of government in economic relations has been jarring in the post–World War II era. After World War II, the tendency was toward extensive government involvement. More recently, an abundance of evidence, including the demise of the Communist experiment in the former Soviet Union, has shown that too much government expenditure and intervention unduly impedes private-sector activity, which is the key to long-term economic growth.

The freer economies of the West always outperformed the centralized economies of the Soviet bloc—a fact that was masked during the Cold War by faulty and inflated statistics provided by Socialist governments. As noted by Heritage Foundation analyst Brett D. Schaefer,

> This swing from a leading role for government to a supporting role has profound implications for developing countries that spent the early post-independence years pursuing development based on heavy government intervention only to discover in the past couple of decades the detrimental effects of such a strategy.[8]

Since 1995, the *Index of Economic Freedom*, published each year by The Heritage Foundation and *The Wall Street Journal*, has documented the discrepancy in performance between free and less free economies.

Conclusion

In questions of human, political, and economic rights, U.S. policymakers in both the executive branch and Congress should keep firmly in mind a number of basic points when dealing with international treaties, law, and organizations.

Freedom, properly understood, means the right to life, liberty, and the pursuit of happiness. In rival and misleading interpretations, it might mean something far different: the right, for example, to join a trade union or to be part of a regulated labor supply. This misunderstanding of rights as entitlements often causes the discussion of freedom in international fora to take a detrimental direction.

Understanding the philosophical and intellectual origins of freedom sheds some light on the disparity that continues to exist between the individualist and collective understandings of the concept. It also gives the true champions of freedom the tools with which to argue their case against the advocates of essentially Socialist interpretations.

By analyzing these origins, it becomes apparent that many of today's "rights" are based on nothing more than an ambiguous and indefensible notion of the "common good." As appealing as the associated rhetoric can be, the "common good" invariably leads to coercion against the individual.

Truly defendable rights exist only when the quest for liberty is guided by the immutable nature of man. This human nature is derived from our Maker and therefore inherently the birthright of every human being.

Policymakers should make every effort in international deliberations to ensure that documents get the terminology right.

8. Brett D. Schaefer, "How the Scope of Government Shapes the Wealth of Nations," Heritage Foundation *Lecture* No. 925, March 7, 2006, at *www.heritage.org/Research/TradeandForeignAid/hl925.cfm* (August 21, 2006).

Chapter 3
Human Rights and Social Issues at the U.N.

Jennifer A. Marshall and Grace V. Smith

Introduction

Whittaker Chambers once described the Cold War as the "critical conflict of…the two irreconcilable faiths of our time—Communism and Freedom."[1] Freedom prevailed in that grave clash of the 20th century, but it remains embattled in a new cold war of ideas.

As the United States defends its freedom at home and abroad, it can expect to be endlessly engaged in cold wars of ideas. America is a nation built on an idea: specifically, the principle "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." That idea had its enemies in 1776, and it continues to have them today.

"[W]ars of ideas are fought in terms of ideas and for the sake of ideas. It follows that ideas…must be in good fighting shape," wrote the late Adda Bozeman, an expert on the interrelation of culture and statecraft.[2] Today, a number of the ideas essential to the American order—including those about the importance of family, religion, and civil society in relation to freedom—are not in prime "fighting shape." This leaves the United States vulnerable to opposing views advanced in the international arena, particularly at the United Nations.

A civil society in which moral authority is exercised by religious congregations, family, and other private associations is fundamental to the American order. Such moral authority supports limited government by obviating the need for expansive government regulations.

The American concept of freedom is influenced by the character of American culture. Civil society in America has been marked by a strong tradition of religious belief and practice and by the type of private associations that intrigued Alexis de Tocqueville as an early 19th century visitor. These features distinguish American freedom as much as its market economy does. A civil society in which moral authority is exercised by religious congregations, family, and other private associations is fundamental to the American order. Such moral authority supports limited government by obviating the need for expansive government regulations. In this way, strong civil society institutions—family, religious congregations, and private associations—reinforce the American founding ideas about limited government and individual liberty. On the other hand, when these elements of civil society are weakened or hemmed in, freedom is more susceptible to erosion, both conceptually and practically, at home and abroad.

One defining characteristic of national sovereignty is the authority to protect and preserve both a public and a private sphere. A nation must defend its government and its people in their private lives. In the case of America, the self-stated purpose of sovereignty is to secure a society in which citizens are free to enjoy the rights of life, liberty, and the pursuit of happiness. Preserving American civil society is an inherent purpose of U.S. national security.

1. Whittaker Chambers, *Witness* (New York: Random House, 1952), p. 4.
2. Adda B. Bozeman, *Strategic Intelligence and Statecraft* (Washington, D.C.: Brassey's, Inc., 1992), p. 19.

During the 20th century, the role of government in American society increased substantially. With the New Deal and Great Society, the national government took on an increasingly broad role in administering aspects of citizens' daily lives, including welfare and family-related issues. The understanding of religious liberty became more and more circumscribed.[3]

At the same time, international relations were tending toward administrative detail. Since World War II, international peacekeeping at the United Nations has grown into international policymaking on a wide range of issues. Historically, international law has been concerned with matters among states, such as rules of war, freedom of the seas, and treatment of foreign nationals and diplomats.[4] In recent decades, however, international treaties and conventions, customary law, and regulatory declarations by technical experts have affected policy on social issues from education to women's health.

From the U.S. constitutional perspective, such social issues fall within the sovereign domain of the United States. Further, many of them remain the province of state or local authorities or are outside the purview of public policy altogether as matters subject to individual private decisions. These social issues properly belong within the jurisdiction of the citizens of the United States, who should determine which level of government should formulate public policy or whether the matter should be left within the sphere of civil society, protected within—but not regulated by—the constitutional order of the United States.

Preserving constitutional authority over domestic policy should be a clear objective within overall U.S. foreign policy. Protecting civil society is critical to the freedom agenda.

U.S. government officials should protect American civil society and retain jurisdiction over domestic social issues by resisting policy encroachment into these areas by the United Nations and its many subsidiaries. As the elected, legislative branch of the U.S. government with the primary responsibility for policymaking at the federal level, Congress should maintain increased awareness of the scope of U.N. policymaking and exercise greater oversight of U.S. involvement in U.N. policymaking bodies. Preserving constitutional authority over domestic policy should be a clear objective within overall U.S. foreign policy. Protecting civil society is critical to the freedom agenda.

Definition of Terms

The following are key terms and concepts for evaluating the United Nations' handling of human rights and social issues.

Civil Society vs. the Administrative State. The American Founders frequently asserted that virtue and religion are essential to maintaining a free society because they "secur[e] the moral conditions of freedom."[5] Man is capable of both justice and evil, they believed, and needs to be inspired to love his neighbors and restrained from harming them by a moral authority beyond government edict. Political solutions must take man's nature into account, moderating it through checks and balances for those in power and encouraging it toward profitable activity in the private sphere.

If affections like familial love and religious faith have the power to pacify the human passions that provoke conflict, family and religion can be counted among the allies of freedom. Furthermore, if the family can provide

3. The U.S. Supreme Court began to promote a new conception of religious liberty and the idea of "the wall of separation between Church and State" beginning with Justice Hugo Black's opinion in *Everson v. Board of Education* (1947). This logic continued in *Lemon v. Kurtzman* (1971), which established the "lemon test" for violation of the Establishment Clause.

4. For a more detailed discussion of international law, see Chapter 1 in this volume, "International Law and the Nation-State at the U.N."

5. Thomas G. West, "Religious Liberty: The View from the Founding," Claremont Institute, January 1997, at *www.claremont.org/ writings/ 970101west.html* (August 18, 2006).

for the welfare of individuals, particularly children, more effectively than the state can, then marriage and parental authority should have the respect of the law. In a free society, law and policy should create an environment in which family, religious observance, and private associations will flourish. This means, in part, securing the private sphere in which these institutions can thrive free from both external threat and internal governmental encroachment.

"Necessitous men are not free men," said President Franklin D. Roosevelt in 1944.[6] If men in need cannot be free men, a government dedicated to the preservation of freedom must also commit itself to the elimination of need among its citizens. Such a view leads to a proliferation of government services and a list of "rights" that has no logical end. For Roosevelt, these "economic truths" were as self-evident as the Declaration's truths "that all men are created equal, that they are endowed by their Creator with certain unalienable rights." The rights to life and liberty, however, "proved inadequate to assure us equality in pursuit of happiness," declared Roosevelt, and that demanded "a second Bill of Rights under which a new basis of security and prosperity can be established." Roosevelt's list included the right to a job and a "decent home," the right to "adequate medical care and the opportunity to achieve and enjoy good health," and the right to protection from the "economic fears of old age, sickness, accident, and unemployment," among others. "All of these rights spell security," he concluded.[7]

The New Deal of the 1930s, followed in the 1960s by the Great Society, began to enact Roosevelt's new "rights" as entitlements: as services, from welfare to education to health care, that the state owes to individuals. This significantly changed the relationship between government and civil society. Rather than securing the space in which individuals in their social context of family and private association are free to pursue their happiness, government would satisfy their needs. Entitlement programs have changed the character of government as well, from the well-balanced three branches conceived in the Constitution to a national government dominated by administrative bureaucracy and promulgating extensive regulation of everyday life in America.[8]

The Internationalization of Administrative Government. In 1944, Roosevelt linked his domestic agenda directly to an international peacekeeping agenda then emerging at the end of the Second World War:

> The one supreme objective for the future…for each nation individually, and for all the United Nations, can be summed up in one word: Security. And that means not only physical security which provides safety from attacks by aggressors. It means also economic security, social security, moral security—in a family of Nations.[9]

This expansive definition of security, both at home and abroad, would change the nature of the relationship between state and citizen, as well as relations among nation-states.

