

THE LEGACY OF NUREMBERG:  
CONFRONTING GENOCIDE AND TERRORISM THROUGH THE RULE OF LAW

*John Shattuck\**

It's great to be here tonight among so many old friends from Amnesty International. After spending much of the 1990s in the State Department, this is like a homecoming. Back in 1986, after fifteen years as a civil liberties lawyer, I was invited to join the Amnesty board. There I met a fellow board member, Joan Fitzpatrick, who became my tutor in human rights law and the mysteries of Amnesty. Joan was an inspiring teacher and a wonderful colleague and friend, and I'm honored to come here tonight at the invitation of the Joan Fitzpatrick Fund Committee of the University of Washington School of Law, where Joan served for many years as a distinguished member of this faculty.

My starting point tonight is one of the great ironies of history. Who would have thought that the city most often associated with Nazi Germany would later become the birthplace of the modern human rights movement? Nuremberg, after all, was where Hitler rallied his supporters, where millions of Nazis staged demonstrations, where Leni Riefenstahl made her notorious Nazi propaganda film, *The Triumph of the Will*. But when the Nazis were finally defeated, Nuremberg was also the place where their leaders were brought to account, where Nazi crimes were prosecuted, and where international human rights were first enforced.

The Nuremberg Tribunal was launched in 1945 as an experiment in confronting genocide and terrorism through the rule of law. Three years later the nations of the world took this experiment further by making two far-reaching commitments. First, on December 9, 1948, they looked back at the Holocaust and collectively declared, "Never again," by drafting an international treaty on the Prevention and Punishment of the Crime of Genocide. The next day, December 10, the U.N. General Assembly adopted the Universal Declaration of Human Rights. These two documents were the earliest banners of the human rights movement.

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\* Keynote speaker; CEO, John F. Kennedy Library Foundation; Assistant Secretary of State for Democracy, Human Rights and Labor (1993-98); U.S. Ambassador to the Czech Republic (1998-2000).

The modern concept of human rights accountability can be traced back to the Nuremberg trials. The Tribunal's chief prosecutor, Robert Jackson, who had taken a leave of absence from the U.S. Supreme Court, told the judges in his opening speech that "the wrongs we seek to condemn and punish have been so calculated, so malignant and so devastating that civilization cannot tolerate their being ignored – because it cannot survive their being repeated." From 1945 to 1948 a dozen trials were conducted. The people who had committed, ordered or enabled genocide and crimes against humanity were found guilty – guilty of criminal conduct that had never before been prosecuted. Politicians, generals, doctors, writers, architects, industrialists – all were brought to justice for crimes that were being punished for the first time in history.

The Holocaust was the second genocide of the 20<sup>th</sup> century. The first came in 1915, when over a million Armenians were slaughtered or forced to starve and driven from their villages in the final days of the Ottoman Empire. Adolph Hitler was well aware of what had happened to the Armenians and how the world had stood by as they were slaughtered. When he was planning the Holocaust, Hitler challenged the skeptics in his inner circle by asking, "Who today... speaks of the annihilation of the Armenians?"

The Genocide Convention, the Universal Declaration of Human Rights and ultimately the international human rights movement—all grew out of the great Nuremberg experiment. And yet over the last sixty years, more than 100 million people—most of them civilians—have been killed by their own governments, or by terrorist organizations condoned by their governments. Since 1994 we've witnessed genocide in Rwanda, in the former Yugoslavia, and as we speak, in the Darfur region of Sudan.

How did all this happen, and what can be done to prevent it from happening again and again? That's the great question before us. Perhaps it's a question that can never be answered—certainly not in a speech or a conference—but it's the most important question of our time, and probably of all time.

I propose to explore this question in light of another irony of history. After World War II the U.S. was in the forefront of an effort to build an international rule of law, symbolized by its leadership at Nuremberg, its role in organizing the conference that framed the UN Charter and its participation in drafting some of the early human rights conventions. Today, the U.S. is at the forefront of an effort to undermine that very system of international law, as demonstrated by its attacks on the United Nations, its resistance to the Geneva Conventions and human rights treaties like the Torture Convention, and its open hostility to new institutions of international justice like the International Criminal Court.

