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# **THE DECLARATION ABROAD: A COMPARATIVE PERSPECTIVE**

## **Co-Moderators**

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**Paul Nemo**

*UIA Director of Human Rights Projects,  
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## **Panelists**

**Abderrahim Jamaï**

*Baronnier, Bar of Kenitra, Morocco*

**Dr. Muhamed Mugraby**

*Vice President, UIA Commission of the Defence,  
Beirut, Lebanon*

**Eugenio Gay Montalvo**

*President, Abogacia Espanola and  
Human Rights Commission*

## **INTRODUCTION**

### **MR. ELLMAN:**

Good afternoon. My name is Michael Ellman. I am a solicitor in London — that is an attorney — and I have, up to now, been Chair of the Defence of the Defence Commission of the UIA, the Union International des Avocats.

I would like to say how pleased and honored we are to have been asked to run this seminar. We have been working for the freedom of lawyers throughout the world to practice their profession free of persecution and interference by the authorities, which in many countries of this world, unfortunately, is not very simple. Many lawyers are severely persecuted.

I will just say a very few words before introducing our speakers about the Universal Declaration of Human Rights,<sup>1</sup> which of course was a wonderful symbol arising out of the ashes of World War II, out of the ashes of the fascism and racism that had been destroyed in that conflict.

It was at its time a tremendous advance, setting out aims and aspirations of all the peoples for a free society in which people's full rights, social and economic as well as civil and political, would be recognized and given effect.

It was, of course, what we call first-generation rights, fairly basic rights. But, looking back on it, they do have a very broad coverage, even if rights that we would consider important nowadays, such as sexual orientation, as was mentioned a few minutes ago, and others were not, of course, thought of at that time.

But for its time it was a remarkable document, and it was the precursor both of the European Convention on Human Rights,<sup>2</sup> the Inter-American Convention, and the two major United Nations Covenants on Civil and Political Rights<sup>3</sup> and Economic, Social, and Cultural Rights,<sup>4</sup> which filled out a lot of the details necessary to give full effect to those rights, and, most importantly, put in place mechanisms for the enforcement of those rights.

So looking back at the Declaration, it is salutary to note how far-reaching those rights already were, although in most countries in those days, and even today, they are very far from realization — the right to privacy, to freedom of movement and resident, freedom of thought, conscience, freedom of expression, and so forth — and the social and economic rights — right to work, to protection against unemployment, rights of leisure, holidays with pay, equal pay for equal work, the right to an adequate standard of living, health, food, housing, et cetera.

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N.Doc. A/810 (1948) [hereinafter Universal Declaration].

<sup>2</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Signed Nov. 4, 1950, entered into force Sept. 3, 1952, 213 U.N.T.S. 222, art. 26 [hereinafter European Convention].

<sup>3</sup> International Covenant on Civil and Political Rights, Adopted Dec. 19, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), art. 16 [hereinafter Political Covenant].

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

In 1948, many of these rights must have seemed quite unattainable to most people, and yet the states were prepared to sign up to them. There were no enforcement proceedings, no sanctions, but it was the beginning of a movement which has now given rise to the procedures and to a lot of case law that we have in effect now, and has come through the regional conventions particularly.

In the last ten years, with the collapse of the Iron Curtain, we have been in Europe — countries from Russia to Portugal and from Iceland to Turkey — accepting the jurisdiction of the European Court, even in Britain, which was one of the first to sign the European Convention,<sup>5</sup> but has nevertheless been one of the countries most frequently condemned by the European Court of Human Rights for breaches of that Convention.

Up until now, we have had to change our law each time we were found in breach of the Convention, and it has been an important point that we have, and every country in Europe has, changed their law every time they are found in breach — except on one occasion, I am afraid, when we entered a reservation to the Convention because they told us that seven days was too long to keep people in detention without charge, and under the Prevention of Terrorism Act, unfortunately, that is still allowed.

But we are now finally incorporating the European Convention<sup>6</sup> into our domestic law, a belated recognition that the protection of human rights in Britain is not always all it has been cracked up to be. And now, the government and the local municipal authorities are getting worried that they may actually have to account for their actions, or failures to act, which up to now they have generally not been obligated to do.

So considerable advances are being made, even though in Europe, as elsewhere, practice is often a long way behind the law, and particularly in a domain like human rights, where governments are always finding ways of restricting people's rights as fast as new rights are being established and incorporated into law.

But the fact that they are so incorporated and that sanctions exist on an international level — not only for perpetrators

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<sup>5</sup> European Convention, *supra* note 2.

<sup>6</sup> *Id.*

of torture, mass murder, and crimes against the laws of war; but also for those, including governments, who deny right of free expression or right to bail and to fair trial; and, to a limited extent, our rights to basic health care, education, and a roof over our heads — all this is an enormous advance.

This summer we have seen the International Criminal Court voted to be set up, and in the last couple of weeks, the Pinochet case,<sup>7</sup> which has been a tremendous advance, even though he has not yet been extradited. But the very fact that a former dictator can be called to account before a court of law has already had a huge effect in the world. I am told that “Papa Doc” Duvalier, the former dictator of Haiti, has suddenly disappeared in France and nobody knows where he is. So things are happening.

On another point, for many years we in Britain and many countries in Europe, and maybe you in the United States, have been presenting counter-reports to the United Nations Human Rights Committee, counter-reports to our governments’ reports. When the governments say how wonderful everything is and how they are making great progress, we have put in a counter-report to show that actually things are not so good. The United Nations Human Rights Committee is also very appreciative of this. This we have done mainly on the Civil and Political Rights Convention,<sup>8</sup> but last year, for the first time, it was also done on the Economic and Social and Cultural Rights,<sup>9</sup> led by OXFAM<sup>10</sup> and a number of other British NGOs.<sup>11</sup>

The Economic and Social Council of the U.N. wanted to know why in a developed country like Britain there are more and more beggars on the streets, why tuberculosis has reappeared thirty years after it was eradicated, and university tuition is no longer free, and so forth. These are things that it

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<sup>7</sup> *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 37 I.L.M. 1302 (United Kingdom House of Lords 1998).

<sup>8</sup> Political Covenant, *supra* note 3.

<sup>9</sup> Economic Covenant, *supra* note 4.

<sup>10</sup> Oxfam’s objectives are to relieve, poverty, distress and suffering in any part of the world, and to educate the public concerning the nature, causes and effects of poverty. Chiara Giorgetti, *The Role of Nongovernmental Organizations in the Climate Change Negotiations*, 9 COLO. J. INT’L ENVTL. L. & POL’Y 115, 137 n.19 (1998).

<sup>11</sup> Nongovernmental organization (NGO).

would have been unthinkable a few years ago for an international body to take interest in.

And so, progress is being made, although there is still a long way to go.

As I say, we are fighting for the freedom of lawyers to practice freely worldwide. Last month, we had a success in Kenya, where our colleague, Juma Kiplenge was charged. The magistrate was reported in the press as saying, "I'm going to convict that guy no matter what the evidence." The Attorney General finally stepped in and canceled the prosecution — "It was nothing to do with international protest," he said, "it was merely internal procedure." So our efforts are never recognized, but we do sometimes get some successes.

But on the other hand, I heard the day before yesterday that Nejib Hosni in Tunis, who has already been persecuted and imprisoned for two or three years and was released only last year, has been re-arrested. We do not know on what trumped-up charges. So we still have got to be constantly vigilant.

We, as lawyers with training and experience to see through the blandishments of the powers that be, must be at the forefront of the fight to maintain our liberties, which the creators of this Universal Declaration set in train fifty years ago.

I think you have heard enough from me. I would like to introduce our colleagues who are going to speak to you about the Universal Declaration in their regions of the world. First, my Co-Moderator, Paul Nemo, the Director of the Human Rights Projects of the UIA, from Paris; Abderrahim Jamai, Batonnier, President of the Bar of Kenitra in Morocco; Dr. Muhamed Mugraby, who is a Vice President of our Commission of the Defence, comes from Beirut, Lebanon; and Abogado Eugenio Gay Montalvo, from Spain, the President of the Abogacia Española and the UIA Human Rights Commission.

