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UNITED STATES HUMAN RIGHTS POLICY IN THE 21ST CENTURY IN AN AGE OF MULTILATERALISM

CATHERINE POWELL*

Professor Harold Koh's thoughtful article ends with the observation that "globalization has both sinister and constructive faces."¹ Indeed, we live in a world that is increasingly interdependent. Even some of those opposed to the project of globalization ironically depend on the tools of globalization to undermine it. Consider the terrorists who hijacked airplanes on September 11, 2001 and flew them into the World Trade Center and the Pentagon, killing thousands of innocent civilians from many different nations. The terrorists used the Internet and other online technology to spread the message of hate underlying their plot, transnational money transfers to finance it, and commercial airlines to execute it.²

Rather than allow such sinister forms of interdependence to flourish without an effective counter-weight, U.S. human rights policy in the twenty-first century should be more fully engaged in shaping and participating in international institutions and legal regimes that promote constructive forms of global interdependence.³ However, the United States has disengaged from a number of critical efforts to promote rule of law through multilateral institutions and regimes. This disengagement is disturbing and can be criticized on both normative and instrumentalist grounds.

In this Response, I first discuss a number of international initiatives in which U.S. participation was sought but rejected or resisted. Second, I discuss normative considerations concerning U.S. participation in international

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1. Harold Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

2. Benjamin Barber, Author of *Jihad vs. McWorld*, Open Society Institute U.S. Programs, Forum: Is Democratization a Response to Terrorism? (Nov. 1, 2001) (observing how the terrorists used tools of modernity against the project of modernity) (audio of these remarks available at <http://www.soros.org/usprograms/forum/democracy/index.html>).

3. *Id.*

institutions. Finally, I turn to instrumentalist considerations concerning U.S. involvement in these institutions.

I. UNITED STATES DISENGAGEMENT FROM INTERNATIONAL INITIATIVES

Despite the United States' key role in establishing the United Nations (U.N.),⁴ current U.S. policy in the fields of human rights and public international law more generally could be described with two words: isolationism and unilateralism. Several prominent examples reflect U.S. isolationism in the human rights area: its failure to pay U.N. dues,⁵ its failure to agree to raising the age for recruitment of soldiers to eighteen,⁶ its withdrawal from the World Conference against Racism in Durban,⁷ and its initial failure to

4. For discussion of the role Americans played in developing and sustaining the international human rights framework, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001), and *The Annual Message to Congress* (Jan. 6, 1941), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 663 (Samuel I. Rosenman ed., 1941), which paved the way for critical concepts in the Universal Declaration of Human Rights. See also LOUIS HENKIN, *THE AGE OF RIGHTS* 156 (1990) ("American constitutionalism can proudly claim an important part in the development of international human rights, and in their dissemination to every continent and corner."); Oscar Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63, 66-69 (1978) (discussing how the United States has given impetus to recognition of core human rights as international legal obligations even in the absence of human rights treaties).

5. For an account of how the United States moved from supporting the "duty to pay" to one of unilateral withholding of U.N. due, see Jose E. Alvarez, *Legal Remedies and the United Nations a la Carte Problem*, 12 MICH. J. INT'L L. 229 (1991). After the September 11 terrorist attacks, the United States paid back most of the dues owed. See, e.g., Lizette Alvarez, *House Approves \$582 Million For Back Dues Owed to U.N.*, N.Y. TIMES, Sept. 25, 2001, at A8.

6. See *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts*, opened for signature May 25, 2000, G.A. Res. 54/263, U.N. GAOR, 54th Sess., 97th plen. mtg., Annex, Agenda Item 116(a), at 2, U.N. Doc. A/Res/54/263 (2000) (not yet in force); Elizabeth Olson, *U.S. Fights Tide on a Move to Raise the Military Service Age*, N.Y. TIMES, Jan. 15, 2000, at A5.

