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Speaker: **Richard Goldstone**, Former Justice, Constitutional Court of South Africa
Speaker: **Aryeh Neier**, President, Open Society Institute

[TRANSCRIPT]

**Andrew Kuper**: Good evening Ladies and Gentlemen. Well, if you were interested in rhetoric, you would have stayed home and watched the lead up to the democratic nomination so I’m going to plunge straight into substance. I expect that is why you braved the rain this evening.

In the twenty years between 1980 and 2000, according to the *United Nations Human Development Report*, 81 countries took significant steps towards democratization. Yet according to the same report, half of those countries are not full democracies. They suffer from shallow political participation, they are dominated by one party, or they allow very limited political competition.
So, take a look at the big picture. Two decades ago one-third of the world’s states used to be democracies. Now, a generation later, two-thirds are democracies. That is something to celebrate. But when we look closely, we find that democracy has not taken deep root. Indeed, several countries are moving backwards. Recent events in Russia, for instance, have led several commentators to proclaim it once again a wasteland of democracy. Many other countries are re-establishing so called “soft authoritarian” regimes – regimes that have the trappings of democracy but none of its substance. We must not fool ourselves that this applies only to poor countries. Highly developed countries like Italy are also showing themselves susceptible to undemocratic media rules and manipulation.

So we find that there has been an unprecedented wave of democracy and simultaneously there is a crisis of democratic quality and sustainability.

The other part of the big picture which I think we should look at tonight is the impact of the “war on terror” on democracy. Dramatic action is needed against the new security threats of our time. The Bush Administration argues that current international apparatuses such as the U.N. are often slow and ineffective. Unilateral action, or at least action by a coalition of the willing, is sometimes necessary in their view. The administration is also opposed to any review of U.S. actions by, for instance, an International Criminal Court.

Whether you agree or disagree strongly with this threat of terrorism raises a deep tension, one that we must confront, and one that is intrinsic to international law itself. On the one hand, there is the content of law. It must demonstrate the right kinds of respect for all persons in the right ways. It must be good law. On the other hand, there is the application of law. The rule of law is vindicated by apprehending, prosecuting, and punishing perpetrators and wrongdoers. The great challenge is that catching and convicting terrorists and other rogues may require methods that good law normally prohibits. And the great concern is that regimes around the world are using the pretext of the war on terror to violate civil liberties and the principles of democracy at home in the United States and elsewhere-- and abroad.

Put this all together and I think we have cause for worry. There seems to be a crisis in international law, a crisis in democracy. And they are connected. What is to be done?

I am sure that many of you, like me, are frustrated by seeing endless complaints in the media, the New York Times, etcetera, and too few positive proposals about how to set things right, and how to get things on track. I am also frustrated by some of the positive proposals, the few that there are, out there. For instance, so-called “liberal imperialists” want to have America impose its will along with democracy on recalcitrant leaders and local populations. Such liberal imperialists have proclaimed “The Empire of Liberty.” As a South African I am somewhat suspicious of this view. I can testify personally that it doesn’t work, and that there are few things more dangerous and ineffective than the old Latin maxim of Oderint dum metuant, or, “Let them hate us so long as they fear us.”

Don’t get me wrong. Power and military force are important for abolishing dictatorships, and America must play a leading role, but democracy will only take root -- and remember
that is the problem -- if democratic institutions and practices are created in large parts by local populations and local communities. And they invariably need the support of a range of a variety of international actors, who invariably need the support of a range of agreed laws and norms.

It was these frustrations that led us to set up the Empire and Democracy Project at the Carnegie Council. Specifically, we are focusing on international mechanisms for promoting democracy around the world. By identifying clear and actionable alternatives to empire, we hope to contribute something to counteract the new tides of militarism and militancy that threaten to engulf global security and global democracy.

Before I turn to tonight’s speakers, let me mention just one finding of the project that I think you will find very interesting. And that is that there is a powerful relationship between social-economic levels and democratic survival and success. If you look at the history, a country that has an average of over $6,000 GDP per capita, that is, income per citizen, has statistically no chance of collapsing if it is a democracy. The democratic institutions are safe and are in place. But in a very poor country, there is statistically a one in eight chance of democracy collapsing every year. Think about that: a 12 percent chance of your political system collapsing every year.

