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Clashing Human Rights Priorities

How the United States and Muslim Countries Selectively Use Provisions of International Human Rights Law

In the face of domestic and external criticisms, both the United States and Muslim countries – the latter to differing degrees – resisted bringing their systems into conformity with international human rights law, and both made a habit of emphasizing certain human rights while ignoring others. Both sides acted as though certain international human rights principles could be overridden by competing considerations based on domestic policies. Profiting from its superpower status, the United States has been able to press its own human rights priorities and to wield human rights as a tool to advance its foreign policy goals without heed for the critical reactions of others, resulting in widespread doubts about the sincerity of the US commitment to human rights. In particular, the US invasion and occupation of Iraq, which is portrayed by US officialdom as aiming to bring democracy and human rights to the region, is overwhelmingly perceived in Muslim countries as a neo-imperialist venture incompatible with respect for Iraqis' right of self-determination. Conflicting perspectives regarding the human rights implications of US policies will likely exacerbate tensions between the United States and Muslim countries at the same time that a chorus of voices within the countries involved is calling for more consistent approaches to human rights.

Introduction and overview

The United States and various Muslim countries rank among the states that have treated human rights as if they could be ranked in a hierarchical order, with certain rights being prioritized and others being downgraded as if they were less urgent or could be ignored altogether. The practice of ranking human rights in terms of importance has been deprecated as being at odds with the logic of the UN human rights system (see the criticisms in Meron 1986). Moreover, the 1993 Vienna Declaration and Programme of Action reaffirmed that in the UN system of human rights all human rights matter and are mutually reinforcing, proclaiming that »All human rights are universal, indivisible, interdependent and interrelated« (United Nations 1993, No. 5).

The United States and Muslim countries have a shared history of awkward relationships with the UN human rights system. Among other things, in addition to picking and choosing among human rights – as if many could be discounted, both sides act as if certain fundamental domestic traditions and policies are entitled to override international human rights law. Their common practice of treating aspects of their domestic laws as sacrosanct and immutable has stood in the way of their adjusting to the more exigent and comprehensive standards of international human rights law, provoking criticisms from its supporters. The critics are both external and internal. A chorus of voices within the countries involved is presently calling for more consistent approaches to human rights and more consistent application of the international standards. Thus, the fact that governments only selectively apply human rights does not necessarily correlate with popular sentiments about what rights matter.

This paper will sketch how the United States and various Muslim countries emphasize certain human rights at the expense of others and also how different their priorities are, their clashing priorities being of a sort that is likely to aggravate current political tensions created by the US invasion and occupation of Iraq. The emphasis will be on the policies of the administration of President George W. Bush. »Muslim countries« will be used as a term of convenience. The discussion will concern dominant trends and the stances typical of Middle Eastern governments. It needs to be stressed that no claim is being made that all Muslim countries follow identical policies or that all Muslims think alike about rights.

As a preface to the discussion of the disparities in the human rights policies of the United States and Muslim countries, it is essential to recall the differences between the three distinct generations of human rights that are embraced in the UN system.

The ideas of the 18th century European Enlightenment influenced the UN formulations of civil and political rights, the so-called negative or first generation rights that place limits on actions of governments. In that era European theorists posited that, whether as individuals or as groups, people needed protection from interference with their freedom to exercise choices and that they required guarantees against governmental coercion and arbitrary violence.

A recent study has showed how, in contrast to other centers of Enlightenment thought like Britain and France, the United States has continued to remain oriented toward 18th century perspectives (see Himmelfarb 2004). The United States is still disposed to favor the limited spectrum of civil and political rights set forth in the constitutional amendments in its 1791 Bill of Rights. It is no coincidence that the First

Amendment, traditionally accorded special solicitude by US judges, protects freedom of speech and prohibits the establishment of religion, typical Enlightenment concerns.

The most influential models for the UN statements of economic and social rights, the so-called positive or second generation rights, which require states to provide for people's basic needs, came from European socialist thought of the 19th century. In contrast, some of the third generation of human rights, elaborated in the latter half of the 20th century, reflect the concerns of developing countries.

The 1948 Universal Declaration of Human Rights (UDHR) comprises both first and second generation rights, treating these as if they were equally vital. The UDHR also includes a principle that could be seen as the germ of the subsequently developed third generation rights in its Article 28 provision that »Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.«

The votes in 1948 in favor of the UDHR by the United States and the small number of Muslim countries that were already UN members in 1948 did not reveal the ambivalence and cleavages that would subsequently emerge. Many states seem to have thought it advisable to give rhetorical backing to the full spectrum of rights in the UDHR – without ever planning to adjust their domestic laws and policies accordingly. For example, despite its vote for the UDHR, the United States never accepted the theory of second generation rights; Muslim countries tended to accept the theory that there were second generation rights without having the commitment or resources to ensure that their standards were realized.

Over the last decades, the United States has often found itself in the company of Muslim countries in failing to adjust to evolving international human rights, including ones in the civil and political rights category. For example, one of the central ideas of the UDHR is the equality of all human beings, a principle that was generally honored in the breach rather than in the observance in 1948. Despite endorsing the UDHR, many countries continued discriminating against women, against racial and religious groups, against disfavored ethnicities and indigenous peoples, and/or against the colonized peoples whom they ruled. The United States and Muslim countries were among the UN members that showed by their subsequent conduct that they were not committed to take prompt steps to upgrade their laws to ensure that that the right to equality would become effective.

In the late 20th century after the formerly colonized countries of Africa and Asia gained their independence and joined the UN, they were able to make their influence felt in discussions of human rights and to register their views about the injustices and deficiencies of the world order. The result was the elaboration of third generation or solidarity rights. Some of these rights are in the collective interest of the human race, but others are more properly seen as being in the collective interest of people living in the developing world. They include the right to self-determination, which has dimensions that mean that it is also related to civil and political rights. [1]

Not surprisingly, the right of self-determination was not set forth in the UDHR, since it was composed before the overthrow of European colonial rule in the following decades gave African and Asian countries their majority voice in the UN, enabling them to ensure that international human rights law reflected their specific interests. Showing the priority accorded to the right of self-determination, it is stipulated in the very first

article of the 1966 International Covenant on Civil and Political Rights (ICCPR). The striking disparity between the 1948 UDHR and the 1996 ICCPR illustrated how the very different historical experiences of Western colonizers and the peoples whom they colonized affected their respective human rights priorities.

