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Implementation of International Law in the United States

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INTRODUCTION

AMERICAN FOREIGN POLICY: AN OVERVIEW

During the George W. Bush administration, the international image of the United States was at a low. Condemnation by the international community of States of American foreign policy escalated to a level that exceeded — so it would seem — the patterns of reprobation that emerged from time to time in modern history.

Perhaps this was so much the more noticeable in the aftermath of September 11th. The profoundly hideous crimes of 9/11 provoked almost universal sympathy with, and support for, the United States in its deepest moment of unspeakable grief. The world came close to being absolutely united in its condemnation of international terrorism and its solidarity with the United States. That solidarity included almost universal support for America's military response against the country that harbored the evil leadership of al Queda and its misguided following.

But subsequently, or perhaps after a brief interlude, the international esteem of the United States took a plunge for the worst.

I am well aware of the fact that, as far as perceptions entertained by the outside world community are concerned, most Americans don't care two hoots. It barely caused a ripple on either side of the political divide in the Presidential election campaign of 2008.

For a proper understanding of American foreign policies, it is nevertheless useful to unravel the long-term biases of the United States, and to trace their manifestations in recent policy decisions and actions of the American government. I would suggest that those decisions and actions have decisively influenced the negative responses that seemed to blemish America's international image.

I. Isolationism and Exceptionalism

International relations of the United States have over the years been tainted by a certain mind-set. First and foremost in this regard is the notion that the United States is something special and should be treated differently within the international arena. In conformity with this conviction, the United States has in the past maintained a degree of isolationism from institutions, norms and obligations that have come to be perceived as conducive to the promotion of

international comity. Refusal of the United States to become a member of the League of Nations over what some American analysts described as a mere triviality is often quoted as a prime example of American isolationism of yesteryear.

But American isolationism has also penetrated the post-World-War II history of inter-State relations. The United States has in fact become notorious for its reluctance to ratify international treaties for the promotion and protection of human rights. In cases where the United States — always belatedly — did accede to human rights conventions and covenants, its instruments of ratification were consistently attended by a package of reservations, understandings and declarations carefully designed to ensure that the United States will not be bound by any provision which is not in conformity with existing laws and practices in the United States — however much those laws and practices might deviate from international standards, or indeed elementary principles, of human rights protection.[1] The United States has not ratified the *International Covenant on Economic, Social and Cultural Rights* (1966), the *Convention on the Suppression and Punishment of the Crime of Apartheid* (1973), or the *Convention on the Elimination of All Forms of Discrimination against Women* (1979). It is furthermore one of only two countries in the world that have not ratified the *Convention on the Rights of the Child* (1989),[2] the other country being Somalia.

The United States mostly rely on considerations of state sovereignty to justify its isolationist stand and to refute criticism of its lack of leadership in the implementation of international human rights standards. Here, too, apologists for the American position are well behind our times. One of the major developments of international law since the Nuremberg Trials has been a rapid decline in considerations of state sovereignty along Westphalia lines. Nuremberg, with its "sovereignty-limiting rationale," introduced a new world order under a rule of law that penetrates serious wrong-doing within municipal borders.[3] As

1 See in greater detail Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, at 777-91 (2001).

2 The United States on 23 January 2003 did ratify the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, U.N. Doc. A/Res/54/263 (25 May 2000) and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, U.N. Doc. A/Res/54/263 (25 May 2000).

3 Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 2 (2003).

noted by Lord Millett in the judgment of the British House of Lords in the *Pinochet Case*: "The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community."[4] Earlier, the International Criminal Tribunal for the Former Yugoslavia (ICTY) observed in the appeal of *Duško Tadić*: "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights."[5]

Since the demise of communism, insistence of the United States on a right to be afforded special privileges in international law took on the form of American exceptionalism rather than isolationism. There is of course a certain link between isolationism and exceptionalism, but the two concepts attract different emphases. Isolationism signifies non-participation in affairs of the international community of States, while exceptionalism implies participation in international institutions and norm-creating activities but on basis of a privileged status for the State singled out for preferential treatment.

II. The Only Super Power Syndrome

Spokespersons of the United States mostly seek to legitimize their country's claim to a privileged position in international relations on basis of the United States being the only remaining Super Power in the world. This, according to American claims, brings with it a responsibility for the maintenance of international peace and security. Executing that responsibility will allegedly be jeopardized unless the United States is afforded a special privileged status within the international arena and be singled out as the beneficiary of a prerogative of dispensation from legal constraints imposed by international law for the maintenance of codes of conduct in war and peace and for the peaceful coexistence of countries of the world.

The American delegation accordingly participated in the Conference of Diplomatic Plenipotentiaries for the Establishment of an International Criminal

4 *R v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (Amnesty International & Others Intervening) (No. 3)*, [1999] 2 ALL E.R. 97, at 177 (HL).