First I will ask Batonnier Jamai to speak to you in French, and I will try to summarize what he has to say in English.



**Abderrahim Jamaï**  
*Bâtonnier, Bar of Kenitra, Morocco*

Mr. Jamaï made his presentation in French. Mr. Ellman provided a summary in English.

**MR. ELLMAN:**

First of all, Maitre Jamaï thanks you very much for asking him [to speak]. He is very pleased to come with his two colleagues to the U.S.A. to speak about the human rights situation on the fiftieth anniversary of the Universal Declaration.<sup>1</sup>

He is not a spokesman for the Moroccan Bar, but he has been involved both in Morocco and in other countries, particularly in Burundi, with the human rights situation, and he has been able to observe and to draw some lessons from what is not a brilliant situation and not one with which we can be self-satisfied.

Each country, of course, is different. There are various aspects of the governments in each country and the powers that be — the police, the administrative powers, and the media. In some countries there are national human rights institutions, and of course it is the duty of the state to protect human rights and also to take measures to alleviate the social and economic situation so that people can enjoy their human rights in full. But at the same time, in many countries the state is often the biggest violator of human rights.

Looking at the traditional division of legislative, administrative, and judicial power of the state, it is of course vital that, just as the judicial system be independent of the state power and also independent of sectoral interests in the public in society, the legislative, on the other hand, must represent public opinion and must ensure compliance with international laws.

Another most important aspect is the institutions of civil society — NGOs, the press, and so on — which must exercise great vigilance and must keep in constant consultation and me-

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].



diation with the public. The NGOs, in fact, can be a great bulwark of human rights, but they have a responsibility to ensure that they only put out accurate and well-checked information and that they keep independent of the government and of political parties and other particular interests.

In Morocco, Mr. Jamaï has witnessed violations of human rights over many years, disappearances, arbitrary arrests of trade unionists and others, kidnappings and so on. But recently, there has been some progress. There has been a National Human Rights Commission set up, and NGOs independent of government and of political parties have been able to flourish. There have been a number of releases from prison and some of the disappeared people have actually reappeared.

The Moroccan State has ratified a number of treaties, including the Convention Against Torture,<sup>2</sup> the Convention Against Elimination of Discrimination Against Women,<sup>3</sup> the Convention for the Elimination of Racial Discrimination,<sup>4</sup> and others.

At the same time, he has, as he mentioned, been involved in Burundi, where he has seen a number of very unfair trials following the genocide in that country. Here he suggests that lawyers, and the UIA in particular, can help by going to the country and assisting in the reestablishment of an independent legal profession.

And then, he referred briefly to the question of impunity. He points out, as I mentioned a little while ago, that there are Pinochets not only in Chile but in many countries of the world, and many of them have been protected, as indeed it is suggested that Pinochet himself was, by the great powers, the United States and other great powers, and we must be vigilant to see that this does not go on.

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<sup>2</sup> Convention Against Torture and Other Cruel, Inhumane or degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. 100-20 (1988).

<sup>3</sup> Convention on the Elimination of All forms of Discrimination Against Women, S. Exec.Rep. No. 103-38 1994, 1249 U.N.T.S. 13.

<sup>4</sup> The International Convention on the Elimination of all forms of Racial Discrimination, opened for signature Mar. 7, 1966, S. Exec. Doc. C. 95-2, (1978), 660 U.N.T.S. 195.

The UIA, he suggests, should not be satisfied with collecting subscriptions and enrolling more bars and individuals as members, but must go to the countries and see the situations on the ground and ensure that in the 21st century we have a greater respect for human rights than we have seen during this century.

In the circumstance he is limiting himself to these comments, for which we are most grateful.



**Eugenio Gay Montalvo**  
*Abogacia Española, UIA Human Rights Commission*

It is an honor for me, as President of the General Council of the Bar of Spain and as President of the Human Rights Commission of the Union International des Avocats, to have been invited to this prestigious university, the cradle of distinguished jurists, and to be able to share with you all some brief reflections on the Universal Declaration of Human Rights.<sup>1</sup>

The Universal Declaration of Human Rights of 1948 was born out of the imperative need of the international community to seek a global and effective protection for the human rights that had been so repeatedly violated during the two world wars.

Since then, the international community has made rather uneven progress in terms of the protection and promotion of human rights. Violations of human rights and breaches of international humanitarian law are still occurring in many parts of the world, and in some cases, such as Cambodia, the former Yugoslavia, and Rwanda, these violations have been so outrageous that they could well be classed as genocide and crimes against humanity, and some eminent jurists have in fact done so.

Despite such atrocities, however, despite the fact that various countries insist on contesting the universality of human rights, and notwithstanding the rebuffs received by the international protection system set up by the United Nations, it is no less true that these fifty years have seen a steady, sustained advance in the protection and promotion of human rights.

The conviction that people have certain inalienable rights arising out of the very dignity that distinguishes them as such, rights that are worthy of the utmost recognition and respect, has become one of the underlying traits of our culture and our civilization.

This is due to the fact that such categories of human rights encapsulate more than just political principles and legal formu-

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

lae; in the heart of them beats a profound moral sense, which was so adroitly summed up by the Preamble of the Universal Declaration when it said that their content is "the common standard of achievement for which all peoples should strive."<sup>2</sup>

As such a "common standard of achievement," the Declaration has left its mark in several treaties and conventions adopted in different parts of the world, Europe being one of the pioneers in the supranational protection of human rights.

This new attitude towards human rights began to make its presence found in Spain from the democratic transition onwards, with sweeping changes in both legislation and praxis, but without any doubt its most important reflection is to be found in the Constitution of 6 December 1978, whose twentieth anniversary we are celebrating this year.

The Preamble and Articles 1, 2, and 9 show us which human rights the Constitution has in its sights and lays down the grounds for recognizing them.

Article 10.1 of the Spanish Constitution, with a wording that adds a notable aesthetic verve to its ethical force, says: "The dignity of the person, the inviolable rights that are inherent thereto, the free development of the personality, respect for law and the rights of others as the bases upon which political order and social peace are built."

Article 10.2 of our Constitution, which states as follows, "Rules relating to the fundamental rights and freedoms recognized by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same matter ratified by Spain," serves as a nexus between our own system of fundamental rights and freedoms, on the one hand, and the international conventions and treaties that Spain is party to, on the other.

It does not give constitutional status to proclaimed international rights and freedoms unless they are also proclaimed by our Constitution, but it binds us to interpret the corresponding precepts of the latter in accordance with the contents of said treaties or conventions.

If we analyze specifically the rights embraced by the Spanish Constitution, we find a clear parallel with those included in

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<sup>2</sup> *Id.* at Universal Declaration Preamble.

the Universal Declaration of Human Rights, practically the same being recognized. Witness the following examples: Equality before the law, recognized in Article 14 of the Spanish Constitution and Article 7 of the Universal Declaration of Human Rights; the right to life and security of persons, recognized in Article 15 of the Spanish Constitution and Articles 3 and 5 of the Universal Declaration of Human Rights, et cetera.

Essentially, both the Universal Declaration of Human Rights of 1948 and the Spanish Constitution of 1978 define the sense of justice that political forces should safeguard.

In the year marking the fiftieth anniversary of the Universal Declaration of Human Rights and the twentieth anniversary of the Constitution, Spain stands firm in its commitment to undertake significant actions in favor of the protection of human rights — not only in Spain itself, but also in other countries where a positive influence can help to mitigate serious violations of personal dignity.

The public at large, organized in institutions, organizations, political parties, unions, et cetera, can also contribute towards improving the situation of human rights in Spain.