In recent decades third generation rights, highly valued by people in the Muslim world, have found little support in the United States, either from the government or for the population at large. Indeed, in part due to US actions that have backed Israel and impeded Palestinians' national liberation struggle, it has become widely viewed as a country antipathetical to the right of self-determination, which will seem ironic to many who recall history. Showing how policies on rights are contingent on the politics of the moment, in the immediate aftermath of the First World War at the Versailles Conference, the United States under the leadership of Woodrow Wilson once acted as the champion of the right of self-determination of »peoples.« The Bush Administration, effectively dismissing the relevance of its positions on the Israel-Palestine conflict, professes to be carrying out a similarly idealistic mission, one of spreading freedom, via its invasion and occupation of Iraq, which are portrayed by the United States as aiming to bring democracy and human rights to the Middle East. However, this intervention is overwhelmingly perceived in Muslim countries as a neo-imperialist venture at odds with the rights that they most cherish.

As will be indicated in the following essay, these conflicting priorities in the human rights domain have political implications at a juncture when United States has been assuming an interventionist role that leads it to be called neo-imperialist the same time that it pursues a strategy of

reshaping the Middle East according to its distinctively narrow human rights criteria.

US resistance to adjusting to international human rights law

The mistaken impression that the United States is a strong backer of international human rights law has been encouraged because it has often vigorously promoted human rights overseas as part of its foreign policy and because it has also linked trade privileges to human rights performance. In addition, the US State Department publishes annually very detailed reviews of the human rights performance of countries around the world. 2 The contrast between US chastisements of other countries for failing to adhere to human rights and the US resistance to incorporating international standards in its domestic system is remarkable. The United States has a long history of resistance to international human rights law, often for distinctive reasons but also sometimes on grounds that have echoes in the rationalizations used by Muslim countries for their non-acceptance of certain principles.

The United States has continued to be reluctant to make binding commitments to uphold international human rights law even where mainstream civil and political rights are concerned. It ratifies relatively few human rights conventions, and, when it does ratify, it does so only subject to qualifications that render ratification ineffective. US ratifications are accompanied by packages of reservations, understandings and declarations (RUDs) that nullify any commitments to abide by treaty provisions. 3 The US RUDs to human rights conventions have been described as being »designed to ensure that these treaties would have virtually no domestic legal effect in enhancing human rights« (Hoffman / Strossen 1994, 478). The US RUDs, it is claimed, have been

»methodically limiting the scope of ratification to existing US practice, rendering acceptance a largely hollow, falsely symbolic act« (Spiro 1997, 567). That is, US RUDs insulate the US legal system from the impact of international human rights conventions. Among others, the reasons prompting the United States to enter RUDs include, in Louis Henkin's summary, that it »will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution« and that U.S. adherence to any human rights treaty should not require changes in existing U.S. laws, policies, or practices, even where these fall below international standards (Henkin 1995, 341).

Not surprisingly, the United States has not adjusted to the expansion of human rights over the last few decades, an expansion that has resulted in many new principles being set forth in a series of UN declarations and treaties. [4] New frontiers have been regularly opened as human rights principles keep expanding. One tendency has been to break down the original »human« category into more specific subcategories, such as women, children, the disabled, or indigenous peoples, on the theory that certain groups require protections geared to their specific situations. The United States stands out by virtue of its failure to ratify either the Women's Convention or the Convention on the Rights of the Child. Currently, a particularly intense controversy rages at the UN over whether international law needs to expand to treat homosexuals as a new category requiring special protections, using ideas developed in various national systems and especially in Europe (see e.g. Amnesty International 2004 and 2003).

The creation of the new subcategories is seen by conservatives as threatening an established patriarchal order, challenging religious doctrines, and unsettling traditional rules on sexual morality. Under

President George W. Bush US positions have been influenced by the views of religious conservatives determined to uphold traditional patriarchal institutions and restraints on sexuality. Religious conservatives in the United States, a rare OECD country where religiosity remains high and where religious groups constitute a politically potent force, have collaborated with their counterparts in Muslim countries in combating expanded human rights concepts that clash with their views on morality (see Mayer 2005). Since President George W. Bush assumed the presidency, the US Government has espoused the positions of what is known domestically as the Religious Right, meaning that in UN forums US delegates often take the same line opposing human rights as do representatives from Muslim countries (see e.g. Benen 2002). Thus, as conservative Muslim countries have stood against the expansion of human rights concepts to encompass homosexuals, they are finding allies among US Christian groups and the Bush Administration, which are also opposed to such expansion of human rights (see e.g. Lunch 2002). For a Western democracy like the United States to be allied not with fellow Western democracies but with conservative Muslim countries on some contentious rights issues is one sign of how backward-looking US positions on rights sometimes are.

There are many factors behind the US failure to keep abreast of international human rights law, but the conviction that the US Constitution – meaning the Constitution as interpreted by the Federal Courts – must be upheld as the definitive statement of rights is one of them. Even when the US Constitutional standards are clearly less protective of human rights than international human rights law is, they are treated as definitive, meaning that the Constitution is conceived of as a ceiling on rights. [5]

It may seem odd that a contemporary democracy would treat its constitution in this way, as a barrier to human rights. After all, the constitutions of contemporary democracies tend to treat provisions protecting human rights as one of their essential ingredients, as being so central that they are often placed at the beginning of their constitutions. However, the US Constitution, by now the oldest constitution anywhere that is still in force, was a product of a much earlier era.

