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Democracy and Human Rights in the United States Foreign Policy: Lessons from the Haitian Crisis

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DEMOCRACY AND HUMAN RIGHTS IN THE UNITED STATES FOREIGN POLICY?: LESSONS FROM THE HAITIAN CRISIS*

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MY subject today is a question: Democracy and Human Rights in United States Foreign Policy? I ask that question because it centrally occupies the minds of most American international human rights lawyers. My students sometimes ask, "[e]xactly what is an international human rights lawyer?" My working definition: an international human rights lawyer is an international lawyer who got mad. In a democracy, human rights are both political and personal. For that reason, this lecture will cover a bit of both. Before I turn to some of the policy questions raised by democracy and human rights in United States foreign policy, particularly by the continuing crisis in Haiti, let me describe how my own career as an international lawyer evolved toward the international human rights work that I am doing now.

My parents came to this country as immigrants more than forty years ago. My father, the late Kwang Lim Koh, was a young professor of international law at Seoul National University in Korea. He came here, as many of you have done, as a foreign student to complete an L.L.M and an S.J.D. at an American law school. When the first democratic government of Korea was elected in 1960, he was drawn into political life. He became the Korean Ambassador to the United Nations, and later the Deputy Chief of Mission at the Korean Embassy in Washington, D.C. In 1960, the Korean government was overthrown by a brutal *coup d'etat* and my father became, in effect, a political exile. We sought refuge in New Haven, Connecticut, where my parents started teaching a course in East Asian Law at Yale Law School. With a few detours, I have continued to reside in New Haven ever since.

My own career began in private practice as an international business lawyer, conducting arbitrations, transnational litigation, and export con-

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trol counseling. In 1983, I became a government lawyer specializing in public international law and the law of United States foreign policy. I began teaching civil procedure and international business and trade law, and gradually shifted to teaching international organizations and international legal theory. In my academic work, I pursued a number of paradigms, the first captured in the title of my article, *Why the President (Almost) Always Wins in Foreign Affairs*.[1] In 1991 I published a sequel, *Transnational Public Law Litigation*,[2] which argued that an emerging transnational analog exists to the familiar domestic phenomenon of public law litigation. In the same way American civil rights lawyers have invoked principles of American public law to seek reform of various domestic institutions, including prisons, hospitals, and school systems, I argued that private litigants increasingly turn to United States courts to enforce international human rights norms against United States and foreign government officials when they act in violation of internationally recognized standards.

Shortly after the article was published, a number of students appeared in my office and asked if I was willing to teach an international human rights clinic. In the words of your local celebrity, H. Ross Perot, they asked, "would I actually *do* transnational public law litigation, not just talk about it?" In the time-honored law professor's tradition, I said that I was too busy and that they should go away. But, in the best student tradition, they persisted, and soon thereafter the Lowenstein International Human Rights Clinic was born.

We named the clinic after Allard Lowenstein, a graduate of Yale law school who had been a political activist and former United States Ambassador to the United Nations Human Rights Commission in the Carter Administration. I agreed to teach the course along with Michael Ratner, an experienced human rights litigator from New York's Center for Constitutional Rights.

In the first few semesters after we established the Clinic, we filed amicus briefs in a number of cases, including a suit against Ferdinand Marcos in the Ninth Circuit.[3] In addition, we filed briefs in a number of human rights cases in the Supreme Court, including *U.S. v. Alvarez-Machain*[4] and *Saudi Arabia v. Nelson*.[5] We brought petitions at the Inter-American Human Rights Commission and a number of lawsuits in domestic court, the first against the former Defense Minister of Guatemala, Hector Gramajo, who had been responsible for various atrocities against

1. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

2. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

3. Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993).

4. 112 S. Ct. 2188 (1992) (involving the extraterritorial kidnapping of Humberto Alvarez-Machain).

5. 113 S. Ct. 1471 (1993) (involving suit for torture under the "commercial activity" exception of the Foreign Sovereign Immunities Act).

