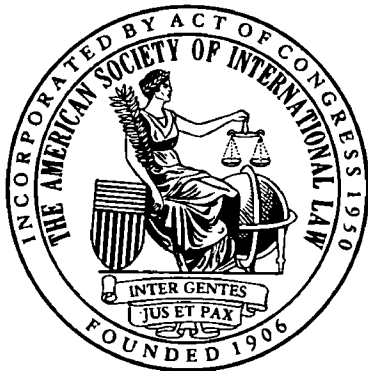




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## JUST BACK FROM THE HUMAN RIGHTS COUNCIL

This panel was convened at 1:00 p.m., Friday, April 11, by its moderator, Margaret Satterthwaite of NYU School of Law, who introduced the panelists: Robert Harris of the Office of the Legal Adviser at the U.S. State Department;\* Makau Mutua of the SUNY Buffalo School of Law; Yvonne Terlingen of Amnesty International; and Constance de la Vega of the University of San Francisco School of Law.

### REMARKS BY MAKAU MUTUA<sup>†</sup>

When I was asked to be on this panel I feared that there was not much to say because I have mixed emotions about the expectations that were created by the reform of the UN Commission on Human Rights through its replacement by the Human Rights Council. Quite apart from semantics in terms of the name change, I think we have to be realistic that nothing much really has changed. This is fundamentally the nature of inter-governmental organizations (IGOs) in the context of human rights where states are both the insiders and outsiders. So, one way to look at the change from the Commission to the Council is to think about five fellows meeting in Room A and then deciding that they do not like the ambience of the room and the circulation of the air in the room and therefore move to Room B. You can draw your conclusions there—whether their meeting in Room B as opposed to A is a substantial departure from practice.

### THE EFFECTIVENESS OF THE COUNCIL

I think that we have to be careful that we are not looking at a magician's illusion. I say that because I think we have to be realistic about what to expect from an intergovernmental body in the area of human rights. The traditional tension between state sovereignty and international supervision exists and is real. The trade-offs are there. Rarely will you find an IGO which has coequal parts in terms of strong norms and strong enforcement mechanisms. Either you get a flaccid institution for enforcement or you get a strong institution but with weak norms. It is not a conspiracy—I think it is just the way states think. They make sure that norms float out there in the open, in orbit, without straight paths for implementation. Norms that threaten states are not desired by states. Institutions that threaten states are not desired by states, especially in the area of human rights. And so that is why you see institutions that rhetorically speak to our nobility as a human race but have little capacity to realize that nobility. That is why I have limited expectations of the Council, and accordingly measure my ambitions for it in that respect.

We ought to see the Council as a political body whose purpose is to be a gentle civilizer of nations at the rhetorical level. Because even if we go further and look at, for example, international tribunals like the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Tribunal for the former Yugoslavia (ICTY), one has to wonder, quite frankly, what is being achieved by these tribunals in terms of the domestic reconstruction of societies? Has, for example, the ICTR in Tanzania had any demonstrable effect on reconstruction inside Rwanda? I would say the answer is no. The two processes are disconnected. So, with respect to the Council, I think we have to

\* Mr. Harris did not submit remarks for publication in the Proceedings.

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look at it as a rhetorical forum whose purpose is to inspire nations and countries to aspire to a higher nobility, understanding that the role of the Council as an enforcer, as a supervisor, and as an implementer, is sharply limited; that leaves the Council with the most important function, in my view, and that is the function of setting standards. That is where it is at, and enforcement of those standards surely must be left at the national level. That is where things are going to happen. That is where the harvesting of those norms will take place, at the national level. The consideration of who participates in internalizing those norms at the national level is a poignant question for civil societies in various countries. So I have this limited ambition for the Council myself, realizing that primarily it is a political body, whose purpose is norm setting.

I just want to disagree slightly with the first speaker who said we have all the norms and standards that we need, and so the challenge now is one of enforcement. I don't think so. I think if you look, for example, at the human rights corpus, as a body of norms, we have done very well on questions of political despotism, which is, addressing questions of civil and political rights, relationships between states and citizens. But we have been bereft and very poor in thinking about economic despotism, and we act as though free markets are natural, and that they should be given sanction by the human rights movement. That is a vast area that is completely left unattended.