The Universal Declaration of Human Rights remains, therefore, a powerful common standard that all peoples should aim at. It has not done away with human oppression single-handedly, but it is a guide, a promise, a challenge.

Its approval marked the end of the idea whereby the “sovereignty of the state” balked any analysis from the outside of the violations of human rights committed therein. It demands action; it lays the responsibility for defending human rights on the whole society, across the board: individuals, organizations, governments, and international bodies.

It has been called “the best-kept secret in the world,” and yet it should be brought to bear on the way all of us lead our lives. Few are aware of its contents; fewer still have even seen a copy, but it is a document available all the world over.

It controls, theoretically, the policies of the governments and is above them all. World leaders are bound to observe it, while corporations and financial houses should promote it in their commercial dealings.

For many, however, especially for victims of human rights violations, it might be merely an old, forgotten, or ignored, dust-

covered document on a New York bookshelf. But it is also true that international organizations and courts and the international community as a whole have made sure that an ongoing, daily improvement in the field of human rights is a palpable reality.

Fifty years later, the world is closer to the goal of achieving "all human rights for all people" and millions of people are working away to this end, even though indifference and a scorn for human rights continues to give rise to barbarous acts that are an outrage to the conscience of mankind.

I would like to conclude, therefore, by saying that this anniversary cries out for the international community to overcome the existing indifference and finally bring into being, once and for all, the International Criminal Court that would enforce strict compliance with the rights laid down in the Declaration and related texts by judging and penalizing any serious breaches of fundamental rights.

**Dr. Muhamed Mugraby**  
*Vice President, UIA Commission of the Defence,*  
*Beirut, Lebanon\**

My Fellow Humans

When one speaks on this great occasion celebrating the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights,<sup>1</sup> the speech cannot possibly be meant for any particular audience. For such a speaker, as the one standing before you, is one human being who cannot see in his audience anything other than human beings of equal dignity and standing.

It is my intention to address the conditions of human rights in the Middle East, which suffer from a tragic denial.<sup>2</sup> This state of affairs must be a cause for grave concern to all mankind. It is of equal concern, however, that there is not one nation on Earth, including virtually all democratic and developed industrial nations, that is in full compliance with the articles of the Declaration and the Covenants.

INTRODUCTION

The eternal human quest for freedom, justice and peace is firmly documented in the history of mankind. It is embodied in ancient philosophy and in all known religions. Time and time

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\* Dr. Mugraby generously submitted a written transcript of the paper he presented at the Celebration. It is that paper, *Denial of Human Rights in the Middle East: Causes and Agenda for Remedy*, which is printed here. Notably, his remarks at the Celebration did not vary substantially – if at all – from this paper.

<sup>1</sup> G.A. Res., 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

<sup>2</sup> In the presentation to follow it will be noticed that references to the state of human rights in Israel are limited. The reason is that the speaker has little or no reliable access to knowledge about what goes on in Israel. Therefore, he has relied largely on reports by international human rights NGOs on Israel, which are of limited focus. As a citizen of Lebanon he is at such a knowledge disadvantage because there is no cultural or any other civilized exchange between the two neighboring countries. As long as Lebanese are not permitted to travel to Israel and Israelis may not come to Lebanon, there will be little or no chance for any significant human or civil dialogue furthering the cause of human rights among the two nations.



again this quest was translated into a call for delivering humans from oppression and servitude: different peoples, different races, different regions, but always human beings who suffered from the denial of freedom (based on equality), justice (founded in compassion) and peace (characterized by humanity, tolerance and comprehensiveness).

In modern times, and perhaps beginning with the French Revolution, the quest for freedom, justice and peace increasingly took the shape of a secular message, truly transcending the bounds of religions, nationalities and regions. The horrors of the Second World War, during which the rise of racism led to the Holocaust, opened the way to the birth of the United Nations and the inevitable proclamation of the Universal Declaration, which was partly authored by a great man from the Middle East and my country, Lebanon, Dr. Charles Malik.

#### I. HUMAN RIGHTS DENIED

Based on the above premises, one would think that the universality of the Declaration, its genius articulation of a historical human message already firmly rooted, and the detailed provisions of the Covenants that followed in the form of international treaties, would have come upon fertile ground in the Middle East. But alas, and on this 50th anniversary of the Declaration, the Middle East is not exactly a haven for freedom, justice and peace. Is it possible that the Declaration could have had the opposite effect in the Region?

On December 10, 1948, the Arab- Israeli military conflict was in progress. A few months later it came to a temporary halt with an armistice, not peace, only to be followed by many more wars in 1956, 1967, 1973, 1982, and the ongoing mini-wars in the West bank and South Lebanon; so much for peace.

As for freedom and justice, volumes upon volumes of reports by international human rights monitoring International Government Organizations ("IGOs") and Non-governmental Organizations ("NGOs") testify to the routine violation of the basic rights guaranteed by the Declaration and the Covenants. A series of military coups d'Etat transformed many countries of the Middle East into the ranks of oppressive authoritarian regimes that had no interest in freedom, justice or peace, but quite the contrary. In fact that was the very foundation of their undemo-

cratic systems. Where there are no military dictatorships you find royal or theocratic rule founded on similar denial of rights. Where one of these governments represents itself as a democracy, beware for this is the age of false and fabricated ballots. For democratic mechanics, elections, parliaments and other accessories, are used just to display the brand name "democracy" as a thin cover to the crushing of basic rights, denial of justice and evasion of peace. Why is that, and what went wrong?

## II. CAUSES OF DENIAL

History tells us that progress toward the full recognition of human and civil rights in Europe and North America was ultimately made possible in an environment of viable democratic institutions under a secular rule of law following the separation of church and state. For example, the historic civil rights movement in the United States in the 1960s could not have taken root and triumphed had it not been for the role of the independent judiciary and the freely elected members of the United States Congress who were duly responsive to the wishes of their constituents.

It is evident that there is a prevailing environment in the Middle East which is not only undemocratic but also not conducive to the emergence of true secular democracies. In fact the denial of human rights and the lack of democracy are twin phenomena which threaten one and the same human value. It follows that progress on democracy must lead to progress on human rights, and the upholding of human rights makes democracy inevitable. For the rulers who deny human rights to their people are not democratically elected and practice no democracy.

I submit that the above described sad state of affairs is the result of a number of causes which, in their turn, were brought into existence by powerful forces, prime among which are: (1) the religions, (2) the security doctrine, (3) the military, (4) the media, (5) the international community, (6) the national courts, (7) the culture of corruption, and (8) the human rights organizations.

### A. *The Religions*

It is popular in some quarters to talk in this context of one religion, Islam, and how Islamic extremists favor terrorism and threaten world peace and Western interests. There has also been much theorization by certain writers on the seemingly inherent incompatibility between Islam and democracy. Much of this talk is manifestly prejudiced and some of it has the obvious motive of justifying the unconscionable relations between Western governments and certain authoritarian governments that allegedly base their laws and policies on Islam according to their self-serving interpretations! The supporting argument for this doctrine is so simplistic that it could easily apply to all religions.

I submit that Islam and all other religions in the Middle East do not pose, by themselves and purely as religions, any impediment to human rights. The true and formidable impediment lies in the role that many religious organizations and leaders are exercising in the civil and political life of the Region.

Such a substantial role and status for religions in the Middle East is not at all understandable to most outside observers and is not always so clear to the people of the Region. For a starter, there are not just three major religions in the Middle East. In fact there are more than twenty active different religious establishments that constitute, for all practical purposes, autonomous religions or religious entities. As an example quite representative of the area, nineteen such entities are officially recognized in Lebanon, but this list excludes almost all Protestant Churches, Buddhists Bahaiis, Ahmadis, and other existing religions with some followers in the country. The Saudi policy of recognizing only one religion, a Hanbali sub-school of Sunni Islam, and banning all others, is unique and not at all representative.