If seen in its original 18th century context, the Constitution and the subsequently drafted Bill of Rights seem an important milestone in advancing democracy and protecting rights. However, when viewed in relation to the constitutional accomplishments of other nations during the last decades of the 20th century, the archaic features of the Constitution spring to the fore. For example, it contains references to the slave trade and to the slave populations of the south (art I, ss 2, cl. 3; art. I ss 9, cl. 1; art. IV, ss 2, cl.3; art. V.), an admonition to the Federal Government not to confer titles of nobility (art. I, ss 9, cl. 8.), and a prohibition of laws working »corruption of the blood« (art. III, ss 2, cl. 2.). It did not originally provide protections for any rights; only after clamor for including rights provisions ensued did the short list of rights adumbrated in the 1791 Bill of Rights become added to the 1791 original text. (Of course, various other amendments protective of rights like the important Fourteenth Amendment were added later.)

The deficiencies of the Constitution in the domain of human rights have troubled US progressives. Scholarly specialists in international law, who are exposed to modern rights concepts, are more likely than other Americans to notice the gap that has opened up between US Constitutional interpretations and US domestic law on one side and contemporary international human rights law on the other. [6] The late

international law expert Richard B. Lillich observed that »to the extent that the Constitution embraced slavery and countenanced the denial of women's rights, it actually was anti-human rights in content« (Lillich 1990, 54). Having studied both US constitutional rights and their international counterparts, Lillich maintained:

> *While contemporary observers of the United States constitutional system praise its concern with individual human rights, it should be recalled that the Constitution itself does not begin to address such concerns in what one today would consider an acceptable manner.* (Ibid., endorsing comments by Henkin 1979)

Commenting on US attitudes towards international human rights law, a generally sympathetic British observer noted in 1988 how the United States remained »sadly isolated« from the direct impact of the rapidly developing corpus of international human rights law (Lester 1988, 539). He expected that, absent improvements in the 1990s, the US Constitution would be found deficient »as a charter of ordered liberty, suitable to the needs and values of the citizens of the United States in the twenty-first century« (ibid., 560-561). The 1990s have come and gone without the Constitution being reconceived as a vehicle for incorporating principles of international human rights law in the US system. 7

Where US rights protections have advanced beyond what 18th century levels, this can be traced more to Americans' responses to specific domestic challenges than to responses to international human rights law (see Primus 1999). Thus, for example, the acceptance of civil rights for non-white citizens in the 1960s came not because of the US vote for the 1948 UDHR or because of UN instruments but as a result of the unsettling domestic impact of World War II on race relations and the dynamics of the domestic civil rights movement.

Occasionally, portents of change have surfaced. In his 1944 State of the Union message, President Franklin Roosevelt, perceiving the deficiencies of the Bill of Rights, called for updating and expanding the original text to provide for social and economic rights (90-I Cong. Rec. 55, 57, 1944). With his untimely death, prospects for undertaking a reform of this historic magnitude dwindled. However, the currently acute health care crisis is encouraging Americans to question why they cannot have constitutional guarantees of access to essential health care, a development that may revive demands for reconsidering the past rejection of second generation rights. Recently, a leading constitutional law scholar has argued that Roosevelt's proposal for an expanded bill of rights must again be taken up (see e.g. Sunstein 2004).

It will not be easy to persuade people that the US Bill of Rights must be amended, as the 1982 defeat of the proposed Equal Rights Amendment to the Constitution showed, a defeat that left the Constitution bereft of any guarantee of equality in rights. To understand why US attitudes are so conservative, one needs to bear in mind that the US Constitution possesses a different status from that of other constitutions. The legal scholar Thomas Grey has observed that the US Constitution is not simply a »hierarchically superior statute« – unlike state constitutions, which people tend to perceive in this manner – but »a sacred symbol, the most potent emblem (along with the flag) of the nation itself« (Grey 1984, 3).

An original version on sheets of parchment is carefully preserved and impressively displayed in the temple-like National Archives building in Washington. As if on religious pilgrimages, Americans from around the country come to gaze at the Constitution, the Bill of Rights, and the Declaration of Independence. They enter the archives via huge doors in

the columned south façade to encounter a high-ceilinged, dimly-lit display chamber reminiscent of the interior of a Greek temple, where one might expect to encounter a statue of the goddess Artemis. There they stand silently in line, awaiting their opportunity to gaze at faded script. The fact that at night the display cases sink down underground into reinforced vaults – so that the documents can survive even if the surrounding capital city of Washington is obliterated by a nuclear attack – indicates how the documents are treasured. Given the attention that is paid to preserving the documents, one could argue that the Constitution is treated more like a holy relic, such as the Shroud of Turin, than like a secular document laying out a scheme of government. Americans deem this normal. However, this kind of constitution-worship is unusual. [8] Citizens of other countries do not make pilgrimages to venerate their constitutions; they normally consult them the way they would any other legal text.

The iconoclastic public intellectual Daniel Lazare has been one of the rare writers who regularly and vigorously attacks the stultifying impact that clinging to an 18th century constitution has had. He has emphasized how peculiar it is to treat the basic law of a country as if it were a magical object or a product of divine revelation (see Lazare 2001). Its having the character of a sacred object could go some way toward explaining why the US Constitution has survived so long with its archaic features intact. After all, it is in the nature of a sacred law to be difficult to change, because change is not easily reconciled with sacred status.

Of course, this is not the only way of viewing matters. From the perspective of Americans who see the Constitution as a document intended to lay down the foundations of democratic freedoms and not one designed to preclude advances in rights, it is not the Constitution by itself that is the obstacle to incorporating international human rights law, but a

mindset that conceives of the Constitution as a limitation on rights. For example, President John Kennedy, a supporter of human rights, went so far as to assert that US law (perhaps meaning the spirit of US law) was already in conformity with international human rights law, so that ratifying human rights conventions could entail no conflicts with the US Constitution (Halberstam / Defeis 1987, 173). US human rights NGOs, lawyers and law professors, religious and civil rights organizations, and other groups have sought to promote the acceptance of international human rights and to achieve ratification of the international human rights conventions, disagreeing with those who conceive of the US Constitution as a barrier in the way of US citizens enjoying the protections accorded by international human rights law.