### THE COUNCIL AND UNIVERSALITY

I think that when we begin talking about a value system that societies across the globe should subscribe to, we are talking about the necessity of universality. But I think in that word is hidden many dangers. Universality is not a natural phenomenon. We have to think about what we are going to make universal, why we are going to make it universal, and how we are going to make it universal. There is no reason for us to assume that we have seen a glimpse of eternity and that we know what the good society looks like and that we know how to get there. I think that if we make those assumptions, we are going to find ourselves in trouble in several respects. First, if that were the case, we would not really have the kinds of problems that we have today around the globe.

An earlier speaker said that enormous progress has been made over the last sixty years. When I look around the globe, I doubt that that is true. I mean, we have Darfur, Iraq, Afghanistan, and the economic crisis around the globe—we have enormous problems. The globe appears to be melting down. What progress really has been made? So it seems to me that when we talk about universality, what we ought to be focused on is the question of legitimacy of those norms that we can agree upon as being universal. And we ought to think about who is going to agree on the universality of the norms, understanding that universality is a function of negotiated normativity. We negotiate norms to make them universal. We should not impose them on people. Nor should states impose those norms on cultures—instead cultures, traditions, religions, and other important variables must participate in the negotiation of what is universal and what is not. We should also agree on how and why to create a hierarchy of norms. And as I pointed out in my earlier comment, we have been focused almost entirely on the political side and have forgotten the economic side.

We have assumed the naturalness of markets in creating human rights norms. If you look, for example, at the human rights documents the word capitalism does not appear in those documents. The word imperialism does not appear in those documents. The word political democracy does not appear in those documents. The documents run away from the most important words of the last hundred years, and duck their heads in the sand. In fact, the

human rights corpus has failed to address economic questions. In order for us to create a legitimate corpus of human rights that addresses the lives of people, especially in countries that are developing, as put by Robert Harris to my right, we have to think about people who live on less than a dollar a day in many parts of the world, in India, in Kenya, in South Africa, in Latin American and all these places, and craft a normative edifice that responds to the challenges of economic privation. We have not done so.

As I said before, if you look for example at the way we conceive of political despotism, of political despots like Adolf Hitler or Idi Amin, they would be unacceptable to the human rights corpus. But economic despots like Bill Gates or George Soros are not unacceptable. We seem to think that it is natural for Gates or Soros to be there, to wield that kind of economic power. If someone held that kind of political power it would be unacceptable. So I think we should not allow the most powerful countries in the West, including the United States, to limit our vision about what norms human rights should address.

### **IS THE COUNCIL AN IMPROVEMENT OVER THE COMMISSION?**

Because human rights victories are few and far between, we take solace in appreciating the few victories we have. But this discussion brings to my mind the question about what really is a human rights project. And I think that Robert Harris, my co-panelist, began to address that issue when he drew this very sharp distinction between western democracies and those “others,” although he tried to run away from his own classification. I won’t let him do so. This reminds me of the historical narrative about the human rights movement as a gift of the West to the rest of the world. That perception is there. It is an arrogant perception that the methods of supervision and enforcement, that the norms themselves, are created to police and civilize brown and black peoples.

Professor Louis Henkin, a figure who is extremely important in our business, has written, that human rights are America’s gift to the rest of the world. That is a predominant narrative in the human rights movement. The Council itself, and previous to it the Commission, was meant to play that role of the civilizing crusader. Yet the Commission was not formed to bring human rights values to the West. That was not the purpose of it. Because when the Commission was formed, the West colonized the rest of the world, committing serious atrocities in many parts of the world. Let’s not forget, for example, that the United States was an apartheid state—imagine that! So the West should be careful when pointing fingers at the rest of the world. That is why developing countries in the Commission felt that they would use it as a tool for the moral reprimand of the West. That is what they did. To them, the West had no business pointing fingers at them. They reminded the West of its historical wrongs. In a sense that was a clearly appropriate role for developing countries to have played. Now in doing so, did they also shield themselves from scrutiny? Of course they did. But let he who is clean throw the first stone.