How did it come to this?

Perhaps in some ways we shouldn't be surprised. Nations, like people, are wary of surrendering their sovereignty. This is particularly true of a nation like our own that becomes a superpower. For more than three and a half centuries, national sovereignty has been at the heart of international relations, and the development of international law has been hindered by that central stubborn fact.

Even at Nuremberg the pursuit of international law eventually gave way to competing national interests. As the Cold War descended on Europe, the U.S. and British governments began to soften their stance toward Germany and looked for ways of avoiding punishment of the Nazi war criminals. One of the Nuremberg prosecutors, Benjamin Ferencz, later recalled that "there was a sense of panic about the Russians, a feeling that there was an urgent need for an understanding with the Germans." By the time of the Korean War, the American High Commissioner in Germany, John J. McCloy, had commuted or reduced the sentences of sixty-four of the seventy-four highest-level convicted Nazi war criminals. As the Allies' interest in Nuremberg faded, so did the Nuremberg promise of "never again." A 1948 article in *The New Yorker* captured what was happening:

"On the barbed wire fence surrounding the crematorium and the mass grave at Dachau, there is a sign that reads, 'This Really Happened.' Now that sign appears to be in danger of being replaced by one that reads, 'So What?'"

But it would be wrong to look at Nuremberg as a failure. After all, the tribunal marked the first time that genocide and crimes against humanity had been singled out in international law, and the first time the perpetrators of those crimes had ever been prosecuted. Nuremberg was a success, but it also demonstrated the limits of the law, and its weakness in the hands of sovereign governments. In the case of the U.S., Nuremberg showed the ambivalence of American officials toward the international enforcement of human rights. The Tribunal trials were seen as a noble experiment so long as they advanced the U.S. interest in holding Nazi leaders accountable for their crimes. But when the trials became an irritant to U.S. policymakers working to rebuild an anti-communist Germany during the early days of the Cold War, they lost their appeal to the foreign policy establishment.

For decades, the Cold War sidelined human rights and international law. The Soviets and their allies were engaging in the massive suppression of political rights, and in response the U.S. often tolerated the violation of these very rights by authoritarian regimes willing to line up as anti-communist allies. Eventually, when the Soviets agreed at Helsinki in 1976 to accept a dialogue on human rights in exchange for the recognition of Eastern European borders, the U.S. once again began to incorporate the promotion of human rights into its foreign policy.

But it wasn't until the fall of the Berlin Wall that a real opportunity for the expansion of freedom finally opened up. Democratic revolutions seemed to burst forth everywhere – in Eastern Europe, in South Africa, in Latin America, in parts of Asia and eventually even in the Soviet Union. Just as hopes for human rights were raised at Nuremberg, these hopes were raised again in the early years of the post-Cold War World.

We all remember what an extraordinary time that was.

In the summer of 1988 I was sent on an Amnesty mission to Prague, where the Soviet satellite regime was still in power. My assignment was to prepare a report on Vaclav Havel and other Czech dissidents in prison. My contact was a woman who told me to meet her in a noisy outdoor café so that our conversation couldn't be bugged or easily overheard. Two years later, after the Velvet Revolution had swept the communists out of power, I remember riding a train between New York and Washington and opening up the New York Times to find a picture of my Czech dissident contact. She had just been appointed the first Ambassador to the United States of a newly democratic Czechoslovakia, and the President who had appointed her was none other than the dissident who'd been in prison only months earlier, Vaclav Havel.

The world was in a state of transformation. For Americans of both the left and right, everyone thought that expanding freedom was a great thing, and that the end of confrontation with the Russians would be good for our security and our economy. Americans saw what we wanted to see during this early post-Cold War period. We welcomed the fall of communism. We watched the forces of global integration shatter barriers and bring people closer together. We celebrated the triumph of democracy and human rights. We were pleased by the opening of borders, the spread of market economics, the technology and communications revolutions, and the growth of the internet, which seemed to be a symbol of all these dramatic changes.