The fact is that the status and role of the Christian churches and the Jewish rabbimates was decreed fourteen centuries ago by the Islamic Caliphate based on the teachings of the Prophet Muhamad. It was a major step in the quest for freedom, justice and peace which had more limited precedents in Roman and Persian times. The Prophet taught that the religious organizations of the Christians, Jews and other peoples of the book, i.e. all organized religions, had the right to be let alone

in full autonomy. Consequently each of the Christian churches and Jewish rabbinate took the status of quasi states under the Islamic Caliphate which to some extent resembled a federation. Not only did they continue their religious structure without governmental interference, but they took the right to have and enact their own religious laws and form their own courts. Furthermore, they were assured jurisdiction over their respective religious communities in all matters related to personal status and family law. They even had their own prisons and could issue and enforce prison sentences on their "subjects." Lastly they acted as the political and commercial representatives of, and spokesmen for, their communities before the Prince, whether a Caliph, a Sultan or a King. Taxes were often collected through the churches and rabbinate.

This autonomous communal system of religions survived without interruption till the collapse of the last Islamic Caliphate, the Ottoman Sultanate. Surprisingly, while the emerging Republic of Turkey took on the status of a strictly secular state, the system continued unabated, and managed to increase its power, in the other states of the Middle East that seceded from the Ottomans.

Although the system called for religions other than Islam to organize on their own, outside the boundaries of the official government structure, the Islamic religious structure had to remain an integral part of the state. This, in addition to autonomy, had the following results:

- (1) The government embraced only one sect and theological school of Islam, under the Ottomans, the Sunni sect according to the Hanafi School. Hence other Islamic sects had to organize on their own outside the umbrella of the Sultanate, learning from the Christian and the Jewish models. But unlike the Christians and the Jews, they were not recognized or accorded any autonomy, and they were often suppressed or even persecuted.
- (2) The patriarchs, bishops and rabbis exercised autonomous temporal powers as princes and virtual rulers of their respective communities, and continue to exert every effort to maintain that position.
- (3) Whenever the opportunity arose after the collapse of the Ottoman Sultanate, leaderships of autonomous religious com-

munities, whether having been officially recognized by the Sultanate such as the Christian and Jewish, or unrecognized, such as the Shiites and Alawis (originally known as "Nussairis"), took all the power they could seize. In Iran (which was not part of the Ottoman Empire) the Jaafari Shiite clerics took over everything. In Syria the Alawis assumed supreme political and military power. In Lebanon the churches, whose leaders are already treated like heads of state, openly participate in the political process in violation of the secular constitution. In concert with Islamic religious communities, most Lebanese Christian church leaders oppose modernization in any way that could infringe on their powers. Israel was established as a Jewish state, and the power of the Rabbinate is far reaching; open conflict between religious and secular forces continues unabated. This may be one of the reasons why Israel does not have a written constitution that could challenge the age old authority of the original Jewish religious establishment.

The impact of the communal religious system is far reaching. What started as a reform fourteen centuries ago has turned into a living nightmare with many features that are directly in open conflict with the universality and meaning of human rights as spelled out in the Declaration, to wit:

- (1) Sectarianism is in charge, which translates into open and institutionalized discrimination. Citizenship does not exist independent of religious affiliation.
- (2) Freedom of speech must give way to the views of the religious leaders, who know better because they are closer to divinity, sometimes under the penalty of death. The famous threat to the life of Salman Rushdie<sup>3</sup> could have come just as easily from a Christian or a Jewish religious authority in the Middle East.
- (3) Basic rights could only be fully accepted within the religious community, as every community has to fend for itself on its own. Hence there could be no recognition of equality among human beings as human beings.
- (4) There could be no equal rights for women as required by the Declaration, the Covenants and other international treaties.

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<sup>3</sup> Salman Rushdie, author of *THE SATANIC VERSES* (1988).

Such rights depend on the religious laws of each of the autonomous communities.

- (5) Intermarriage is discouraged, very difficult to enter into, and occasionally hazardous to the spouses involved. There are no modern civil laws in the Middle East providing for civil marriage. The right to license and celebrate weddings is one of the most dearly protected privileges of the autonomous communities.

## II. THE SECURITY DOCTRINE

In the Middle East, human rights are much of the time set aside under the pretext of national security. Whether it is the security of the undemocratic regime or mere sectarian security, the outcome is the same: human rights denied.

To emphasize the national security cause or repression, political and other prisoners are regularly tried before military and special security courts that have little or no regard for due process. Such courts are active in Egypt, Syria, Iraq, Libya, the Israeli administered Palestinian territories, Palestinian Authority and most other countries of the region. In Israel judges of regular courts often listen to police and/or army officers explaining the security angle of situations, particularly when it concerns Palestinians and Israeli settlers. The Israeli Supreme Court has declined many times to rule favorably or to intervene on petitions by lawyers representing Palestinian prisoners actually being tortured under interrogation. Israeli gunners scored a direct hit in South Lebanon on a prefabricated building, in a United Nations compound, full of scared civilian refugees, which resulted in the loss of more than a hundred innocent lives, mostly women and children. Such contempt by many elements of the Israeli Army for the human rights of "others" is reciprocated by groups (consisting mainly of Islamic extremists) fighting the Israelis in South Lebanon and elsewhere.

Members of the legal profession are also affected by the national security doctrine. Lebanese prisoners in both Syria and Israel have no access to lawyers and lawyers appointed to assist them are often denied access. Disciplinary charges were brought by the Cairo Bar against an Egyptian lawyer who dared represent the alleged Israeli spy Azzam Azzam in bizarre

proceedings before an Egyptian state security court.<sup>4</sup> The Lebanese Government attempted to prosecute a Lebanese lawyer who argued before a Beirut Military Court that Israel does not fit the legal definition of the "enemy" for purposes of enforcing the penal code, on the ground of endangering the morale of the armed forces. Defenders are regularly harassed and it is very hard for persons charged with security related crimes as "collaboration with the enemy" to find lawyers who will agree to represent them. Even if they do it is almost impossible for such lawyers to make a serious and credible defense on their clients' behalf. Even in non-security related matters lawyers are easily intimidated as evidenced in a recent case in Lebanon. When a Lebanese Jew who occupies a sensitive position in an international organization earned the wrath of former prime minister Hariri by publicly criticizing the high level of corruption in the country, his lawyers in landlord-tenants cases in Sidon were intimidated into dropping him as a client, for fear of being accused of sending money to Israel. How easy it is for human beings, for their own selfish interests, to dehumanize other human beings!

### III. THE MILITARY

The glorification of the military is a Middle Eastern phenomenon of major negative consequences to democracy and human rights. Former military officers play major roles as leaders, co-leaders or policy makers in Syria, Iraq, Libya, Egypt, Sudan, Yemen, Israel and Lebanon. In North Africa the same phenomenon exists in Tunisia and Algeria. Following the war of 1948, military uprisings took the helm of government from the hands of civilians in Syria, Egypt, Yemen, Sudan, and Iraq. The Lebanese army commander has just been made president. In Israel the army has long been a national icon with super credentials arising out of a series of military successes in the Israel-Arab wars. In a country long living in an ocean of hostility, many Israeli army generals look forward to shiny political careers upon their retirement. The same wars that gave the

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<sup>4</sup> Abdeen Phelony Court, August 31, 1997, case # 1594/97. The Egyptian Court convicted Azzam Azzam of spying against Egypt to Israeli Mossad and was sentenced for 15 years in jail with hard labor. Al-Ayyam, Arabic News.com (visited Mar.10, 1999) <<http://www.hebron.com/article04-09-06-987.html>>.

political advantage to Israeli officers boosted the careers of officers in the armies of neighboring countries they once fought against.

With very few exceptions, Middle Eastern military commanders have proven to be natural enemies of human rights. The Israeli-Arab military and political confrontation has provided the most tragic framework to human rights abuses by both sides.

