Has the United States Lost the Moral Authority to Insist That Other Countries Comply with the International Law of Human Rights?

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Democracy and Human Rights Week
July 22, 2004

Ladies and Gentlemen:

It is a pleasure and an honor once again to have been asked to address the student body of the Western Hemisphere Institute for Security Cooperation during Democracy and Human Rights Week. It was originally my intention to talk about a subject about which I had recently written an article: international law and ethnic conflict, a topic that raises interesting and important questions about who has rights and obligations under international law. It asks whether, when all is said and done, human rights belong to individuals or peoples, and, if human rights are the rights that each of us has simply by virtue of being human, whether it makes sense to speak of ethnic groups as having a place in international law at all.

Unfortunately, however, I have to postpone that topic to another day. There is, in my opinion, one critical question that dominates the world of human rights today. It is vital that this question not be evaded, that it be addressed head-on, that its consequences be examined carefully and critically, and that we not content ourselves with trite answers, shot through with clichés, and reflecting nothing but prejudices and wishful thinking.

The question is whether the United States, the world's only superpower, has by its conduct in recent times forfeited the right to demand that other countries observe international law in general, and the international law of human rights in particular. This issue must be confronted before it is possible to say anything useful about international law, since if there is no law that governs the United States with all its might, then it is impossible to justify the claim that any legal system exists to regulate the conduct of nations, or of people who act in their name.

Let me go even further, and remind you where you are. The Western Hemisphere Institute for Security Cooperation, here at Fort Benning, operates under a strict Congressional mandate – an order from Congress – that it impart to you, its students, professional education

> within the context of democratic principles set forth in the Charter of the Organization of American States, while fostering mutual knowledge, transparency, confidence, and cooperation among the participating nations, and promoting democratic values, respect for human rights, and knowledge and understanding of United States customs and traditions.

The annual celebration of human rights which is Democracy and Human Rights Week is one of many ways in which the leadership of the Institute fulfill their responsibility to you as rising officers of your countries' armed forces and police forces, as well as civilians concerned with military professionalism. The purpose of this Week is to remind each of you of the preeminence of human rights and democratic principles of government as priorities at all levels of civil and military operations.

All of that is well and good. But I can state with some confidence that every single one of you, whatever your nationality, has since he or she has been here at WHINSEC entertained this thought: How do these North Americans claim the right to lecture me about human rights, and about my obligations as a representative of my country? From where do they get the authority to tell me that I am required to honor the human rights even of terrorists, whose goal is the destruction of our society and of our very lives? Do they not wear the uniform of the soldiers at Abu Ghraib and at Guantanamo and in Afghanistan who, to one extent or another, openly violated the rules that we are being taught here, and did so with at least the acquiescence, if not the encouragement, of their commanders?

The implications of these questions are profound, for the United States Army, and for the United States. They demand serious consideration. Let us dispense quickly with two responses that will obviously not suffice.

First, no reasonable person believes that the abuses at Abu Ghraib were the work of a handful of privates first class, operating on their own, without the knowledge of their superiors, and driven by nothing more than boredom or sadism. These men and (sadly) women were not simply hooligans who somehow tricked Army recruiters into letting them into the service. The individual soldiers who piled up naked prisoners at Abu Ghraib, or who devised supposedly funny means of humiliating and terrifying their fellow human beings, most assuredly deserve to be punished. Indeed, if there is no accountability for these kinds of acts, then no system of law can ever hope to affect people's behavior. But the apprehension of those soldiers and their arraignment and trial before courts martial do not exhaust the need to pursue justice.

It is important to know what instructions these personnel were given regarding how to treat prisoners and to extract information. It is important to determine whether they were taught the applicability of the Geneva Conventions. It is important to learn whether they appreciated that their actions were subject to review not only by those directly above them in the military chain of command, but by the wider world of observers, including the international community, which can and does have the authority to condemn them.

The purpose of such an investigation is not to reduce the degree of individual soldiers' liability. It is not to help anyone to evade guilt or punishment. It is to ensure that all of those who were guilty be subjected to the legal process.