Two world wars had convinced some that the international system was hopelessly mired in power struggles. The nature of the relationships among nations and institutions, not the nature of man, was seen as the root of conflict. One strategy for overcoming power politics was to increase administrative cooperation among nation-states. Interaction would produce interdependence that could supersede national interest, it was argued. The world needed "a working peace system," according to Romanian political scientist David Mitrany, an early member of the faculty at the Institute for Advanced Study in Princeton, New Jersey.[10] "Not a peace that would keep the nations quietly apart, but a peace that would bring them actively together."[11]

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6. English judge quoted in Franklin D. Roosevelt, "State of the Union Message to Congress," January 11, 1944, at *www.presidency.ucsb.edu/ws/index.php?pid=16518* (August 18, 2006).
7. *Ibid.*
8. For a more thorough analysis of the Roosevelt Doctrine and human security, see Chapter 4 in this volume, "The Muddled Notion of 'Human Security' at the U.N."
9. Roosevelt, "State of the Union Message to Congress."
10. Mitrany served on the British Labour Party's Advisory Committee on International Affairs from 1918–1931, wrote on foreign policy for T*he Manchester Guardian* as Europe emerged from World War I, and taught at Princeton before joining the Institute for Advanced Study in the early 1930s. See David Mitrany, *The Functional Theory of Politics* (New York: St. Martin's Press, 1975), pp. 8–9 and 28.

In terms like those used by FDR, Mitrany defined security as "an undisturbed social life," not "the out-dated sense of security of a physical territory, to be protected by tanks and planes."[12] This could best be achieved through what he called a "functional" approach, "making frontier lines meaningless by overlaying them with a natural growth of common activities and common administrative agencies." Power politics then would give way to harmonious international relations built around functions, such as fighting poverty or advancing education. Promoting welfare was intended to prevent warfare.[13]

This would transcend territorial sovereignty and military might and instead "distribute power in accordance with the practical requirements of every function."[14] Technical expertise and competency, not claims of sovereign jurisdiction over territory, would be the prerequisites of authority. Bureaucracy, not the executive or legislature, would be the operative agent of international relations.

One of the merits of this method, from Mitrany's perspective, was that progress was not dependent on formal agreement at every turn. He considered it a flaw of previous peace attempts that they had sought to make terms explicit by treaty when what was really needed was to make them actual in practice.[15] Here he drew a lesson from FDR's New Deal:

> The significant point in the emergency action [by Roosevelt] was that each and every problem was tackled as a practical issue in itself. No attempt was made to relate it to a general theory or system of government. Every function was left to generate others gradually, like the functional subdivision of organic cells.… A great constitutional transformation has thus taken place without any changes in the Constitution.… People have gladly accepted the service when they might have questioned the theory.[16]

International organizations figure prominently in functional theory.[17] Writing on the 25th anniversary of the United Nations in 1970, Mitrany suggested that the U.N.'s future success was dependent on expanding its functional activity.[18] The United Nations has indeed taken such a course (described below), adding to its number of "functional bodies" over the decades, with the administrative scope of each of these subsidiary bodies dramatically expanding at the same time.

The internationalization of the administrative state has merely opened a new front for political conflict among nations. States lacking military power have a new means of confronting traditionally stronger nations on the world stage.

But while functional interaction among nations has increased through the U.N. and related organizations, it has not ushered in an era of peace. The internationalization of the administrative state has merely opened a new front for political conflict among nations. States lacking military power have a new means of confronting tradition-

11. David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organizations*, 4th ed. (London: National Peace Council, 1946), p. 59.

12. *Ibid.*, p. 35.

13. "[F]unctionalism treats the promotion of welfare as an indirect approach to the prevention of warfare." Inis L. Claude, "International Organisation: The Process and the Institutions," *International Encyclopedia of the Social Sciences*, Vol. 8, pp. 34–35, quoted in Mitrany, *The Functional Theory of Politics*, p. 226.

14. Mitrany, *A Working Peace System*, p. 52.

15. "It is too often overlooked that written constitutions have in the main served as a check to authority." *Ibid.*, p. 9.

16. *Ibid.*, pp. 29–30.

17. For example, see John Gillingham, *European Integration, 1950–2003: Superstate or New Market Economy?* (Cambridge: Cambridge University Press, 2003), p. 28, and James E. Dougherty and Robert L. Pfaltzgraff, Jr., *Contending Theories of International Relations: A Comprehensive Survey*, 5th ed. (New York: Longman, 2001), p. 512.

18. Mitrany was encouraged by "the growing body of international administrative law…[which] parallels the rapid growth of [national] administrative law." David Mitrany, *The Functional Theory of Politics*, p. 227.

ally stronger nations on the world stage. Expanded international policymaking has thus heightened, not transcended, power politics.

Moreover, the functional relationships that have emerged are not nearly so organic as theorists of this school might have imagined; instead, like the vanguard to help the proletariat achieve the revolution it did not know it wanted, the functional networks that have emerged in international organizations are dominated by politicized factions that frequently do not represent the views of the populations that they claim to represent. States and nonstate actors alike pursue their interests and seek to impose their agendas globally through the functional avenues that Mitrany and others had envisioned for keeping the peace.

The U.N. Architecture for Human Rights and Social Issues. Headlines about cease-fires and negotiations to avert war often obscure the ongoing functional work of the United Nations. Far from being merely a forum in which the nations of the world can assemble in moments of crisis, the U.N. and its agencies in fact debate, oversee, and budget for projects and issues well beyond military and humanitarian emergencies. Although not originally promoted as an entity that would become involved in actively seeking to shape member states' domestic policies, the U.N. has become increasingly intrusive in these arenas. Its purposes include:

> to promote social progress and better standards of life in larger freedom, to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples.[19]

The international machinery has become quite intricate. The United Nations is composed principally of the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat. By its own admission, however, the "United Nations family…is much larger," consisting of 15 agencies and numerous additional programs and entities.[20] Each of these other U.N. agencies has its own governing body and budget.

Together, the U.N.'s agencies, programs, funds, and commissions "provide technical assistance and other forms of practical help *in virtually all areas of economic and social endeavour*."[21] The U.N. Department of Economic and Social Affairs alone includes 12 divisions and offices, ranging from the Office of the Special Adviser on Gender Issues and the Advancement of Women to the Secretariat of the United Nations Forum on Forests.[22] A chart of the various U.N. bodies and structures includes six principal organs, 11 subsidiary bodies, nine functional commissions, 19 specialized agencies, 17 departments and offices of the Secretariat, 14 programmes and funds, five research and training institutes, five regional commissions, four other bodies, five other U.N. entities, and four related organizations.[23] Mitrany's observation about the expansion of the New Deal seems to describe the growth of the U.N. as well: "Every function was left to generate others gradually, like the functional subdivision of organic cells."

Treaties and conventions are the most formal documents generated by the U.N. system; they are legally binding on the signatories and require great negotiation and scrutiny. The more common and voluminous products of the U.N. system include declarations, protocols, and administrative documents issued by "treaty bodies," sometimes referred to as "implementing committees."

Treaty bodies are staffed with technical experts who are tasked with ensuring that states that have ratified a treaty implement its provisions at the national level. Although member states' delegates negotiate a treaty and their national governments sign and ratify it, it is the treaty body that largely determines the treaty's ongoing

19. Charter of the United Nations, at *www.un.org/aboutun/charter* (August 15, 2006).

20. United Nations, "The United Nations: Organization," at *www.un.org/aboutun/basicfacts/unorg.htm* (July 27, 2006).

21. *Ibid.* (emphasis added).

22. U.N. Department of Economic and Social Affairs, "Divisions and Offices," at *www.un.org/esa/desa/divisions.htm*l (July 27, 2006).

23. U.N. Department of Public Information, "The United Nations System," March 2004, at *www.un.org/aboutun/unchart.pdf* (August 15, 2006).

impact years into the future. Each treaty body is composed of independent experts who retain the ongoing policymaking authority to define, interpret, and expand the parameters of treaty compliance, which are binding on treaty signatories. States are obligated to submit periodic reports to the treaty body to demonstrate their domestic progress in complying with the treaty. The treaty body investigates the state's reported action, communicates its concerns, and issues recommendations for the state's future action. The state is then "expected to undertake the necessary measures to implement the recommendations of the treaty bodies."[24]

In addition, U.N. functional forums have greatly increased the significance of nonstate actors and their agendas. These forums give occasion for nongovernmental organizations (NGOs) to express political agendas separate from, and even at odds with, the policies of most nation-states. Such groups typically specialize in economic and social policy advocacy and have used avenues such as U.N. conventions, committee reports, and customary international law to great effect in changing the domestic policies of nations around the world. These NGOs are numerous at the United Nations. As of March 2005, there were 2,613 NGOs in consultative status with the U.N. Economic and Social Council (ECOSOC).[25] NGOs are heavily involved in the controversies surrounding the various social issues discussed below.

Current Controversies

Some of the current controversies at the U.N. are of particular significance to the United States in maintaining its sovereign jurisdiction over domestic policymaking and preserving the freedom of American civil society.

Human Rights: Individual Rights vs. Social Rights. Although international declarations and covenants applaud human rights, and states and nongovernmental organizations alike pledge to defend them, there is no agreement within the framework of the U.N. as to what distinguishes human rights from other sorts of rights, what they include, who has such rights, and the authority from which they are derived.[26]

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The U.N. General Assembly adopted the Universal Declaration of Human Rights by unanimous consent (with eight abstentions) in 1948. Although it is not a legally binding treaty, the Universal Declaration serves as the foundation of international human rights law.[27] The U.N. treaties that have further defined international human rights law are the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Racial Discrimination (1966); the Convention on the Elimination of All Forms of Discrimination Against Women (1979); the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); and the Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990).

As an illustration of the ambiguity surrounding U.N. human rights documents, the U.S. has declined to ratify the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, arguing that while these treaties ostensibly deal with human rights, they actually

24. Office of the U.N. High Commissioner for Human Rights, "Treaty Bodies," at *www.unhchr.ch/pdf/leafletontreatybodies.pdf* (August 15, 2006).

25. Global Policy Forum, "NGOs and the UN: Basic Information," Web site, at *www.globalpolicy.org/ngos/ngo-un/infoindex.htm* (July 28, 2006). For the full list of these NGOs, see U.N. Economic and Social Council, "NGOs in Consultative Status with ECOSOC," July 25, 2005, at *www.un.org/esa/coordination/ngo/pdf/INF_List.pdf* (July 28, 2006).