Notwithstanding the ingrained resistance to change, there are fresh signs that the yawning gap between US law and international human rights law has been troubling liberal members of the Supreme Court. In some controversial recent cases and in public statements the more liberal Justices have called for courts to take into account evolving international human rights concepts, as well as the rights standards in force in other Western democracies. Recent rulings show how some Justices can reconceptualize the Constitution as a vehicle for protecting rights according to modern standards. In the decision in *Atkins v. Virginia* 536 US 304 (2002), the Supreme Court looked at foreign decisions and international law in deciding that executing persons with mental retardation was unconstitutional. In the decision in *Lawrence v. Texas* 539 US 558 (2003), ruling that a Texas law criminalizing consensual sodomy between adults was unconstitutional, the Supreme Court relied heavily on European jurisprudence protecting the right of adult homosexuals to engage in consensual sex acts. This expansion of the Supreme Court's frame of reference, applauded by advocates of updating

US rights concepts, has provoked condemnations on the part of conservatives, who want US courts to refer exclusively to domestic standards. 9

The prospect that the US Supreme Court in interpreting Constitutional rights provisions might in future be guided by jurisprudence from other countries and/or by international human rights standards has provoked hostile reactions in Congress. This led to efforts in November 2003 to discourage the Supreme Court from referring to the jurisprudence of other countries or to international law via the introduction of the so-called »Constitutional Preservation Resolution,« which aims to reinforce US isolation and keep external human rights developments from infiltrating the US legal system. The name of this resolution is significant in that it embodies the common US perspective that »foreign« or »international« rights principles must be treated like dangerous viruses from which the Constitution should be shielded. The text reads as follows:

> *Resolution*
>
> *Expressing the sense of the House of Representatives that the Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States.*
>
> *Whereas article VI, clause 2 of the Constitution provides in part that the ›Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land‹;*
>
> *Whereas article VI, clause 3 of the Constitution provides in part that ›The*

Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution‹;

Whereas the role of the Supreme Court is to interpret laws based on the Constitution;

Whereas the Supreme Court has cited world opinions and laws in two recently decided cases, Atkins v. Virginia and Lawrence v. Texas; and

Whereas the laws of foreign countries, and international laws and agreements not made under the authority of the United States, have no legal standing under the United States legal system: Now, therefore, be it Resolved*,*

SECTION 1. SHORT TITLE.

This Resolution may be cited as the ›Constitutional Preservation Resolution‹.

SEC. 2. SENSE OF THE HOUSE OF REPRESENTATIVES.

It is the sense of the House of Representatives that, pursuant to article VI of the Constitution, the Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States.

(House of Representatives 2003)

Thus, one sees that the United States has a deeply conflictual relationship with the international human rights system. One the one

hand, it wields human rights as a tool of its foreign policy and preaches the universality of human rights, and on the other, it refuses to incorporate international human rights law in its own domestic system, preferring to stand by its constitutional standards, which retain 18th century characteristics. It is a sign of the insularity and parochialism that typically shape Americans' vision of rights issues that only a minority seems to be either interested in or perturbed by the relative weakness of the rights provisions in the US Constitution vis-à-vis those set forth in the laws of other Western democracies and international human rights law.

At the same time, in the face of a deeply-ingrained conservativism that disinclines most Americans to adjust to international human rights law, there are indications that the status quo may be challenged. At least some Americans seem motivated to try to overturn the US habit of treating past interpretations of US Constitutional principles as definitive, with the corollary that progress elsewhere in amplifying rights cannot be deemed relevant.

Given this background, if the United States were a small country and not the world's preeminent military and economic power, the ambivalent US positions on human rights would not be taken seriously. However, because the United States is both so powerful and so assertive, its positions on human rights, no matter how inconsistent or problematic they may seem, have to be recognized as ones that are politically significant.

Challenges to human rights in the name of upholding Islam

Like the United States, Muslim countries have long neglected to adjust their actual laws and policies to conform to international human rights law.

Notwithstanding their unwillingness to undertake needed reforms, governments of Muslim countries often gave lip service to human rights ideals. However, their deficiencies in the area of civil and political rights have been manifest. In many cases they have refused to ratify human rights conventions or, like the United States, have resorted to ratifying subject to reservations that diluted or canceled their commitments to convention principles. However, more recently, they have changed tactics, organizing themselves – and also arranging alliances with non-Muslim countries in Asia – in order to launch a collaborative challenge to the binding force of international human rights law. This challenge has been based on the concern, which critics would claim is only a pretextual concern, for upholding traditions associated with fidelity to Islamic law.

Notwithstanding the fact that at the outset the UDHR was not identified with a particular culture or a particular religious view, a mounting chorus of objections that are purportedly grounded in specific cultures and specific religions has recently been raised to it, as well as to other UN human rights documents. Especially since the mid-1980s, charges have been put forward to the effect that international human rights law is imbued with values that are essentially Western and that are incompatible with non-Western traditions. Various governments have asserted that concerns such as respect for »Asian values« or the Islamic tradition require distinctive approaches to human rights, challenging the ideal of human rights universality that was central to the original UN system. Paradoxically, those making these charges often identify international human rights law with US culture, which is hardly warranted in the light of the US estrangement from international human rights law.

An interesting aspect of these challenges accusing the UN system of Western bias is that they have been largely directed against the civil and

political rights that, if protected, would entail serious restraints on governments and place curbs on their oppressive and exploitative practices. In contrast, these same governments purport to agree – at least at the theoretical level – with economic and social rights, without acknowledging that these are components of the UN system that could likewise be characterized as byproducts of European influences. Of course, rhetorical or abstract endorsements of the proposition that people deserve the basic necessities of life do not threaten to jeopardize the hold of undemocratic elites on the reins of power.