Kanjobal Indians in the Western Highlands. We served process upon him at his graduation from Harvard, where he was receiving a degree from the Kennedy School of Government.[6] A number of years later we filed a similar suit against an Indonesian general named Panjaitan who was responsible for the 1991 massacre in East Timor.[7]

The case in which we were most deeply involved was a suit against the former Dictator of Haiti, Prosper Avril, who had fled Haiti for Miami, where he was living in a large house with several bank accounts.[8] Through this lawsuit, we encountered the newly-elected government of Haiti under the Presidency of Jean-Bertrand Aristide. In the brief period during which we worked with the newly-elected government, I saw a touching similarity between the Korean government that my father had served and the fledgling government trying to get started in Haiti. When the newly-elected government was overthrown in the fall of 1991, the students came to me and said: "We have got to do something about Haitian refugees. They are fleeing, being stopped on the high seas, and returned. We cannot let this happen."

What to do? Previously, I had argued that there was a way, through transnational public law litigation, to make government officials satisfy internationally recognized human rights standards. Here was a chance to vindicate this theory in real life. But if the President almost always wins in foreign affairs, what chance did we really have? The case that we brought, *Haitian Centers Council v. Sale*,[9] in the next year went to the Second Circuit seven times, and to the Supreme Court six times. During that period, more than one hundred Yale law students and thirteen faculty members worked on the case, logging more than twenty thousand hours. Think about that for a second: twenty thousand hours is more than three law school educations, all spent litigating one case.[10] In the end we won a split decision. We lost our Supreme Court effort to challenge the Bush and Clinton policies of summarily returning all Haitians to Haiti—a policy that continues as we speak.[11] But in a less publicized part of the case, we won a district court judgment that ordered the release of more than two hundred Haitian refugees, who were being held behind barbed wire in Guantanamo, Cuba, to the United States, where they are now living and pursuing new lives.[12] Interestingly, at the beginning of this case, the government filed a motion against me for Rule 11 sanctions claiming that we had brought a "frivolous" lawsuit and asking that a ten

6. Xuncax v. Gramajo, No. 91-11564 WD (D. Mass. filed June 6, 1991).

7. Todd v. Panjaitan, No. 92-12255 WD (D. Mass. filed Sept. 17, 1992).

8. Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993). In *Avril*, we recently won a $41 million default judgment.

9. 113 S. Ct. 2549 (1993); 823 F. Supp. 1028 (E.D.N.Y. 1993).

10. For an account of the case by three Yale law student participants, see Victoria Clawson et al., *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L.J. 2337 (1994).

11. Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993). The direct return policy was later modified to a policy of safe haven in July of 1994.

12. Sale v. Haitian Centers Council, 823 F. Supp. 1028 (E.D.N.Y. 1993).

million dollar bond be posted before we could proceed. A ten million dollar bond was, at the time, ten times larger than the largest bond ever requested on a temporary restraining order in the history of the Second Circuit.[13] In the end, however, we prevailed on most of the counts of our complaint and settled for $634,100 in fees and costs.

For me, the Haitian litigation was a career-transforming experience. During the three thousand hours that I worked on the case, I was driven by the memory of my own parents and how they had found refuge in this country. It was because of America's willingness to take them in that I became a lawyer. When the Haitians did precisely the same thing, however, they were summarily returned to those from whom they were fleeing.

As the Haitian case drew to a close last spring, two events happened. First, I went to LaGuardia Airport to meet the Haitians who arrived from Guantanamo by court order. As we took them through the immigration process, one Haitian came up to me and said, "Monsieur Harold, my lawyer, my name is wrong!" For the last two years he had worn a computerized arm bracelet with a bar code stamped on it like the code stamped on a piece of meat at a grocery store. He had written a variation of the same name on a napkin. He pointed to the napkin and said, "*This* is my name, *this* is my name." I realized that when he was picked up off the boat, his name had been misspelled. As I went back to change it, suddenly I realized we could not. All of his rights under our injunction keyed off of the wrong name. So I said to him, "This is your Ellis Island name. That is your name now." He was deeply puzzled. He asked me, "What is *your* name?" I said, "In this country, we spell it KOH." He answered, "Then *this* is now my name." It occurred to me that the cycle had come full circle and was beginning again. Maybe *his* child would become a lawyer, maybe even an international human rights lawyer someday.

