THE EUROPEAN UNION, THE UNITED STATES AND HUMAN RIGHTS:

MAJOR TRENDS AND CHALLENGES

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The nations of the European Union and the United States of America have more in common in support of human rights than do any other two regions in the world. Both are committed to majority rule through pluralistic, multi-party democracies and genuinely free elections. Both govern within a framework of tolerance for difference, relative respect for the rights of minority groups and individuals, expansive freedom of the press, growing gender equality, and protection of basic freedoms of all persons (within limits defined by law to meet pressing social needs by proportionate means). Both espouse the rule of law, assured by independent courts enforcing constitutional guarantees through due process of law.

These similarities should not be surprising. Most Americans are of European descent. Their common language is English. Their legal system (except in one state) was inherited from English law and retains much of that heritage.

Within their broadly similar traditions, however, lie important differences. Some are of relatively recent vintage, such as different mixes of law enforcement and military force in counter-terrorism operations. Others are more longstanding, including sharply different approaches to international law and international criminal accountability, fundamentally different roles for religion and religious values, markedly varying ideologies of political economy, differing emphases on freedom of expression, contrasting attitudes toward state-sanctioned violence, and dramatically different approaches to the Israeli-Palestinian conflict.

These differences reflect larger, underlying causes. Geopolitical power disparities loom large among them: the United States is so powerful that it too often believes it does not need international law or organizations and can go it alone, whereas Europe understands that unless it unites under common rules and a common organization, it cannot hope to compete with the U.S. or East Asia, economically, diplomatically or otherwise.

Whatever the root causes, these larger differences lead Europe and America to differing outcomes on sensitive questions of human rights. In one context or another all may at times pose challenges to trans-Atlantic understanding and cooperation. The following is a non-exhaustive list of important differences:

A. Counter-Terrorism Operations

1. Military Force vs. Law Enforcement

Apart from military cooperation through NATO in Afghanistan, Europe appears committed to a mainly law enforcement approach in counter-terrorism operations. This is illustrated by the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Ocalan v. Turkey*,[1] involving a criminal trial of an alleged terrorist. The Court ruled that the presence of even a single military judge on a three-judge tribunal, during only a portion of the proceedings, was sufficient to violate the right of the accused to a trial before an impartial court.

In the United States, the Obama Administration has abandoned the "war on terrorism" rhetoric of the previous Administration. It has banned torture and other mistreatment of prisoners, ended CIA detentions and interrogations of detainees, committed itself to closing the Guantanamo detention center, and recently announced that leading Al Qaeda suspects will be tried in civilian courts in New York.

Yet the Obama Administration has not foresworn military approaches. It claims a continuing (albeit more narrowly justified) right to detain terrorism suspects indefinitely without trial at Guantanamo and elsewhere, it opposes judicial review of U.S. detentions at Bagram Air Base in Afghanistan (even of prisoners brought there from other countries), it still plans to prosecute some terrorism suspects before military commissions, it declines to renounce "extraordinary renditions" altogether (so long as receiving countries give "assurances" that they will not mistreat detainees), and it deploys unmanned drone aircraft to kill terrorism suspects in Pakistan.

Apart from specifics, there clearly remain general differences between Europe and the U.S. on the extent to which terrorism should be countered by military rather than by law enforcement means. These, in turn, affect the human rights of terrorism detainees and suspects – and the signals sent to the public – with regard to liberty, integrity of the person and due process of law.

2. Applicability of Human Rights Law

A related difference has to do with the scope of application of international human rights law. The Obama Administration has not yet, so far as I am aware, jettisoned the Bush Administration contention that human rights law does not apply in armed conflicts. Even if anti-terrorism is no longer by definition an armed conflict, there remain anti-terrorist conflicts in Iraq, Afghanistan and Pakistan. According to the U.S. position, only international humanitarian law ("IHL") applies in these conflicts. This view is contrary to the opinions of the International Court of Justice and of most authorities. The majority view is that, while IHL is the *lex specialis* applicable in armed conflict, international human rights law applies to the extent it is not inconsistent with IHL.

[1] App. No. 46221/99, Judgment of 12 May 2005.