Taking the position that Muslims must have their own separate version of human rights, the Organization of the Islamic Conference (OIC) issued its 1990 Cairo Declaration on Human Rights in Islam, which reflected policies hostile to civil and political rights and which was promoted by governments in countries like Iran and Saudi Arabia. Resembling the US pattern of treating the US Constitution and US domestic law as if it were sacred and should therefore override international human rights law, the assumption pervading the Cairo Declaration is that the need to respect Islamic law must trump all competing concerns and that all rights are to be subordinated to requirements of Islamic law. Only where Islam allows human rights, can they be accepted. That is, just as the US Constitution is positioned by foes of international human rights law to filter out »alien« rights concepts, so Islamic law is deployed to filter out rights that are labeled »Western« or »secular.«

Since in practice there is no independent institution designed to uphold Islamic law, a scheme like the one in the Cairo Declarations entails references to Islamic law as interpreted and applied by regimes – largely undemocratic regimes – in individual countries. The declaration places absolutely no restraints on the degree to which governments can utilize

the various national versions of Islamic law to restrict or deny rights, and its provisions seriously dilute and sometimes eliminate the civil and political rights protected under international law. [10] Among the significant features of the Cairo Declaration is its failure to afford any protection whatsoever for freedom of religion, one sign of how the governments behind this OIC project were from sharing US priorities.

In addition to the OIC effort, a number of Muslim countries – not coincidentally, ones with deplorable human rights records – have made individual appeals to Islamic particularism in efforts to justify non-compliance with international human rights law and to discredit critiques of their human rights records (see generally Mayer 1994, 307-404). In other publications I have analyzed these claims and have pointed out that treating Islam as if it by itself dictated the non-compliance with human rights is problematic.

These attempts to destabilize the international consensus supporting human rights have been deplored by human rights activists and NGOs from around the globe, whose shared belief in universality creates a bridge linking human rights activists in Muslim countries with their counterparts in other regions. The ideas of Iranian Nobel Laureate Shirin Ebadi, an attorney who is a vigorous supporter of international human rights law, exemplify the positions that human rights activists within Muslim countries typically espouse. Like Americans supportive of international human rights law who dispute the idea that respect for the Constitution entails rejecting UN standards, Ebadi scoffs at the proposition that fidelity to Islamic values stands in the way of endorsing international human rights law. In a published interview she observed:

> *The idea of cultural relativism is nothing but an excuse to violate human rights. Human rights is the fruit of various civilizations. I know of no*

> *civilization that tolerates or justifies violence, terrorism, or injustice. There is no civilization that justifies the killing of innocent people. Those who are invoking cultural relativism are really using that as an excuse for violating human rights and to put a cultural mask on the face of what they're doing. They argue that cultural relativism prevents us from implementing human rights. This is nothing but an excuse. Human rights is a universal standard. It is a component of every religion and every civilization.* (Pal 2004)

Ebadi's great popularity in Iran shows that she is not alone in thinking this way; that there are many »Islams« with differing implications for whether human rights can be accepted in Muslim countries needs to be kept in mind. The fact that Muslim governments insist that Islam is the reason why they fail to upgrade their laws to meet international standards cannot be said to represent the general consensus among Muslims. Instead, their insistence should be viewed as an expression of a facet of human rights politics.

Human rights policies as factors in the relationship between the United States and Muslim countries

The United States has publicly denounced the deficiencies of many countries in the Muslim Middle East in the domain of civil and political rights – albeit in a manner that has struck observers as being both opportunistic and highly selective. Countries deemed particularly valuable allies like Pakistan, Saudi Arabia, and Tunisia have often been treated gingerly, whereas countries like Iran, Libya, Sudan, and Syria, which have had hostile relations with the United States, have often been blasted with harsh condemnations. Since the United States has posed as the great champion of human rights on the international scene, it is natural that

Muslims should in turn subject the US policies on rights to critical scrutiny, and that, upon noticing US shortcomings and double standards, they should raise these in challenging US qualifications to speak on human rights issues or to criticize others for human rights deficiencies.

Many US foreign policy initiatives since the presidency of Jimmy Carter have been directed at promoting a short menu of civil and political rights overseas, concerns for religious freedom and the rights of religious minorities ranking particularly high among these. [12] An example of a recent initiative would be the establishment in 1997 of the US Office of International Religious Freedom, which has the mission of promoting religious freedom as a central objective of US foreign policy. [13] As the Bush Administration opted to cater to the concerns of US Christians worried about discriminatory treatment of Christian minorities overseas and eager to remove impediments to their plans to evangelize in Muslim countries, the Office assumed a prominent role. The office in 2003 proclaimed that:

> *A core American value and a cornerstone of democracy, religious freedom is a central tenet of United States foreign policy. As President Bush has repeatedly affirmed, religious freedom is a key component of U.S. efforts to ensure security, protect stability, and promote liberty.* (U.S. Department of State 2003, Executive Summary)

As it happens, the right to freedom of religion is one typically honored in the breach rather than in the observance in Muslim countries, setting up a direct conflict between a human right that is especially esteemed in the US tradition and the situations in Muslim countries, where sharply circumscribed religious freedom is the norm. Governments of Muslim countries often promote an official version of Islam as part of the state ideology, treating religious dissent as dangerous and even treasonous.

This is true both in a self-professed Islamic state like Iran, where the constitution in article 12 expressly endorses Twelver Shi'ism as the official religion, and in countries like Turkey that may be classified as »secular« but where in practice one version of Islam is sponsored, an Islam that dovetails with state policies. Depending on whether or not they accept the version of Islam promoted by the government or adhere to a disfavored version of the religion, Muslims often face religious persecution and discrimination; indeed, dissenting Muslims may suffer harsher discrimination than do members of non-Muslim minority communities living in the same Muslim countries. However, discriminatory treatment of non-Muslims is also common. 14 Nonetheless, because of suspicions of US motives, few people in Muslim countries welcome US pressures on their governments to open up their systems to accommodate US ideas of religious freedom.