A second event that occurred about the same time was the appointment of my colleague at Yale, Drew Days, as Solicitor General of the United States. Drew had been the Director of our Schell Center for International Human Rights. As a result, our dean asked me to succeed Drew with an eye toward furthering the human rights work in which I had become deeply engaged. I saw this as an opportunity to take my personal experience and put it into a policy perspective, thinking in broader policy terms about the actual and desirable role of democracy and human rights in United States foreign policy. In that capacity, I have had occasion to evaluate the Clinton Administration's first-year record in democracy and human rights, the subject to which I now turn.

How should we evaluate the Clinton Administration's human rights performance thus far? Let me suggest five criteria:

1) *Rhetoric*;

13. Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 262 (S.D.N.Y. 1986), *aff'd in part, rev'd in part*, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987).

2) *Appointments* to key policy-making positions;
3) *Intervention*, to prevent ongoing human rights abuses;
4) *Accountability*, to seek remedies for past human rights abuses; and
5) *Preventive Measures*, to forestall future human rights abuses by, for example, adopting international standards and treaties, promoting institutional change, and taking measures of deterrence.

Thus far, I would rate the Clinton Administration fairly high on criteria 1) and 2), Rhetoric and Appointments. I would give the administration a low to failing grade in Intervention and Accountability, and say that the jury is still out on the fifth criterion, Preventive Measures. In viewing the situation more broadly, I have concluded that the Haitian case-study represents not only this administration's greatest failure with regard to both democracy and human rights, but it also presents a paradigm, which I call the "Haiti paradigm," demonstrating what can and will go wrong with the United States human rights policy.[14]

Starting with the first criterion, Rhetoric, I give President Clinton enormous credit for being the first American president since Jimmy Carter to put human rights prominently on his foreign policy agenda. Clinton's rhetoric began with a campaign speech he gave in Milwaukee in October 1992. In addition, democracy and human rights were surprisingly prominent themes in Clinton's State of the Union Address in January 1994. Warren Christopher mentioned human rights prominently in his confirmation hearing as Secretary of State, and the subject emerged as a particularly strong theme in Secretary Christopher's address to the Vienna Conference on Human Rights in June of 1993 where he made the following statement:

> [O]ver the course of the last two centuries, Americans have found that advancing democratic values and human rights serve our deepest values as well as our practical interests. That is why the United States stands with men and women everywhere who are standing up for these principles, and that is why President Clinton has made reinforcing democracy and protecting human rights a pillar of our foreign policy . . . In this post-cold war era, we are at a new moment. Our agenda for freedom must embrace every prisoner of conscience, every victim of torture, every individual denied basic human rights.[15]

Note four things. First, Christopher went on to say, "[i]n the battle for democracy and human rights words matter, but what we do, matters much more."[16] In other words, judge us by what we do, not by what we say. Second, he emphasized the individuals who have been denied human rights, rather than focusing on state interests: a recognition of the human rights revolution wrought by Nuremberg, which restored individuals to their proper place as subjects of international law. Third, Christo-

14. For elaboration, see Koh, *supra* note 1.

15. Warren Christopher, *Democracy and Human Rights: Where America Stands*, Address Before World Conference on Human Rights, *in* INFO. ACCESS CO., June 21, 1993, at 441.

16. *Id.*

pher focused not just on human rights, but on democracy and human rights as interlinked objectives of United States foreign policy. Finally, he recognized that advancing democratic values and human rights serves our deepest values as well as our practical interests. Such statements were the first in more than a decade by a high United States foreign policy official acknowledging that promoting human rights can serve both our values and our interests.