#### IV. THE MEDIA

Middle Eastern media has played a central role in an ongoing campaign of misinformation and trade in hate. Most of the printed media is owned by governments and the few publications which are not are either corrupted by government money or by fear of ruthless repression. TV and radio broadcasting is no better. More recently, satellite channels available to television have experienced the same fate. It is unfortunate, but it is certain beyond a shadow of a doubt that the dissemination of information to the people of the Region is influenced financially by the governments (of Libya, Saudi Arabia, Iran, Kuwait and other wealthy Gulf states), on the one hand, and/or is at the mercy of the daggers and guns of assassins working for the said, or other, governments or armed extremists groups.

Unfortunately, the media does not only fail miserably in performing its duty to bring unbiased information, news and opinion to the people, but it lies to them and distracts their attention from the real and local causes of their misery and the denial of their basic rights. The media gives a political advantage to the oppressive ruling regimes: people who are denied their human rights are brainwashed by the media in such a way as to shift the responsibility and blame to external culprits and scapegoats that their leaders would like them to hate. Moreover, the media supports the manifestations and tactics of the religious communal system, legitimizing the national security basis of oppression, and portrays the very concept of universal human rights as alien to the national culture and a tool of Western political policies aimed at destroying their indigenous way of life.



## V. THE INTERNATIONAL COMMUNITY

It is regrettable that the international community, led by the big powers, has done all the wrong things with the effect of supporting the above-described state of affairs. Western governments, in particular, have done and continue without regret to do business as usual with regimes that deny human rights to their own people. They have given their direct and indirect support to the corrupt media. They have recognized military adventurers as legitimate leaders. And they miserably failed to lift a finger in the defense of beleaguered human rights in the Middle East. That role is best described in the 1998 report of Human Rights Watch:

[g]overnments of the larger industrialized countries generally paid scant public attention to human rights issues in the Middle East. Their chief interests were access to oil, natural gas, and export markets . . . .

One of the reasons publicly advanced in the West for this regrettable apathy is deference to "Islamic sensibilities," an obvious reference to the above described religious communal system. In fact, they are the same Western governments that were responsible for the survival of that system after the collapse of the Ottoman Sultanate. At that time, the League of Nations placed Iraq, Jordan and Palestine under the British Mandate and Syria and Lebanon under the French Mandate. Egypt and the Sudan were already under British occupation. Under the terms of the mandate, Britain and France were supposed to guide those nations in the democratic ways, but instead their choice was to maintain the status quo ante of the autonomous communities. Thus the communal religious system breathed new life and actually thrived under the mandate.

For example, it was the French High Commissioner for Lebanon and Syria who issued a decree<sup>5</sup> naming eighteen religious denominations as officially organized and entitled to the special privileges within the system. Very recently, the Coptic Church of Egypt was added to the list and its leader began making regular long visits to Lebanon complete with political state-

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<sup>5</sup> Decree No. LR/61 (March 13, 1926).

ments. Something similar took place in Jordan, Iraq and Palestine which was inherited intact by the State of Israel.

Deference to "Islamic sensibilities" is a mere excuse for failure to make the choices mandated by the Declaration and international law. The best illustration can be found in comparing the Western position on Islamic law in the Sudan with that of Saudi Arabia. Under the presidency of General Jaafar Numeiri, a chapter on Islamic punishments was added to the otherwise modern penal code of Sudan. This raised very few eyebrows in the international community. Soon after, a highly respected Sudanese scholar was charged with apostasy, convicted and publicly executed. No big deal! When a new government came to power in the Sudan heavily influenced by the Turabi party of Islamists, hell broke loose over the same penal code! In the meantime, and across the Red Sea in Saudi Arabia, there is nothing but Islamic punishments applied to Saudis and foreigners alike and scoring the highest rate of executions in the world. In Saudi Arabia there is no due process, no right to counsel, nothing. In a recent case documented by Human Rights Watch a Syrian worker in the Kingdom, a member of an ancient Sufi sect, was executed on charges of witchcraft for possession of an amulet cherished by Sufis. The evil character of the amulet was established from the expert testimony of the Committee for the Enforcement of Virtue and Prevention of Vice, a huge Saudi religious police organization. There was no trial in any sense of the word and when the poor man was executed he was not aware that he had been sentenced. Is this the kind of sensibilities that the United States and other Western governments wish to protect?

## VI. THE NATIONAL COURTS

For all the above mentioned reasons, and the impossibility of an independent judiciary without democratic government, national courts in the Middle East have failed to play an effective role in defending human rights. Where the rule of law existed in theory, it has not at all been upheld in practice, especially when confronted with alleged religious or national security imperatives.

The role of military and security courts all over the Region has already been mentioned. I have also cited the impotence of

Israel's Supreme Court, as well as other regular courts, in the face of the national security doctrine justifying, among other things, the regular practice of torture.

In Egypt, a Cairo court of appeals (June, 1995) declared the dissolution of the marriage of Dr. Nasr Abou Zaid and his wife Dr. Ibtihal Younis,<sup>6</sup> both Egyptian university professors, against their will, for apostasy (i.e. on purely fundamentalist religious grounds). This decision is not the work of some bearded religious clerics with ideas that belong in prehistoric times. It was, surprisingly, authored by a panel of three learned and senior civil judges who graduated from civil law schools, and made part of a sophisticated judicial system on the continental model.

The case came before the high judicial panel on appeal from a lower court that had rejected the action brought by an unrelated third party (another college instructor). The plaintiff appealed and the appellate court ruled that Dr. Abou Zaid, as evidenced from many of his published scholarly writings, had indeed committed apostasy and that any Muslim was entitled to sue for the dissolution of the marriage.

The panel emphasized that the Egyptian state was not secular, atheist, or Christian, but Muslim. Hence it considered any attack on what is sacred in Islam as an attack on the state. Dr. Abou Zaid was quoted extensively as ridiculing religious belief in the existence of devils and *jinis*, and the court found such quotations to be an affront to Islam.

Furthermore, the appellate court found Dr. Abou Zaid's call for upholding positive law over religious law as more evidence of his apostasy. Most significantly, the court, in finding, Dr. Abou Zaid guilty of the crime of apostasy (punishable by death in Saudi Arabia, Iran and Sudan) declared that Islamic punishments were indeed still in force as part of the law.

In Lebanon courts are prohibited from refusing to enforce statutes for conflict with the constitution. Hence they are precluded from playing any effective role in protecting and enforcing the constitutional guarantees to civil and human rights as provided in the Lebanese constitution. Although Lebanese courts are under the statutory duty of enforcing international

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<sup>6</sup> Case # 287 for the judicial year 111, June 14. 1995.

conventions over local statutes, they become suddenly impotent when it comes to human rights.

Examples of flawed justice are abundant. An informative summary introduction to the subject is contained in a recent report by Amnesty International.<sup>7</sup>

## VII. THE CULTURE OF CORRUPTION

The above-described causes for the denial of human rights have also given rise to a culture of corruption in the rulers and cronies. Some of the regimes in question are corrupt in simply taking advantage of naked power to achieve rapid and enormous private enrichment. Other regimes see corruption as a useful tool of government. As long as all senior public servants and security commanders are busy making illicit money, they have no time to plot against the regime and no moral grounds for criticizing their superiors.

It is no secret that enormous wealth generated by astronomical oil revenues in the oil producing parts of the Region was largely blundered. The absence of natural resources has not presented any problem to corrupt rulers and officials in most other Middle Eastern countries, but to those who had to work harder in stealing from the less abundant means of their poorer nations. For example, an enterprising prime minister of resources-poor Lebanon, with a contracting business of his own in Saudi Arabia, was suspected of being a mere front for the ruling family, caused the country to run into public debt of nearly \$20 billion within six years of his tenure and, within the same period, was able to appropriate together with his associates public properties and wealth in amounts estimated to exceed \$10 billion. This prompted the World Bank to declare that corruption in Lebanon had exceeded the level it had reached in Indonesia.

Corruption creates a very powerful and obvious incentive to jeopardize democracy, and hence human rights, for fear of accountability.