Poor countries struggle to save democracy and improve democracy partly because the political system and its functionaries such as judges and representatives are more easily tempted and sometimes bought by wealthy and powerful interests, sometimes business interests. This is one place where international law surely comes in. Since business interests, for example, are often based in developed countries such as the United States and France, international law and conventions such as those against bribery – backed by real enforcement – are indispensable for reducing such democracy-undermining abuses. Again, we see that democracy is not just a concern for developing countries and that the problems are not simply caused by those internal to developing countries.

These finding have obvious implications for Iraq and Afghanistan, which I shall not go into now. If you would like to learn more about these and other issues and findings of the project, I encourage you to look at our Web site www.carnegiecouncil.org There is also wonderful material on the Foreign Policy Association Web site on related issues, at www.fpa.org. You will find on our Web site, for instance, a recent panel transcript that included Joseph Stiglitz, Mary Robinson, Sakiko Fukuda-Parr and other real leaders in democracy and human rights promotion.

With that, let me turn to tonight’s speakers. I am going to introduce the second speaker first. Aryeh Neier is going to be our second speaker. When it comes to mobilizing international norms and institutions to produce change, no one is more experienced than Aryeh. He has conducted investigations of human rights abuses in over 40 countries, and has been deeply engaged for decades in efforts to strengthen international accountability. He was national director of the American Civil Liberties Union. He founded Human Rights Watch and served as its Executive Director for 12 years. Since 1993 he has served as President of the Open Society Institute and the Soros Foundations Network.
Indeed, he is credited by some with getting Mr. Soros into philanthropy in the first place. It is an indication of the power of this new force, the Open Society, in world affairs that Eduard Shevardnadze, the recently deposed president of Georgia, complained that the Open Society had orchestrated a “democratic coup” against him and had mastered this fine art first by helping depose Milosevic in Yugoslavia. Aryeh is a man who stands on principle and yet clearly gets things done – and he is likely to be a wise guide on how to reduce the legal and democratic tensions produced by terror in our world.

Our first speaker will be Richard Goldstone. Richard has just stepped down as a Justice of the Constitutional Court of South Africa, where he was centrally involved in developing and then applying the South African Constitution, and let me just say that it is one of the most progressive in the world. From 1994 to 1996 he served as the first Chief Prosecutor of the United Nations Criminal Tribunals for the former Yugoslavia and Rwanda. Sandra Day O’Connor, the U.S. Supreme Court Justice has said of Richard, and I quote:

“The breadth of his personal experiences in South Africa and at The Hague provides unrivalled insight into the difficult choices that face emerging democracies in dealing with the crimes of a previous regime.”

But let me relay a brief anecdote that tells even more about the man. When leaders of an important law initiative approached Richard, as prosecutor, to ask him what they could do to help bring perpetrators to justice, he had one simple answer for them: “Help the defense.” He was more concerned with having a fair trial than with having an overwhelming advantage for himself as prosecutor. We are lucky to have Richard visiting NYU and Fordham Law Schools this year and lucky to have him here tonight to address us on “Promoting Democracy Through International Law”.

Thank you.

[APPLAUSE]

Richard J Goldstone: Well, good evening and thank you, Andy, for that generous introduction. I’ve been asked by our master of ceremonies and director of tonight’s program to address three questions. They all relate to the manner in which international law and especially legal proceedings can and should be used; firstly, to undermine authoritarian and semi-authoritarian rule; secondly, to strengthen democratic practices in countries in transition to democracy; and thirdly, to act as a deterrent to retrogressive action such as anti-democratic coups. So really it’s a before, during and after scenario.

Let me begin by referring to my own country, South Africa. Our transition was of course remarkable -- the transition from deep oppression of apartheid to democracy -- and it was in no small part the result of the use and application of international law. From the end of World War II the liberation movement, and especially the African National Congress
(ANC), the prime liberation organization, became a major protagonist of human rights. It was part of an international and domestic human rights movement. The anti-apartheid movement was a human rights campaign. And for over 40 years our black leaders, and it wasn’t only black leaders, but the members of the African National Congress, were a part of the human rights culture. Their bible was literally the Universal Declaration of Human Rights. They carried it around in their back pocket. And in 1956 they consulted their mass membership and they produced the Freedom Charter - a remarkable document, in those days an avant-garde document, which reflected the aspirations of the organization and its many million supporters. It reflected their commitment not only to a democratic form of government but one that was non-racist and non-sexist.