Treating human rights and democracy as a unit actually disguises two competing rationales for promoting human rights as part of United States foreign policy. First, consider what I call an *intrinsic* rationale. Namely, we promote human rights because it is the right thing to do and because it is consistent with our national values and identity. The second, *instrumental* reason is that promoting human rights serves our other national interests, such as peace, security, and freedom. Secretary Christopher began by saying, "[o]ur agenda is expansive. It embraces every prisoner of conscience, every victim of torture, every individual denied basic human rights," language reminiscent of John F. Kennedy's famous promise in 1961 "to pay any price, bear any burden, support any friend, and oppose any foe to secure the blessings of liberty." In fact, however, the Clinton Administration has largely adopted the Reagan and Bush practice of promoting human rights as an instrumentalist means of pursuing other national interests: promoting democracy, and through some "trickle-down" mechanism, hoping that democracy will in turn promote human rights. This kind of instrumental reasoning first led to President Reagan's appeal for *contra* funding in the language of democracy and human rights, and President Bush's use of the rhetoric of human rights to rally a coalition of nations against Iraq's aggression towards Kuwait, without later invoking the same rhetoric to condemn non-democratic human rights abuses by countries like Saudi Arabia and Kuwait.

If a failure in the Bush Administration's human rights policy occurred, it was caused by a lack of vision. When the cold war ended, President Bush received a golden opportunity to define a central place for human rights as part of our foreign policy agenda. He did preside over some advances in human rights, particularly in Eastern Europe, South Africa and Central America, but he never articulated a *vision* that would establish why human rights should be given a consistent premium. In this regard, President-elect Clinton, as a candidate, was highly critical of President Bush. He said, "President Bush doesn't recognize that our nation has a higher purpose than to coddle dictators and stand aside from the global movement towards democracy. He seems too often to prefer a foreign policy that embraces stability at the expense of freedom."[17] The question now, however, is whether President Clinton's heightened *rhetorical* emphasis on democracy and human rights will translate into committed and principled support, or whether it will instead constitute implicit

17. Governor William J. Clinton, Speech to Univ. of Wisconsin Inst. of World Affairs (Oct. 1, 1992).

acceptance of a more limited human rights agenda, such as promoting market-based democracies with hopes that human rights might benefit because of the familiar notion that market-based democracies "do not fight with each other." We should, therefore, ask four questions:

1) Will the Administration's rhetorical emphasis on democracy somehow short-change human rights?
2) Will we criticize human rights violations by undemocratic but stable regimes?
3) Will we support principles, not leaders, applying the same human rights principles to our large allies as to our foes? and
4) How broadly will we define democracy itself? Does "democracy" mean simply holding elections? Or do we view democracy as more broadly encompassing respect for the rule of law, due process, respect for the rights of minorities, indigenous peoples, etc?

So much for Rhetoric. What about Appointments, the second criterion? It seems to me that, at least initially, the Clinton Administration's appointments in the human rights area have been excellent. For example, the following prominent persons have been appointed to key positions in the Administration: John Shattuck (a former head of the American Civil Liberty Union's Washington Office) as Assistant Secretary of State for Human Rights, Democracy, and Humanitarian Affairs; Drew Days, my Yale colleague, as Solicitor General; Doris Meissner as Commissioner of the Immigration and Naturalization Service; and Tim Wirth as the Under Secretary for Global Affairs.[18]

In addition, other early appointees display significant international human rights experience, including Morton Halperin, whose nomination was withdrawn as Assistant Secretary of Defense for Human Rights, but who now works on the National Security Council staff, and Phil Heymann (a Harvard law professor) who served as Deputy Attorney General. The problem is not with the quality of these appointments, which has generally been excellent, but the extent to which these fine people have actually been listened to with regard to foreign policy. The unfortunate first signs are that they have not. Again, Haiti provides a good example. When Assistant Secretary of State John Shattuck visited Haiti, he was apparently shocked to discover that the situation there was far more violent and dangerous than he ever understood. He suggested that a "policy review" might be necessary.[19] For this statement he was rebuked by the White House. An anonymous official told the *New York Times*, "[I]t was completely wrong and outrageous and there is enormous anger in the White House . . . ," referring to Shattuck's statement, but not the policy itself. In other words, the anger was about the statement that the em-

18. Wirth began the job more interested in the environment than human rights, although now he seems to be warming to the human rights task.