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<sup>7</sup> See AMNESTY INTERNATIONAL REPORT, *State Injustice: Unfair Trials in the Middle East and North Africa*, (April, 1998).

### VIII. THE HUMAN RIGHTS ORGANIZATIONS

During the fifty years since the birth of the Universal Declaration dozens of non-governmental human rights advocacy groups have come into existence worldwide and many of them have become very influential morally. Inevitably, the role of these NGOs has been substantially confined to research and monitoring of human rights violations. This function has been extremely helpful in bringing out the truth about the horrible practices of oppressive regimes around the world in general and in the Middle East in particular.

Many of those NGOs are based in countries perceived in the Middle East as colonial or neo-colonial powers. Hence enemies of human rights have some illegitimate ammunition for discrediting their great work by accusing them directly or indirectly of being tools of their countries policies. Such accusations are often used as ammunition for sinister attacks on the whole subject of human rights as an instrument of Western colonialism.

It is quite encouraging that the prestige and influence of international human rights NGOs is constantly rising as a result of their increasing external political activism in the promotion of their ideals. But this activism has been mainly directed against the known human rights violators, most of whom could not care less. Little energy has been focused on political activism within their own countries aimed at making human rights part of the top national interests of foreign policy of such countries. This is where international human rights violators may be compelled to worry and to take human rights issues much more seriously.

### VIII. CONCLUSIONS AND AGENDA FOR ACTION

The Middle East is one region of the world with deeply rooted pluralism. People of different religions, languages and ethnicity have lived together for thousands of years. They are all, and without exception, good and noble people and they all deserve, without exception, to enjoy and exercise their human rights in full, thus fulfilling the common and historic quest for freedom, justice and peace.

Turning the tide that works against human rights would simply require turning the tide that opposes freedom, democ-

racy and peace. The people of the region are like a patient who had an accident that confined him to bed for years, hence when he is recovered from his original illness he must learn to do things that came natural to him before his hospitalization, such as walking.

The first order of business is to put an end to the control of the media by governments and groups that spread information and trade-in-hate. This requires the full international enforcement of Article 20 of the International Covenant on Civil and Political Rights<sup>8</sup> which prohibits any advocacy of national, racial or religious hatred that incites discrimination, hostility or violence. The universal enforcement of this article will make the need for the services of international criminal tribunals against criminals, who usually base their political careers on national, racial or religious hatred, less likely.

As a first step in this direction, I call for the setting up of one or more impartial private and/or public international group. This group would monitor the media, public statements by politicians and declared governmental policies for traffic in national, racial, or religious hatred aimed at inciting discrimination, hostility or violence. I further recommend appropriate international sanctions against such abuse, not only in the Middle East but also where it equally counts (i.e. Europe and North America).

Secondly, with the reduction and eventual removal of this obstacle, an internationally funded human rights education program should be launched with its own media tools and directed at the people of the Region with the acquiescence, but not direct involvement of their governments. The purpose of this program is to teach people "how to walk" (i.e. that they can indeed live together in freedom, justice and peace like most of their ancestors did).

Thirdly, a similar internationally funded program should be created to uphold the rule of law as a national priority in every Middle Eastern nation. The aim of the program should be to reform the local judicial systems and establish a truly independent and effective judiciary with the integrity, training

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<sup>8</sup> Adopted Dec.19, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No.16) 52, U.N. Doc. A/6316 (1966), art. 16.

and experience to be relied upon for swift and effective intervention for the protection of international law. Throwing the political weight of big powers behind such an innocent but highly vital program will be worth more than lobbying for an arms contract.

Fourthly, the political activism of the human rights NGOs should be redirected and with new vigor at their own home governments with the aim of improving and eventually perfecting human rights compliance in such countries and commencing a new international political initiative by the family of free nations. Such initiative would have the following medium and long-term objectives:

1. Recognizing human rights as a universally common vital international policy interest of all nations.
2. Making the recognition and enforcement of human rights a precondition for admission into the family of nations. Thus nations that do not uphold human rights to the satisfaction of the family of nations should not receive economic assistance or become the beneficiary of any international economic, trade or security advantages. Their leaders and officials will not have customary immunities. They will not be admitted into world organizations and if already admitted their membership will be frozen. They will be candidates for international sanctions.
3. Encouraging the secularization of government in the Middle East by cutting the historic religious communal system down to the size necessary to achieve the full separation of church and state. In return, it should be understood that the individual constitutional and human rights of parishioners of all religious groups are fully guaranteed under the procedures of an effective regional human rights court on the European model and by the international community through the United Nations.
4. Affirming, without exception, that no member of the family of nations shall have the right to enforce, or be in the business of enforcing religion. Enforcement of religion violates human rights and turns religion from a question of personal conviction into an instrument of coercion as a matter of perceived religious duty by authoritarian governments, extremist private groups and zealous individuals alike, often with hazardous consequences.

## QUESTIONS AND COMMENTS

**QUESTION:** My question is for Dr. Mugarby. You noted that Salman Rushdie<sup>1</sup> could have been condemned to death by any particular country, including Christian countries. But I would like to point out that Britain, a Christian country, is the reason why he is alive right now because they have not arrested him up until this time.

Since you are discussing human rights issues in the Middle East, would you please elaborate on human rights violations in Syria, which you seem to have left out for some strange reason?

**DR. MUGRABY:** I am sorry that I may have been speaking a little bit fast, being prodded by my colleague, Mr. Ellman, and I had to speak as fast as I could. In the process I may have not made myself perfectly understood.

I did not say that a judgment or a sentence on Salman Rushdie could have been issued in any Christian country. I said the same type of fatwa could have been issued by some Christian or Jewish authorities in the Middle East. I was not talking about Christian countries. I do not have any classification in my mind of countries as Christian or Moslem. I do not believe in that.

But in the Middle East there are certain religious leaders in all regions who feel and believe that it is their duty to enforce the divine law, and they do it by sometimes issuing sentences. If you would like me to give you examples about such fatwas issued by Jewish religious leaders, I have the authority, I can do it. And I know that, from my experience in Lebanon, that there are some Christian religious authorities that believe that they have the right to do the same thing.

So what I am trying to say is that there is a phenomenon of religious establishments in the Middle East which have exercised and enjoyed autonomy for centuries and centuries, and these guys have done all right. What they understand to be their rights interfere with the civil and human rights that we expect a secular state to enforce.

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<sup>1</sup> Author of the book *THE SATANIC VERSES* (1988), which was banned in several Islamic countries.



QUESTIONER: Human rights abuses in Syria?

DR. MUGRABY: Human rights abuses in Syria? You want me, coming from Lebanon, to talk about human rights abuses in Syria?

QUESTIONER: Absolutely.

DR. MUGRABY: Don't you think that this is crazy? You think that I will be allowed in Beirut if I criticize the human rights abuses?

Well, let me tell you, my friend, that I am one man in Beirut who stands always up to abuses by the Syrians. Before that, I stood up to abuses by the Palestinians. I am not an eye witness to human rights abuses in Syria, but I read regularly reports issued by NGOs, such as Amnesty International and Human Rights Watch, I am on their mailing list, and I know that there are lots of abuses.

But as far as I am concerned, as a Lebanese, I know that there are lots and lots of Lebanese prisoners in Syrian jails. I may have skipped that section in my presentation, under the prodding of Mr. Ellman, but there are lots of Lebanese prisoners in Syrian jails with no access to lawyers, and we have no way of knowing their full numbers or names or conditions of their imprisonment.

There is a smaller number in Israel, which are a little bit more fortunate. But also, as you know, in Israel access by lawyers is often limited and there is the power to imprison people administratively. Well, in Syria, there is always the power to imprison people administratively.

I do not know the number. Maybe we have a couple hundred prisoners in Israel and maybe a couple/three thousand prisoners in Syria. But, unfortunately, lawyers are denied access and they do not have the benefit of due process of law, as understood by lawyers who study in regular law schools.