That human rights culture explains why our Constitution is one of the most progressive in the world. The majority party, the African National Congress, was committed to a bill of rights that would act as a brake on majoritarianism. Many in the black population objected and still object to their duly elected representatives being constrained by a bill of rights, and that there is a court of 11 unelected men and women who can say ‘no, you can’t do that,’ even if a 100% of you want to do it. That’s what a constitutional democracy is all about. The white minority, of course, became sudden converts to a bill of rights overnight. When they saw the writing on the wall and when they saw that there was going to be black majority rule they grabbed the bill of rights and became great human rights protagonists because they saw in the bill of rights the protection of their privileges that they had acquired over 350 years.

The policy of the ANC also explains why our Constitution now obliges our courts to consult international law and invites our judges in all our courts to consult foreign law. It obliges our courts in the interpretation of ambiguous legislation to prefer any reasonable interpretation consistent with international law over any interpretation inconsistent with international law. I think it is unique in having that rule applying to the interpretation of legislation. Our courts, and especially our Constitutional Court, have taken these provisions seriously, and our opinions reflect a wide use of comparative law and a respect for international law.

These uses of international human rights law are unquestionably playing an important role in compelling compliance by public authorities with democratic processes. It is reflected in our administrative law, in our labor law, in all of our procedures that look into corruption in our society, and unfortunately there is still too much of that. And we have active NGOs -- non-governmental organizations -- that use the constitutional provisions and that use the bill of rights to hold our public officials to account. Let me say immediately that those NGOs exist to a large extent because of input from the United States. It was the United States government, United States foundations in particular, that encouraged these human rights NGOs in our country. And American lawyers and judges engaged with lawyers and particularly with judges in South Africa. I was an early beneficiary of that and it was a remarkable experience for me to be exposed to the internationalization of human rights at an Aspen Institute seminar for federal judges to which I was invited in 1984.
Until 9/11/01 the United States, as Mary Robinson put it at a recent Carnegie Council high level panel discussion, the United States was the standard bearer on civil and political rights. It was regrettably tardy in ratifying many international conventions, the Genocide Convention and many others, but it was the United States that took the lead in encouraging human rights endeavors in my own country. From my own experience, I can assure you that without the push and without the human and financial resources from the United States, the Yugoslavia tribunal and the Rwanda tribunal would never have been established and, having been established, would never have succeeded. Many other South African judges have had a similar experience, and much of our work has been influenced by this engagement from the United States. What is remarkable is that our history would have led one to believe that such engagement would have come from English lawyers and English judges, but they gave up too early. They wrote us off as being beyond redemption and had little, if anything, to do with us.

The South African Constitution requires our courts to test limitations of human rights against those found in other “open and democratic societies based on human dignity, equality and freedom.” That is a touchstone that our constitution demands. More often than not, we looked first to the United States in this comparative exercise. I would suggest -- though it hasn’t yet happened but it might well, since the promulgation of the Patriot Act, the denial of habeas corpus to United States citizens, and the detention without trial of young boys and men at Guantanamo Bay now for over two years -- that there will be a growing reluctance to turn to the United States for appropriate inspiration and guidance as an open and democratic society. The negative effect of these developments on emerging democracies is nothing short of tragic, I would suggest.

As a report from the Lawyers Committee for Human Rights recently demonstrated and documented, there has been an unfortunate knock-on effect in a number of countries resulting from this backward movement in this country. In Indonesia, one reads in that report there has been talk of setting up its own Guantanamo Bay. In a number of countries there are references to political opponents as being ‘enemy combatants’ and denying journalists freedom of expression.

Obviously there is a tension between combating terrorism in the modern world and protecting civil liberties. But too many politicians right around the world, I would suggest, wish to be seen to be doing something to combat terrorism, without questioning too much whether what they are doing is really helpful in that regard. Fearful citizens are slow to oppose such measures especially when their leaders tell them that doing so is unpatriotic and aiding the terrorists. So, in the democracies, and especially in this one, this trend will only be reversed by a well-informed electorate exercising its constitutional rights and making appropriate demands on its leaders.