The US determination to dissuade Middle Eastern countries from persisting in courses of conduct at odds with US priorities in the area of freedom of religion is so powerful that in 2004 the United States even broke with its longstanding practice of tacitly condoning Saudi Arabia's human rights abuses. So important is Saudi Arabia to US strategic interests that the United States has mostly turned a blind eye to its egregious human rights violations, which include upholding a regime of gender apartheid, brutal repression of dissent, routine recourse to cruel and inhuman punishments and torture, and savage exploitation and abuse of legions of migrant workers. The United States has continued to downplay most of Saudi Arabia's deplorable human rights record, but the Bush administration ran out of patience where Saudi denials of religious freedoms were concerned. In September 2004 the United States publicly castigated Saudi Arabia in the Department of State's Sixth Annual Report on International Religious Freedom, listing it as one of the »Countries of

Particular Concern,« (US Department of State 2004a) meaning that the kingdom had been classified as one of the governments »that engage in or tolerate gross infringements of religious freedom« (US Department of State 2004b). Announcing the Sixth Annual Report on September 15, 2004, and showing how attitudes dating from the 18th century continue to shape the perspectives of US officials, Secretary of State Colin Powell proclaimed:

> *America's commitment to religious liberty is older than our nation itself. The men and women who journeyed to this new world believed that one's conscience was sacred ground upon which government cannot tread.*
>
> *Those courageous settlers cherished religious freedom as one of many inalienable rights inherent in human nature itself, one of those rights that formed the moral foundation of all just political orders.*
>
> *As President Bush has said, religious liberty is the first freedom of the human soul. America stands for that freedom in our own country, and we speak for that freedom throughout the world.*
>
> *With the release of today's report, we reaffirm the universal spirit of our nation's founding. We reaffirm that government exists to protect human rights, not to restrict them; and we stand in solidarity with people everywhere who wish to worship without coercion.* (Ibid.)

Speaking on the same occasion Ambassador-at-Large for International Religious Freedom John Hanford exhibited a similar mindset when he celebrated the priority attached to religious freedom:

> *The impulse to protect and champion this right is born of our nation's history, which has inspired in us an appreciation for peace, tolerance and*

compassion as cornerstones of religious freedom. And it is strengthened by the priority that many Americans continue to place on the importance of religious faith in their own lives. [...]

As a hallmark of our nation's history, religious freedom is also a blessing that we seek to encourage in other parts of the world. ›Almighty God hath created the mind free,‹ declared Thomas Jefferson, in introducing the landmark Virginia Act for Establishing Religious Freedom. And he continued: ›The rights hereby asserted are the natural rights of mankind.‹ (Ibid.)

To persons who imagine that today's world is the same as the one contemplated by Thomas Jefferson in the 18th century, it may seem that efforts to ensure greater respect for religious freedom should be classified as part of an idealistic mission of promoting human rights. However, in the eyes of the typical denizen of today's Muslim countries, when the United States attempts to intervene in the domestic affairs of a Muslim country, it is not doing so out of disinterested commitment to advancing human rights. Instead, the tendency is to assume that the United States acts on the basis of cynical calculations about how to use human rights to achieve its own foreign policy goals, goals that include hegemonic domination of the Middle East and its oil resources. Today the United States is widely viewed by Muslims as a neo-imperialist power, a view that US interventions in the last years have only encouraged (see, e.g., Cohen 2004). The Middle East expert Rashid Khalidi has suggested that by occupying Iraq, the United States effectively assumed the role formerly played by European colonial powers in a region where memories of past colonial occupations remain fresh. 15

In this context, US support for religious freedom in Muslim countries courts an angry reaction because of the history of European colonialism,

during which colonial rulers opened the door to Christian missionaries' efforts to lure Muslims away from their faith at the same time that they sought to exploit religious divisions to consolidate their hegemony, with favor being shown to religious minorities and to non-Muslims. US pressures on issues of religious freedom, which may include freedom for Christian missionary activities and enhanced protections for non-Muslim minorities, are readily associated with policies once pursued by former colonial rulers and are seen as efforts to divide and weaken Muslim societies.

In Muslim countries, bitter memories of European rule mean that a very different right typically strikes people as being of overwhelming importance – the right of self-determination. There is widespread congruence between public opinion and governmental stances regarding the high priority to be accorded to this right. The great store that people in Muslim countries place by the right of self-determination correlates closely with Muslims' preoccupation with Palestinians' failure after decades of struggle to establish an independent Palestine. 16 Exploiting this preoccupation with the Palestinians' plight, governments in Muslim countries have often encouraged people to focus on Palestinians' long-thwarted national liberation struggle as way to quell and deflect popular demands for expanded rights and freedoms on the domestic scene. US positions on the Palestinian issue and the Bush Administration's particular closeness to the government of Ariel Sharon convey the message that the United States is indifferent, if not hostile, to the principle of self-determination.

A variety of recent statements evince Muslims' continuing preoccupation with the right of self-determination and the priority that it is accorded. Documents from the Arab world, whether emanating from human rights

activists or from officialdom, emphasize this right. An illustration can be found in the 1997 Arab Charter on Human Rights composed by the Council of the League of Arab States, which affirms in its very first section, Part I, Article 1(a) that:

> *All peoples have the right of self-determination and control over their natural wealth and resources and, accordingly, have the right to freely determine the form of their political structure and to freely pursue their economic, social and cultural development.* (Council of the League of Arab States 1994)

Reflecting civil society perspectives, the 1999 Casablanca Declaration, which was adopted by the First International Conference of the Arab Human Rights Movement, treated self-determination as a priority right. It called for »the due respect of human rights – most notably the right to self-determination,« and proclaimed:

> *The Conference declares its full support for the right of the Palestinian people to self-determination and to establish their independent state on their occupied national soil … The rights of the Palestinian people are the proper standard to measure the consistency of international positions towards a just peace and human rights. The Arab human rights movement will apply this standard in its relations with the different international organizations and actors.* (Arab Human Rights Movement 1999)

Islamic sources may also be read to confirm the right to self-determination, even though Islam was not traditionally interpreted as stipulating a right to national self-determination (see the discussion in Mayer 1991). Thus, the OIC Cairo Declaration of Human Rights in Islam, purporting to set forth human rights as mandated by Islam, provides in Article 11(b):

