

**ADDRESS OF JUDGE THOMAS BUERGENTHAL OF THE
INTERNATIONAL COURT OF JUSTICE**

AT THE AMERICAN BAR ASSOCIATION

MIDYEAR MEETING

**SPONSORED BY THE AMERICAN BAR ASSOCIATION
CENTER FOR HUMAN RIGHTS**

February 12, 2007

Speech by Judge Thomas Buergenthal

ABA Midyear Meeting, Miami, 12 February 2007

Thank you very much, President Mathis, for this most kind introduction. It is a great pleasure for me, of course, to be with you today and to speak at this luncheon sponsored by the ABA Council on Human Rights.

Because I have now lived in Europe since my election to the International Court of Justice in 2000, I thought that you might be interested in getting a sense of what the people I have contact with think about some issues that I believe should concern all of us and what we as lawyers and ABA members might do about them. Over the past few years, my friends and acquaintances in Europe would increasingly preface their conversations with me about the U.S. and international relations in general with phrases such as “while I disagree with America’s current foreign policy.” The conversation would then shift to the things American they admire and the role they believe America should play in the world. Frequently, too, when introduced to someone at a dinner or reception, my new acquaintances would engage in a sort of diplomatic dance designed to elicit my views about the current U.S. administration’s policies. Once satisfied that being the American judge on the ICJ did not mean that I necessarily supported all those policies, they would follow up by expressing their frustration and disappointment with various aspects of current U.S. policy.

These views, I believe, do not reflect anti-American feelings as such, but rather the type of disappointment or sadness people feel when a good friend or relative has engaged in unacceptable conduct. In short, what we have here is not the reaction that the behavior of the Soviet Union, for example,

used to elicit in the U.S. and elsewhere in the world, which began or ended with expressions such as “well, what did you expect from them given their political system.” I believe that the U.S. has thus far escaped being placed in the same category,

Why do I focus on these differences in attitude? It cannot be denied, on the one hand, that our diplomatic unilateralism, the practice of rendition, Guantánamo and Abu Ghraib, as well as attempts by some U.S. Justice and Defense Department lawyers to redefine torture or to rewrite or dismiss the Geneva Conventions as irrelevant, seriously damaged U.S. standing in many parts of the world, particularly among our friends in the West. On the other hand, I am convinced that our friends around the world have still not given up on the U.S. altogether, despite the fact that they consider some of our recent behavior unacceptable and at times even reprehensible. The U.S. continues to be admired, among other things, for its democratic values, its independent judiciary, its free press, and many of the other values we Americans cherish and are justly proud of.

Foreigners, particularly lawyers with whom I have come in contact over the past few years, have been especially impressed to read two news items reported in the European press and widely discussed in legal circles. One, that the former legal adviser of the State Department, William Taft, refused to sign off on the Justice Department’s memo that asserted that the Geneva Conventions were archaic treaties irrelevant to modern-day warfare and did not need to be fully respected. The other, the recent decision of the U.S. Supreme Court in the Hamdan case, which was enthusiastically welcomed.

While there remains a tremendous amount of good will towards the U.S. and admiration for our political system, many traditional friends of the

U.S. have watched American leaders become intolerant of the views of others, hypocritical and at times even dishonest in justifying their policies, and increasingly more willing to excuse serious violations of human rights on the ground that they were necessary to win the war on terror. They began to see America, the country that inspired their democratic institutions and social aspirations, behave more and more just like other major powers they had learned to detest and fear.

The November elections in the U.S. have already produced some noticeable changes in the attitudes among America's friends abroad. Even a year ago many people in Europe were becoming increasingly pessimistic about America. They saw a hardening of American unilateralism and the lack of any serious debate within the U.S. about its foreign policy.

The election results have led to a surge of optimism among America's friends abroad. Not that people in Europe, for example, generally favor Democrats over Republicans or that they know much about U.S. party politics or policies. But they rejoiced about what they think the election results mean: that a majority of Americans no longer seem to support policies that have increasingly made America unpopular in the world. And they welcome this development because they have long ago recognized that a strong and influential America is in their interest. The refrain that one could hear with increasing frequency during the last few years "what has happened to the America we knew?" has been replaced after November 2006 with "it took them a while, but they are finally waking up."

If we believe, as I do, that it is important for the U.S. to recapture the political influence it has had in the world in the past, we must recognize that political or diplomatic unilateralism, if it ever was a valid policy for the U.S., is certainly particularly harmful today. It forces the U.S. to rely ever more on

the use of force in our international relations and it diminishes our political influence and good will around the world. We have to learn that we cannot go it alone in protecting ourselves against terrorism, that more is at stake: America cannot afford to lose its soul by relying on sheer military might and ruthless disregard of our own political values, such as respect for human rights, in seeking to advance our policies. America's once genuine commitment to the promotion and protection of human rights around the world, which used to be the hallmark of our foreign policy, is unfortunately no longer believed. That is very sad indeed. We have to reestablish our credibility, particularly in the human rights area.

What does all this mean for us lawyers individually and for the ABA? To begin with, Jerry Shestack recently proposed a campaign in the new Congress to support U.S. ratification of the UN Convention against the Discrimination of Women. A vast number of countries has ratified this treaty, but not the U.S. Not that this treaty will necessarily have a significant impact on the status of women in the U.S. But by joining it, we would demonstrate our solidarity with those in other parts of the world who see the treaty as a valuable tool to advance the cause of gender equality. There are other human rights treaties to which we are not parties but should be, for example, the UN Convention on the Rights of the Child and the American Convention on Human Rights. By staying out of the inter-American human rights system, which we have done thus far, we are missing an opportunity to influence the protection of human rights in the Western Hemisphere, a region of the world the U.S. has neglected to its detriment in recent years and which is increasingly distancing itself from the U.S.