26. For a discussion of the issue of rights vs. entitlements, see Chapter 2 in this volume, "Economic and Political Rights at the U.N."

27. United Nations, "A United Nations Priority," at *www.un.org/rights/HRToday/declar.htm* (April 9, 2006).

infringe on domestic policymaking concerning family and would impede U.S. government capacity to protect individual rights.[28]

The Universal Declaration recognizes "the inherent dignity and…the equal and inalienable rights of all members of the human family."[29] Unlike the United States' Declaration of Independence, however, it never identifies a source of or rationale for humanity's inherent dignity or man's inalienable rights. The failure to address these fundamental philosophical questions has hampered the efficacy of human rights law and has not prevented egregious violations of basic human rights. More than 50 years after the creation of the U.N., ongoing wide-scale abuse and genocide, most notably in places like Sudan, demonstrate the inadequacy of U.N. functional bodies in promoting and protecting basic human rights.

While the Universal Declaration states that "all human beings are born free and equal in dignity and rights" and asserts that "everyone has the right to life, liberty and security of person," it also insists that no one ought to suffer "attacks upon his honour and reputation" and that "everyone has the right to rest and leisure, including…periodic holidays with pay."[30] According to Mary Ann Glendon, Professor of Law at Harvard University and former delegate to the Fourth U.N. Conference on Women, the Universal Declaration today "is almost universally regarded as a kind of menu of rights from which one can pick and choose according to taste."[31]

Another example of a U.N. action that has diffused the definition of human rights is the "right to development," defined in a 1986 U.N. statement as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development."[32] (It also calls for "general and complete disarmament" and for all nations to ensure that resources resulting from such disarmament are redirected to development.)[33] In response to efforts to assert, within the context of human rights deliberations, a "right to development" on the part of nations, a U.S. representative clarified that it does not make sense to claim "a nation's right to development…for the simple reason that nations do not have human rights." Nations "may have sovereign rights, but…[w]e are here to talk about human rights—the rights of individuals and the responsibilities of states to see that those rights are respected."[34]

The confusion about human rights stems from a dispute about the nature of rights in general. In 1947, even before the Universal Declaration of Human Rights was adopted, David Mitrany observed:

> [G]rand international "Declarations" of human rights had become generally irrelevant and unenforceable with the transformation in the relationship between state and society. In the new planned "welfare state" traditional, essentially negative, individual rights were being translated into positive collective rights…within the ambit of the spreading administrative web.[35]

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28. For further discussion, see Patrick F. Fagan, "How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty," Heritage Foundation *Backgrounder* No. 1407, February 5, 2001, at *www.heritage.org/Research/InternationalOrganizations/BG1407.cfm*.

29. United Nations, Universal Declaration of Human Rights, Preamble, at *www.un.org/Overview/rights.html* (March 27, 2006).

30. United Nations, Universal Declaration of Human Rights, Articles 1, 3, 12, and 24.

31. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), p. xviii.

32. U.N. General Assembly, Declaration on the Right to Development, Article 1.1, December 4, 1986, at *www.unhchr.ch/html/ menu3/b/74.htm* (August 28, 2006). Taking exception to this definition, the United States has repeatedly stated its understanding that the term "right to development" means "that each individual should enjoy the right to develop his or her intellectual or other capabilities to the maximum extent possible through the exercise of the full range of civil and political rights." U.S. Delegation to the 61st Commission on Human Rights, "Explanation of Vote on Right to Development," April 12, 2005, at *www.state.gov/p/io/44595.htm* (August 28, 2006).

33. U.N. General Assembly, Declaration on the Right to Development, Article 7.

34. Statement by Lino J. Piedra, Public Member, U.S. Delegation to the 61st Session of the U.N. Commission on Human Rights, March 22, 2005, at *geneva.usmission.gov/humanrights/2005/0322Item7.htm* (August 23, 2006).

Social rights could be applied across national boundaries to specific groups in society along common interest lines. This transformation led to the understanding of rights in terms of classes—e.g., women's rights, children's rights, migrants' rights— which has detracted from the principle of universal natural human rights.

Mitrany cut to the heart of the conflict between the classic view of individual rights and the emerging social rights: "Between individual rights in the traditional sense and social rights in the modern sense there is indeed an inevitable compensating relationship…. [T]he one can only increase at the expense of the other."[36] That mid-century observation is an apt commentary on the U.N. human rights situation today.

Reproductive and Sexual "Rights." "Reproductive health" has become one of the most contentious social issue battlefronts at the United Nations, and abortion has been at the center of the ongoing debate. The Beijing Declaration and Platform for Action, the product of the Fourth World Conference on Women in 1995, defines reproductive health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes."[37] The Platform for Action—the document that details the strategic objectives and actions that governments committed to undertake to achieve the Beijing Declaration's stated goals— goes on to assert that people ought to be "able to have a satisfying and safe sex life and…the capability to reproduce and the freedom to decide if, when and how often to do so."[38] The U.N. Population Fund explicitly "calls for women's empowerment in all spheres of life, particularly regarding their reproductive and sexual health and rights."[39]

International advocacy groups have gone a step further. According to Human Rights Watch, for example:

> [W]omen's decisions about abortion are not just about their bodies in the abstract, but rather about their human rights relating to personhood, dignity, and privacy more broadly. Continuing barriers to such decisions…interfere with women's enjoyment of their rights.[40]

Human Rights Watch has argued that "international human rights legal instruments and interpretations of those instruments by authoritative U.N. expert bodies compel the conclusion that access to safe and legal abortion services is integral to the fulfillment of women's human rights generally."[41] The NGO's claim is based on the conclusions and recommendations that U.N. treaty-monitoring bodies have issued to member states.

This regulatory practice is prevalent. As of early 2005, U.N. treaty bodies had issued recommendations in at least 122 instances urging 93 countries to modify their abortion laws.[42] Like many other countries, the United States has sought repeatedly to keep these sensitive matters within its sphere of sovereignty.[43]

The movement to create sexual rights has included an effort to define sexual orientation as a human right. To this end, the Human Rights Committee has been critical of many member states, including the U.S., for their laws respecting sexual orientation. For example, in recent concluding observations about the U.S., the Human Rights

35. Mitrany, *The Functional Theory of Politics*, p. 24.

36. *Ibid.*, p. 72.

37. U.N. Fourth World Conference on Women, *Beijing Declaration and Platform for Actio*n (New York: U.N. Department of Public Information, 1995), p. 58, paragraph 94.

38. *Ibid.*

39. U.N. Population Fund, "Critical Area 9: Human Rights of Women," at *www.unfpa.org/intercenter/beijing/rights.htm* (March 27, 2006).

40. Human Rights Watch, "International Human Rights Law and Abortion in Latin America," July 2005, p. 1, at *hrw.org/backgrounder/wrd/wrd0106* (March 24, 2006).

41. *Ibid.*

42. *Ibid.*, p. 4.

43. In a statement of its position regarding abortion-related matters, the U.S. mission to the U.N. has clarified that: "The United States understands that there is international consensus that the terms 'reproductive health services,' 'reproductive right,' and 'reproductive health' do not include abortion or constitute support, endorsement, or promotion of abortion or the use of abortifacients." Press release, "Explanation of Position by Laurie Lerner Shestack, Adviser, on Women in Development, in the Second Committee," U.S. Mission to the United Nations, December 19, 2005, at *www.un.int/usa/05_271.htm* (August 16, 2006).

Committee "notes with concern the failure to outlaw employment discrimination on the basis of sexual orientation in many [U.S.] states."[44] A 2004 press release from Amnesty International is particularly illuminating:

> Sexual rights are human rights…. There is a long legacy of advocacy on sexuality and human rights within the U.N. arena that will continue until all people are free to exercise all their human rights without discrimination of any kind.[45]

Family: Rhetoric Without Recognition for Parental Authority. U.N. documents refer to the family as "the basic unit of society"[46] and "the natural environment for the growth and well-being of all its members"[47] and even call for its protection. However, more specific policy statements do not follow through on that rhetoric.

The U.N. Convention on the Rights of the Child includes numerous provisions that would distance children from their parents' oversight, infringing on parental rights and authority in their child's education and upbringing. For example:

> The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.[48]

U.N. conventions and declarations also curtail parental rights when they declare sexual health privacy rights for adolescents. Although minors ought to have their parents' or guardians' guidance in sensitive health issues, the Beijing Declaration laments, "Counseling and access to sexual and reproductive health information and services for adolescents are still inadequate or lacking completely, and a young women's right to privacy, confidentiality, respect and informed consent is often not considered."[49]

Making an International Issue of Gender. Considering the original premise of the United Nations, the organization's engagement in the politics of gender is an extraordinary example of mission creep. The name of the U.N. Office of the Special Advisor on Gender Issues and Advancement of Women exemplifies the specificity with which the U.N. addresses social issues. According to that office, gender is not merely the condition of being male or female. Rather, gender is "socially constructed," "context/time-specific and changeable," and "part of the broader socio-cultural context."[50]

The United Nations' stated strategy of "gender mainstreaming" is its policy implementation of this radical concept of gender. Gender mainstreaming is the practice of "ensuring that gender perspectives and attention to the goal of gender equality are *central to all activities*—policy development, research, advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects."[51] The U.N. has proven a more promising avenue for promoting this agenda than have the political processes of most nations.