5 *Prosecutor v. Duško Tadić (Jurisdiction) (Appeals Chamber)*, Case No. IT-94-1-A, par. 58 (7 May 1997).

Court that was held in Rome on 15 June to 17 July 1998[6] with strict instructions from Washington D.C. to ensure that American nationals will not be subjected to prosecutions in an international criminal court without the consent of the American government.[7] Prior to the Rome Conference, Senator Jesse Helms (R-NC), at the time Chair of the Senate Special Committee on Foreign Relations, in a letter addressed to Secretary of State Madeleine Albright (dated 26 March 1998) promised that any treaty establishing "a permanent U.N. criminal court ... without a clear U.S. veto ... will be dead-on-arrival at the Senate Foreign Relations Committee."[8] This could mean that the United States was asserting the right of American service members to commit war crimes while engaged in peace-keeping missions without running the risk of being prosecuted for such crimes without the consent of the American government.[9] However, there might be a more feasible explanation for the American position, which by the way was insisted upon by the Pentagon (the American Department of Defense): members of American peace-keeping forces who commit war crimes while executing instructions from political authorities in Washington D.C. objected to the fact that they might be at risk of prosecution for such crimes while the real culprits — those who actually initiated the wrongful acts — remain shielded against prosecution on the basis of sovereign immunity or merely in virtue of their standing in the international community.

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6 The ICC Statute was adopted by the Rome Conference on 17 July 1998 and entered into force on 1 June 2002 following its ratification by 60 States. To date, 109 States have ratified the Statute.

7 In an interview with THE WASHINGTON POST preceding the Rome Conference, David Scheffer, Ambassador-at-Large for War Crime Issues and leader of the American delegation in proceedings for the establishment of an international criminal court, stated quite bluntly that "[a]ny arrangement by which a UN-sponsored tribunal could assert jurisdiction to prosecute Americans would be political poison in Congress." See Thomas W. Lippman, *Ambassador to the Darkest Areas of Human Conflict*, in THE WASHINGTON POST (18 Nov. 1997) A19.

8 On file with author; see also David Scheffer, *US Policy on International Criminal Tribunals*, 13 AM. UNIV. INT'L L. REV. 1389, at 1399 (1998); David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, at 18-19 (1999).

9 Richard Goldstone, *US Stance Contradictory*, in 3 TERRA VIVA (17 June 1998).

III. A Persecution Complex

Which brings us to a further element of the American mind-set that influences its international policies; that is, a certain paranoia, the perception of being the target of international envy and persecution — which evidently gained revived impetus from the terrorist onslaught of September 11th.

The persecution syndrome clearly filtered through in American reasoning regarding the international criminal court; the fear that American nationals will be singled out for frivolous investigations and prosecutions. It should be noted, though, that an American national can only be prosecuted in the ICC without the consent of the American government for the crime of genocide, a crime against humanity, or a war crime if the crime was committed on the territory of a foreign country that has ratified the ICC Statute or has agreed on an *ad hoc* basis to the exercise of jurisdiction by the ICC in the particular case.[10] The ICC Statute furthermore contains numerous precautions against unwarranted investigations and frivolous prosecutions. Power of the Prosecutor to initiate an investigation *proprio motu*, for example, is subject to judicial control.[11] And most importantly, the jurisdiction of the ICC is complementary to that of national criminal justice systems of countries with a special interest in the matter under investigation. The first right and duty to bring perpetrators of the crimes within the jurisdiction of the ICC to justice vest in national courts. ICC jurisdiction can only be triggered if the national authorities are either unwilling or unable to bring the perpetrator to justice.[12] Any State — that is, all States and not only States Parties to the ICC Statute — can foreclose the exercise of jurisdiction by the ICC by simply conducting a *bona fide* investigation into allegations of wrongdoing by any of its nationals.[13] If following an investigation the national State should decide not to proceed with a prosecution for lack of probable cause, the ICC cannot step in but must abide by the sovereign exercise of the investigatory prerogative of the municipal administrators of justice.

The United States most certainly has much to be proud of and is indeed the envy of many people in the world. Its economic prosperity, military might, scientific excellence, the technological achievements of its people, and much more have placed it above the best of all times. Everyone will agree that

10 *Statute of the International Criminal Court*, art. 12, U.N. Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. 1002 (1998) (hereafter "ICC Statute").

11 *Id.*, art. 15(3).

12 *Id.*, art. 17.

13 *Ibid.*

America is the land of opportunities. It has been said that the percentage of church-going citizens in the United States by far exceeds that in all the other countries of the world with a predominantly Christian population. To me, having been raised in a plural society where group-related rivalries had almost reached epidemic dimensions, a very special attribute of the American nation is its placing the predominance of being American above sectional alliances of its racial, ethnic, religious and linguistic components. Being American can rightly do a person proud — that is, in many, many respects.