Let me be clear about what I am saying. A soldier who stands a hooded prisoner on a box, sticks wires onto his body, and tells him that if he falls off the box he will be electrocuted, and then takes photographs so that he can brag to his friends about what he has done, is a criminal. It is no excuse to say that he was not in class the day the Geneva Conventions were taught. Every

responsible person would recognize this kind of behavior as illegal. But these acts were not done in secret. The command structure had to know of them. The logistics of bringing so many prisoners together required the participation of a large number of people, not all of them of the lowest ranks.

The point is not that a soldier is less guilty because her superiors did not teach her about the contents of international treaties. The point is that the same superior who failed to impart that academic lesson also created a command atmosphere in which this kind of criminal behavior was tolerated. That is why, in my view, the commanders are also responsible. And I, for one, have no idea how high up the command chain one must go in pursuit of justice. Certainly Brigadier General Karpinski, the flag officer in charge of the Military Police detachment for all of Iraq, believes that the guilt extends well above her level. This investigation is a critical priority, and it must be followed wherever it leads.

The second defense to which we can give short shrift is the claim that the offenses committed by American soldiers at Abu Ghraib were not so serious. The idea that U.S. soldiers confronting shackled, kneeling prisoners with unmuzzled dogs are morally superior to Al Qaeda terrorists murdering 3,000 innocent people, and therefore deserve, if anything, the mildest form of condemnation, is utterly wrong. It does, however, offer one perverse advantage: it suggests a solution to the overcrowding crisis in our prisons. If only the worst of the worst deserve punishment, and everyone else is an angel by comparison, then there is no need to worry about who might have committed theft, or stock fraud, or drunk driving, since only mass murderers should be the focus of the criminal justice system.

In the strong form of this defense, the torture of prisoners at Abu Ghraib (some 85% of whom, according to the Red Cross, are probably guilty of no offense at all) was even justified, because Iraqis, or non-Iraqi Muslims, or Muslim terrorists, or someone, has done something truly terrible to the United States. While you may think that no rational person would mount such an argument, *The Washington Post* has reported that the American soldier who first revealed the scandal – a hero, in my view – was confronted with exactly this. It is inconceivable that an army's obligations to its prisoners captured in the field depend on the conduct of the prisoners' fellow nationals away from the theater of hostilities. No one would have said that it was all right to torture soldiers of the Wehrmacht, since the regime for which they were fighting ran death camps at Auschwitz or Treblinka.

And make no mistake, what was reported by the press to have happened at Abu Ghraib was torture. The memoranda to the President defending these abuses would have been unconscionable had they been written by first-year law students. That they were prepared and signed by the President's legal counsel – civilian, not military, lawyers – stands as an indictment of the legal profession, just as the conduct of certain soldiers in Iraq, rightly or wrongly, raises questions about the conduct of other women and men in uniform. As Justice Frankfurter once wrote for the Supreme Court, "There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men." Nor does the fact that these opinions have been "repudiated" go very far. There has been no acknowledgment at any level of Government of the binding force of the international prohibition against torture. And that is the problem.

May no one in this room ever be subjected to the kinds of abuse as a captive on the battlefield that officers of the executive branch were prepared to justify as consistent with the international obligations of the United States.

Allegations of physical abuse on a systematic basis at Guantanamo and in Afghanistan are more sporadic and less documented than those at Abu Ghraib. Yet there, it appears as if occupants of the very highest offices of Government specifically approved interrogation methods that are forbidden by the Geneva Conventions. And beyond this, the notion that detainees there have not been permitted to contest their detention for any reason, the claim that the United States reserves the right to determine whether or not they are entitled to prisoner-of-war status even though the Geneva Conventions spell out in very straightforward terms how such an evaluation is to be conducted, and the fact that the Red Cross has not had full access to the detainees, all suggest no reason for confidence that respect for internationally protected human rights is the cornerstone of the rules of engagement at Guantanamo or at Bagram.