The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) resembles the feminist agenda in the United States.[52] While CEDAW does address egregious cases of discrimination, it goes well beyond this in an effort to effect social transformation, stating that a "change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women" and arguing that "the upbringing of children requires a sharing of responsibility between men and women and soci-

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44. U.N. Human Rights Committee, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant," advance unedited edition, 87th Sess., July 10–28, 2006, paragraph 25, at *www.ushrnetwork.org/pubs/CCPR.C.USA.CO.pdf* (August 28, 2006).
45. Amnesty International, public statement, POL 30/020/2004, April 21, 2004.
46. U.N. Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, p. 27, paragraph 29.
47. U.N. General Assembly, Convention on the Rights of the Child, Preamble, at *www.unhchr.ch/thml/menu3/b/k2crc.htm* (March 31, 2006).
48. *Ibid.*, Article 13.
49. U.N. Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, pp. 57–58, paragraph 93.
50. U.N. Office of the Special Advisor on Gender Issues and Advancement of Women, "Gender Mainstreaming Concepts and Definitions," at *www.un.org/womenwatch/osagi/gendermainstreaming.htm* (February 23, 2005).
51. *Ibid.* (emphasis added).

ety as a whole."[53] The specifics of how to achieve these goals for each country that ratifies CEDAW are left to the treaty body, the Committee on the Elimination of Discrimination Against Women, which in one example exercised its mandate against "traditional roles" in criticizing Belarus: "The Committee is concerned by the continuing prevalence of sex-role stereotypes and by the reintroduction of such symbols as a Mothers' Day and a Mothers' Award, which it sees as encouraging women's traditional roles."[54]

The CEDAW Committee frequently includes recommendations on the subject of prostitution, urging countries to adopt more lenient prostitution laws or even to decriminalize and treat prostitution the same as any other form of labor. In 1999, it gave China this report: "The Committee is concerned that prostitution, which is often a result of poverty and economic deprivation, is illegal in China. The Committee recommends decriminalization of prostitution."[55]

The Committee urged the Swedish government "to evaluate the effect of the current policy of criminalizing the purchase of sexual services"[56] and reported its concern to Germany that, "although they are legally obliged to pay taxes, prostitutes still do not enjoy the protection of labour and social law." It recommended "that the Government [of Germany] improve the legislative situation affecting these women so as to render them less vulnerable to exploitation and increase their social protection."[57]

The United States has refused to sign or ratify CEDAW, but countries that have signed it are legally bound to implement its provisions. Signatories "are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations."[58] Despite the U.S. government's refusal to ratify CEDAW, Supreme Court Justice Ruth Bader Ginsberg cited it in her concurring opinion in *Grutter v. Bollinger*.[59]

Conclusion

With attention focused on the United Nations following high-profile scandals like Oil-for-Food and the approaching transition in the Office of U.N. Secretary-General, this is a prime opportunity for the President and Congress to assess the scope of U.N. policymaking, which has expanded over the decades, and consider the implications for U.S. constitutional governance. It is critical that the U.S. government carefully scrutinize each negotiating circumstance not only with respect to its discrete content, but within the broader context of U.S. national security.

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52. According to CEDAW, discrimination against women includes "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." U.N. General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, at *www.un.org/womenwatch/daw/cedaw/text/econvention.htm* (August 16, 2006).

53. *Ibid.*

54. U.N. General Assembly, *Report of the Committee on the Elimination of Discrimination Against Women*, A/55/38, 22nd Sess., January 17–February 4, 2000, and 23rd Sess., June 12–30, 2000, paragraph 361, at *www.un.org/womenwatch/daw/cedaw/ reports/a5538.pdf* (August 18, 2006).

55. U.N. Office of the High Commissioner for Human Rights, "Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China," A/54/38, February 3, 1999, paragraphs 288–289, at *www.unhchr.ch/tbs/doc.nsf/(Symbol)/1483ffb5a2a626a980256732003e82c8?Opendocument* (August 23, 2006).

56. Office of the High Commissioner for Human Rights, "Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Sweden," A/56/38, July 31, 2001, paragraph 355, at *www.unhchr.ch/tbs/doc.nsf/(Symbol)/80bb4b9d34212c1fc1256acc004f72e2?Opendocument* (August 23, 2006).

57. Office of the High Commissioner for Human Rights, "Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Germany," A/55/38, February 2, 2000, paragraphs 325 and 326, at *www.unhchr.ch/tbs/doc.nsf/(Symbol)/64d8644ed9ea3f788025688c0054c3f4?Opendocument* (August 23, 2006).

58. U.N. General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women.

59. *Grutter v. Bollinger*, 539 U.S. 344–346 (2003).

Specifically, the United States should:

- **Reject treaties that infringe on U.S. domestic jurisdiction over social issues.** The President should not sign, nor should the U.S. Senate ratify, treaties that abrogate the authority of American government—whether national, state, or local—to make policy on domestic social issues.
- **Maintain increased awareness of the extent of U.N. social policymaking to guard against encroachment on congressional authority and the American constitutional order**. As the elected, legislative branch of government, Congress has the primary policymaking authority within the federal government. To guard that authority, Members of Congress must be aware of the scope of U.N. policymaking and resist encroachments. Congress must also maintain oversight of unelected U.S. officials who negotiate family, religion, and civil society issues at the United Nations. A major purpose of national security is to defend the civil society within American society. Congress should play the leading role in shaping how that goal will be integrated into overall foreign policy, including measures to prevent U.N. policymaking for the United States.
- **Preserve and encourage a strong civil society in the interest of protecting constitutional order and individual rights.** Representatives of the U.S. government should present the case that family, religious practice, and private associations are essential to freedom and that the U.S. will not participate in international policymaking that would create an environment that is not conducive to them. Moreover, the federal government should refrain from expanding the scope of the administrative state domestically and seek strategies to roll it back so that civil society will thrive. One successful example is the welfare reform of 1996, which decreased dependence on the government and reduced poverty. Only by restraining the administrative state at home will the United States be equipped to resist it and restrain it on the international level.
- **Recognize that many nations and nonstate actors view functional deliberations as means of exercising power.** This is particularly true for those that do not possess significant military or political power. Further, it includes states and nonstate actors that do not share a confidence in or commitment to the primacy of the nation-state in general, particularly U.S. national sovereignty. To better defend American interests, U.S. policymakers must assess the interests that motivate participants in functional forums.
- **Consider the cost before opening new international social policymaking fronts, and weigh the national interest in participating in ongoing policymaking forums.** Once opened, functional forums demand attention. Before becoming party to a new functional forum or agreeing to participate in an existing body, U.S. policymakers should consider whether participation is in the national interest; define the objectives of participation (e.g., monitoring and intelligence gathering, defending a key policy, or advancing a strategic agenda); and weigh costs and benefits, particularly in terms of the resources that will be required to accomplish the stated objectives. By definition, functional forums are staffed by bureaucrats with specialized administrative job descriptions who frequently have extensive technical expertise in bureaucracy and/or the subject matter at hand. It is important to reckon soberly in terms of personnel, resources, strategic integration, and support from other foreign policy sectors what will be needed to achieve success in an ongoing mission to a functional forum. In doing so, U.S. policymakers should recognize that they are engaging on foreign terms of debate, since the internationalization of administrative governance in domestic policy issues is antithetical to American freedom.
- **Develop a strategy for engaging in cold wars of ideas and defending civil society.** The United States will be involved perpetually in cold wars of ideas. Such wars in the ideological realm also require strategy, and the U.S. should approach them with an offensive, rather than defensive, footing. This should include enhanced public diplomacy and a coherent strategy for dealing with international organizations. A clear tenet of this strategy should be protecting American civil society.
- **Treat U.N. functional forums as an opportunity for public diplomacy.** When U.S. representatives participate in U.N. forums on social issues, they should be equipped to champion the U.S. model for

protecting individual rights and advancing the general welfare and prosperity of Americans through limited government and civil society. On issues from human rights to women's status, the U.S. has a strong record. NGOs that recognize the benefits of the American constitutional order for family, faith, and freedom should participate actively in presenting this message at the United Nations.

As the United Nations engages in administrative policymaking on an increasingly wide range of issues, it threatens the security of civil society in the United States. Family, religious faith, and private associations have been bulwarks of America's freedom throughout its history. Surrendering policymaking authority in these areas would erode some of the great sources of strength for the American order. Constitutional government remains the best protection for individual rights and civil society, and the United States should continue to secure them within its sovereign sphere rather than relinquishing authority to international decision makers who are not committed to America's founding ideals.

Constitutional government remains the best protection for individual rights and civil society, and the United States should continue to secure them within its sovereign sphere rather than relinquishing authority to international decision makers who are not committed to America's founding ideals.

In the end, the interests of civil society institutions coincide with the interests of freedom. By protecting civil society, constitutional government ensures its own longevity and fortifies its security in the world. The character of our culture shapes our idea of freedom in powerful ways. As George Weigel has observed, "history is driven, over the long haul, by culture—by what men and women honor, cherish, and worship; by what societies deem to be true and good and noble…by what individuals and societies are willing to stake their lives on."[60]

60. George Weigel, *The Cube and the Cathedral: Europe, America, and Politics Without God* (New York: Basic Books, 2005), p. 30.

Chapter 4
The Muddled Notion of "Human Security" at the U.N.

James Jay Carafano, Ph.D., and Janice A. Smith

Introduction

Most Americans would probably define "human security" as a summation of the founding principles set forth in the Declaration of Independence:

> 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. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The Founding Fathers understood that there will be no life, liberty, or pursuit of one's dreams without security. It is security that enables us to enjoy every other right enumerated and implied in our founding documents and the charters of organizations like the United Nations that we helped create. These documents recognize that the first responsibility of the nation-state is to provide that security. Hence, Article 1 of the U.N. Charter lists as its first purpose "To maintain international peace and security." This is followed by purposes that enumerate "respect for the principle of equal rights and self-determination of peoples" and "promoting and encouraging respect for human rights and for fundamental freedoms for all."[1]

Regrettably, many non-Americans have come to view "human security" quite differently. Over the years, various groups have stretched the definition of "security" to mean supranational entities intervening ostensibly to protect individuals anywhere and the definition of "rights" to include everything from a right to life to a right to development and resources. The well-developed entry on Wikipedia, the popular online "free encyclopedia," demonstrates how far this concept has come.[2]

Today, the United Nations is pursuing a broad "human security" agenda that proponents claim is merely complementing national security. In reality, they aim to shift the focus of U.N. and other international activities away from state relations to protecting groups of people based on a plethora of needs and wants. As U.N. Secretary-General Kofi Annan puts it:

> We must also broaden our view of what is meant by peace and security. Peace means much more than the absence of war. Human security can no longer be understood in purely military terms. Rather, it must encompass economic development, social justice, environmental protection, democratization, disarmament, and respect for human rights and the rule of law.[3]

As Anne-Marie Slaughter, Dean of the Woodrow Wilson School at Princeton University, explains, the "principal conclusion" of the Secretary-General's High-Level Panel on Threats, Challenges, and Change is that:

> [I]nternational security comprises both state security and human security. Human security, in turn, is a function above all of the quality and capacity of domestic governments across the globe.