However, it is wrong to assume that wide-ranging envy of the many positive attributes and achievements of the United States is a malleable tool to be abused in a wide-ranging campaign to disadvantage American nationals. Acts of terror committed against American targets do of course require special precautions to limit the risks of their repetition, but the typical perception of persecution entertained by those engineering American foreign relations goes well beyond the fear of military interventions or terrorist attacks.

IV. Promotion of American Self-Interests

American foreign policy is also conditioned by a strong commitment to place the perceived interests of the United States above considerations of international cooperation and the rule of law. During the election campaign of 2000, Condoleezza Rice, Secretary of State in the George W. Bush administration, lamented the fact that some Americans seem to think that the exercise of power by the United States should be guided by "humanitarian interests" or "the interests of 'the international community'," [14] and promised that the foreign policy of a Republican government "will ... proceed from the firm ground of the national interest, not from the interests of an illusionary international community. " [15]

Promoting the self-interests of one's own country is in principle quite commendable. Doing so to the detriment of others or in violation of international law is a different matter. There is also ample evidence to suggest that political gain of persons in authority is often interpolated to simulate the best interests of the entire community. American foreign policy is at times no exception to this rule.

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14 Condoleezza Rice, *Promoting the National Interest*, 79.1 FOREIGN AFFAIRS 45, at 47 (1999).

15 *Id.*, at 62.

The United States has furthermore become notorious for taking action in its short-term interests with quite devastating long-term consequences. Its support for the *mujāhidīn* (Muslim rebels) of Afghanistan in their struggle against the Soviet occupation (1979-1989) thus paved the way for the Taliban to take over political control of the country. When the United States offered military support to Iraq in its war against Iran (1980-1988), it had no regard for the fact that Iraq was actually the invading aggressor and furthermore turned a blind eye to conspicuous atrocities committed by Saddam Hussein. What was perceived at the time to be in the best interest of the United States turned out to have become an American nightmare.

V. A Messianic World Mission

A further determinant of American foreign policy worth mentioning is the belief in a missionary calling of the United States to save the world from repressive regimes.

Self-accreditation of being God's chosen nation is deeply imbedded in the political history of the United States. There has always been a distinctly militant component to the assumption by the United States of a missionary calling for bringing "barbarism" in the world to its knees — one that does not seek compliance with the U.N. Charter or the approval or acquiescence of the international community of States but would prompt the United States to take up arms on its own initiative.

In its most radical extreme, the commitment to military intervention is commonly referred to as "the Reagan Doctrine". In an address to the Security Council of the United Nations on 20 January 2000, Senator Jesse Helms (R-NC) explained that in virtue of this doctrine the United States committed itself to provide weapons, training and intelligence, or to intervene directly, to replace communist and repressive regimes with democratic governments, and that it did so without asking for approval of the United Nations to legitimize its actions.[16] In an address delivered at Whitehall Palace in London on 19 November 2003 on the United States' Iraqi policy, President George W. Bush referred to the "liberty deficit" in the Middle East and identified a "commitment to the global expansion of democracy" as a "pillar of security" to be pursued, adding: "We will use force when necessary in the defense of

16 Reprinted in THE NEW YORK TIMES of 21 Jan. 2000, available at <http://www.nytimes.com>.

freedom. And we will raise up an ideal of democracy in every part of the world."[17]

Justification for the American commitment to topple repressive regimes is often based on the often quoted statement of President Woodrow Wilson during World War I proclaiming: "The world must be made safe for democracy."[18] However, the Woodrow Wilson speech must not be taken out of context. He was calling for action in cases where democracies were actually being threatened by aggressive expansionism. His words were not intended to legitimize offensive military action to enforce democratic rule in countries that have not come to accept a form of government by the people and for the people. In a judgment condemning the United States for providing weapons and logistical or other support to rebel forces (the Contras) that attempted to overthrow the government of Nicaragua, the International Court of Justice in 1986 in effect proclaimed the Reagan Doctrine to be unlawful under the rules of international law that prohibit the threat or use of force, or intervention in the internal affairs of other States.[19]

It is perhaps also important to emphasize that the international community of States has placed its trust in the United Nations, and not the United States, to promote the basic human rights and fundamental freedoms of all the peoples of the world, and as an institution with the primary responsibility for taking action to secure the maintenance of international peace and security. Admittedly, the power entrusted to the Security Council of the United Nations to counteract a threat to the peace, a breach of the peace, or an act of aggression is subject to radical constraints, including a competence of the five Super Powers (China, France, Russia, the United Kingdom, and the United States of America) to veto Chapter VII decisions of the Security Council. However, it should always be borne in mind that international law is strongly opposed to the settlement of international disputes through armed interventions and that a primary objective of the United Nations was from the outset based on a re-

17 *President Bush Discusses Iraq Policy at Whitehall Palace in London: Remarks by the President at Whitehall Palace Royal Banquet House* — Whitehall Palace London, England, available at <http://www.whitehouse.gov/news/release/20031119-1.html>.