> *Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and selfdetermination [sic]. It is the duty of all States and peoples to support the struggle of colonized peoples for the liquidation of all forms of [sic] and occupation.* (Organization of the Islamic Conference 1990)

At the same time that they are concerned to resist neo-imperialism, people in Muslim countries are growing more impatient with restraints on their freedoms and with governmental rationalizations for oppression. Conditions in Muslim countries have taught their inhabitants the value of civil and political rights. Today people generally aspire to have democratized political systems where they can hold governments accountable. Enduring corrupt and arbitrary courts and brutal criminal justice systems, people hunger for the rule of law and demand safeguards for the rights of the criminal accused. Suffering under regimes where rulers roughly repress dissent and crush independent associations, people demand the right to express critical opinions and to set up independent associations and political parties. Many women chafe under the discriminatory treatment that they endure and aspire to greater freedoms and expanded opportunities, which government policies may deny them. Believers, whether Muslim or non-Muslim, may feel oppressed by governmental efforts to monopolize religion and to penalize those who do not defer to the state-approved orthodoxy. Thus, the prospect of obtaining real guarantees for civil and political rights does have potent appeal at the popular level.

As a result, notwithstanding the strong support for Palestinians' rights, some in the Arab world question whether the focus on this issue – a focus often encouraged by governments – has been used to distract people

from the need for reforms to remedy the major rights deficits within their own societies. Signaling a growing disposition to challenge the preoccupation with self-determination at the expense of campaigns for expanding human rights in Arab countries, participants in a June 2004 conference of over one hundred Arab intellectuals and politicians issued the Doha Declaration for Democracy and Reforms. Among the statements in the declaration was a challenge to the prioritization of the Palestinian issue at the expense of attending to the broader cause of democratic reform:

> *Hiding behind the necessity to resolve the Palestinian question before implementing political reform is obstructive and unacceptable. Historical experience has proven beyond a doubt that liberation movements throughout the world and democratic reform movements which grant people their freedom of expression are the best way to liberate the land and the nation. Autocratic regimes are unable or unwilling to deal seriously with outside threats and hegemonic designs. There is ample evidence that these same regimes sometimes are ready to surrender their sovereignty to ensure their own survival.* (Doha Conference on Democracy and Reform 2004)

These and other signs of unrest with the status quo – like the recent spurt of campaigns in Saudi Arabia calling for democratization – could signal the beginning of an era of struggle on the part of citizens of Muslim countries for broadening the human rights agenda and ending the long-prevailing deficits in the area of civil and political human rights.

Far from appealing to the restive populations in Muslim countries, US criticisms of shortcomings in the area of civil and political rights may be treated dismissively as flimsy rationales for US interference in Muslim countries. Perceptions of US indifference to the Palestinian cause mean,

as noted, that Muslims tend to react negatively to the US habit of lecturing Muslim countries on human rights. Thus, for example, the 1999 Casablanca Declaration affirms:

> *The importance of drawing the attention to the grave consequences of using the principles of human rights for the realization of specific foreign policy objectives of some countries. [The declaration] affirms that the Arab world is still suffering from the opportunistic, political and propagandist use of human rights by some major powers as evidenced by the double-standards employed by such powers, most notably the United States of America.* (Arab Human Rights Movement 1999)

The US invasion and occupation of Iraq, an intervention advertised as one designed to advance the human rights of the Iraqi people, is a case in point. Far from winning popular support, the US actions and policies in Iraq have deeply alienated many Arabs and Muslims – even ones who shed no tears for the overthrow of Saddam's dictatorship. Condemnation of the invasion of Iraq and subsequent human rights abuses have been added to the existing grievances over US policies affecting Palestinians. As US occupation forces struggle to quell the mounting insurgency, the growing toll of civilian casualties, commonly attributed to the US devaluation of Iraqi lives, further alienates Muslim opinion. The photographs of members of the US military grossly abusing Iraqi detainees in the Abu Ghraib prison have further discredited the United States and prompted scornful reactions to official US claims that the occupation has ended the kinds of human rights violations once perpetrated by Saddam Hussein's regime. Although the Bush administration seeks to dismiss incidents like the Abu Ghraib scandal as minor aberrations, Muslims tend to see things differently. The pattern of human rights abuses is widely attributed to the policies of the Bush administration, which has in many ways manifested its disregard for

international law, including the Geneva Conventions and prohibitions against torture.

Recent public opinion surveys done in a variety of Arab countries have indicated pervasive condemnations of US Middle East policy (see e.g. Rohde 2004 and Lobe 2004). In a related development, in June 2004 US invitations to Arab leaders to attend a Sea Island conference to discuss US plans for spreading democracy in the Arab world led to embarrassment when it turned out that intense anger over US lecturing on human rights and general condemnation of the US occupation of Iraq meant that few Arab countries would attend (see Weisman 2004). [17]

Suspiciousness of Western motives can now hamstring well-intentioned projects for humanitarian relief. Thus, the level of popular anger over the US invasion and occupation of Iraq has been a factor in Arab governments' resistance to Western calls for international intervention to deal with the massive humanitarian crisis in Darfur (see Wallis 2004). Despite widespread expressions of concern for the victims of the Darfur atrocities, the United States is unable to muster a coalition to intervene. Perhaps one million people will be exposed to starvation and death as a result. By repeatedly raising the profile of human rights issues while at the same time following policies that are perceived as inimical to the rights and interests of people in Muslim countries, the United States has become so mistrusted that leaders of Muslim countries are reluctant to cooperate with it, even where abstaining from intervention risks occasioning a massive loss of life on the part of innocent Muslim civilians.

Conclusion

As this brief sketch has indicated, the United States and Muslim countries are in many ways similar in their habits of clinging to traditions in their domestic legal systems and resisting upgrading their laws to meet international human rights standards. At the governmental level, both US and Muslim countries have philosophies that posit that international human rights law is not necessarily binding, meaning that it can be trumped by domestic laws. One might expect that their policies of only selectively embracing human rights would lead them to become allies. Indeed, some areas where traditional morality and the family are involved, they have taken similar positions and have even collaborated, as in their current resistance to expanding international human rights law to protect homosexuals.