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1. Charter of the United Nations, Article 1, at *www.un.org/aboutun/charter* (August 29, 2006).
2. Wikipedia, s.v. "human security," at h*ttp://en.wikipedia.org/wiki/Human_security* (August 29, 2006).
3. Kofi Annan, "Towards a Culture of Peace," at *www.unesco.org/opi2/lettres/TextAnglais/AnnanE.html* (August 23, 2006).

> International-security problems are irretrievably intertwined with domestic political, economic, and social problems.[4]

The impetus for these statements was the failure of the U.N. Security Council to keep the United States from enforcing the U.N. resolutions on Iraq, which drew great attention to U.N. failures in the Middle East, Rwanda, Sudan, and the Balkans. Proponents of human security no longer believe that nation-states are capable of securing "freedom from want" and "freedom from fear" for individual peoples. They advocate an international system that makes paramount the determination of the "general will" and "common good" by bureaucrats and elites.

The effort to "broaden our view of what is meant by peace and security" obscures and runs counter to the long-standing right of nation-states to secure their own territories and populations from external threats

This is a dramatic and fundamental distortion of the right to be secure. The effort to "broaden our view of what is meant by peace and security" obscures and runs counter to the long-standing right of nation-states to secure their own territories and populations from external threats—a principle upon which international legal traditions and treaty organizations such as the U.N. are based.[5] The human security agenda has the potential to undermine not only the nation-state model on which the U.N. was founded, but also the principles of sovereignty, accountability, and national security that the United States holds as fundamental.

Most Americans are already skeptical about the ability of the U.N. to advance global security and peace.[6] Commonly cited reasons are the U.N.'s inability to secure peace in the Middle East, to keep Iran and North Korea from developing nuclear weapons, and to prevent internal fraud and abuse such as the Oil-for-Food scandal and sexual abuse by U.N. peacekeepers. Their confidence has been deeply shaken by a number of highly critical reports that confirm the U.N.'s record of ineffectiveness and a politicized U.N. agenda that promotes failed social and economic policies.

Therefore, it is understandable that Americans question the U.N.'s seemingly constant pursuit of binding documents on themes that purportedly would advance security or development but in actuality would restrain U.S. power and leadership and undermine America's democratic and free-market practices.

The human security agenda is one such effort that may well prove inimical to U.S. interests, and some observers believe that the goal could be a declaration on human security in 2006 and a convention in 2007. One indication of this is that the U.N. has made "human security" the theme of a three-day conference for nongovernmental organizations preceding the opening of the U.N. General Assembly in September 2006. The U.N. Department of Public Information expects over 2,500 civil society "partners" to attend its three-day conference on "Unfinished Business: Effective Partnerships for Human Security and Sustainable Development."[7]

It is incumbent upon Congress, the Administration, and federal courts to be vigilant. They should resist language in international declarations, resolutions, and agreements that embraces this faulty understanding of security. Rather, they should clarify what is meant by any references to security and insist on using the term "national security" wherever sovereignty is at stake. In legislative enactments, agency regulations, and case decisions, they should rely exclusively on human rights instruments that have been officially adopted and ratified by the United States.

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4. Anne-Marie Slaughter, "To Pursue Primacy for Its Own Sake Seems an Odd Way to Reassure Other Nations," *Boston Review*, February/March 2005, at b*ostonreview.net/BR30.1/slaughter.html* (August 23, 2006).
5. For more on the issue of international law, see Chapter 1 in this volume, "International Law and the Nation-State at the U.N."
6. Gallup Poll, "Americans' Rating of United Nations Among Worst Ever: Sixty-Four Percent Say It Is Doing a Poor Job," March 13, 2006, at *http://poll.gallup.com/content/?ci=21871* (August 23, 2006).
7. U.N. Department of Public Information, "Unfinished Business: Effective Partnerships for Human Security and Sustainable Development," at *www.un.org/dpi/ngosection/index.asp* (August 28, 2006).

Defining Human Security

According to its proponents, human security involves protecting "the dignity and worth of the human person."[8] To the extent that poverty, famine, conflict, pandemics, and lack of access to resources pose an affront to individuals' dignity and worth, they believe these problems must be addressed in *supranational* ways, since nation-states, in their view, are failing to do so.

The definition of human security in the 2003 report of the U.N. Commission on Human Security shows the breadth of this agenda:

> Human security means protecting vital freedoms. It means protecting people from critical and pervasive threats and situations, building on their strengths and aspirations. It also means creating systems that give people the building blocks of survival, dignity and livelihood. To do this, it offers two general strategies: protection and empowerment. Protection shields people from dangers. Empowerment enables people to develop their potential and become full participants in decision-making.[9]

The U.N. Office for the Coordination of Humanitarian Affairs (OCHA) uses an expanded definition:

> [Human security means] the protection of "the vital core of all human lives in ways that enhance human freedoms and fulfillment."… It means *creating political, social, environmental, economic, military and cultural systems* that, when combined, give people the building blocks for survival, livelihood and dignity.
>
> Human security is far more than the absence of violent conflict. It encompasses human rights, good governance and access to economic opportunity, education and health care. It is a concept that comprehensively addresses both "freedom from fear" and "freedom from want."[10]

Under this expansive definition, human security covers needs that are traditionally the responsibility of families, civil society, and local, state, and national governments. Specifically, as one 1994 U.N. document explains, the definition of human security includes:

- Economic security, such as ensuring individuals a minimum income;
- Food security, such as guaranteeing access to food;
- Health security, such as guaranteeing protection from disease and unhealthy lifestyles;
- Environmental security, such as protecting people from short-term and long-term natural and man-made disasters;
- Personal security, such as protecting people from any form and perpetration of violence;
- Community security, such as protecting people from the loss of traditions and values and from secular and ethnic violence; and
- Political security, such as ensuring individuals' basic human rights.[11]

The purpose of such a broad-brush agenda is not the protection of human rights, but rather the promotion of social entitlements through an internationally protected welfare system.[12] The Commission on Human Security

8. Charter of the United Nations, Preamble.
9. U.N. Commission on Human Security, "Outline of the Report of the Commission on Human Security," at *www.humansecurity-chs.org/finalreport/Outlines/outline.pdf* (August 29, 2006).
10. U.N. Office for the Coordination of Humanitarian Affairs, "Human Security," at *http://ochaonline.un.org/webpage.asp?MenuID=10473&Page=1494* (August 23, 2006) (emphasis added).
11. U.N. Development Programme, *Human Development Report 1994* (New York: Oxford University Press, 1994), p. 24, at *http://hdr.undp.org/reports/global/1994/en/pdf/hdr_1994_ch2.pdf* (August 23, 2006).
12. For a more detailed discussion of the issue of rights versus entitlements, see Chapter 2 in this volume, "Economic and Political Rights at the U.N."

even acknowledged the immensity of the task: "To attain the goals of human security, the Commission proposes a framework based on the protection and empowerment of people"—a bottom-up approach that empowers individuals and communities to "act on their own behalf" in addition to the traditional top-down approach by which states have the primary role of protection from "critical and pervasive threats."[13]

Examples of this broad agenda abound on U.N. Web sites. The United Nations Educational, Scientific and Cultural Organization (UNESCO) describes its human security focus this way:

> This rebuilding of security, which is now human rather than inter-State, imposes new directions for reflection and action. It presupposes first of all a *sociological* conception of security, which must be perceived in its social and cultural environment. It also implies an act of *political engineering*, the peacemaker being vested with the role of rebuilder of battered political communities but also with that of designing new political communities dispensing with those features of the nation-State which make for war: working for peace means promoting regional integration, opening up political communities to globalization and human flows, and establishing new forms of democratic deliberation that go beyond the national setting. It must be *responsible* before being sovereign, with everybody accountable for the failings in the social contract of the other and thus being led to act in a subsidiary way with the other. Lastly, it is bound to be *interactive* since States operate in interaction with an international public space made up of non-State actors increasingly involved in international life, monitoring and watching over the use of power by States, and helping to define the conditions of war and of peace (nongovernmental organizations, media, transnational networks, etc.).[14]

The United Nations Development Program (UNDP) describes human security as "an effort to re-conceptualize security in a fundamental manner. It is primarily an analytical tool that focuses on ensuring security for the individual, not the state."[15] UNDP also acknowledges on its Web site that it is the largest recipient agency of funds from the U.N. Trust Fund for Human Security (UNTFHS):

> Between 1999 and June 2005, UNDP received approximately $55 million for 28 projects which consisted of 36% of the overall allocation of UNTFHS….
>
> UNTFHS has been enabling UNDP to conceptualize and operationalize the notion of Human Security initially suggested in the Human Development Report 1994. UNDP's operation and partnership building with the people-centred approaches and principles is considered as an integral part of Sustainable Human Development….
>
> Activities supported by UNTFHS overlaps [*sic*] UNDP's five focus areas; Democratic Governance, Poverty Reduction, Crisis Prevention and Recovery, Energy and Environment, HIV/AIDS, and has been helping efforts to achieve the Millennium Development Goals….
>
> UNTFHS has strengthened UNDP's coordination and partnerships with other UN agencies, and civil society and other partners, which promotes effective use of UN and international aid resources.[16]

In a May 2006 report, UNDP analyzed its various National Human Development Reports and "the notion of human security as a useful tool of analysis, explanation and *policy generation*." It recommended using human security as an "operational approach to people-centred security that is able to identify priorities and produce important conclusions for national and international policy."[17]

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13. U.N. Office for the Coordination of Humanitarian Affairs, "Human Security" (emphasis omitted).
14. "Objectifs," in U.N. Educational, Scientific and Cultural Organization, "Human Security," updated March 13, 2002, at *www.unesco.org/securipax* (August 23, 2006) (emphasis in original).
15. Richard Jolly and Deepayan Basu Ray, "The Human Security Framework and National Human Development Reports," U.N. Development Programme, *National Human Development Report Occasional Paper* No. 5, May 2006, p. 5, at *http://hdr.undp.org/ docs/nhdr/thematic_reviews/Human_Security_Guidance_Note.pdf* (August 23, 2006).
16. U.N. Development Programme, "UNDP and Human Security," at *www.undp.org/partnerships/untfhs/humansec.html* (August 23, 2006).