19. Steven A. Holmes, *Rebuking Aide, U.S. Says Haiti Policy Stands*, N.Y. TIMES, Dec. 16, 1993, at A6.

peror has no clothes, not about the defective policy itself.[20]

Let me turn to the third criterion: Intervention to prevent ongoing human rights abuses. Thus far, it seems to me, the Clinton Administration has had far more failures than successes on this score. The failures stem from a combination of a lack of recognition and a lack of resolve. Again, the Haiti example is very instructive. Think about a nation's human rights options as grouped at four levels: ranging from Level One, the least interventionistic, to Level Four, the most interventionistic. Level One, representing the lowest level of intervention, encompasses those actions that a nation can take to promote human rights within its own territory, without invading the sovereignty of another nation. Such measures include, for example, adopting human rights standards as part of national law (whether by treaty, judicial decision, or legislation), maintaining a persistent public moral condemnation of human rights abuses when they occur abroad, and providing temporary safe haven for refugees who come here.[21] Level One domestic actions also embrace monitoring, reporting, and certifying human rights abuses in a fair and accurate way. These may seem like modest steps, but they are the minimum human rights efforts that a nation can undertake: reporting, certification, providing a safe haven for refugees, public condemnation, and maintaining international law standards at home.

If you move to the second level, political intervention, you can include diplomatic intervention, such as jaw-boning, diplomatic protests, and multilateral and regional political action. At a third level, a nation can consider economic intervention, the withholding of carrots and the brandishing of sticks against human rights violators. Withholding of benefits includes denying Most-Favored-Nation (MFN) status, removing a country from the General System of Preferences, denying it loans and visas, withdrawing air landing rights, cutting off foreign aid, either security assistance under section 502(b),[22] humanitarian development assistance under section 116,[23] or any other benefit that a human rights-violating nation might seek. (For example, refusing to hold the Olympics in China could be viewed as a denial of a benefit.) Sanctions include the range of options available to a country both unilaterally and multilaterally under its economic laws: asset freezes, trade embargoes, bank account freezes, and oil blockades.

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20. Two months after this lecture, the Clinton Administration finally abandoned its summary repatriation policy, shifting first to a policy of conducting shipboard refugee interviews in Jamaica, and then in July of 1994 to a policy of housing fleeing Haitians in various offshore internment camps without the possibility of resettlement in the United States. In August 1994, the Administration began bringing fleeing Cubans to the same sites in Guantanamo, and later to the camps in Panama.

21. Temporary safe haven does not mean asylum, but rather, a safe place of refuge, somewhere other than the place from which the refugees are fleeing. In July 1994, the United States finally shifted to such a temporary safe haven policy.

22. Foreign Assistance Act of 1961, § 502(b), 22 U.S.C. § 2304(b) (1988).

23. *Id.* § 116, 22 U.S.C. § 215n (1988 & Supp. 1993).

Finally, Level Four is military intervention, obviously the most controversial. The most limited military intervention is the rescue of a country's nationals who are facing danger, for example, the famous Israeli raid at Entebbe. More extensive is military intervention for the purpose of providing humanitarian assistance, such as, *e.g.*, food to Somalia, to limited air strikes, and finally to larger-scale military activities of the kind now being contemplated for Haiti itself. We need not now decide whether such intervention should be unilateral or multilateral or is lawful under domestic constitutional law or the War Powers Resolution.[24] But if you recognize that this is the list of interventionistic options, ranging from Level One (least interventionistic) to Level Four (most interventionistic), we should agree upon six basic propositions.

The first principle is the "blunt instrument" principle. As you go up the ladder of intervention options, the instruments become more blunt and inherently less capable of achieving an ultimate negotiated settlement. For that reason, as the Iraq war illustrates, you must be cautious in moving up the list.

The second principle requiring agreement is the "ratchet-up-but-not-ratchet-down" principle. This principle maintains that, at a minimum, you should keep the policy at Level One constant as you move up the ladder. If, for example, you begin at Level One with moral condemnation and a refugee safe haven policy and move up the ladder, the policies should get tougher and tougher, without relaxing the lower rungs. To do otherwise—for example, imposing economic sanctions while still returning fleeing refugees—makes no sense.