In contrast, Europe appears to accept that both bodies of law apply. Indeed, the European Court of Human Rights may go too far in the opposite direction: it applies the European Convention on Human Rights to cases of executions, detentions and torture arising in the Chechen armed conflict, with no mention of IHL, even as a body of law relevant to interpretation of human rights.[2]

B. International Law

Even under the Obama Administration, the U.S. will continue to place less emphasis on international law and international organizations and submit less to international adjudication than Europe. The result is to render international mechanisms less potent in protecting human rights.

1. International Law and Human Rights

With international human rights law expert Harold Koh as the new State Department Legal Advisor, this Administration will not repeat the argument of former U.S. Ambassador to the United Nations, John Bolton, that international law is not law. But no one can entirely overcome domestic U.S. political skepticism toward international law. For example, scores of members of Congress, who in recent years co-sponsored bills that would generally bar federal judges from citing international law, still haunt Washington.

American unwillingness to conform to international law is especially rigid in the case of international human rights treaties. Domestic political opposition has to date blocked U.S. ratification of treaties protecting, for example, the rights of women and children. Even when the U.S. does ratify human rights treaties such as the International Covenant on Civil and Political Rights, Washington attaches reservations and understandings designed to make the treaties, as applied to the U.S., conform to U.S. law, rather than make U.S. law meet international norms. This parochial approach will largely continue in the current Administration, in part because treaty ratification under the Constitution requires the consent of two thirds of the Senate, and hence of a significant number of Republican Senators.

In contrast, Europe is the region most respectful of international law, and most prone to join international human rights treaties and to accept in fact, with relatively few formal reservations, the standards they set.

2. International Organizations and Human Rights

The Obama Administration is far more inclined than its predecessor to favor multilateral approaches in international affairs, including human rights. Witness its decision to join the UN Human Rights Council. Yet as illustrated by Washington's recent undercutting of the

[2] *E.g., Khashiyev v. Russia,* Apps. Nos. 57942/00 and 57945/00, Judgment of 24 February 2005, Final 6 July 2005.

Organization of American States in the Honduran crisis, the Administration's appetite for multilateralism is by no means unlimited. By contrast, despite its recent election of relative unknowns to top EU positions, the European Union remains the world's most multilaterally committed bloc of states.

3. International Human Rights Adjudication

EU member states regularly submit to judgments of the European Court of Human Rights and to judgments on human rights (among other topics) of the European Court of Justice. In contrast, the U.S. has not joined the Inter-American Court of Human Rights or any other human rights court. It does not accept even the non-binding individual complaint competence of UN human rights treaty committees.

There is one quasi-judicial human rights complaint procedure from which the U.S. cannot escape: Short of withdrawing from the OAS, the U.S. has no choice but to be subject to proceedings before the Inter-American Commission on Human Rights. However, the U.S. consistently refuses to comply with Commission resolutions in cases against the U.S.

Even when President Bush attempted to comply with the judgment of the International Court of Justice in the *Avena* case (*Mexico v. U.S.),*[3] the U.S. Supreme Court in 2008 ruled in *Medellín v. Texas* [4] that the President had no power to order the State of Texas to comply with an ICJ Order not to execute Mr. Medellín. Only Congress could require Texas to comply, said a majority of the Court, but Congress showed no interest in doing so. Medellín was subsequently executed.

C. International Human Rights Crimes

1. International Criminal Court

While EU states compose part of the backbone of the ICC membership, the U.S. signed but did not ratify the Rome Statute under President Clinton, and withdrew its signature under President Bush. The initial Bush campaign against the ICC later mellowed. In 2005 the U.S. abstained on the UN Security Council referral of Darfur to the ICC, and by 2008 the U.S. provided intelligence and other support to the ICC.

Most recently the Obama Administration has announced that the U.S. will resume attending meetings of the ICC Assembly of States Parties, as an observer. This is a hopeful sign. But in view of the longstanding U.S. objections to the ICC, and the constitutional requirement of the consent of two thirds of the Senate to ratify a treaty, U.S. participation as a state party is nowhere on the horizon.

[3] I.C.J. Reports 2004, p. 12.
[4] 552 U.S. 491 (2008).