And there are the checks and balances in democracies and especially, perhaps, in the United States. There are the cases presently before the United States Supreme Court, dealing with the jurisdiction of the United States courts over the persons detained at Guantanamo Bay, and a second with regard to the rights of United States citizens to be detained by executive fiat and without any access to courts. There was a public outcry in
this country that accompanied the first publication of the rules that were to apply to military commissions. There were protests, and there was an outcry from the legal profession, from human rights organization and it did not take too many months until March of 2002 that the rules were radically changed -- in direct response to public objection. That is the importance in a democracy of leaders having to very frequently pay regard to the views of their voters. And, during the past week pressure from Congress has moved the White House to set up a full investigation into the intelligence lapse that preceded the military attack in Iraq. Prime Minister Blair is being forced for that reason to follow suit in the United Kingdom.

A fundamental norm of democracy is the rule of law. Andrew Kuper referred to it in his opening remarks. The rule of law is the assurance that leaders will be judged by the same laws that apply to all citizens and that those laws will apply to the wealthy as well as the poor -- to the weak as well as to the powerful. It is that same rule of law that is so needed and so missed in the international community. Respect for international law is not possible when the wide perception is that it is intended to be a constraint on the activities of the poor nations and does not apply to the wealthy and powerful nations. This perception, and it is a wide perception that is growing, is fed by the resistance of wealthy nations, which resist being bound by international conventions. The most visible, but by no means the only example, of course again, is the United States -- from its opposition to the International Criminal Court to the Kyoto Protocol on global warming. The United States is now the only country in the world, the only member of the United Nations that has not ratified the International Convention on the Rights of the Child. These laws and institutions are thought by some more powerful nations to be a good idea for the rest of the world but not for them. They claim an entitlement to be treated exceptionally.

We see selectivity in relation to Iraq. The United States, in its efforts to withdraw in the face of continuing violence, is keen to put off democratic elections. This is obviously rejected by the majority Shiites, who are assured by their majority in coming to power. It is feared by the minority Sunni. It does not still the demand for some form of independence from the Kurds. These are serious problems. Delaying democratic elections was also, I would remind you, the preference of South Africa’s white leaders at the end of apartheid. Not for dissimilar reasons. They saw that democratic elections would mean the end of white rule in South Africa and the longer they could put that off, the better. If they had been allowed to do our transition, negotiations would have gone on for a decade and more. But neither the black leaders nor the global community would allow that to happen.

The result was that the first national election was a joyful celebration and majority groups and minority groups have learned to discuss their differences and to participate in a vibrant debate in public legislatures around our country. The political violence that dominated the transition has all but disappeared. There appears, in the last few weeks, to have been a really small resurgence of it, but that too has died down, even as we approach our third democratic election in April or May of this year. Decisions of the courts are carried out by the government and the power of the Constitutional Court to set aside decisions of the president of the country is respected.
The challenge is educating present and future generations of South Africans to understand and embrace our culture of democracy. It’s not easy. It’s expensive. We need adequate teachers. We need well-trained teachers in order to do that. The challenge is to educate South Africans to appreciate their democratic rights and to ensure that they are used to bring benefits for all of our people within a reasonable time frame. It is not going to work if democracy does not really sift down to the ordinary people, men, women and children around the country.

If democracy is to be encouraged in the Middle East, I would suggest that half-measures are not sufficient. I do hope that the United Nations will become actively involved in the process and that every measure will be taken to enable free elections to be held sooner rather than later.

Let me end by turning to the question of a trial of Saddam Hussein. The fact that the worst of Nazi war criminals were given a trial fair by the standards of the day was to the credit of the United States. Churchill had to be convinced by Truman that the Nazi leaders should not be lined up against a wall and summarily executed. Stalin would have gone along with that; he was doing it for many years. Saddam Hussein is under the control of the United States, and it would be a huge setback to democracy in Iraq if he were to be handed over for a trial that is not judged to be fair by his millions of victims and by other nations in the region. And really the customers of such a trial, if I may put it that way, are the victims. That is the purpose of punishing criminals -- to bring acknowledgement and some satisfaction to the victims of criminality.