The third principle is not to close the barn door after the horses have fled. Democracies are fragile. If democratic leadership is ousted, its ability to resume power has a very short half life. To act at all to restore democracy, you must act quickly. The greatest danger is doing too little too late. Take, for example, economic sanctions; nothing is more pointless than freezing a bank account after the money has been removed. It may sound absurd, but recently certain Haitian bank accounts were frozen, one of which had a balance of less than five dollars. This was a powerful symbolic act having absolutely no real-world consequence. A second, equally ineffective sanction was the imposition of an oil embargo after oil had been stock-piled by the Haitian regime for a period of months.

Fourth is the safe haven principle. At a minimum, a crucial policy consideration should be protecting victims of human rights abuses from their abusers. Even if victims are denied asylum, the United States should not send them back, thereby aiding and abetting human rights abusers. No more powerful an intellect than Warren Christopher stated this in 1980 as Deputy Secretary of State, when he said, "[O]ur support for human rights may offer the only long-term solution to our most pressing problem on

24. 50 U.S.C. §§ 1541-48 (1988).

the international agenda, the problem of refugees. . . . When a government respects the human rights of its citizens, refugees are a rare phenomenon."[25]

Principle number five is regional burden-sharing. The problem is restoring democracy. The symptom is refugees. A regional, integrated approach is necessary to address both problems. If you deal multilaterally with the problem of restoration of democracy, then the refugee solution only need be an interim solution. But, if you deal *only* with the refugee problem, the heart of the matter is never addressed.

Sixth and finally, the United States must defend the principle of non-neutrality in the face of gross violations of human rights. If mass torture, rape, and genocide are occurring, it is insufficient for the United States simply to enter and act as a broker or mediator between opposing sides. A nation committed to human rights, whether for instrumental or intrinsic purposes, cannot be neutral in the face of these types of illegal activities.

If the United States had applied these six principles in Haiti in 1991, what would we have done? Under the blunt instrument principle, we properly refrained from quick military intervention. However, under the barn door principle, we should have moved immediately toward full-scale economic sanctions. At the same time, we should have maintained our Level One position, aggressively criticizing and condemning the coup, putting in place a humane temporary safe-haven program, and engaging in active diplomatic intervention. Under the regional burden-sharing rule, we should have convened a regional high political level summit and dealt with the democracy problem while also requesting all countries to do their part in addressing the interim refugee flow. We might have established a safe-haven zone in Haiti on the Dominican border to keep refugees from fleeing by boat. We should have carefully maintained the possibility of military intervention, to avoid sending a signal to the coup leaders that we were not serious. Most importantly, we should not have adopted a neutral position between a legitimately elected government, supported by almost 68% of the Haitian people, and an illegal regime of military thugs engaged in human rights violations.

What did we do? We started low—with moral condemnation, some regional approaches, and weak economic sanctions. But, when refugees started to arrive, we began to view the refugees, not the restoration of democracy, as the problem. We abandoned the safe-haven principle and we began taking action against the refugees by imprisoning them on Guantanamo.[26] To justify returning the refugees to Haiti, we claimed

25. Warren Christopher, Human Rights and the National Interest, U.S. Dep't of State, Current Policy No. 2-6 (1980) at 1.

26. During our litigation, I never had any opposition to running a legitimate refugee camp on Guantanamo. My problem with Guantanamo was setting up a camp there that operated like a prisoner-of-war camp, guarded by United States military, where people fleeing from persecution were treated as if they had done criminal wrongs and were denied the most basic due process rights given to any domestic criminal defendants.