2. Universal Jurisdiction

Europe, and especially Belgium and Spain, have pioneered the ambitious use of universal jurisdiction to prosecute foreign citizens who commit serious human rights crimes in other countries where they enjoy impunity. But both nations amended their legislation after their criminal investigations of American, Israeli and (in the case of Spain) Chinese officials brought pressure from Washington, Tel Aviv and Beijing. Belgian and Spanish universal jurisdiction is now generally limited to cases where the offender is found on their territories.

Their new posture may yet bring further confrontation, in the event a former U.S. official accused of war crimes were to visit Belgium or Spain. On the other hand, even Washington has recently exercised universal criminal jurisdiction under the torture convention, where an alleged violator – Chuckie Taylor, son of the former Liberian dictator – was caught on U.S. territory.

In addition, thanks to the anomaly of a two centuries-old statute (the Alien Tort Claims Act), American courts exercise universal jurisdiction in civil tort cases against serious foreign human rights violators. This is an area where Europeans might learn from the American experience, which on balance has been positive.

D. Role of Religion

1. Freedom of Religion

Unlike many European States with their State-established churches, the United States was founded in large part by diverse religious groups fleeing persecution in Europe. Hence the U.S. Constitution goes much further than European human rights law in restricting state support for particular religions (or even religion in general), and in protecting the right to the free exercise of religion, including proselytization. For example, one would not expect the U.S. Supreme Court to uphold a ban on women or girls wearing Muslim head dress in schools or public buildings.

2. Rights Affected by Religious Social Values

In the United States, a far less secular society than Europe, religious groups are more politically potent. Largely as a result of their political pressure, the law in the U.S. is less protective of a woman's right to a publicly funded abortion, or of stem cell research, or of gay rights to equality.

In regard to gay rights, the gap may be narrowing. In ruling that private, consensual, adult gay sex may not be criminalized, a majority of the Supreme Court in *Lawrence v. Texas*[5] cited European human rights law in support of its interpretation of the implicit right to privacy in the U.S. Constitution.

[5] 539 U.S. 558 (2003).

E. Free Market Ideology

The ideology of the "free market" and hostility to socialism are more deeply entrenched in the U.S. than in Europe. This means, for example, that Americans are less prone to view economic, social and cultural rights as rights (as shown by the current U.S. debate on whether to extend health insurance coverage to nearly all Americans). It also means that the U.S. Supreme Court appears to be on the verge of expanding the free speech rights of corporations, so they can spend large sums to influence the outcome of elections to public office.[6] It similarly means that while American restrictions on the privacy of personal information in government files are as strict (or more so) than in Europe, U.S. restrictions on the privacy of personal information in the files of private corporations are more permissive than in Europe.

F. Freedom of Expression

American jurisprudence since the second half of the 20th century has been more protective of freedom of expression than in Europe. Reflecting their different historical experiences in the 20th century, the difference is especially notable with respect to racial hate speech. As the Holocaust recedes into history, however, the gap appears to be narrowing.

G. Attitudes Toward State-Sanctioned Violence

The United States is far more tolerant than Europe of state-sanctioned violence in the form of the death penalty (abolished in Europe but not in the U.S.), the right to bear arms (a right in the U.S. but not in Europe), and punitive prison terms and conditions (the U.S. incarcerates the highest percentage of its population in the world).

In regard to the death penalty, the U.S. appears to be trending closer to the European position. The U.S. Supreme Court recently abolished the death penalty for juveniles and the mentally retarded and raised the procedural standards for assistance of counsel in capital cases. Judges and juries have reduced the overall number of death penalties. But elimination of the death penalty in the U.S. does not seem likely in the foreseeable future.

H. Israel and Palestine

The U.S. is far more protective of Israel, and less so of the rights of the Palestinians, than is Europe. While this trans-Atlantic difference has broader ramifications, it also affects human rights, most recently in the U.S.-led attack on the Goldstone report on war crimes in Gaza. If the Palestinians are to have any chance in the international diplomatic arena, they need Europe as a partial counter-balance to the generally pro-Israeli stance of the U.S. And if long-term prospects for peace are to improve, ways must be found to ensure respect for the human rights of all parties in this intractable conflict.

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[6] A. Liptak, *Day at Supreme Court Augurs a Victory on Political Speech, But How Broad?*, N.Y. Times, Sept. 10, 2009, p. A28.