This idea that the commission was politicized is hogwash. The commission was a political body. How can you politicize that which is political? The West wanted to use the Commission for its own purposes, to use human rights language as a tool to advance its own foreign policy objectives. Is there anyone who wants to doubt that is why the United States is always talking about China’s human rights record? Is it because Americans care about the Chinese human rights record? Of course not. Because if they did, they would care about the human rights problems in Egypt, Saudi Arabia, and in other countries where they have enormous interests, strategic interests. Not everyone knows this, but Robert Harris knows this, that the United States spent the last fifty years defending Saudi Arabia before the Human Rights

Commission. That is a fact. And attacking Cuba, on the other hand. So that duplicity cannot be allowed to stand. At least not in my court. And as to the fingers being pointed as to who should be joining the Council and who should not, the contrast was drawn between Libya and the United States. Now, you know I will be the first one to admit that Muammar Qaddafi is not papa bear. But I mean Qaddafi and Libya in my books have not committed as many violations abroad as has the United States. I am sorry to say this, but it is simply a fact.

Look at the record of the United States in Latin America. Look at the record of the United States during the Cold War. Look at what the United States has done to Iraq. The United States is not a saint. Not at all. It now occupies a country under false pretenses. So it has no standing to make a statement about a superior moral claim. So when reform of the Council is talked about from the point of view of the global North, the Council ought to be a forum for it to advance its own interests. And if the Council does not do that, it is not good. From the point of view of the global South, I think the motives are mixed. I think on the one hand the South wants voice in international institutions, and secondly, it wants inclusivity. That is what reform means to the South. Now there are also many, many bad countries in the South—countries that want to shield themselves from international scrutiny. But the answer to the problem of badness by states is not this dual narrative that has been created, which is duplicitous and hypocritical.

So I just want to make sure that we understand that if we are serious about going beyond standard setting, beyond mobilizing shame, beyond sanctioning by word of mouth, we have to re-conceive the Council. I think it might be perhaps useful to carry out real reform in the Council as opposed to musical chairs. And real reform might mean, for example, making the Council a forum for experts as opposed to states. Make it a forum for experts. Give it to experts who care about human rights and who can set the right agenda. Then create a normative relationship between the Council of experts and the states in which at least we know the Council would put the real issues on the table without fear or favor. That has not happened. It is no wonder that 170 countries approved the resolution creating the Council. Why? Because they saw it as flaccid. So all of us in human rights have to decide either to play along with the states as they pretend to do something or we can tell them “look you guys ain’t doing much.”

### CONCLUSION

One thing we do as academics is try to understand questions of history in their entirety, and to frame issues in thematic ways. And so when I look at human rights I am not looking at a convention or a norm or an article in the convention. I am looking at the human rights text, by which I mean the entire corpus, as a statement of history, a certain history. And then I am trying to place that statement of history in the context of a larger historical narrative. So when I look at human rights, I say what are human rights? They are a genre of international law. What is international law, I ask myself. Why was it necessary to create international law? Could we live without it? Who created international law? I ask those kinds of questions. These are fascinating questions.

I want to refer you to the work of Antony Anghie, Professor of Law at the University of Utah College of Law. I think he has done the most definitive work on the colonial origins of international law. He has shown that the nature of the legal argument of international law as a system of rules and structures has as its original intent the management of brown and black peoples, whom it regards as dangerous and largely unmanageable. Let’s just do the history. If you look at the early part of the human rights movement, one is left with little

choice but to conclude that if you look at the discussions within the Commission in the formulation of the Universal Declaration of Human Rights and other subsequent documents, if you look at the countries that lined up on various issues, and you look at earlier historical developments in colonialism, it is difficult for us not to deny that human rights is a part of an historical continuum, stretching from the merchant of capital and the colonial administrator in which colonialism was perceived as a reclamation of backward cultures. That was the moral justification of colonialism. Of course its real rationale was economic exploitation. But its moral justification was that those backward peoples in the global South had to be organized into states, out of which sense could be made out of them.

The international state system is a system of policing. Nor can we get away from the fact that the United States is a global policeman. That is just a fact. And so what you want to look at is the nature of the norms in the human rights movement and ask yourselves what role do those norms play, who are they policing? What are they trying to create? I think if you look at the ICC, the ICTR, and ICTY, you want to ask yourself, which Western leader is going to be the subject of the ICC? Or the ICTY? Can you imagine the ICC trying Donald Rumsfeld or Dick Cheney? It is no accident that the people that the ICC is trying to indict are the Sudanese, who no doubt deserve to be indicted, and Joseph Kony, the Ugandan genocidal killer. But are these Third Worlders the only horrible violators of human rights today? I leave you with that question.