7. Professor Koh is surely correct in suggesting that Secretary of State Powell should have participated in the World Conference, as he could have used his participation as an opportunity to challenge attempts to use the Conference to assert that "Zionism is racism." As Professor Koh points out, in challenging this platform, Secretary of State Powell might have been able to use his prestige to "redirect[] the Conference agenda toward the real emerging global discrimination issues of the twenty-first century, such as caste discrimination, discrimination against refugees, workable affirmative action techniques, and other efforts to give meaningful reparations for past discrimination." Koh, *supra* note 1, at 309. The rights of Palestinians are central to these concerns, as are the rights of Jews—both of whom have faced a variety of forms of discrimination historically and currently. The problem with asserting that "Zionism is racism" is that it denies the legitimacy of Jewish nationalism. Even while this mantra attempts to advance the grievances and aspirations of Palestinians, it fails to make room for the identity and aspirations of Jews. Shibley Telhami, *Remarks Made at Open Meeting of the Human Rights Watch* (Dec. 5, 2001).

sign the International Criminal Court Treaty and the Landmines Convention.⁸ In other fields of public international law, the United States has demonstrated a similar pattern of isolationism. For example, in international environmental law, the United States walked away from the Kyoto Protocol.⁹ In the area of germ weapons, the United States suspended negotiations on strengthening the 1972 Biological Weapons Convention, rejecting a draft protocol designed to strengthen the 1972 treaty,¹⁰ offering instead its own set of proposals.¹¹ Finally, in the area of small arms trafficking, the United States failed to agree with attempts at a U.N. conference to address the devastating humanitarian impact of small arms proliferation.¹²

The examples of unilateralism are equally stunning. The United States recently announced its unilateral withdrawal from the 1972 Antiballistic Missile Treaty,¹³ despite the fact that “[m]utual abandonment of the accord might even have been possible” to negotiate eventually with Russia.¹⁴ While lawful, “[t]he Bush administration’s decision to abrogate the 1972 Antiballistic Missile Treaty with Russia will increase European concerns about American unilateralism[.]”¹⁵ Equally startling was the United States’ failure to seek

8. See *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), at <http://www.un.org/law/icc/statute/contents.htm> (last visited Feb. 22, 2002); United Nations: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507. As Professor Koh notes, “President Clinton ultimately signed the International Criminal Court treaty on December 31, 2000 and declared the United States’ intent to sign the Landmines Convention by 2006.” Koh, *supra* note 1, at 306 n.31.

9. David E. Sanger, *Bush Will Continue to Oppose Kyoto Pact on Global Warming*, N.Y. TIMES, June 12, 2001, at A1.

10. The protocol would have strengthened the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583 (entered into force Mar. 26, 1975), by requiring treaty members to create a new international organization to conduct mandatory inspections of plants in which germ weapons could be made. Judith Miller, *U.S. Seeks Changes in Germ War Pact*, N.Y. TIMES, Nov. 1, 2001, at A1.

11. Preferring the more sweeping approach taken in the protocol, one veteran European diplomat said, “We are ready and willing to work with the Americans to bridge the gaps . . . [b]ut we hope this is only a first step and that it opens the door to more sweeping multilateral measures.” *Id.*

12. Barbara Crossette, *Effort by U.N. To Cut Traffic In Arms Meets a U.S. Rebuff*, N.Y. TIMES, July 10, 2001, at A8.

13. See *Tearing up the ABM Treaty*, Editorial, N.Y. TIMES, Dec. 13, 2001, at A38.

14. *Id.*

15. Steven Erlanger, *Bush’s Move On ABM Pact Gives Pause to Europeans*, N.Y. TIMES, Dec. 13, 2001, at A19 (citing several senior European officials). “[T]his raises again the question of unilateralism,” said one Italian official, who asserted that “[i]t will be damaging in the effort to keep the United States involved and engaged in the international treaties that do exist.” *Id.* Similarly, a senior German official lamented that “the problem is less about missile defense than about treaties, about how much the Bush administration respects international obligations.” *Id.*

Security Council approval for its bombing campaign in Kosovo in response to the ethnic cleansing of Kosovar Albanians. While the U.S.-led bombing campaign was not strictly unilateral in that it was carried out under the auspices of NATO, its failure to seek U.N. Security Council approval marked its distaste for working through international institutions.¹⁶

II. NORMATIVE CONSIDERATIONS

As the unquestioned global hegemon, the United States must exercise its military, economic and political power within a normative framework that it helps construct and reinforce, even as it is constrained by this framework.¹⁷ In making the case that international institutions should figure into this normative framework, in this section, I draw on institutionalist approaches to international relations theory. Because institutionalism is a response to realist critiques of international institutions, this section begins with a discussion of realism. I then discuss institutionalist responses to realism to demonstrate why institutionalism is a helpful framework for understanding the value of international institutions in the human rights area, both as a descriptive and normative matter.