However, in terms of the priorities that they accord to particular human rights, their perspectives have clashed sharply in some areas. The United States still relies heavily on 18th century priorities to determine which rights really matter. Acting as if its distinctive human rights agenda should be accepted by other countries, the United States has aggressively promoted human rights overseas, using rights in a highly politicized manner. The US emphasis on religious freedom suggests that it imagines that as it campaigns to reshape the Middle East, religious freedom is the central problem afflicting contemporary Middle Eastern societies, which is far from what the typical assessment within these societies would be.

In Muslim countries, in contrast, the sense of what priority is due various human rights has evolved in relation to recent political history, resulting in a particularly strong emphasis being placed on the right of self-determination, a third generation right. Muslims charge that this right, along with the corollary principle of respect for national sovereignty, has been wrongly disregarded and even trampled on by the United States in

the course of carrying out its Middle East strategy. The result is that the United States is seen as the foe of the human rights that count most.

Because the United States is such a dominant force on the international scene and because it is pursuing interventionist strategies in the Middle East, what could be academic disputes about differing human rights priorities have been transformed into actual political collisions. The United States in its invasion and occupation of Iraq has shown insensitivity to the reality that its intervention reminds Muslims of former European imperialist predations. With striking obliviousness to how hollow its claims to be committed to advancing human rights and freedoms will sound to Muslim ears, the United States has continued to portray its intervention as necessary to carry out a human rights mission. As the world's only superpower, the United States enjoys the ability to exert strong pressures on other countries to get them to defer to its priorities – but not the ability to forestall resentment and a hostile backlash when its claims to be concerned with human rights strike observers as meretricious.

The people of the United States are currently deprived of many of the protections afforded under international human rights law due to the US insistence on upholding traditions that impede adjustments to that law. To date the US failure to embrace the idea that all human rights matter has primarily had harmful effects in the domestic sphere. However, it seems that now that it has embarked on an ambitious project to remake the Middle East according to its own vision, the United States may be exacerbating tensions in an already volatile region by pressing its distinctive and limited human rights priorities in Muslim societies where human rights priorities are assessed very differently and where resentments of US double standards on human rights issues have been magnified by recent events.

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Notes

1 Other solidarity rights include the right to development, to sovereignty over natural resources, to participate in the common heritage of mankind, to peace, to a healthy and sustainable environment, and to humanitarian disaster relief.

2 *Country Reports on Human Rights*, published annually by the U.S. Department of State.

3 For example, the legal scholar Cherif Bassiouni has highlighted the plethora of reservations that the United States has placed on the three major human rights treaties that it has belatedly ratified, the Genocide Convention, the Convention Against Torture, and the ICCPR, burdening them with nine reservations, fifteen understandings, seven declarations, and two provisos. See Bassiouni 1993.

4On the historical development of human rights ideas both leading up to the UDHR and afterwards, see Lauren 1998, and Hesse / Post 1999.

5 For example, the US reservation entered to Article 6(5) of the ICCPR indicated that the United States would only recognize constitutional constraints on the death penalty – as opposed to the ICCPR rule banning the imposition of the death penalty for crimes committed by persons below eighteen years of age. The Eighth Amendment bans on »cruel and unusual punishments,« which as heretofore interpreted, does not preclude imposing the death penalty on juveniles. In a widely-criticized reservation to Article 6(5), the United States advised:
»The United States reserves the right, subject to its Constitutional constrains [sic], to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.«

6 The problems that the United States has with human rights correlate with the problems that it has had under the Bush Administration with accepting international law more generally. See e.g., the discussion in Koh 2003. (Harold Hongju Koh is the new dean of the Yale Law School.)

7 For a comparison of international human rights law and rights provisions in the US Constitution see Wronka 1998, 135-157.

8 Richard Bernstein is among the scholars who have remarked on this pattern. See Bernstein / Agel 1993, 3-4. Grey points out that other nations do not treat their constitutions this way (1984, 17).

9 The arguments on both sides of this controversy have been catalogued in a set of articles recently published in the *American Journal of International Law*.

See the articles collected in (2004) »Agora: The United States Constitution and International Law«. In: *The American Journal of International Law* 98, 42-108.

10 For a critical dissection of the treatment of rights in the Cairo Declaration, see Mayer 1999a, 80, 86-87, 89, 96, 120-121, 146-147, 172, 204, 206-208. For a favorable evaluation of the Cairo Declaration and other efforts to craft distinctive Islamic human rights standards to govern Muslims, see generally Baderin 2004.

11 For example, I have argued that »Islamic« reservations to the Woman's Convention deserve critical examination, see Mayer 1999b, 105-127, and Mayer 2004, 133-160.

12Thus, for example, the 1974 Jackson-Vanik Amendment to the Trade Reform Act barred extending trade privileges to »non-market economy« countries that violated human rights by impeding emigration. Its primary concern was using US trade restrictions to pressure the Soviet Union to allow Jews to emigrate freely to the West or Israel, but it also opened the door to members of various Christian denominations to emigrate to the West to escape religiously-based discrimination and persecution.

13Information on this office, which monitors religious persecution and discrimination and recommends policies, can be found at: http://www.state.gov/g/drl/irf/

14Details of the different patterns can be found in the US Department of State's *Country Reports on Human Rights Practices* and in the *International Religious Freedom Report* for 2003.

15The impact of this experience of European Imperialism and how it shapes Muslims' reactions to US intervention in the Middle East is discussed in a recent work by Rashid Khalidi (2004).

16Of course, concerns for Muslims' thwarted liberation struggles in other places like Chechnya and Kashmir also play a role in Muslims' elevating self-determination to the status of a particularly central human right.

17Algeria, Bahrain, Jordan, and Yemen were the only Arab countries choosing to accept the invitation.

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