that, in fact, conditions in Haiti were safer than we had previously stated. Our reporting, certifying, and monitoring activities became duplicitous. We undercut international legal standards at home. We defended illegal violations of international treaties before our courts and violated the principle of non-neutrality. Nor did the situation improve after the opposing sides met at Governor's Island to attempt a compromise. The United States acted as a broker, not as an advocate of democracy, cutting a deal between the legitimately elected government and the coup leaders. The United States agreed to lift the embargo *before* the democratic government returned to Haiti, thus allowing the Haitian military to spend six months stockpiling oil. The United States insisted on amnesty for gross human rights abuses, effectively eliminating any incentive for the military officials to discontinue these abuses. Our government suggested that the military regime retire to civilian life rather than demanding its departure as the United States previously did, for example, with Ferdinand Marcos, Jean-Claude Duvalier, and General Prosper Avril. We ignored human rights abuses while the United States negotiations continued. Then deaths occurred. People were killed. Supporters of the democratic government were shot in the street, including Guy Malary, Aristide's Justice Minister. From the United States came relatively mild protests, until finally, as the deadline for returning the Aristide government approached, we sent two hundred American soldiers with sidearms to Haiti with the announced mission of training the Haitian military to become civilian police officers. When Haitians protested at the dock, we turned our boat around and departed. Our boats now stand in a blockade stopping Haitian oil exports, while also returning Haitian refugees to their persecutors.[27]

The irony, of course, is that the Haitian situation was a textbook opportunity for an intelligent democracy-and-human-rights policy. In fact, the Haitian situation has led to an upside-down policy, where we are now tougher on the refugees than we are on the regime. What this reveals about the Clinton policy is that although our leaders talk about "growing democracies," they seem to have no conception of how to do it. They have no real idea how to support the development of viable institutions, nor do they seem willing to commit the necessary means to accomplish such development.

In Somalia, we similarly started with a humanitarian mission, but no real sense of how to build democracy. We became partisan and personalized the struggle against General Aidid. We came to act as yet another clan in a group of warring clans until finally, our goal became simply to remove all of our own troops by a certain date. Bosnia presents a different, more complicated, political, military, and human rights situation.

27. Significantly, several months after this lecture, in July 1994, the United States finally put in place a Haiti policy that incorporated nearly all of the basic principles outlined here. In September, 1994, after that policy had been in place for only a few months, the United States threatened invasion, and finally negotiated an "administrative entry" into Haiti.

Again the core problem was inapt neutrality. An arms embargo imposed to help encourage negotiations and contain the violence, in fact, denied one side access to needed weapons. We then essentially stood back and remained neutral in the face of conceded genocide, mass rape, and torture by all sides.

Let us also consider China. On the one hand, we are saying that the situation in China constitutes such a massive abuse of human rights that we will consider not renewing China's Most-Favored-Nation status. But then, when Chinese refugees come on the high seas, we return them to China. What about the notion of supporting principles and not leaders? We have refused to act, even at Level One, to make powerful public condemnations of actions by the Mexican government in Chiapas, anti-democratic actions by Boris Yeltsin in Russia, and anti-democratic and human rights abuses in Saudi Arabia, or even in Israel. So much for the third criterion, Intervention.

What is our score card on Accountability, the fourth criterion? The United States established a slow-moving War Crimes Commission and a War Crimes Tribunal regarding the Bosnian situation that have yet to show their true colors.[28] We have pursued a Claims Compensation Commission against Iraq, but have persisted in urging grants of amnesty in the Haitian situation.[29]

Finally, what is the grade on the fifth criterion, Preventive Measures designed to forestall future human rights abuses? The Clinton Administration's officials have taken numerous aggressive actions, which should be applauded. The officials have moved to ratify a number of treaties that have been left unratified to this point—the American Convention on Human Rights, the Covenant on Economic, Social and Cultural Rights, and the Conventions on Elimination of All Forms of Discrimination Against Women and All Forms of Racial Discrimination. The administration has advocated a Commissioner for Human Rights for the United Nations, which has now been established, and argued against the principle of cultural relativism at the Vienna Conference on Human Rights.

What is wrong with this way of promoting human rights? If we do not back up our rhetoric with action in one context, namely intervention, it will quickly ring hollow in the context of preventive measures. For example, why is it that the United States government promotes the creation of a United Nations Commissioner of Human Rights when the United Nations High Commissioner on Refugees has condemned our actions regarding Haiti and we have ignored her protests? Why do we say that we are going to ratify and respect the American Convention on Human Rights when the American Human Rights System has condemned our actions on Haiti and we have not responded? Preventive measures alone

28. At this writing, a similar war crimes tribunal is being contemplated to address atrocities in Rwanda.

29. The United States averted invading Haiti in the fall of 1994 by agreeing to a legislative amnesty for coup leaders, so long as it is enacted before October 15, 1994.

cannot overcome the kind of problems that we are having because we fail to think coherently about what we are trying to accomplish with a human rights policy.