The U.N. Environmental Program (UNEP) refers to UNDP's work in explaining its own human security agenda:

> In 1994, the UN Human Development Report introduced the concept of human security, predicating it on the dual notion of, on the one hand, safety from chronic threats of hunger, disease and repression and, on the other hand, protection from sudden and hurtful disruptions in daily life. Environmental insecurity became shorthand for the dimension of human insecurity induced by the combined effects of natural disasters and mismanaged environmental endowment.[18]

Thus, myriad U.N. agencies increasingly find the human security theme beneficial to their aims.

The Nation-State Buy-In. Regrettably, many U.N. member states have also adopted the human security mindset and are incorporating its language and goals into their foreign policy.[19]

Japan. Japan was the initial contributor to the U.N. Human Security Trust Fund and has stated:

> [T]he concept of "human security"…means in addition to providing national protection, focusing on each and every person, eliminating threats to people through cooperation by various countries, international organizations, nongovernmental organizations (NGOs) and civil society, and striving to strengthen the capacity of people and society so as to enable people to lead self-sufficient lives.[20]

European Union (EU). "A Human Security Doctrine for Europe: The Barcelona Report of the Study Group on Europe's Security Capabilities" explains the breadth of the EU's human security agenda in this way:

> Human security means individual freedom from basic insecurities. Genocide, wide-spread or systematic torture, inhuman and degrading treatment, disappearances, slavery, and crimes against humanity and grave violations of the laws of war as defined in the Statute of the International Criminal Court (ICC) are forms of intolerable insecurity that breach human security. Massive violations of the right to food, health and housing may also be considered in this category, although their legal status is less elevated. A human security approach for the European Union means that it should contribute to the protection of every individual human being and not only on the defence of the Union's borders, as was the security approach of nation-states.[21]

Canada, Norway, Sweden, Switzerland, and the United Kingdom. The governments of Canada, Norway, Sweden, Switzerland, and the U.K. fund a Web site, "The Human Security Gateway," that describes itself as a "rapidly expanding searchable online database of human security-related resources including reports, journal articles, news items and fact sheets. It is designed to make human security-related research more accessible to the policy and research communities, the media, educators and the interested public."[22]

Human Security vs. National Security. The Human Security Gateway Web site succinctly explains the challenge that the human security agenda poses to the principle of national security:

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17. Jolly and Ray, "The Human Security Framework and National Human Development Reports," pp. 1 and 2 (emphasis added).
18. U.N. Environment Programme, *Africa Environment Outlook: Past, Present and Future Perspective*, Chapter 3, December 2002, at *www.unep.org/dewa/Africa/publications/aeo-1/235.htm* (August 23, 2006).
19. Currently, several countries use "human security" as a foundation for their foreign policy. These countries include Austria, Chile, Greece, Iceland, Jordan, Mali, the Netherlands, Norway, Switzerland, Slovenia, Thailand, Costa Rica, Japan, and South Africa. Japan heavily funds the Human Security Trust Fund.
20. Japanese Ministry of Foreign Affairs, *Diplomatic Bluebook 2004*, p. 185, at *www.mofa.go.jp/policy/other/bluebook/2004* (August 23, 2006).
21. Study Group on Europe's Security Capabilities, "A Human Security Doctrine for Europe: The Barcelona Report of the Study Group on Europe's Security Capabilities," presented to Javier Solana, EU High Representative for Common Foreign and Security Policy, Barcelona, September 15, 2004, p. 9, at *www.lse.edu/Depts/global/Publications/HumanSecurityDoctrine.pdf* (August 23, 2006).
22. Human Security Gateway, "About the Human Security Gateway," at *www.humansecuritygateway.info/about_en* (August 23, 2006).

> Human security focuses on the protection of individuals, rather than defending the physical and political integrity of states from external military threats—the traditional goal of national security. Ideally, national security and human security should be mutually reinforcing, but in the last 100 years far more people have died as a direct or indirect consequence of the actions of their own governments or rebel forces in civil wars than have been killed by invading foreign armies. *Acting in the name of national security, governments can pose profound threats to human security.*[23]

Although it is perhaps understandable that some might wish to update conceptions of national security to reflect the realities of a 21st century world, the notion that human security should supplant national security and the preservation of freedom as the fundamental responsibilities of the state is wrongheaded. During the Cold War, national security was considered largely within the context of a bipolar world in which the United States and the Soviet Union, and their spheres of influence, squared off against each other ideologically, diplomatically, economically, politically, and militarily. National security was often measured in terms of nuclear warheads, weapons platforms, military divisions, and defense spending.

The notion that human security should supplant national security and the preservation of freedom as the fundamental responsibilities of the state is wrongheaded.

The dissolution of the Soviet Union changed the dynamics. States now understand and view security not solely in terms of military threats and territorial invasions, but also in terms of terrorism and weapons of mass destruction; economic dangers (e.g., cyber attacks); and global environmental threats (e.g., avian flu). The term "national security" has come under scrutiny because of the growing number of threats that are transnational.[24] The Bush Administration has encouraged a robust dialogue on how states can best address these threats through cooperative actions to ensure their security in a globalized world.

Discarding the principle of national security is not the answer. Neither is creating a binding international agreement on human security. Yet from the initial report of the Commission on Human Security in 2000[25] to the latest draft documents from UNESCO conferences in the developing world and the May 2006 UNDP Human Security Framework report, promoters of human security have set in motion a multi-year plan that may well culminate in a declaration or universal convention on human security.[26]

The process is quite similar to the six-year process at UNESCO that in 2005 culminated in a binding Convention on Cultural Diversity. Despite intense efforts to make that convention acceptable, the United States could not sign it because of its core protectionist policies.[27] The first successful use of this new deliberative U.N. process is described on Wikipedia as the NGO effort to push governments to adopt a convention banning anti-personnel land mines:

23. *Ibid.* (emphasis added).
24. "The end of the Cold War unleashed a debate that had been growing for years, provoked by scholars and practitioners increasingly dissatisfied with traditional conceptions of security." Dan Henk, "Human Security: Relevance and Implications," *Parameters*, Vol. 35, No. 2 (Summer 2005), p. 92, at *www.carlisle.army.mil/usawc/parameters/05summer/contents.htm* (August 23, 2006). See also Steve Smith, "The Increasing Insecurity of Security Studies: Conceptualizing Security in the Last Twenty Years," in Stuart Croft and Terry Terriff, eds., *Critical Reflections on Security and Change* (London: Frank Cass, 2000), pp. 72– 101, and Emma Rothschild, "What is Security?" *Daedalus*, Vol. 124, Issue 3 (Summer 1995).
25. For example, see Commission on Human Security, *Human Security Now*, 2003, at *www.humansecurity-chs.org/finalreport/English/FinalReport.pdf* (August 23, 2006), and Jeffrey Thomas, "U.S. Deeply Disappointed by Vote on UNESCO Diversity Convention," U.S. Mission to the UN Agencies in Rome, October 21, 2005, at *http://usunrome.usmission.gov/UNISSUES/sustdev/docs/a5102403.htm* (August 23, 2006).
26. This was in fact proposed at the initial meeting of the Commission on Human Security on June 8–10, 2001. See Commission on Human Security, "Report: Meeting of the Commission on Human Security," June 8–10, 2001, p. 3, at *www.humansecurity-chs.org/activities/meetings/first/report.pdf* (August 28, 2006).
27. Janice A. Smith and Helle Dale, "Cultural Diversity and Freedom at Risk at UNESCO," Heritage Foundation *WebMemo* No. 885, October 17, 2005, at *www.heritage.org/Research/InternationalOrganizations/wm885.cfm* (August 23, 2006).

> Arms control is also an important priority for Human Security advocates, closely linking with the Freedom from Fear agenda. An oft-claimed example of this is the Ottawa Convention banning anti-personnel landmines. The Convention has been described as an illustration of how human security can work in the real world, as a coalition of like-minded powers, along with civil society worked together to eliminate anti-personnel land mines. The process leading up to the formation of the Convention was quite a departure from that of traditional security instruments with massive involvement from non-government groups and civil society—it could almost be seen as NGO's bringing governments to the negotiating table.[28]

David Davenport indicates in an extensive piece on this "new diplomacy," as he calls the Ottawa Process, that NGOs have learned from these successes how to exert enormous pressure on governments to achieve binding international conventions to improve human security. Following success in Ottawa, the process proved successful in Rome in creating an International Criminal Court. Says Davenport:

> NGOS and like-minded states continue to meet to discuss what additional projects they might tackle together. One need only listen to their rhetoric, and that of the U.N. leadership, to speculate about what other projects might be on the new diplomacy horizon. In a larger sense, their agenda is no less than setting the global agenda and, as U.N. documents describe it, constructing a "new global architecture for the twenty-first century." The report of the Commission on Global Governance, with its lovely title ("Our Global Village") and anti-American tone, speaks of organizing life on the planet not by balancing the power among nations, but by constraining the states themselves. This is the agenda of the new diplomacy.[29]

In essence, these efforts to achieve binding documents are aimed at recasting the traditional meaning of human rights and development as national security challenges that are better addressed by "people-centric" rather than state-based activities. Getting multilateral organizations to use individuals, instead of states, as the reference points for evaluating security policy is extremely problematic because it diffuses accountability and fiduciary responsibility.

Getting multilateral organizations to use individuals, instead of states, as the reference points for evaluating security policy is extremely problematic because it diffuses accountability and fiduciary responsibility.

The United States government, which prioritizes national security and homeland security, has wisely not yet tried to formulate a specific human security policy, but that does not mean the mindset is not already being advocated. Indeed, Members of Congress such as Senator Barbara Boxer (D–CA)[30] and scholars such as Professor Slaughter[31] have adopted the language of human security and have published pieces on how to deal with the myriad issues that it subsumes.