A. *Realism*

Realists believe that international institutions do not contribute to peace in any significant way, and matter only at the margins.¹⁸ Because the core assumptions of realism are that “states operate in an anarchic environment and behave in a self-interested manner,” realists view international institutions as being “based on self-interested calculations of the great powers”¹⁹ Under a realist framework, a government conceives of its national interest in a narrowly defined way, by determining unilaterally what is in the nation’s best interest and advancing these interests through international institutions to the

16. For a critical analysis of the U.S.-led bombing campaign, see Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1 (1999), for a discussion on the need for Security Council approval, pursuant to Chapter VII of the U.N. Charter.

17. I would like to thank my colleague Susan Sturm here, whose thoughtful counsel helped me develop this claim. Note that this claim is consistent with constructivist approaches to international relations theory, which view world politics as socially constructed. Constructivists Alexander Wendt notes that “the fundamental structures of international politics are social rather than strictly material . . . and that these structures shape actors’ identities and interests, rather than just their behavior” Alexander Wendt, *Constructing International Politics*, 20 INT’L SECURITY 71, 71-72 (1995). See also John Gerard Ruggie, *What Makes the World Hang Together? Neoutilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855 (1998).

18. John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5, 7 (1994).

19. *Id.*

extent it has the power to do so and force other governments to adapt.²⁰ According to realists, “institutions are basically a reflection of [this] distribution of power in the world . . . and they have no independent effect on state behavior.”²¹

B. Institutionalism

By contrast, institutionalists assert that institutions can change state behavior and facilitate cooperation.²² Here I focus on the institutionalist argument that “borrows elements from both liberalism and realism.”²³ Like realism, this institutionalist argument assumes that state behavior is based on self-interest. However, consistent with liberalism’s focus on the formation of interest, these institutionalists emphasize the role of international institutions in altering a state’s conception of its self-interest.²⁴

According to institutionalists, international institutions assist states to change their conception of their self-interest by minimizing one of the principal obstacles to cooperation among states with mutual interests—cheating.²⁵ Cheating occurs as a result of the classic prisoners’ dilemma in which the likely strategy chosen by a state faced with the choice of either cheating or cooperating will be to cheat and hope that another state will pursue a cooperative strategy.²⁶ While this ideal outcome maximizes gain for the cheating state, if both states pursue this logic, then both will try to cheat the other, and consequently both sides may be worse off than had they cooperated.

An example of this in the human rights area is the treatment of prisoners of war. Lack of cooperation leads to insecurity in that each state is not able to guarantee humane treatment for its soldiers captured by the other side during a war. By contrast, cooperation secured under the Third Geneva Convention leads states to observe standards guaranteeing humane treatment of captured

20. Cf. Erlanger, *supra* note 15, at A19 (quoting a German official: “[I]n the past, Washington determined its national interest in shaping international rules, behavior and institutions. ‘Now Washington seems to want to pursue its national interest in a more narrowly defined way, doing what it wants and forcing others to adapt’”)

21. Mearsheimer, *supra* note 18, at 7.

22. *Id.*

23. Robert O. Keohane, *Institutional Theory and the Realist Challenge after the Cold War*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* 269, 271 (David A. Baldwin ed., 1993).

24. *Id.*

25. Mearsheimer, *supra* note 18, at 17 (describing cheating as principal obstacle to cooperation according to what he describes as “liberal” institutionalists). Mearsheimer refers to the “centrality of the prisoners’ dilemma and cheating to the liberal institutionalist literature” *Id.* at 17 n.47.