18 *Address Delivered to a Joint Session of Congress, 3 April 1917*, in THE PUBLIC PAPERS OF WOODROW WILSON, vol. 1; War and Peace 6, at 14 (eds. Baker & Dodd, 1927).

19 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: Merits, 1986 I.C.J. 14, par. 202 (at 106), par. 292(3) (at 146) (27 June 1986).

solve to prevent the recurrence of armed conflicts as far as possible. The difficulty of obtaining the required support of the Security Council for the exercise of its powers must therefore not be taken to legitimize unilateral action in cases where the formalities have not been or cannot be complied with.

VI. A Sense of Self-Righteousness

American exceptionalism and a self-assumed missionary political calling are founded on an immodest sense of self-righteousness. The International Religious Freedom Act of 1998[20] may be singled out here to make the point.

The Act, among other things, authorizes the President to impose all kinds of punitive measures against States which, in the opinion of a politically appointed commission, violate certain basic principles of religious freedom, including in the case of "particularly severe violations of religious freedom" as defined in the Act,[21] economic sanctions of various kinds.

The International Religious Freedom Act raises several constitutional issues. Through its "entanglement" with matters of religion in virtue of the Act, the American government is required to engage in conduct on the international level which it is constitutionally prohibited from doing domestically. Applying a religious test for selecting members of the Commission assigned to administer the Act is furthermore unconstitutional in virtue of Article VI, Clause [3] of the Constitution of the United States. From the perspective of sphere sovereignty, the Act is censurable for affording to a *political* institution the competence to evaluate and to judge the propriety of *religious* dogma and practices.

For a political institution to engage in a dialogue with foreign governments regarding practices founded on religious scruples is furthermore no easy task. Religious convictions and the conduct emanating from such convictions are not susceptible to rational discourse. Faith in the religious sense is the acceptance without question of phenomena that cannot be observed through one's senses or demonstrated through scientific demonstration or rational reasoning.

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20 Pub. L. No. 105-292 (2 Oct. 1998), 112 STAT. 2787 (codified in scattered sections of 22 U.S.C.).

21 22 USC, sec. 6402(11) (1998): "[S]ystematic, ongoing, egregious violations of religious freedom, including violations such as — (A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or security of persons."

The norms that underpin religious practices require blind obedience from all persons belonging to the particular faith community. Religious scruples are based on conviction and can best be addressed by adversaries through the medium of persuasion. In the domain of religious conviction, sanctions are not the answer and could in fact be counter-productive. Religious discourse can at best become a tool of reform in cases of human rights violations if their sponsors patently occupy the moral high ground. In matters of religion, there is no clearly identifiable moral high ground beyond the one claimed by every religious sect in adversarial argument.

Unbecoming religious practices imposed by state legislation ought indeed not to be tolerated, but for one State to take unilateral action against others perceived by it to be at fault is not the way to go. The appropriate platform on which repressive practices of States founded on religious predilections ought to be addressed is one within the international arena.

Having said this, it is important to note that the International Religious Freedom Act has thus far been applied with caution and compassion. The annual reports compiled by the State Department under the Act furthermore provide the most reliable and comprehensive account of the state of religious freedom in different countries of the world.

VII. Translating Policy into Action

The notion of being something special that warrants isolationism from the outside world and exceptional privileges and immunities within the world community; the perception of being on the receiving end of wide-ranging hostile action in virtue of resentments of the victim country's national excellence; a commitment to place short-term interests of the United States above everything else; a national calling to topple unbecoming governments and impose democratic structures of state authority on recalcitrant regimes; and a sense of self-righteousness — the terms of reference of American foreign policy, recorded here in no particular order — are all founded on historical roots that penetrate deeply into the Graeco-Roman, Christian and Enlightenment influences upon the immigrants who were destined to become definitive forces of an American mind-set.[22] Manifestations of that mind-set in contemporary in-

22 See James W. Skillen, *With or Against the World? America's Role among the Nation*s (2005).

ternational relations are a matter of profound concern. Consider the following examples:

(a) In 1984, when the International Court of Justice (ICJ) asserted jurisdiction to hear a complaint brought by Nicaragua based on military and logistical support afforded by the United States to the Contras seeking to overthrow the government of the Applicant State,[23] the United States responded by withdrawing from further proceedings in the case, terminated the automatic jurisdiction of the ICJ in regard to international disputes to which the United States is a party, and has since then consistently refused to subscribe to or accept the jurisdiction of the ICJ.[24]