There are some leaders in Iraq who want a speedy trial before Iraqi judges. One of the ministers said on a BBC program recently that he wanted a swift trial and that the court should not be a platform for Saddam Hussein to give political speeches. The United States appears to be supporting the approach that he should be tried by courts set up by the present United States appointed Iraqi Council. Whether appropriate judges can be found after 35 years of oppression in Iraq is not questioned, and it seems to me is open to doubt. Whether there are efficient prosecutors that will meticulously collect evidence against Saddam Hussein seems to me to be open to doubt. I have no doubt that a fair and impartial trial will require the cooperation of and input from the international community and, particularly from the United Nations. Its fairness will unquestionably be judged by the norms of international law.

A fair trial of Saddam will have the effect of bringing acknowledgement to the millions of his victims and elsewhere in the region. It will enable those victims to begin their healing process and to become full participants in their new democracy. It will also have the effect of demonstrating that the evil regime was that of a criminal clique and not one representing all of the people of Iraq or even that of the minority Sunni or any other group of people. I know of no better way to avoid belief in collective guilt that can poison the path to democracy.
In South Africa, I have no doubt that the work of the Truth and Reconciliation Commission has helped to avert collective guilt on the part of many in the white community. The demonstration of individual criminal behavior through the evidence of more than 21,000 victims who gave evidence to the Truth Commission, of more than 7,000 perpetrators who claimed amnesty, has enabled many in the white community to join their black compatriots in building a decent non-racial society.

The crimes perpetrated by the regime of Saddam Hussein cry out for a fair and impartial criminal process. A truth and reconciliation commission might come later but there must be appropriate punishment for the leaders in light of crimes of this magnitude – genocide and crimes against humanity.

May I end with a note of caution? In South Africa the institutions of democracy were present prior to the transformation. There was a working democracy for the white minority from which the black majority was totally excluded. Notwithstanding that exclusion, the institutions were there for the new majority to take over and use. If anything, they are being used more efficiently and more purposefully than had been the case during apartheid. In Iraq, the institutions of democracy will have to be built from the ground up. That is a daunting prospect and one that does not appear to have been fully appreciated by the present administration.

In all of these endeavors, the people of Iraq are not going to succeed without the fullest international assistance. Neither elections nor trials can be held in an atmosphere of fear and violence. Adequate policing will be essential for those processes to take place. Having intervened with military force, having rid Iraq of the government of Saddam Hussein, I would suggest that the United States and its coalition partners have no option but to stay the course. They and the United Nations should not leave Iraq until the Iraqi people have been given the opportunity of fashioning their own democratic constitution and institutions. If that can be accomplished, and only if that can be accomplished, will the prospects for lasting peace and the prevention of anti-democratic coup be substantially increased.

[APPLAUSE]

**Aryeh Neier**: Thank you very much. It is a great pleasure to be here, and it is an honor to appear on the same platform as Richard Goldstone. Probably no one has managed to symbolize a commitment to international law more effectively than Richard Goldstone. I believe that such institutions as we have to promote compliance with international law were in many ways made effective by Richard Goldstone, and that he deserves my admiration, and certainly everyone’s admiration, for his efforts.

As Mr. Kuper said in his introduction, at the Open Society Institute, I am engaged in efforts to promote democracy. I think Eduard Shevardnadze exaggerated greatly in suggesting that the Open Society Institute organized a democratic coup in Georgia.
Georgians organized a democratic coup in Georgia, and the Open Society Institute played a rather minor role. Our most significant contribution was that we provided funding for an exit poll that helped to indicate that the results that were claimed in respect to parliamentary elections were in fact fraudulent. That did play a part, but it was really Georgians who ousted Shevardnadze, it was Serbs who ousted Milosevic, and so forth.

Although I am engaged in efforts to promote democracy, my view is that of far greater importance is the effort to promote international law, in that if we are to achieve democracies that function in the way that we would like democracies to function, it is crucial that this should be done in the context of international law. Unfortunately, I think that the position that I espouse contrasts with the position of the Bush administration. The Bush administration also espouses democracy. The Bush administration espouses freedom, or human rights, but it doesn’t do so in the context of international law. Rather, the administration’s approach is to say that we the United States embody democracy; we embody freedom, and that we are successful and therefore you ought to follow in our path. This is really quite explicit.

The first sentence of the Bush administration’s national security strategy embodies its view. It says that there is a single, sustainable model for national success: freedom, democracy and free enterprise. This idea of success, which seems to mean that the United States is rich and powerful and therefore successful, is constantly repeated as the argument for freedom and democracy. Last November, President Bush spoke about democracy at the 20th anniversary celebration for the National Endowment for Democracy, and the word ‘success’ was the leitmotif of that speech.