Now, the greatest abuse in Syria, of course, is the same abuse that you will find in all these oppressive Middle Eastern regimes, beginning with Iraq and going to Libya, not sparing Saudi Arabia and so forth, is that you have government by a dictator that enforces the wishes of the governing clique by force without any democracy and without any due process, without the benefit of any protection to citizens. So there is no

freedom of speech, there is no democracy, there is no square ballot.

Of course, there were general elections in Syria only a few days ago, and probably 99 percent of all Syrians voted. But this is the type of false and fabricated ballot that I was referring to.

Is this sufficient?

MR. ELLMAN: Thank you. I've got a number of questions. I will take a group of questions next and then we will try to come back and get a bit more discussion.

QUESTION: Mr. Chairman, I do not pretend to any expertise in the matter of Syrian problems, and for that matter, I do not really have expertise in the background, although I do know Dr. Mugraby. But I think that our questioner misunderstood and by her question presented a very false impression of an individual who has been one of the most outspoken persons. You cannot ask someone to actually put a noose around their neck and jump off of a scaffold, but I will tell you that if you will read some of Dr. Mugraby's articles, including in an American journal entitled *The Middle East Quarterly*, you will see a very forthright, outspoken advocate for human rights who does not pull punches and who does not apologize for either the country that he hails from or others who might be there in occupation. So I just wanted to go on record as supporting Dr. Mugraby from the vantage point that I have.

DR. MUGRABY: Thank you very much.

MR. ELLMAN: I can bear witness to that myself as well.

QUESTION: As to the Pinochet matter, one of the issues that comes up is the issue of sovereignty, and I know in our State Department issues have come up of how can we eliminate some of these dictators or rulers peacefully and what would be the impact if you do prosecute Pinochet? Would they leave their positions without additional bloodshed, and whether you are going to take one person rather than look at it globally and how many you can save by not effectively going after a "Papa Doc"<sup>2</sup> or someone else?

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<sup>2</sup> Duvalier, François (1907-1971), Haitian political leader and physician, known as Papa Doc. Elected president of Haiti in 1957 and in 1964 had himself declared president for life. His dictatorial regime oversaw military and governmental purges and mass executions. The constitution was amended to allow his son, Jean Claude Duvalier, to succeed him.

MR. ELLMAN: Thank you. I will come back. If we may, we will take two or three questions and then come back on that very interesting point.

QUESTION: The theory has been expressed, particularly with respect to South America and perhaps with respect to Southeast Asia, that one of the most promising routes for the advancement of the human rights cause might in fact be through commercial development, the theory being that laws designed to protect international commerce and trade require the neutral application of law, and indeed, if only slowly, through respect for the rule of law and the willingness of the judiciary to protect property interests against the state. I am just wondering what the panelists from their different perspectives think of that argument? It is not an argument that is universally shared, obviously, but whether they view in countries that are particularly repressive of commercial activity, commercial expansion, and the law's protection of that activity as a promising avenue for the expansion of human rights?

MR. ELLMAN: Thank you. There is a question in the back.

QUESTIONER: Following up on the Pinochet question, how has that affected the situation of human rights in Spain and discussions about human rights in Spain, and within the judiciary if there is any talk of other, similar cases that might be taken on by Judge Garzon<sup>3</sup> or other judges against people like Pinochet.

MR. ELLMAN: Who would like to respond on that? Do you want to say something, and then I will come in, or anyone else.

MR. MONTALVO: [Spanish — not transcribed].

INTERPRETER: I will try to sum up.

What our guest speaker has said is that he is not sure what Judge Garzon will do, but it is a reality that it is in the courts, and also it is a reality that there is backing of the European Community. It is a difficult topic to approach without sovereignty, obviously, but it is in effect something that we will address.

MR. ELLMAN: I would just like to add to that, to answer the other question that was raised about Pinochet whether in

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<sup>3</sup> Investigative Magistrate Judge Baltasar Garzon, from Madrid, Spain.

fact by prosecuting him other dictators will hang onto power even longer — if I understood, that is what you meant.

I am afraid that we have not seen many dictators let go of power partly because people like President Moi in Kenya<sup>4</sup> and President Mugabe<sup>5</sup> in Zimbabwe, to name but a couple, are terrified that if they let go, then people will find even more skeletons in their cupboards.

I do not think the fact that Pinochet is going to be prosecuted, or may be prosecuted, will add to their concerns. I think they are already worried about it. And I think that if we fail to prosecute on the ground that it might scare some others into an even more reactionary hold on power, then we would miss an opportunity for establishing some sort of freedom and repressing impunity.

Going on to the other question that was raised about commercial development and property interests and so forth, I think we have to be very, very careful in this. The West has, over the last few years, decided not to complain so much about China, for example, about the breaches of human rights in China, in the hope that a so-called “constructive engagement” might reduce the severity and number of these breaches.

In fact, I think most Sinologists and China watchers would agree that that has not been the case; the opposite has been the case, that the repression has continued. Every now and then, when there is a little bit more pressure put from the West or when there is some big occasion coming up, such as Clinton’s and Tony Blair’s visit to China, China shows a little bit of goodwill. They have now, I think, signed the International Covenant on Civil and Political Rights.

So I am not saying that we must totally boycott them or totally put pressure on them. It has to be a mixture. But I think that the idea that if we simply sit back and do trade with them then everything will be fine is a very dangerous one, and we must constantly keep reminding them of their obligations. And when we do trade with them — as, indeed, when we are doing trade with and producing aid for the developing world — we should say, “We will do this provided, and if we are going to

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<sup>4</sup> Moi, Daniel arap (1924- ), second president of Kenya (1978- ).

<sup>5</sup> Mugabe, Robert Gabriel (1924- ), first prime minister of Zimbabwe (1980-1987), and first president of Zimbabwe (1987- ).

give you aid or trade with you, we must see some *quid pro quo*." It could be done in as tactful and careful a way as you like, but it must be done.

I do not know if other members of the panel would like to comment.

DR. MUGRABY: I would like to add a comment. There was practically a scandal in Britain last year over the order to deport a Saudi dissident because it was established that that order was obtained under the heavy pressure of some commercial entities that had fat contracts with Saudi Arabia. When that was established, the order was rescinded. It was really — I do not know if Mr. Ellman has followed the situation closely, but it was a scandal of major proportion.

It is often the private interests that have the incentive to corrupt the policies of their home governments by making sure that they take such policy positions as will be conducive to their commercial interests. I think the industrialized Western countries are not in such great need of these contracts anymore.

MR. ELLMAN: Thank you. I entirely agree with your comments on that. In fact, the government hoped that they could quietly deport this man to the West Indies and hoped that everybody would forget about it, under pressure from commercial, and particularly from Saudi commercial, interests. In fact, they had to scrap that attempted deportation, and the Saudis continued to trade with us just as before.

DR. MUGRABY: Absolutely.

MR. ELLMAN: And I think the threat of certain Chilean businesses to cease trading with Britain and with Spain because of this prosecution will be a very temporary thing. Even if one or two contracts are canceled in the short term, very soon they will come back to it, and we must not allow ourselves to be put off by this sort of blackmail.

QUESTION: With various recent emergency special sessions of the United Nations, the nations of the world, with the exception of the United States and Israel, have begun consultations, with the help of Switzerland and the International Red Cross, to consider how the Fourth Geneva Convention might be enforced in regard to the territories that were occupied in 1967, approximately. I am not sure quite how it was decided — and I know that there was a meeting of experts at the end of October,

not reported very much in the American press. I think the people here may be able to tell us more about it, especially about what may be following that.

DR. MUGRABY: I am not technically competent to answer that question. But I can tell you that, as regards the West Bank, there had been a very unusual legal situation. After the war of 1948, the West Bank was annexed by the King of Transjordan, and as a result of that the name of the kingdom was changed from Transjordan to Jordan.