(b) The United States almost as a matter of course declines to comply with its obligation under the *Vienna Convention on Consular Relations* to inform a national of a foreign country who has been indicted to stand trial in the United States for a criminal offence of his or her right to contact the Consulate of the country of which he or she is a national. It has on three occasions been condemned in the ICJ for these violations of its treaty obligation, once in regard to a citizen of Guatemala, once in regard to two nationals of Germany, and in the most recent case involving 52 Mexicans.[25] The United States, with the support of the U.S. Supreme Court,[26] ignored provisional measures ordered by the ICJ not to proceed with executions of the convicted persons pending a final decision of the Court.[27] The Guatemalan citizen and one of the German nationals were executed while their respective cases were pending before the ICJ, while the other German na-

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23 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America): Jurisdiction and Admissibility*, 1984 I.C.J. 391 (26 Nov. 1984).

24 Matters involving the United States which have been brought before the ICJ subsequent to that date were based on consent of the United States contained in treaties that preceded the 1984 judgment.

25 *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States),* 1998 I.C.J. 247 (9 April 1998); *LaGrand Case (Germany v. United States)*, 2001 I.C.J.465 (27 June 2001); *Avena & Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J 12 (31 March 2004).

26 *Breard v. Green* 523 U.S. 371 (1998); and see also *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999).

27 *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States)*, 1998 I.C.J. 247 (9 April 1998); *LaGrand Case (Germany v. United States of America) (Request for the Indication of Provisional Measures)*, 1999 I.C.J. 9 (3 March 1999).

tional was executed the day after judgment was given against the United States and in defiance of an order of the Court to stay the execution pending a re-trial following compliance by the United States with the *Vienna Convention*.

In the cases involving the two German nationals and the one involving the 52 Mexicans, the ICJ called upon the United States to remedy the consequences of non-compliance with its obligations under the *Vienna Convention on Consular Relations* "by means of its own choosing"; that is — one may assume — by reviewing the conviction and sentence, and reconsidering the same in view of the consequences of non-compliance with the Convention. On 28 February 2005, President George W. Bush, in response to the judgment of the ICJ handed down earlier in the case involving the 52 Mexicans, instructed Attorneys General to comply with the judgment of the ICJ.[28] However, shortly thereafter, the United States made it known that it intended to withdraw from the *Optional Protocol to the Vienna Convention on Consular Relations* under which disputes emanating from the Convention must be submitted to the ICJ. The United States formally notified the Secretary-General of the United States' withdrawal from the *Optional Protocol* on 7 March 2005. The U.S. Supreme Court subsequently decided that the President lacked the authority to instruct Attorneys General to comply with the judgment of the ICJ and that American courts were not bound by judgments of the ICJ specifying the obligations of the United States under an international treaty to which it is a party.[29] The United States was on several occasions similarly condemned by the Inter-American Commission on Human Rights for non-compliance with the *Vienna Convention*. The Commission noted that "a hightened level of scrutiny" is called for in all capital cases, that non-compliance with the *Vienna Convention* constituted a violation of the rules and principles of the due process of law, and that failure to comply with the *Vienna Convention* amounted to arbitrary deprivation of the right to life of the convicted person.[30]

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28 *Memorandum for the Attorney General*, reprinted in 44 I.L.M. 964 (28 Feb. 2005).

29 *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

30 *Ramón Martinez Villareal v. United States of America*, Report No. 52/42, Case No. 11.753, par. 51, 52, 70 (10 Oct. 2002); see also *Cesar Fierro v. United States of America*, Report No. 99/03, Case No. 11.331 (29 Dec. 2003) (noting that should the convicted person be executed, it would constitute an arbitrary deprivation of his right to life).

(c) In 1990, Willie L. Celestine, who had been sentenced to death in the United States on charges of first-degree murder, brought an application before the Inter-American Commission on Human Rights, claiming among other things that the death penalty was applied in the United States on a racially discriminatory basis.[31] He was executed while the case was pending before the Commission.