26. *Id.* at 17. See also William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT’L L. & POL’Y 227, 242-56 (1997) (summarizing substantial literature by scholars of international relations and game theory).

enemy soldiers.²⁷ In agreeing to observe the Geneva Conventions, though not necessarily prisoner of war status, for the Taliban prisoners detained at the U.S. naval base at Guantánamo Bay, Cuba, the United States has half-way acknowledged a value of cooperation in this context—laying the groundwork for fair treatment of U.S. soldiers captured in future wars.²⁸ A similar example involves cooperative arrangements requiring that states notify a detained or arrested foreign national of her right to consult with an official from the consulate of the foreign national's home country.²⁹ Lack of cooperation between two states leaves both sides worse off in the sense that it is difficult to ensure access to citizens detained or arrested overseas. Through notification of the right to consult with a consular official, cooperation ensures a minimal level of access and protection. Here, the United States has begun to acknowledge the value of cooperation by providing law enforcement officials with information regarding the notification requirement.³⁰

To deter cheaters and protect victims, institutional rules can change a state's calculations about how to maximize gain, by assisting states realize that short term sacrifices in terms of cooperation will lead to long-term gains.³¹ Rules can alter this calculation, for example, by rewarding states that develop reputations for adherence to international rules; by creating greater

27. Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287 (requiring that prisoners of war receive humane treatment; are not punished for not providing additional information beyond their name, rank, birth date and serial number; and are entitled to a right to be tried before the same courts with the same procedures that the detaining power's military personnel would face, offering "the essential guarantees of independence and impartiality").

28. Katharine Q. Seelye, *In Shift, Bush Says Geneva Rule Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1 (describing that Secretary of State Colin Powell won over other Bush Administration officials to observe the Geneva Conventions, "largely on the premise that American soldiers needed Geneva protection").

29. This right can be found in the Vienna Convention on Consular Relations, bilateral agreements, and is considered to be a customary international law norm. *See* Vienna Convention on Consular Relations, April 24, 1963, art. 42, 596 U.N.T.S. 261.

30. *Compare* Catherine W. Brown, Assistant Legal Adviser for Counselor Affairs, State Department, Office of the Legal Adviser, Remarks at the American Society of International Law, 2001 Annual Meeting, *International Law and the Work of Federal and State Governments* (April 4-7, 2001) 14 ("[W]hat I have been trying to do is to get federal, state and local law enforcement[,] judicial and other officials to comply with these notification requirements.") (transcript on file with author and Saint Louis University Law Journal), *with* *Breard v. Greene*, 523 U.S. 371 (1998) (denying certiorari in case challenging death sentence where the defendant was not notified of his right to consult a consular official). For information regarding the American Society of International Law 2001 Annual Meeting, see http://www.asil.org/annual_meeting/2001/index.htm (last visited Mar. 13, 2002).

31. Jose E. Alvarez, *The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146 (2002) ("International regimes . . . enable parties to escape perennial prisoners' dilemmas by replacing short-term calculations of interest with long-term strategic analysis and mutual reliance on long-term regulation[.]").

interdependence between states thereby raising the cost of cheating; by increasing the amount of available information to ensure effective monitoring of adherence and early warning of cheating; and by reducing the transaction costs of individual agreements, thereby making cooperation more profitable for self-interested states.³²

One prominent realist, John Mearsheimer, argues that institutionalism ignores another principal obstacle to cooperation—the fact that states measure their own gains relative to gains of other states, or what realists call “relative-gains concerns.”³³ However, institutionalists Robert Keohane and Lisa Martin point out that distributional conflict arising from relative gains “may render institutions *more* important.”³⁴ Because more than one cooperative outcome typically exists, “states involved may not agree on which of these outcomes is preferred, as each has different distributional implications.”³⁵ While such disagreement is a major obstacle to cooperation, because international institutions provide “valuable information . . . about the distribution of gains from cooperation . . . [they] can step in to provide ‘constructed focal points’ that make particular cooperative outcomes prominent.”³⁶

As a descriptive matter, institutionalism usefully explains why self-interested states cooperate and how forms of cooperation change states’ conceptions of self-interest. As a normative matter, institutionalism is helpful because if all states relied solely on self-interest unchecked by forms of collaboration to reshape self-interest, we would live in a world of chaos. Because of its hegemony and ability to impact the global normative framework, U.S. participation in international institutions reshapes self-interest both for itself and the world. Reconstituted conceptions of states’ self interests that favor collaboration can, in turn, shift normative expectations toward greater compliance with human rights.