Then, the PLO in the 1960s was established by a decree of the Arab League. That was a resolution by the Arab League to establish the PLO. It is not a self-founded organization. The Arab League decided to give the PLO the rights over the West Bank.

In the meantime, Jordan, by joining in the 1967 war, had lost the West Bank, lost military control of the West Bank. Consequently, when the Arab League gave responsibility for the West Bank to the PLO, the Government of Jordan renounced its claim on the West Bank.

So a very peculiar legal situation arose whereby you had this territory, which is called "the territories," where the former sovereign, that is Jordan, had renounced its sovereignty over it. The party that was proclaimed as the new owner was not a state but a political organization.

Of course, the Arab position on Israel was at that time summarized in the famous "Three Nos" of the Khartoum Proclamation by the heads of state that convened after the 1967 horrible defeat. The "Three Nos" were no to recognition, no to negotiation, no to — I don't know what.

With that negative attitude, Israel was left in full control of the West Bank. Since the great legal minds of the Arab League member governments had continued to decide that Israel did not exist, they were not at all willing to not only negotiate, but to call on Israel to exercise its obligations under the Geneva Conventions.

And so, these new procedures are procedures which are coming a bit too late, but I hope that the peace negotiations would make them totally unnecessary, because the purpose really is to reach peace. If in 1948, like I said in my presentation, the world powers had encouraged the parties to enter into a

peace agreement, which they could have done very easily — they could have done that like that — instead of the armistice, then we would have been living today in a much happier Middle East, with no military governments, with much less oppression and so forth.

QUESTION: Professor Mugarby, don't you think that in the two different cases that we have discussed recently regarding the sovereign immunity law of the United States of 1976 — for example, when the court of appeals did not grant immunity in the case of *Nelson v. Saudi Arabia*,<sup>6</sup> it was because South Arabia was acting in their commercial capacity not in their sovereign capacity.

In the other case of Pinochet, the British law of 1978 on immunity was exactly the opposite. That is to say, immunity was not granted to General Pinochet because sovereign immunity did not include the torture or killings almost 1,000 people. So it is exactly the opposite. Immunity was not denied because of commercial purposes absent in the sovereign immunity law, but because it is not included in the general concept of sovereign immunity to act as a president or, in the case of General Pinochet, for acts of torture or acts of death.

MR. ELLMAN: Did you want to add something on that point?

QUESTION: Yes. In the case of *Nelson v. Saudi Arabia*,<sup>7</sup> on the federal appellate level, I think the decision found that it was a commercial activity. The State Department, with Starr being the prosecutor, acted for Saudi Arabia, and I do not know what issues were raised on the national level here. The Supreme Court, I believe by a six-to-three decision, upheld the issue of act of state, and this allowed a commercial activity, which raises the issue of whether our country should legislatively allow for a human rights exception under FSIA, the Foreign Sovereign Immunities Act.

DR. MUGRABY: There is confusion here, if I may say, between two different concepts, between the concept of diplomatic immunity and the very new concept of sovereign immunity. Actually, what they teach in law school is diplomatic immunity,

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<sup>6</sup> 923 F.2d 1528 (11<sup>th</sup> Cir. 1991).

<sup>7</sup> *Id.*

and diplomatic immunity does not hold when the state is trading.

QUESTIONER: In commercial affairs.

DR. MUGRABY: In commercial affairs. The question of sovereign immunity I think is being raised for the first time in these situations. It is not a question of sovereign immunity; it is a question of diplomatic immunity.

This is really a new concept that tries to say that people who are involved in acts of state can benefit from some type of imaginary immunity. It is different. It is just diplomatic immunity, and diplomatic immunity is accorded to sitting heads of state.

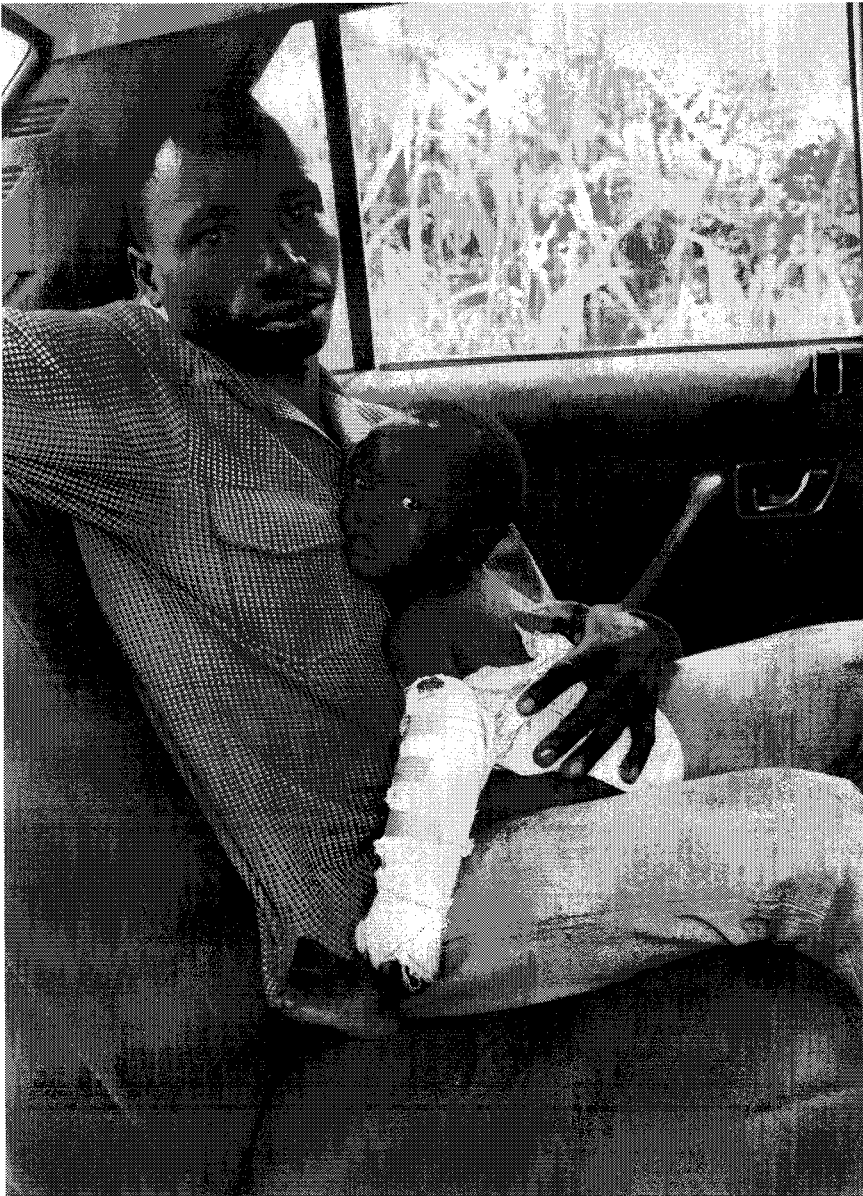
Before this ruling in Britain — and someone should correct me — I have not seen any authority.

MR. ELLMAN: I would only add that one of the most significant things about the House of Lords decision was that I think it was Lord Nicholls — who we hadn't expected to come out against the immunity of Pinochet, but, to our surprise and delight, he did — he said, "We have to recognize that international law is developing." This is a very significant thing, for a British judge who is normally extremely conservative, to say, "We recognize that progress is being made, that change is happening."

That perhaps may explain to some extent the difference between the U.S. practice — if indeed it is different; I am not sure that it is — and this new British interpretation of international law.

I would like to thank you all very much for a very interesting discussion and thank the panelists for their invaluable contributions.





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A 16 month old Burundian refugee, who was bayoneted by Burundian soldiers, is taken to the hospital in Rwanda. A man is holding the baby on his lap in a car. He was taken to Rwanda by his mother, who was also seriously wounded, to escape a massacre of Hutu tribesmen by the Burundian army.