(d) The United States has also been condemned by the Inter-American Commission on Human Rights in 1987 for not upholding the principle of equal protection of the laws in regard to capital punishment.[32] The Inter-American Commission on Human Rights entertained several applications concerning juvenile executions in the United States. The Commission decided that an international norm has emerged, as a matter of *ius cogens*, establishing 18 years as the minimum age at which individuals are liable to face the death penalty.[33] Here, too, the United States proceeded with the execution of juveniles in spite of precautionary measures recommended by the Commission not to do so while the matter remained in dispute.[34] The Commission held that the executions amounted to violation of the juveniles' right to life and recommended that compensation be paid to their next of kin. In one of the more recent cases, the juvenile had already been executed before the matter was brought before the Commission. The Commission nevertheless ruled that the case was admissible for adjudication before the Commission.[35]
On 1 March 2005, the U.S. Supreme Court in *Roper v. Simmons* pro-

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31 *Willie L. Celestine*, IACHR, Res. 23/89, Case No. 10/031 (United States), *Annual Report of the Inter-American Commission on Human Rights, 1989-1990* OEA/Ser. L/V/II/77 rev. 1 doc. 7, 63-73 (17 May 1990).

32 *Roach & Pinkerton v. United States of America*, IACHR, Res. 3/87 (United States) *Annual Report of the Inter-American Commission on Human Rights, 1985-1987*, OEA/Ser. L/V/II/71 rev. 1 doc. 9 (original Spanish), at 148 (22 Sept. 1987).

33 *Michael Domingues v. United States of America*, Report No. 62/02, Case No. 12.285, par. 64, 83, 85 (22 Oct. 2002).

34 *Napoleon Beazley v. United States of America*, Report No. 101/03, Case No. 12.412 (29 Dec. 2003); *Douglas Christopher Thomas v. United States of America*, Report No. 100/03, Case No. 12.240 (29 Dec. 2003); *Gary T. Graham*, now known as *Shaka Sankefa v. United States of America*, Report No. 97/03, Case No. 11.193 (29 Dec. 2003); see also *Cesar Fierro v. United States of America*, Report No. 99/03, Case No. 11.331 (29 Dec. 2003) (the Commission holding that should the applicant be executed, it would constitute an arbitrary deprivation of life).

35 *Tracy Lee Housel v. United States of America*, Report No. 16/04, Petition No. 129/2002 (27 Feb. 2004).

claimed juvenile executions to be unconstitutional.[36] Although six of the judges (including one who concurred in the dissent) referred to international standards of juvenile justice, no one of the judges included in those references any of the cases before international tribunals that condemned the practice of juvenile executions in the United States.

(e) The United States stands accused of having embarked on the war in Iraq in indisputable violation of international law and in blatant defiance of the United Nations.[37] Its reasons for doing so were, to say the least, quite dubious. Its act of aggression has thus far taken the lives of thousands of people, mostly non-combatant civilians. It has plunged a relative peaceful community — albeit under the iron fist of dictatorial rule — into a state of turmoil and anarchy. Instead of combating terrorism, the United States and its allies have on the contrary created a fertile field for the cultivation of acts of terror.
Refusal of the United States to afford prisoner-of-war status to persons held captive in Guantánamo Bay furthermore clearly violated the *Third Geneva Convention on the Protection of Prisoners of War*, and the methods of interrogation of those captives were, to say the least, highly questionable.

(f) During the George W. Bush regime, the United States was engaged in a malicious campaign to discredit and to undermine the International Criminal Court simply because drafters of the Rome Statute refused to render American nationals immune from prosecution in the ICC for crimes against humanity and the most serious of war crimes.[38] John Bolton, who was to become Under Secretary of State for Arms Control and International Security and was for a while Ambassador of the United States in the United Nations, thus called upon the United States "to ignore it [the ICC] in our official posture, and to isolate it through diplomacy, in order to pre-

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36 *Roper v. Simmons*, 543 U.S. 551 (2005). In *Stanford v Kentucky*, 492 U.S. 361 (1989), the U.S. Supreme Court had set the minimum age at which a juvenile may be sentenced to death at 16 years. On the same day, the U.S. Supreme Court decided that mentally retarded persons were not exempt from capital punishment (*Penry v. Lynaugh*, 492 U.S. 302 (1989)). The Court subsequently reversed this decision, holding that executions of the mentally retarded constituted cruel and unusual punishment and was therefore unconstitutional. *Atkins v. Virginia*, 536 U.S. 304 (2002).

37 See in greater detail Johan D. van der Vyver, *Ius Contra Bellum and American Foreign Policy*, 28 SOU. AFR. Y.B. INT'L L., 1 (2003).

38 Johan D. van der Vyver, *The International Criminal Court: American Responses to the Rome Conference and the Role of the European Union* (2003).

vent it from acquiring further legitimacy or resources."[39] Senator Jesse Helms, at the time Chair of the Senate Special Committee on Foreign Relations, writing in the *Financial Times*, depicted the ICC as "a threat to US national interests," adding that "it is our responsibility to slay it before it grows to devour us."[40]

And the list goes on.