For example, Professor Slaughter, in the introduction to a 2004 Trilateral Commission report, explains that theory about the legitimate use of force is undergoing transformation. She believes the basic tension is now "state security vs. human security" or how to:

28. Wikipedia, "Human Security."

29. David Davenport, "The New Diplomacy," *Policy Review*, No. 116 (December 2002/January 2003), at *www.policyreview.org/ DEC02/ davenport.html* (August 29, 2006).

30. Barbara Boxer, "Providing Basic Human Security," *The Washington Quarterly*, Vol. 26, No. 2 (Spring 2003), pp. 199–207, at *www.twq.com/ 03spring/docs/13-boxer-noc.pdf* (August 23, 2006). She quotes Peter Piot, executive director of the Joint United Nations Program on HIV/ AIDS (UNAIDS): "There is a world of difference between the root causes of terrorism and the impact of AIDS on security. But at some deep level, we should be reminded that, in many parts of the world, AIDS has caused a normal way of life to be called into question. As a global issue, therefore, we must pay attention to AIDS as a threat to human security and redouble our efforts against the epidemic and its impact." *Ibid.*, p. 203.

31. Anne-Marie Slaughter, Carl Bildt, and Kazuo Ogura, "The New Challenges to International, National and Human Security Policy," Trilateral Commission Task Force Report No. 58, 2004.

> integrate traditional understandings of state security—whereby the principal threat to a state's survival was posed by another state and the security of a state was largely synonymous with the security of its people—with an appreciation of the magnitude and importance of what Kazuo Ogura [the Japan Foundation] calls "global security issues"—terrorism, environmental degradation, international crime, infectious diseases and refugees? These issues cross borders with disdain for the divisions of national and international authority.[32]

This misunderstanding of the nature of security poses significant threats to the international order because it undermines the primacy of nation-state relations and sovereignty. Providing for the security and public safety of citizens is a principal attribute of national sovereignty. Indeed, nation-states that are democracies are best prepared to fill this role because their leaders are held accountable by the governed. As the U.N.'s problems in responding to crises around the world show, the nation-state, not any international organization, is the best guarantor of individual freedoms for the 21st century. Shifting the focus of security policy from the collective will of free people to provide for their common defense to one of protecting a range of individual and collective political, economic, and cultural "rights" as defined by international bodies or non-state actors like NGOs confuses the nature of the modern state's roles and responsibilities.

Regrettably, the United States is unintentionally helping to promote this misunderstanding of security by funding the U.N. organizations that are engaged in promoting human security activities.

Philosophical Underpinnings: Repackaged Wilsonianism

The concept of human security is closely connected to the neoliberal conception of foreign policy that evolved over the first half of the 20th century. Neoliberalism contends that state actions represent the collective will of groups within society. Foreign policy and national security strategy are the products of the cooperative view of the state's "empowered" elements, such as Congress, the courts, special-interest groups, and NGOs. According to neoliberalism, states are not monolithic rational actors; instead, their decisions represent the cumulative influence of group interests.

Neoliberalism also takes a structuralist approach to international relations, believing that power is exercised and distributed through formal organizations and institutions, but that its theoretical framework includes domestic players (e.g., legislatures, unions, and corporations) and non-state actors (e.g., NGOs and international organizations). In the neoliberal paradigm, conflict and competition are not inevitable. Institutions can act to ameliorate international conflict and promote cooperation, trust, and joint action.[33] President Woodrow Wilson's foreign policies and his effort to create a governing international security institution through the League of Nations are often cited as the foundation of neoliberal thinking in the United States.[34]

Four Freedoms. A dialogue on using the collective power of states to protect the rights of individuals emerged as part of the debate over the post–World War II order. The challenge was to prevent the reemergence of fascist ideologies, which became state policies during the Nazi era, without interfering in the legitimate sovereignty of individual states.

President Franklin Roosevelt attempted to provide an answer in his Four Freedoms speech on January 6, 1941, to the 77th Congress. Roosevelt outlined the world he would like to see in the future—one that the United States would be helping to make secure. This world would be founded on four freedoms:

- "Freedom of speech and expression everywhere in the world."
- "Freedom for everyone to worship God in his or her way throughout the world."

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32. Ibid.

33. Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), pp. 12–13.

34. For example, see Lloyd E. Ambrosius, *Wilsonianism: Woodrow Wilson and His Legacy in American Foreign Relations* (London: Palgrave-MacMillian, 2002).

- "Freedom from want," which Roosevelt translated as grounded in economic relationships. He envisioned a world order in which all peoples would have a secure, peacetime life.
- "Freedom from fear," which he interpreted as meaning "a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world."[35]

In July 1941, Roosevelt and Winston Churchill relied on this world view to draft the Atlantic Charter, but reportedly, not even its signers were satisfied with that document. In fact, Roosevelt, a former member of the Wilson Administration, left an ambivalent record of what he believed the charter meant.[36] Josef Stalin declined even to sign it.

Many U.S. postwar initiatives encouraged international governance by democratic processes, with international organizations serving as arbiters of disputes and protectors of the peace. The years after World War II saw the establishment of mechanisms that stabilized the international economy and further promoted a vision of collective security. The Bretton Woods Agreement in 1944 established rules, institutions, and procedures to regulate the international monetary system. It required each country to adopt a monetary policy that fixed its currency exchange rate at a certain value of gold, plus or minus 1 percent, and established the International Monetary Fund as a way to bridge temporary payment imbalances.

The signing of the U.N. Charter on June 26, 1945, provided another push toward a new principle of collective security. It established the following stated goals:

- "to practice tolerance and live together in peace with one another as good neighbours, and
- "to unite our strength to maintain international peace and security, and
- "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- "to employ international machinery for the promotion of the economic and social advancement of all peoples."[37]

Over the course of decades, the U.N. bureaucracy has come to see its role as facilitating not only peace and security, but also human rights, development, and social equity.

Human Rights and Human Security. Much of the U.N. agenda involves the protection of human rights. Although use of the term "human rights" preceded 1945, its meaning was largely recast in the postwar years. In Western thought during the 18th century, human rights were associated with concepts of natural law, often interchanged with the term "rights of man." Human rights also served as a synonym for "civil rights," a narrow set of individual legal entitlements.[38] After World War II, the term "human rights" was used to delineate the difference between democratic and authoritarian societies. Democratic societies recognized that individuals were entitled to certain rights merely by being human. In 1948, the U.N. published a Universal Declaration of Human Rights in 300 languages.[39]

The outbreak of the Cold War, however, did much to dampen the drive toward international governance. While there was much discussion of the role of human rights in foreign affairs, their protection was considered a matter of national policy. Charges of human rights abuses were endemic during the Cold War. Some were valid complaints. Others were made for propaganda value or as part of psychological warfare campaigns. In part because of the Cold War standoff between the nuclear superpowers, the international community found it difficult to interfere in the internal governance of other countries, even in the face of human rights abuses and genocide.

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35. Franklin Delano Roosevelt, "The Four Freedoms," January 6, 1941, at *www.libertynet.org/~edcivic/fdr.html* (December 20, 2005).
36. Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge: Harvard University Press, 2005), pp. 21–43.
37. Charter of the United Nations, Preamble.
38. Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), p. 21.
39. For a more detailed discussion of this issue, see Chapter 3 in this volume, "Human Rights and Social Issues at the U.N."

After the Cold War, the term "human security" came into vogue, signaling a movement away from a focus on national security and states as actors.[40] The concept was meant to define security within a broad global framework as "political, strategic, economic, social, or ecological [in] nature."[41] Arguments were made that security represented more than physical security and the right of common defense and that the international community had rights and responsibilities that superseded those of individual states.

Globalization and the increasing interconnectedness of societies around the world added impetus to the human security movement. The growth of international, multinational, transnational, nongovernmental, and non-state actors challenged academics and practitioners of security studies to think more broadly and to reconsider the world construct and the role of traditional state actors.

Current Challenges

In the early 1990s, UNDP published a series of annual reports that cast its work in the new paradigm of human security: "Now that the cold war is over, the challenge is to rebuild societies around people's needs," argued UNDP. "Security should be reinterpreted as security for people, not security for land."[42] The emphasis was clear: In the post–Cold War world, individuals—not the collective community or the state—mattered most.

Secretary-General Annan recalled Roosevelt's Four Freedoms at the U.N. Millennium Summit in 2005, when he called upon nations to advance the goals of "freedom from want" and "freedom from fear." He relied on this theme in his "In Larger Freedom" report of 2005,[43] to which he added "freedom to live in dignity." As he described it in *Foreign Affairs*, "the states of the world must create a collective security system" that promotes freedom from want and freedom from fear.[44] Rhetorically, these terms—like human security—sound laudable, but they dissemble rather than clarify how states and non-state actors should think about national security and on what state activities international organizations should focus. While non-state actors may voluntarily monitor, assist, and facilitate states in fulfilling their responsibilities, the state is ultimately responsible and accountable for the population in its charge.

The human security movement has made significant progress in promoting a redistributionist regime as a reasonable approach to providing national security. A good example of this is provided by the conclusions of a March 2005 International Conference on Human Security in the Arab Region organized by UNESCO and the Regional Human Security Center at the Jordan Institute of Diplomacy. In attendance were officials from U.N. agencies and programs, ministers from Jordan, government officials from the Middle East and North Africa region, local and international civil society groups and nongovernmental organizations, and academics. They concluded with these specific points:

> (1) At a minimum, every citizen should enjoy access to education, health services and income-generating activities. Citizens who are unable to meet their basic needs through their own efforts should have public support. In particular, particular attention should be given to vulnerable groups, such as children, the elderly, the handicapped, the chronically ill and people in isolated or remote areas. *If States are unable to provide assistance, such assistance should be provided by the international community*.
>
> (2) The concept of human security and its underlying values of solidarity, tolerance, openness, dialogue, transparency, accountability, justice and equity should be widely disseminated in societ-

40. Independent Commission on Disarmament and Security Issues, *Common Security: A Blueprint for Survival* (New York: Simon and Schuster, 1982).