That was the good news. But there was also bad news, and at first we didn't see it coming. As the Cold War ended, equally powerful forces of disintegration began to tear the new world apart. States that had been held together for decades by Cold War tensions or strong-man regimes began to fail and collapse. In these failed states ethnic, political and religious conflict broke out, and the conflict was often manipulated by cynical leaders seeking to enhance their power, like Slobodan Milosevic in Yugoslavia or the Taliban in Afghanistan or Osama bin Laden in Somalia and Sudan. Some of these leaders began to use terrorist tactics to commit massive crimes against humanity and genocide. Huge numbers of refugees and dislocated people began to flee from failed states and the human rights wars inside them, and by the end of the 1990s there were more than 20 million – even more than after World War II. Meanwhile, the gap between the rich and the poor began to grow, as economic globalization made the rich richer and left

the poor behind. And those left behind began to turn to religious fanaticism, especially political Islam, and became recruits for the terrorist designs of their leaders.

This leads to a darker chapter of my Prague story. After witnessing the communist repression of 1988 and the Velvet Revolution of 1989, a decade later I saw something quite different, this time as the U.S. Ambassador to the Czech Republic. Seven years ago today, on February 17, 1999, I was awakened in the middle of night by a phone call from our CIA station chief. He said he had to see me right away. When he came he handed me a highly classified fresh intelligence report that a terrorist group from a Middle Eastern country was planning an imminent attack on our embassy. After consulting with Washington, I shut down the embassy and immediately implemented the counter-terrorism strategy that ambassadors were supposed to use when their embassies were targeted for attack. I ordered intensive surveillance of the area, terrorist profiling and the full-scale use of all available U.S. and Czech intelligence assets. We foiled the terrorist plot, but along the way I had to make tough decisions about how to defend the embassy without violating human rights and the rule of law.

I learned what it was like to be on the front lines of a struggle against terrorism. Defending against attack was high on the agenda of all U.S. ambassadors in the late 1990s, particularly after the bombing and terrible loss of life at the embassies in Nairobi and Dar es Salaam in 1998. I remember standing at a solemn ceremony in a hangar at Dover Air Force Base a month before I left for Prague as the bodies of U.S. diplomats were brought home and thinking how far the world had come from those heady early days after the fall of the Berlin Wall.

From my experience as Ambassador and earlier as Assistant Secretary of State for Human Rights, I knew that terrorism and genocide were the two gravest threats to international security that we faced. These threats were closely intertwined. They were stimulated by the forces of disintegration. And if we were to confront them, we had to use a strategy of working within the rule of law and the framework of international institutions. That was the lesson of Nuremberg, when these same threats had to be addressed after World War II, and it was also the lesson of the 1990s, when a series of human rights wars became the breeding grounds for terrorism and genocide.

During the first half of the 1990s we learned that lesson the hard way, by misunderstanding or failing to deal with what was happening in the world.

A human rights war had broken out in Somalia in 1992, where a UN effort to relieve a famine turned into a hunt for the warlords who were stealing relief supplies. U.S. troops participated in the hunt, and in October 1993 two Blackhawk helicopters were shot down by guerrillas, 18 U.S. Rangers were killed, and the body of one of the Rangers was dragged

through the streets of Mogadishu, an event that was filmed live by CNN. This was a political disaster in Washington, and led to a Congressional outcry against further U.S. involvement in UN peacekeeping missions in distant human rights wars that were not seen to represent any threat to Americans.