VIII. A New Beginning?

The election of Barack Obama to become the 44th President of the United States brought about radical changes in official governmental policies as far as international cooperation in matters of common interests is concerned. Following his inauguration on 20 January 2009, President Obama was hailed by the European Union for introducing a new era in international cooperation that "could mark a turning point for the whole world." Speaking in Prague on 5 April 2009, he called for the strengthening of alliances within the North Atlantic Treaty Organization. In an address delivered on 11 April 2009, he urged the international community of States to unite in resolving the world's most pressing global challenges, such as extremism, environmental pollution, and the current economic crisis. He repeatedly proclaimed that the war on terror violence cannot succeed without international cooperation, and time and time again singled out nuclear proliferation, rogue States, and global terrorism as matters of trans-national concern that require international deliberation and action. He declared the combating of global warming a top priority and committed his government to promote a new international climate change agreement.

President Obama singled out as "one of the great strengths of the United States" the fact that it has a very large Christian population but does not regard itself as a Christian or a Jewish or a Muslim nation: "We consider ourselves a nation of citizens who are bound by ideals and a set of values." Speaking in Cairo on 4 June 2009, he emphasized that many Americans were Muslims and gave assurances to Muslim communities in the world that the United States respected their religious tradition. Throughout his political career he came out strongly in favor of basic human-rights values and as an opponent of viola-

39 John Bolton, *Courting Danger: What's Wrong With the International Criminal Court*, 54 THE NATIONAL INTEREST 60, at 71 (Winter 1998/99).

40 Jesse Helms, *We Must Slay This Monster: Voting Against the International Criminal Court is not Enough. The US Should Try to Bring It Down*, in FINANCIAL TIMES (31 July 1998) 18.

tions of international standards for peace and security of the world. On 22 January 2009, he issued a directive to shut down the Guantánamo Bay detention center; and on 15 April 2009, he ordered the release of government documents giving details of, and simulating justification for, the interrogation techniques used by the Central Intelligence Agency in the context of the "war on terror". Commenting on the decision to release the documents, one analyst expressed the view that it signifies "a normative break with the past" which sends a message that "the United States will no longer tolerate the legitimation of torture in the name of national security."[41]

During the election campaign, President Obama depicted failure of the United States to ratify the *Convention on the Rights of the Child* as "embarrassing" and promised that as President of the United States he would review the matter.[42] The Obama administration has also given early indications of a revised policy toward the International Criminal Court (ICC). On 29 January 2009, in her first address to (a closed meeting of) the Security Council, newly appointed U.S. Ambassador to the United Nations Susan E. Rice observed: "The International Criminal Court, which has started its first trial this week, looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur."[43] The 2009 Supplemental Appropriation Bill authorizes payment of the United States' debt to the United Nations that has accumulated since 1999 and appropriates $906 million. According to one analyst, the bill "is an important demonstration of President Obama's … commitment to engaging effectively with the United Nations."[44] When the Human Rights Council of the United Nations was established in 2006, the George W. Bush administration indicated that it will not seek membership of the Council. In a letter dated 24 April 2009, the United States announced its candidacy for a seat in the Human Rights Council.[45] Annexed to the letter was a document

41 Alexandra Barahona de Brito, *"The Past is a Foreign Country"? Obama and the Torture Files*, ISS Opinion, European Union Institute for Security Studies (May 2009).

42 Senator Barack H. Obama, *Address at the Walden University Presidential Youth Debate* (28 Oct. 2008), available at <http://debate.waldenu.edu/debate-transcript>.

43 Available at <http://www.state.gov/p/io/rls/rm/2009/115579.htm>.

44 Global Solutions Blog, *Citizens for Global Action Applaud Passage of Peacekeeping Payments*, posted by Lydia Dennett (19 June 2009), available at <http://globalsolutions.org/blog/2009/06>.

45 Letter dated 22 April 2009 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the General Assembly,

outlining the commitments and pledges of the United States in respect of human rights.[46] On 12 May 2009, the United States was duly elected to the Council (receiving 167 votes).

On several occasions President Obama expressed serious environment concerns, promised renewed international efforts to address the problems of climate change and global warming, and actually introduced measures to combat the emission of harmful gases. He promised to shift the United States from reliance on foreign oil to green energy. He proclaimed tough standards on vehicle fuel efficiency and promised legislation that will bring about an 80% reduction in harmful carbon emissions by 2050.

He voted against the war in Iraq, and as President of the United States promised to terminate the American occupation of Iraq and to re-deploy more American troops in Afghanistan so as to focus American military intervention on perpetrators of the terrorist onslaught of September 11th. He has committed himself to consultation and negotiation as primary alternatives to violent confrontation. He accepted a two-State solution to the Middle Eastern crisis and called upon Israel to terminate further Israeli settlements in the West Bank.

On the domestic front, he proclaimed a policy of state support for stem cell research, the improvement of health care services and educational facilities, tax concessions for the less privileged sections of the American people, and much more.