So how can we be sure that United States men and women in uniform recognize their obligations under international law? Why should you listen to your American instructors in international human rights and international humanitarian law? It will not do simply to repeat the assurance that Americans are good to their very souls, that our armed forces represent the best of the best, and that the fact that I am permitted to deliver this speech today without being hauled off to jail demonstrates that this country is a model of human rights observance. The great American philosopher Bob Dylan wrote that "to live outside the law you must be honest." But it is reasonable for observers of the United States in the international arena to ask not just for assurances of honesty but for demonstrations of it. "Trust," as the late President Reagan used to say, "but verify." How will my country respond?

Before proposing an answer to this, I want to introduce a second reason for my focus on the moral authority of the United States to insist on compliance with international law. The first is the one of which I have already spoken: whether recent experiences, at Abu Ghraib and elsewhere, have called into question the commitment of the United States military itself to take international human rights and international humanitarian law seriously. But there is a broader context in which this issue arises. It is whether the United States acts as if it is bound by international law at all.

The picture here too, I am afraid, is not a pretty one. What we have seen in recent years is a troubling pattern of resistance to the development of international law, and a constant insistence on standing outside the law's path. And before anyone accuses me of making a partisan political speech, let me remind you that this pattern did not begin with the election of George Bush. Many of the examples I will cite presently arose during the term of his predecessor, a Democrat who fancied himself an internationalist firmly committed to the law of nations.

Let me set out just a few elements of what lawyers call "the bill of particulars": the evidence I will use to support my claim that this country sees itself as simply not subject to international law. Please remember that I am now presenting the accusations. I do not mean to suggest that

any or all of these cannot be rebutted, and I will myself in just a moment suggest a way of doing exactly that.

That said, here are some indications that my thesis is correct:

- The United States is the only country in the Western world not a party to the U.N. Convention on the Rights of the Child.

- The United States is the only country in the Western world to enter reservations to every single one of the major human rights treaties, insisting that their provisions do not create legally enforceable rights.

- This country consistently declines the jurisdiction of international courts. The United States is the only country in the Western world not only to refuse to participate in the International Criminal Court, but to threaten sanctions against any nation that will not agree in advance that no American may be brought before that Court under any imaginable circumstances. As you look around this room, please be aware that students of other nationalities would be here had their funding to attend this Institute not been held hostage to so-called Article 98 agreements.

- The United States is the only developed country in the Western world not to participate in the Kyoto Accord on global warming.

- The United States is the only country in the Western world to subject juvenile offenders to the death penalty, and it regularly insists that its domestic criminal legal system in this and in other respects is not to be reviewed by such tribunals as the International Court of Justice.

- Even in the World Trade Organization, of which this country has been the greatest proponent, the United States has lost no fewer than four cases over the last few years in which a panel of judges directed this country to change its laws to come into compliance with international rules, and we have yet to institute even one of those changes.

This is, I regret to say, just an illustrative list. As an international lawyer, I could go on. And I am resisting – again, because I do not want the import of what I say to be overwhelmed by partisan politics – invocation of what much of the world would consider the most glaring example of my point, which is the unilateral decision by the United States to invade another sovereign country which did not attack us, and to overthrow its government, without the use of procedures authorizing the use of force under the United Nations Charter.

Obviously, it is the very essence of a legal system that it has the authority and the muscle to compel its subjects to do things that they do not want to do, or to refrain from doing things that they do want to do. At the end of the day, the recent United States attitude toward international law in the instances I listed fails this basic test.

I need to get technical for a moment. As you are all aware, there are fundamental ways in which international law differs from any domestic legal regime. There is no legislature, and there are no enacted statutes. Determining the content of international law on any given issue is far more complex than determining how many grams of marijuana you may sell before you are guilty of a felony, or how many people may live in a house before the owner has violated the zoning ordinances. While people may disagree about the proper interpretation of domestic law, they do not disagree about what it says. But in international law they do.

Traditionally, there are four sources of international law: treaties, general principles of law, custom, and the writings of jurists. The first three are usually said to be primary sources, while the last is a secondary source. What the three primary sources have in common is that all are reflections of the wills of states: international law, far more than domestic law, depends on explicit or implicit indications of consent on the part of those whose conduct it would regulate.

You are all familiar with the notion of treaties, which are no more or less than international contracts. When a party enters into a contract, it indicates its willingness to do (or not to do) certain things, and to accept legal punishment should it act inconsistently with its voluntary undertaking.