As you know, the UN recently replaced the UN Human Rights Commission with a Human Rights Council. The United States strongly

supported the abolition of the Commission, which had become ever more politicized, but the U.S. opposed the manner in which the Council was eventually constituted. The U.S. had hoped that the membership of the Council would be limited to countries with good human rights records. That did not happen, if only because such hopes were unrealistic since a large number of UN Member States have bad human rights records. It cannot be denied, though, that the membership eligibility requirements of the Council amount to an improvement over those of the old Commission. The U.S. nevertheless decided not to seek membership on the Council. As a result, we now have little, if any, influence in affecting the policies and working methods of the Council. That is most regrettable since it is certainly not in the interest of the U.S. or good for the promotion of human rights if the U.S. stays out of the Council, even if we have good reasons to object to the presence of some countries in it. As a member, the U.S. can add its weight to the views of those Member States on the Council that genuinely support the promotion of human rights; it can also play a major role in formulating and implementing these policies. I believe therefore that the U.S. should seek membership in the Council and that it would make sense for the ABA to formally advocate such membership if it has not already done so.

Once the U.S. has become a member, the ABA should monitor the performance of the Council as well the performance of the various UN human rights treaty bodies, and issue annual reports assessing their performance. Some of these functions could be performed by the ABA Human Rights Center, for example. In these monitoring efforts, the ABA should focus not only on the performance of the Council and the human rights treaty bodies; it should also assess the policies the U.S. pursues in these bodies and the performance of those Americans who serve on them. In short, I believe that the ABA should become much more active in reviewing UN human rights

activities and U.S. government policies relating to them. It might even make sense for the ABA to establish a review mechanism similar to the one applicable to our domestic judicial appointments that would assess the qualifications of U.S. government representatives and nominees to UN human rights organs and committees.

It may be too early to expect the U.S. to ratify the Rome Statute establishing the International Criminal Court, which has now been ratified by more than 100 countries, including the UK, France and Germany in addition to a large number of other Western countries. In the meantime, however, the U.S. should not undermine the international rule of law by trying to keep other states from ratifying that treaty. Whether we like it or not, that institution is here to stay because the world wants it and needs it.

Of course, there are many other treaties on a variety of subjects that the U.S. could easily ratify and thus demonstrate its commitment to international cooperation. One such treaty is the UN Law of the Sea Treaty. That treaty was once widely opposed in the Senate but it now apparently enjoys very substantial support. While I am told that the time is not ripe for the U.S. to ratify the Kyoto environmental treaty — I don't know enough about the subject to comment on it — I assume that there are areas in the environmental law field that the U.S. could promote by supporting or by proposing treaties dealing with that subject. Environmental law initiatives by the U.S. would be especially welcome at this time in many parts of the world.

Recently some former State Department lawyers drew up a list of largely uncontroversial treaties the U.S. could and should ratify to re-establish the country as a supporter of international cooperation through international

law in a variety of fields.¹ In my view, this is a wise initiative that the ABA might want to look into.

Another area that needs to be addressed by lawyers are the difficulties foreign travelers to the U.S. encounter these days in obtaining entry visas and the long delays and frequent humiliations to which foreigners are subjected at U.S. entry points. These measures are designed to prevent terrorists from entering the U.S. which is an important consideration, of course. The problem is that these practices make it increasingly more difficult for genuine tourists, foreign students and business people to enter the country. These individuals also find their treatment to be abusive and demeaning, both at U.S. consulates and border entry points. As a result, many foreigners who would otherwise come to the U.S., decide not to do so. Under the headline “Businesses turn away from ‘Fortress America’,” the International Herald Tribune recently reported that the number of business travelers to the U.S. fell by 10% in 2005 from the previous year and that, according to the National Foreign Trade Council, current U.S. entry practices cost U.S. businesses \$30 billion in lost sales from 2002 to 2004.² This sum has since gone up, I am sure. Many foreign students who would have preferred to study in the U.S. are flocking to European universities to avoid the visa hustle. While it is true that more students from India and China are today studying in the U.S., it is equally true that an ever smaller number now comes from other parts of the world. In the past, foreign graduates of our universities provided a steady reservoir of good will and support for America. We are losing this great asset.

¹ David Kaye, K. Russel Lamotte and Peter Hoey, Pacts Americana?, New York Times, December 15, 2006.

² International Herald Tribune, December 27, 2006, p. 9.

In short, I believe that there is much we lawyers and the ABA can do to reconnect the U.S. with our friends around the world and to help re-build the respect and admiration this country justly enjoyed and deserved, but has begun to lose in recent years. In today's world no country, however strong militarily, can afford to go it alone. Nor can we afford to jettison the values and principles that have served us and the world so well in the past by mistakenly assuming that they must be sacrificed in the war on terror. It is a mistake not to recognize that these values and principles are our strongest weapon against those who are trying to destroy us. In America, we lawyers have probably contributed more than any other profession to the development and strengthening of these values and principles. The time has come for us to help the country focus once again on the role the U.S. can and should play around the world.