III. INSTRUMENTALIST CONSIDERATIONS

In this section, I consider two instrumentalist considerations that rely on realist assumptions that states act in a self-interested manner. First, the United States would be more credible and therefore more effective in advancing respect for human rights law overseas if it led by example. The credibility of U.S. human rights policy suffers so long as the United States applies a double standard—insisting that other states comply with international human rights

32. *Id.*

33. Mearsheimer, *supra* note 18.

34. Robert Keohane & Lisa Martin, *The Promise of Institutional Theory*, 20 INT’L SECURITY 39, 45 (1995) (responding to Mearsheimer’s article, *The False Promise of International Institutions*, *supra* note 18).

35. *Id.* (describing how multiple equilibriums lead to disagreement in game theory logic).

36. *Id.*

regimes, but often refusing to participate in these regimes itself. Second, U.S. efforts to advance human rights overseas would be more persuasive and therefore more effective if these efforts were informed by first-hand experience in applying international standards.

Both points are demonstrated in the U.S. efforts to promote women's human rights in Afghanistan. The United States would have both more credibility and greater experience to draw on women's human rights once it ratifies the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).³⁷ Once it ratifies CEDAW, the United States will have more influence at the international level, both as a matter of principle and as a matter of institutional competence. If the United States were to participate in international institutions, such as the CEDAW Committee, it could take a more principled stand, increase its knowledge and experience in women's human rights and strengthen the capacity of international institutions to ensure compliance.

IV. CONCLUSION

I end where I began with Professor Koh's quote, "globalization has both sinister and constructive faces."³⁸ A twenty-first century U.S. human rights policy must "use the constructive face of globalization to overcome its most destructive face."³⁹ This requires U.S. participation in and compliance with international regimes.⁴⁰ In this Response, I have argued in support of multilateralism as a constructive face of globalization on both normative and instrumentalist grounds.⁴¹ Rather than living in satisfaction in a world whose fabric of interdependence is woven with seeds of despair and anger,⁴² the

37. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

38. Koh, *supra* note 1, at 344.

39. *Id.* at 331.

40. As Michael Ignatieff has pointed out in considering U.S. exceptionalism, it is important to distinguish U.S. nonparticipation from noncompliance. Michael Ignatieff, *No Exceptions?*, 1 LEGAL AFF. 59 (2002).

41. Of course, multilateral institutions themselves have sinister as well as constructive sides. For discussion of the drawbacks of multilateralism, see Jose E. Alvarez's scholarship. *See, e.g.*, Jose E. Alvarez, *supra* note 31, at 11 (describing drawbacks of multilateral institutions and treaty regimes); Jose E. Alvarez, *Multilateralism and its Discontents*, 11 EUR. J. INT'L L. 393-411 (2000) (summarizing hazards of multilateralism); and Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365-483 (1999) (exploring shortcomings of the International Tribunal for Rwanda). Through greater engagement in international organizations, the United States can promote the constructive side of multilateralism and discourage the hazards.

42. For an astute discussion of how this despair and anger has taken root in Europe, where Muslim immigrants find it hard to assimilate (and where many of the September 11th hijackers

United States should promote constructive forms of globalization whose foundation and sustainability are bolstered by international institutions and the rule of law.

studied), see Thomas L. Friedman, *The 2 Domes of Belgium*, N.Y. TIMES, Jan. 27, 2002, at 13. Friedman states.

What radicalized the Sept. 11 terrorists was not that they suffered from poverty of food, it was that they suffered from a poverty of dignity. Frustrated by the low standing of Muslim countries in the world, compared with Europe or the United States, and the low standing in which they were personally held where they were living, they were easy pickings for militant preachers who knew how to direct their rage.

Id.