General principles are those basic building blocks of procedural and substantive law that everyone agrees must be binding if the system is to work. No one may be a judge in his own cause. No one should be permitted to enjoy a better position as a result of an acknowledged violation of the law. These are abstractions distilled from a great mass of legal principles tested by time and accepted by all.

Customary international law, however, is a different kind of animal. While it is recognized as a source of law, and indeed most of the important human rights principles trace their origin to customary international law, it is harder to pin down.

It consists of two elements: state practice, and something lawyers describe with a Latin expression, *opinio juris*. State practice means that, before something can be said to be a principle of customary international law, states must actually act in conformity with it, if not always, then at least generally. But the *opinio juris* requirement is something additional, meant to ensure that states adhere to a standard not by coincidence, or out of courtesy or tradition, but from a sense of legal obligation. States may honor customary international law in the breach, by acknowledging its binding force even as they act inconsistently with it. Thus, many states torture, but those that do rarely attempt to justify the act; they deny it, or excuse it as exceptional, because they know that to concede the facts would be to open themselves to legal liability.

I have taken you through this legal detour for a reason. It can fairly be said that the United States consistently refuses to acknowledge the *opinio juris* that attends principles of customary

international law. After all, the problem is not that the United States regularly or habitually violates international rules: that is surely not true. By and large, day after day, year in and year out, I would wager that the United States acts in greater and more loyal compliance with international legal rules in virtually every area in which they are applicable than any other nation.

There is nothing wrong in opposing the prospect that a particular legal provision may come into force. There is nothing wrong in saying that the law should develop in a different direction from the direction that others favor. And while I personally may disagree with the attitude of this administration on whether or not a particular rule is or is not (or should or should not be) international law, that is a reasonable debate that can and should take place among reasonable people. But if there comes a time when the proposition undoubtedly has become part of the body of law, then the discussion shifts character rather drastically.

The problem is in the acknowledgment that the reason for obeying the law is that it is compulsory to do so. In democracies, one hopes that the law always will conform to our moral systems. When they diverge, the law may require people to act one way, and their senses of morality another, and they must choose. Most people reach an accommodation: they obey the law nearly all the time. If they cheat occasionally, they try not to get caught, and if they do get caught, they accept the sanctions that the law imposes. Sometimes they do that simply as part of the cost of living the lives that they want, and sometimes (as in the cases of heroes like Martin Luther King), they do it in order to remind the rest of us of fundamental inconsistencies between our legal systems and the moral principles in which they are grounded.

The change in the conduct of the United States that I think would go far to solve the present crisis would be to reinstate the primacy of international law. The United States must act, as Thomas Jefferson wrote into our immortal Declaration of Independence, with "a decent respect to the opinions of mankind." We must understand that our insistence on rejecting *opinio juris* threatens not only the moral and legal legitimacy of our own actions, but the entire legal structure on which we want to build a peaceful and prosperous and tolerant world of the 21st century.

This is a rhetorical shift, at least, that politicians of either party will not even propose to make. It would be seen as compromising our sovereignty, and limiting our freedom of action. It would be denounced as national weakness, as yielding the hard-won independence of our nation to anonymous bureaucrats and one-world corporatists and pacifists, who do not have the best interests of the United States at heart.

Those reactions, of course, are disastrously short-sighted and wrong. Our Founding Fathers knew that. The Declaration, the Constitution, and the first acts of Congress were written largely for the eyes of a critical world that wanted, and that had the right, to test the real commitments of our fledgling country. It is no sign of cowardice to acknowledge that our actions as a nation are subject to review by our sovereign peers. Nor is it to accept limitation. Indeed, to acquiesce in the existence of a legal regime that governs us, as Mahatma Gandhi and Nelson Mandela showed, is not to compromise the freedom to disobey the law out of commitment to higher principle. What we may not do is make believe that the legal regime does not exist, or that it does not apply to us.