Six months later genocide broke out in Rwanda. In many ways it was a “perfect storm.” The political terrorists who planned the genocide in order to take over the Rwandan government had learned a lethal lesson from Somalia. That lesson was that if you kill international peacekeepers, the UN will withdraw. That’s exactly what happened, and the new U.S. policy on peacekeeping after Somalia meant that the U.S. would support the UN’s withdrawal from Rwanda. I worked with others in the State Department to try to prevent that, and traveled to Rwanda and its neighboring countries to report on what was happening and line up support for a new regional peacekeeping force. But I got a cold shoulder from Washington, which refused to offer any help for a new force. In the end, all I could do was bear witness to the genocide. I’ll never forget flying low in a small plane over the border between Rwanda and Tanzania, and seeing thousands of bodies floating like logs down the Kagera River. In my report I warned that the world would soon look like Rwanda if we stood by and did nothing to stop the human rights war that I had seen.

Rwanda eventually had an impact on U.S. foreign policy, although far too late for 800,000 genocide victims. In October 1994, six months after the killings began in Rwanda, the U.S. led a multinational force authorized by the UN to stop the political killings in Haiti and restore the country’s democratically-elected president. This time my human rights reporting had an effect on policymaking in Washington and was used by President Clinton in his decision to authorize the intervention. Pressure from the Congress forced the U.S. to withdraw too early, but a precedent had been set for a multilateral intervention under international law to defend human rights.

Haiti set the stage for an even larger intervention to stop a much bigger human rights war, this time in Bosnia. In July 1995 thousands of Muslim men went missing after Bosnian Serb forces captured the town of Srebrenica, and lightly armed international peacekeepers offered no resistance. I set out to find the missing men. In a mission coordinated with the UN and the International Red Cross, I interviewed refugees in the war zone and came across six Muslims who told me they had escaped mass executions that the Serbs had carried out in the soccer fields and warehouses around Srebrenica. When I reported this back to Washington, the CIA found aerial surveillance photographs of newly dug mass graves near Srebrenica which corroborated the stories I’d been told. The photos and my report were taken by Madeleine Albright to the UN Security Council, which authorized NATO to intervene to stop the genocide instigated by Slobodan

Milosevic. Three years later, NATO intervened again to stop another Milosevic genocide, this time against the Kosovar Albanians. Within a year Milosevic was arrested and flown to The Hague to stand trial at the International Criminal Tribunal for the Former Yugoslavia.

By the end of the 1990s two lessons were clear from all of this. First, failed states and human rights wars had become the breeding grounds of the two great threats we faced—increasing terrorism and renewed genocide. Second, it was equally clear that the only effective way to respond to these threats was to act within a framework of international law, international institutions and broad alliances. Military intervention was far too complex and controversial to be carried out unilaterally. But not acting was not an option. When we looked away, as we did with Rwanda, or when we stood aside, as we did with Bosnia until 1995, the threats only increased.

Then came September 11.

Several things happened right away. First, there was a shift in U.S. public opinion about foreign events. Americans now understood in their gut that when the planes flew into the World Trade Center and the Pentagon, the human rights wars in faraway places like Somalia or Rwanda or Bosnia or Afghanistan had come right into their living rooms.

A second immediate effect of 9/11 was that people began to understand that when a terrorist organization like al Qaeda captures a failed state like Afghanistan, international security is threatened. There was a huge outpouring around the world of support for the U.S., and for a strong international response to the terrorist attacks. In October 2001 the UN authorized the use of force against the Taliban and al Qaeda in Afghanistan, and for a while it appeared that the terrorism threat would be addressed within the framework of international law and alliances.

But that's not what happened. In early 2002 a radical new foreign policy doctrine was unveiled by the administration of President George W. Bush. The Bush Doctrine called for the U.S. to act unilaterally in an open-ended "war on terrorism." It required the preemptive use of force. It disdained international law. And it stretched the President's powers to points beyond the reach of statutes, treaties or the U.S. Constitution. Above all, it turned radically away from the lessons of the 90s about how to counter the forces of disintegration.

Today, the world is less secure and less free than it was five years ago.