Finally, we have the blow-back effect. What happens when international human rights abuses abroad come home? The Clinton Administration, I think, started well in the area of reproductive freedom, but faltered on the issues of immigration reform and gays in the military. The administration is now proposing a foolish filing fee for refugees to participate in the asylum process that adds a pointless second level of bureaucracy to address the question of whether or not these charges are to be waived. Our government is "nickel and diming" freedom for no obvious gain.[30] Of course, the Clinton Administration cannot solely be faulted. Congress has been pathetically passive on Haiti, in contrast to the way it forced the President's hand on South Africa, Indonesia, and China. The courts have been predictably deferential, as is illustrated by the Haitian refugee case at the Supreme Court. That is, of course, why the President almost always wins in foreign affairs.

But certainly we should aspire to more. Our nation should support elected democracies, promote human rights, exert moral leadership, and promote a humanitarian, yet realistic, policy toward refugees. The end of the cold war presented this administration with an opportunity that its predecessor never recognized nor seized. The Clinton Administration has thus far taken few better steps to deal with that problem. When we say that human rights are not in our national interest, we show only that we have not yet modified our narrow notion of national interest to incorporate the *international interest* in promoting international human rights for both instrumental and intrinsic reasons.

What the Haitian case taught me is that human rights violations are not just things that happen to other people. In the faces of the Haitians, I saw the faces of my own parents. If you or one of your forebears ever was a refugee, then you, too, are a Haitian. If you ever lived in an internment

30. If the United States government wants to change the asylum system, the first and most obvious way is to put money into hiring more asylum officers who can process people quickly. The solution that has been adopted instead is not to increase the asylum corps, but to impose a charge on refugees seeking access to the asylum system, which denies them work permits for a period of six months. What will this accomplish? Most likely, bona fide refugees will engage in work fraud, sneak into the system, and avoid all kinds of connections with the legal system. Those who proceed will often claim a waiver of the filing fee because they are too poor, forcing the Immigration and Naturalization Service to evaluate their poverty, wasting everyone's time. The filing fee may satisfy some constituencies that do not like refugees, but it does not serve our actual goal, namely, separating political refugees from economic refugees.

In any event, political refugee determinations should be made on an individualized basis. We cannot make blanket assumptions that everybody from a particular country, such as Haiti, is an economic refugee. Under the direct return system we had for many months, if President Aristide came on a boat, he would have been returned, even though he clearly has a well-founded fear of political persecution in Haiti. If the United States is going to stop and return Haitians, it must assess their individual claims for political refugee status, not make some irrebuttable presumption that all are economic migrants, based solely on the fact that they happen to be Haitian.

camp or knew someone who was held in an internment camp, then you are a Haitian. If you ever were discriminated against because you had a disease, then you are a Haitian. If you ever believed that the inscriptions on the Statue of Liberty are not just words, but embody an enduring moral principle, then you are a Haitian. When I argued at the Supreme Court, it occurred to me that the way our government was able to dehumanize these people and deny them their basic human rights was by creating a sense of "we" and "they." After all, if these poor people are not "us," they are not our problem. After all, don't we have enough problems of our own? To remove this sense of "we" versus "they," I decided to close my argument by saying, "Your Honors, ours is a nation of refugees. Most of our ancestors came here by boat. If they can do this to the Haitians, they could do this to any of us."[31] I wanted the Justices to remember, for just a second, that the Haitians *are* us. The refugee story is our story. By reliving the case, not only did I relive my own life in this country, but also our country relived its own past once again. I hoped to remind them that even in this new world disorder, with all of its challenges and complications, we must still promote a foreign policy that treasures and protects both democracy and human rights.

Thank you.

31. Transcript of Supreme Court Argument at 22, Mar. 2, 1993, Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993).