In our system in the United States, the guardians who I believe will ultimately prevail in reminding us of these principles are the judges. Ours is a system of laws, and a lonely judge sitting in a court anywhere in the country retains the power to restrain the President himself from violating the Constitution. And the Supreme Court regularly rises to this challenge. This past term presented a virtually unprecedented parade of cases concerning critical issues of international law. The majority of the Court embraces the notion that international law is part of the laws of our country, and that we cannot act domestically or internationally as if we were independent of it.

The approach I am urging is one that goes to the very heart of our nation: the rule of law transcends all else, and this is true in peace as in war, in the international sphere as in the domestic. Justice Antonin Scalia, that most conservative voice on the current Supreme Court, stated this most eloquently in the recent decision concerning the status of Yaser Hamdi, an American citizen, captured in Afghanistan and transported for detention to the United States. The Government imprisoned him, and denied him access to the courts to challenge his detention. He brought an action for a writ of habeas corpus. Justice Scalia voted to grant the writ, even in the face of the President's representation that the release of Hamdi would threaten the national security in time of war. He wrote as follows:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis – that, at the extremes of military exigency, [the laws are silent.] Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.

It is this commitment of our judges to the rule of law that, in the end, gives me hope. It is this commitment that permits me to answer in the affirmative the question with which I began: yes, Americans do have the authority to insist that other countries obey international law, because this country is in its essence persuaded of the need to live within the law. That it does not always do so successfully is an indication of human imperfections of which we are all guilty. It does not reflect a rejection of the moral basis on which the law rests. This is the lesson of the very public government inquiries into what happened at Abu Ghraib, and the importance of legal review of the detentions at Guantanamo. In the end, the issue is not the nationality of the spokesman who defends the rule of law: it is about the sanctity of the law itself. And the United States, even in the face of what happened in Abu Ghraib, and even in the face of the continuing challenges we face as a nation confronted with a merciless attack on our own territory, remains committed as a nation to that principle.

My answer, however, must be tentative, as events that threaten it are still occurring. The conclusion of my presentation can be nothing other than a call for vigilance. Confidence that we can do no wrong because we are Americans – or because we are American soldiers – is simply not adequate any longer. The United States and its representatives, military and civilian, must demonstrate in the time-tested ways that they comply with the law and are governed by it, not

that they happen to conform to it when it suits them. Yet this is the very essence of the rule of law in this country, and a return to that principle is a return to our national character.

Let me conclude my talk with some personal thoughts. I am an international lawyer, and I have dedicated much of my career to advocacy of human rights as the basis for legally enforceable rules of behavior. The United States has been in the vanguard of that effort. It pains me greatly to have to say some of the things that I have said here today. But it is important that these things be said, and that they be said in front of audiences like this one.

My purpose is not to lay blame, and not to despair about my country. It is simply to recognize that the United States has achieved a level of world power that makes it unacceptable to act as if it were outside the law. This is an uncomfortable truth in the context of a war against people who would destroy everything that we have achieved. But I believe that patriotism requires no less than this.

The hope for the future lies in this proven, historical fact: the American way demands that the law apply to all equally, regardless of their station in life and of the power that they happen to wield.

Charles Swift is a graduate of the United States Naval Academy, a Lieutenant Commander, and a Judge Advocate tasked with representing Guantanamo detainees. He has challenged the official policies governing the treatment of his clients in the U.S. courts. On behalf of these people, he is suing the Department of Defense, and, if he wins, he will cause great embarrassment to the Government, which will have to rethink its entire approach to its war on terrorism.

Commander Smith recently gave an interview to the Amnesty International publication *Amnesty Now*. He was asked how he feels, as a sailor, to be confronting his superiors, and ultimately his Commander-in-Chief, representing individuals suspected of the worst kinds of acts of terrorism. This was his response. I would be unable better to state the awesome challenge with which we are now faced:

> Questioning the system is the height of loyalty. The American system differs from other systems in that my loyalty is to defend the Constitution, not to follow orders. Our loyalty is to fairness.
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> I fully share with the President the idea that terrorists must never be allowed to bring down our love of freedom. I don't think that terrorists ever could. But if we're not careful, maybe we will do it ourselves.

Thank you very much for listening to me. I look forward to taking your questions.