It's less secure because there's more terrorism – most prominently in Iraq, Afghanistan, the Middle East and Europe. It's less secure because there's more genocide, notably in Darfur. The world is also less secure because international alliances are weaker, in large part because of broad opposition to the way the U.S. intervened in Iraq, unilaterally, and under a premise later proven to be false – and reported by intelligence analysts *before* the intervention to be false—that Iraq possessed weapons of mass

destruction. Weaker alliances mean less attention to other crises, like Darfur, where the situation is comparable to Rwanda or Bosnia, and little is being done to stop the killing. Weaker alliances also mean weaker international institutions, particularly the UN, which has been sidelined under the Bush Doctrine, and the International Criminal Court, which has been shut out completely.

Above all, the world is less secure today because its only superpower, the United States, has lost its capacity to lead by example and persuasion because it insists on leading by force and coercion.

The Bush Doctrine has not only made us less secure, it's also made us less free. We're less free today because we have a president who claims breathtaking powers to override the Congress and the Constitution in the name of an open-ended, ill-defined and undeclared war. A vast warrantless wiretapping program has been conducted by the National Security Agency in disregard of a clear congressional statute. An interrogation program that uses methods many experts regard as torture has been conducted by the CIA and the military in violation of the International Torture Convention and the federal legislation that implements it. Earlier this year, when Congress passed a new prohibition on the use of torture, the President issued a statement saying he wouldn't be bound by the prohibition. That should come as no surprise because the President has also asserted that he's not bound by statute or the Constitution when he claims an unreviewable authority to designate American citizens as "enemy combatants" and strip them of all their rights.

The message of the Bush Doctrine is that for the war on terrorism to succeed, the rule of law has to get out of the way. Back in 2002, when the radical new National Security Strategy was announced, a Justice Department official told the Washington Post what he believed this approach meant for law enforcement officials. "If you don't violate someone's civil liberties some of the time," he said, "you probably aren't doing your job."

Not only are Americans less free at home because of this approach, people are less free around the world. A climate of international lawlessness has been created in which foreign detainees in U.S. custody abroad have been brutally abused at Abu Ghraib and other prisons in Iraq and Afghanistan, hundreds of foreigners have been caged up indefinitely without charges and without rights at a U.S. military base in Guantanamo, and repressive regimes everywhere have been given a green light to crack down on political dissidents and religious and ethnic minorities in the name of fighting terrorism.

What's the result of all this? A drastic increase in the number of people convinced that America is their enemy, and stepped-up recruiting by terrorist groups throughout the Muslim world and beyond. After four years



of the Bush Doctrine, it's difficult not to conclude that the forces of disintegration are winning. They're winning because the United States is squandering one of its greatest assets: our commitment to the rule of law. For more than three decades Republican and Democratic Presidents alike have scored major victories for freedom and security by working within a framework of international law. Jimmy Carter mobilized democratic governments under the International Convention on Civil and Political Rights to press for the release of political prisoners held by repressive regimes. Ronald Reagan invoked the Helsinki Accords to champion the cause of dissidents in the Soviet Union. George Bush Senior created a global coalition with UN backing to block the aggression of Saddam Hussein. And Bill Clinton worked with NATO and the UN to stop the genocide in Bosnia and Kosovo.

But the Bush Doctrine sees the rule of law as an obstacle, not an asset. Back in January 2002, the President's Counsel, Alberto Gonzales – now our Attorney General – wrote a memo reporting that the President had decided that “the war on terrorism renders obsolete the Geneva Conventions.” Gonzales' only rationale for that sweeping assertion was that “terrorism is a new type of warfare not contemplated when the conventions were framed.” But the world has seen many types of new warfare since the Geneva Conventions were framed – most notably nuclear warfare and guerrilla warfare. Until the Bush Doctrine was announced, no American president had ever questioned the basic rules of international humanitarian law, including Lyndon Johnson and Richard Nixon during the Vietnam War and George Bush Senior during the Gulf War.