41. Peter Vale, "Can International Relations Survive?" *International Affairs Bulletin*, Vol. 16, No. 3 (1992).

42. U.N. Development Programme, *Human Development Report 1993* (New York: Oxford University Press, 1994), p. 1, at *http://hdr.undp.org/reports/global/1993/en/pdf/hdr_1993_overview.pdf* (August 23, 2006).

43. U.N. Secretary-General, "In Larger Freedom: Towards Development, Security and Human Rights for All," A/59/2005, U.N. General Assembly, 59th Sess., agenda items 45 and 55, March 21, 2005, at *www.un.org/largerfreedom* (August 23, 2006).

44. Kofi Annan, "'In Larger Freedom': Decision Time at the UN," *Foreign Affairs*, Vol. 84, No. 3 (May/June 2005).

> ies. To that effect, human security should be incorporated at all levels of education. The media, particularly radio and television, should be mobilized to organize awareness-raising campaigns. It should also encourage people to explore ways to enhance their own security and that of members of their communities.
>
> (3) Civil society should be mobilized to participate in the promotion of human security. Special efforts should be made to mobilize women's associations, academics, professional organizations and the private sector. This is to benefit from their resources, skills and proximity to ensure ownership of the concept of human security by local stakeholders and a wide dissemination of the culture of human security.[45]

Human Security as Welfare Entitlements. UNESCO officials appear to have determined that the human security agenda can best be advanced through changes in domestic policies based on social science data, independent from the difficult traditional member-state negotiations process. Through UNESCO's Management of Social Transformations (MOST) Program, they are encouraging the formation of regional research and policy think tanks comprised primarily of university social science researchers and representatives of NGOs sympathetic to the human security agenda. At the prompting of UNESCO, these regional bodies are producing social science research and policies for a UNESCO database—a database that, significantly, makes no provision for countervailing research. Advocates are encouraged to rely on this database and research to lobby states to make changes in domestic laws.

The foundational and motivating sentiments of the MOST Program can be found in the Buenos Aires Declaration adopted in February 2006 at the International Forum on the Social Science-Policy Nexus, which mirrors much of the established language of human security in other documents:

> *Taking into account* several United Nations reports highlighting the sharp increase in inequalities between and within countries, and *greatly concerned* that the universal thrust of human rights, human dignity and justice is in many instances being eroded under contemporary social and economic pressure.
>
> *Assuming* that the Millennium Development Goals and other internationally agreed development goals are not only the statement of new moral purpose but also the minimum threshold compatible with the proclaimed values of the international community, and *affirming* that failure to make serious progress toward achieving them would entail tremendous cost in terms of human lives, quality of life and social development.
>
> *Convinced* that without moral vision and political will, the challenges of the Millennium Development Goals cannot be met, that meeting these goals requires new knowledge used in innovative ways and better use of existing knowledge, and that, in this regard, the social sciences have a crucial contribution to make in formulating development policy.[46]

The human security agenda has progressed quite rapidly since 2001, when the U.N. first tasked the Commission on Human Security with developing the concept as an operational tool for policy formulation and implementation and proposing a concrete program of action to address critical and pervasive threats to human security.[47] The commission's 2003 report called specifically for linking human security initiatives and the establishment of joint public, private, and civil society activities. It made no effort to disguise its philosophy that nation-states are incapable of providing security:

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45. U.N. Office for the Coordination of Humanitarian Affairs, "International Conference on Human Security in the Arab Region," March 14–15, 2005, at *http://ochaonline.un.org/webpage.asp?Page=1957* (August 23, 2006) (emphasis added).

46. U.N. Educational, Scientific and Cultural Organization, "Declaration," Buenos Aires, at *http://portal.unesco.org/shs/en/ev.php-URL_ID=9004&URL_DO=DO_TOPIC&URL_SECTION=201.html* (August 23, 2006) (emphasis in original).

47. Commission on Human Security, "Establishment of the Commission," at *www.humansecurity-chs.org/about/Establishment.html* (December 20, 2005). The commission's secretariat disbanded in May 2003 with the publication of its final report.

> It is no longer viable for any state to assert unrestricted national sovereignty while acting in its own interests, especially where others are affected by its actions. There has to be an institutional system of external oversight and decision-making that states voluntarily subscribe to.[48]

The commission also recommended the creation of the U.N. Trust Fund for Human Security with an advisory board of a group of nations committed to spreading the human security agenda. The fund is supposed to be used to address threats to "human lives, livelihoods and dignity currently facing the international community." Any U.N. agency can apply for funding to address issues like poverty, refugees, medical and health care, drug control, and transnational crime. For example, the World Health Organization uses its funding to provide emergency reproductive health services to displaced populations in the Solomon Islands. UNDP uses its funding to establish support groups for those with HIV/AIDS in Trinidad and Tobago.[49]

The problem here is not that the U.N. is trying to help people in need, but that it uses the Human Security Trust Fund to advance an agenda for security that bears no resemblance to established security paradigms.

UNESCO is intensifying its human security activities. It has an on-line forum where anyone in the world can post opinions on human security.[50] It is holding a series of regional conferences in 2006–2007 in Africa, the Arab states, and Southeast Asia to consider priorities. The outcome will likely mirror recommendations that came out of the March 2005 International Conference on Human Security meeting in the Arab region. As noted above, those recommendations treat issues such as education, health, and welfare—issues already addressed by other U.N. programs—as rights that require the international redistribution of wealth and a greater reliance on supranational organizations if states are not meeting their standards.

It is no wonder that human security appears to be more like an elaborate international welfare scheme than an endeavor to protect against real security threats. Proponents treat human security as a grand and noble cause and a responsibility of the human community as a whole. Their use of the term suggests broad international consensus over which political, economic, cultural, legal, and physical rights constitute human rights. However, neither of these presumptions is factually true.

Arguably, no state can meet all of the security needs of its people as described by the U.N.'s definition of human security. The United Nations bureaucracy frequently issues reports that criticize states for failing to do so, and the United States receives its share of criticism. For example, the July 28, 2006, report of the U.N. Human Rights Committee expresses concern that the United States "has not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students." It concludes that the United States should take "remedial steps."[51] The report fails to mention the federalism principle of U.S. government, which gives states the primary responsibility for education. Nor does it point out that the school districts in many major U.S. cities, where those disparities are greatest, already spend tens of thousands of dollars per student.

No state will ever be able to meet even a majority of the needs proponents now associate with human security for every individual within its borders.

In reality, no state will ever be able to meet even a majority of the needs proponents now associate with human security for every individual within its borders. Without careful prioritization, a state seeking to meet the

48. Commission on Human Security, *Human Security Now*, p. 12.

49. Japanese Ministry of Foreign Affairs, "The Trust Fund for Human Security for the 'Human-Centered' 21st Century," at *www.mofa.go.jp/mofaj/press/pr/pub/pamph/pdfs/t_fund21.pdf* (August 23, 2006).

50. "This Forum should become a meeting place to exchange ideas and debate about topical issues which we shall present to you in an interactive manner." U.N. Educational, Scientific and Cultural Organization, "Human Security."

51. U.N. Human Rights Committee, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant," advance unedited edition, 87th Sess., July 10–28, 2006, paragraph 23, at *www.ushrnetwork.org/pubs/CCPR.C.USA.CO.pdf* (August 23, 2006).

demands of human security could well disburse its resources inefficiently on peripheral but politically sensitive priorities.

Not only could this focus on human security undermine a state's authority and sovereignty, but its broad scope could also be exploited by authoritarian states as an excuse for unwarranted internal oppression. Given that "community security" is considered essential to human security, a state could argue that it can justifiably suppress any form of free expression that it believes jeopardizes a community's traditions and values.

Given all of these concerns, the notion that human security should become an integral part of the U.S. lexicon of international relations is troubling.

Conclusion

Human security, as conservatives understand it, is really all about protecting ourselves from national security threats and securing fundamental freedoms and human rights while providing opportunities to improve one's own standard of living. They see globalization and competition in a free-market economy as enablers of the opportunities that lead to prosperity and the achievement of human dignity, not as threats to human security.

In international agreements, the term "human security" should be used only as a description of a desirable human condition, not as an alternative to national security or an entitlements issue. Careful attention to its use is critical to counter the notion that international organizations have more moral right to protect people than the state has. Moreover, careful attention to its use should preserve, not confuse, the historical understanding of human rights.

In international agreements, the term "human security" should be used only as a description of a desirable human condition, not as an alternative to national security or an entitlements issue.

The goal of international deliberations should be to strengthen democratic states as the best guarantors of security and liberty. In no case should something as broadly defined as human security be considered appropriate for international declarations and conventions. To that end, the Administration and Congress should:

- **Protect** the use of "national security" and "national sovereignty" in international statements, documents, and treaties;
- **Discourage** use of the term "human security" in international deliberations unless it is defined within the boundaries of nation-states and sovereignty;
- **Retain** the term "human rights" as the international standard for moral behavior by the state toward its citizens, and
- **Rely**, in legislative enactments, agency regulations, and case decisions, exclusively on human rights instruments that have been officially adopted and ratified by the United States.

In May 2006, the U.S. National Commission for UNESCO provided U.S. negotiators with welcome guidance in this respect in its statement regarding UNESCO's "Draft Medium Term Strategy for 2008–2013 and Draft Program and Budget for 2008–2009":

> Any human security agenda or program developed, facilitated, or promoted by UNESCO should be defined, designed, and pursued only with the meaningful participation and approval of all Member States and should not involve the pursuit and adoption of any human security standards or normative instruments.[52]

52. U.S. Department of State, U.S. National Commission for UNESCO, Vol. 2, Issue 2 (April/May/June 2006), at *www.state.gov/p/io/unesco/media/68984.htm* (August 23, 2006).

War, aggression, violence, and all the other negative aspects of living in today's world will continue to endanger the lives of individuals, states, and regions of the world. As long as this is true, security—which provides the environment in which all other liberties and opportunities are possible—will remain a function and responsibility of the sovereign state.