In his maiden address to the General Assembly the United Nations on 23 September 2009, President Obama stated publicly to the world community that his administration has sought "a new era of engagement with the world" and proposed "four pillars that are fundamental to the future," namely stopping the spread of nuclear weapons, pursuing peace and strengthening American support for effective peacekeeping, taking responsibility for nature conservation and preservation of the world we live in, and building a global economy that will advance opportunities for all people. He promised that "[t]he United States stands ready to begin a new chapter of international cooperation." On 10 October 2009, it was announced that President Obama has been awarded the Nobel Peace Prize for 2009. In making the announcement, the

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U.N. Doc. A/63/831 (24 April 2009), available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/63/831&lang=E>.

46 *U.S. Human Rights Commitments and Pledges* (24 April 2009), available at <http://www.state.gov.documents/organization/122476.pdf>.

chair of the Norwegian Nobel Committee stated: "It is important for the Committee to recognize people who are struggling and idealistic."

IX. Concluding Observations

In 1945, the United States and other founding members of the United Nations Organization "pledge[d] themselves to take joint and separate action in co-operation with the Organization" to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion; "[47] and it is not merely fortuitous that the former American First Lady, Eleanor Roosevelt, chaired the Human Rights Commission when it drafted the *Universal Declaration of Human Rights* to afford substance to the concept of human rights and fundamental freedoms referred to in the U.N. Charter.

The United States has sadly lost the incentive to honour that pledge. It, on the contrary, did not hesitate to challenge the authority of the United Nations or discredit international law whenever the powers that be in Washington D.C. consider that authority or the decrees of that law to contradict their self-assumed and often short-sightedly perceived interests. There is furthermore a strong body of opinion in the United States hostile toward the salience of international standards as feasible directives of the legal idea. And, to make things worse, policy making in the United States almost entirely ignores the input of academic discourse and scholarly writings. In the latter respect, the United States stands in stark contrast to the German tradition and that of other European countries. There, the work of academic writers decidedly has an impact on state policies and judgments of the courts.

American imperialism — a certain variety of neo-colonialism — is not aimed at ruling the world or any part thereof beyond the national borders of the United States. Nor is it truthfully inspired by humanitarian concerns or a desire to impose American democracy, or any variety thereof, on communities subject to a dictatorship or group-related discrimination. Where the target country singled out by the United States for diplomatic pressure, economic sanctions, or military intervention happens to be in the grips of undemocratic rule, a denial of basic freedoms or sectional repression, those contingencies of unbecoming governmental practices will be exploited to afford a cloak of le-

47 *Charter of the United Nations*, arts. 55, 56, 59 STAT. 1031, T.S. No. 993, 1976 Y.B.U.N 1043, reprinted in 3 BEVANS 1153.

gitimacy to the American offensive, and to substantiate the widely held perception in the United States that American self-interests coincide with the best interest of the international community of states.

The superiority of the United States in respect of military capabilities cannot be disputed. However, superiority should take on the form of leadership within the confines of the international legal order and not of domination. If the United States, as the only remaining Super Power, were to be entrusted with the responsibilities of an international peace-keeper and promoter of democratic values, it ought to execute those responsibilities on the basis of internationally defined norms for the peaceful co-existence of States and not with its national self-interests as the only guide. It should submit itself to the norms it seeks to enforce and not undermine the rule of international law by seeking to place itself above the law.

Two further comments will suffice in response to the demonstration of might in American foreign policy:

- Typically, brute force and instilling fear of reprisals are the strategy of dominance resorted to by persons in authority who cannot muster support for a preferred program of action through the moral appeal of their cause; and
- Unassailable power in political confrontation or armed conflict will never succeed in subverting terrorism but on the contrary invites acts of terror violence as a strategy of ideological rivalry.

But there is hope for the future.

On her first day in office as U.S. Ambassador to the United Nations (26 January 2009), Susan E. Rice held out a commitment of the Obama administration to promote and be a full party to international cooperation: "President Obama's view is clear, that our security and well-being can best be advanced in cooperation and in partnership with other nations. And there is no more important forum, for that effective cooperation, than the United Nations."[48]

The successful implementation of President Obama's initiatives remains to be seen. The challenges he has to counter include almost 100% opposition to those initiatives from Republican members of Congress. Insofar as reversing certain unbecoming American deviations from international standards requires a two-thirds majority support in the Senate, he may not be able to pull it off;

48 Available at <http://www.state.gov/w/remarks/115573.htm>.

and inasmuch as non-compliance by the United States with certain international standards derived from, or has been sanctioned by, judgments of the U.S. Supreme Court, his hands are completely bound. He has nevertheless set the United States on a new course that holds out great promises for the future.