The reasons for this are clear, and they were spelled out inside the Bush Administration by former Secretary of State Colin Powell. When he learned of the President's decision, Powell warned in a memo to the White House that “revers[ing] over a century of U.S. policy and practice” in adhering to the laws of war would “undermine the protection of our troops,” provoke “negative international reaction, with immediate adverse consequences for our foreign policy,” and diminish “public support among critical allies, making military cooperation more difficult to sustain.” Powell's memo was brushed aside at the time like the law itself. Today it reads like a prophecy.

In order to repair the damage done over the past four years to security and freedom around the world, we need to restore the rule of law to American foreign policy.

First, it's time for the Congress to begin to reassert its constitutional authority to provide a check on executive power. Through oversight hearings and legislation, Congress should make it clear that the President is not above the law, and is bound by the Geneva Conventions, the Torture Convention, the International Covenant on Civil and Political Rights and all the other international laws that have been ratified and adopted as part of

our domestic law. Congress should do the same thing to reassert its authority over other federal laws that have been flagrantly violated by the President, such as the Foreign Intelligence Surveillance Act. In recent weeks, Republicans as well as Democrats have begun to challenge the lawlessness of the Bush Doctrine. In this election year it's essential that Amnesty and other citizen organizations conduct a nonpartisan grassroots campaign to restore the rule of law to American foreign policy. This kind of campaign has been successful at the local level, where many cities and towns have gone on record against anti-civil liberties measures in the war on terrorism. Now it's time to take the campaign to a national level.

Second, the United States should take the lead in strengthening international law on terrorism. The UN is working on this issue, but the Bush Doctrine has kept the U.S. from actively participating. This is a serious mistake, because by stigmatizing terrorism as a crime against humanity, we would rebuild our alliances, isolate terrorists as outlaws, and confront them as focused targets of a law enforcement crisis, not ill-defined enemies in an open-ended war.

Third, the U.S. should protect human rights at home. When the President violates civil liberties by defying an act of Congress or the Constitution, the Congress should rein him in, and not wait for the courts to do so. Here again, a grassroots citizens campaign is the key to moving the Congress.

Fourth, the U.S. should resume its leadership in strengthening the system of international law it helped create at Nuremberg. The Bush Doctrine has blocked all action on this front, but a growing number of Republicans as well as Democrats in Congress are expressing concern that the U.S. is undermining its own security by becoming an outlaw in international negotiations. We should rejoin negotiations on such critical issues as climate change, nonproliferation of weapons of mass destruction, and international justice.

Finally, the U.S. should work with other countries and the UN to stop human rights wars in failed states. After Rwanda, a doctrine of humanitarian intervention was invoked under international law to stop the genocide in Bosnia. After Iraq, this doctrine is in tatters, and genocide continues in Darfur as if nothing was learned from what happened when the world stood by as 800,000 Rwandans were slaughtered.

Sixty years ago Justice Jackson stood up in a make-shift courtroom in a bombed-out city and told the judges at Nuremberg what was at stake. The stakes are the same today. "This Tribunal," he said, "is not the product of abstract speculation.... It represents a practical effort to use international law to meet the greatest menace of our time... We are able to stop this menace only when we make all men and nations equally answerable to the law." Seventeen years later, President John F. Kennedy addressed the world after

leading it back from the brink of nuclear war in the Cuban Missile Crisis. What he said then about protecting security and freedom in dangerous times serves as a warning and a plan of action for what we should be doing today: “The United States is neither omniscient nor omnipotent. We are 6% of the world’s population. We cannot simply impose our will on the other 94% of mankind.... There cannot be an American solution to every world problem. There must be a world solution [under the rule of law].”

Let me close with the words of Vaclav Havel, who eloquently expresses how we should think about all of this, and what we should do right now: “I am not an optimist,” Havel says, “because I do not believe that all ends well. I am not a pessimist because I do not believe all ends badly. Instead, I am a realist who carries hope, and hope is the belief that freedom has meaning and is always worth the struggle.”