He said, “Successful societies limit the power of the state and the power of the military so that governments respond to the will of the people and not the will of an elite. Successful societies protect freedom with a consistent and impartial rule of law, instead of selectively applying the law to punish political opponents. Successful societies allow room for healthy civic institutions, political parties and labor unions, and independent newspapers and broadcast media. Successful societies guarantee religious liberty, the right to serve and honor God.” He didn’t say anything about the right not to serve and honor God, “Without fear of persecution. Successful societies privatize their economies and secure the rights of property. They prohibit and punish official corruption, and invest in the health and education of their people. They recognize the rights of women, and instead of directing hatred and resentment against others, successful societies appeal to the hopes of their own people.”

So, it is really saying that this is the path to success, that is used as the justification for all the good things -- democracy and the protection of the rights of minorities and independent newspapers, and so on and so forth. But the concept of international law is missing from this. I think it is an appeal that doesn’t go over well in most of the world. First, most people in most countries are quite conscious that they are not in a position to emulate the success of the United States. If you are in Zambia, and you start practicing these things, you are not suddenly going to become powerful and rich. We are at the
center of global capital. There is no way that Zambians are going to achieve success in that matter. I think it is the appeal that is ‘emulate us because we are so successful’ or ‘go along with us because we are so successful’ that breeds resentment. I think that there is a better approach, and it is the approach of international law.

The approach of international law seems to me to be this: That all of us share a common humanity, and that the peoples of the world, through their governments, have come together and have made certain international agreements. Those agreements were entered into over the past six decades, since the end of World War II, starting with the adoption of the United Nations Charter and followed by a long series of agreements dealing with international human rights. In those agreements, the International Declaration of Human Rights, the International Covenant on Civil and Political Rights, there is a commitment that the peoples of the world have made to government by the choice of the people through free elections, and therefore, the idea of democracy is incorporated in those international agreements. But it is not the dominant aspect of those agreements. Most of the language of those agreements is focused on such things as freedom of speech, the right to a fair trial, the right not to be tortured, and the right to be treated equally. These are the agreements that the peoples of the world have entered into.

And the United States could lead in securing compliance with those agreements first by setting an example of itself adhering to those agreements; second, by reminding others of their commitment to abide by those agreements; third, by providing assistance to others in meeting those agreements and finally, by helping to strengthen and improve those institutions that have been created to secure compliance with those international agreements. I believe it is in that fashion that the U.S. would find many willing collaborators around the world, but the resentments that are built up by the manner in which we promote democracy probably would not be engendered if we did so through an appeal to the governments of the world and the peoples of the world to live up to those agreements, which they have entered into.

Mr. Kuper talked about the question of whether it is better to be feared than loved, a suggestion that even hatred can be accommodated, or there is an argument that hatred can be accommodated so long as one is feared. I don’t think that works today. We live in an era of asymmetric violence, in an age when suicide bombers engage in terrorism and fear clearly isn’t the method by which we are capable of eliminating that kind of violence. If people feared, they wouldn’t take their own lives in the process of committing terrorism. So we need a better way in which to proceed, and I believe that international law and the agreements and institutions of international law are a better way.

Of all the institutions of international law, the one that the Bush administration has demonstrated the greatest hostility to is the International Criminal Court. I think that is a very sad development. It is sad because as Richard Goldstone indicated, without the United States, the ad hoc tribunals for ex-Yugoslavia and Rwanda could not exist and would not have succeeded. But the Bush administration essentially argues that what it has advocated for others should not be applied to the United States. That creates the
impression internationally of hypocrisy, and that we are not willing to take on to ourselves what we say others have to abide by.

The United States argues that it has responsibilities in the world that are different from those of other governments, but I am not sure that stands up under scrutiny. The United States, for example, does not participate in peacekeeping missions of the United Nations. It has agreed to participate in two NATO peacekeeping missions in Bosnia and Kosovo, but many other governments participate in peacekeeping missions all around the world, while the U.S. does not. Therefore, the forces of other governments expose themselves to the possibility of being brought up on charges before an International Criminal Court in many more settings than is the case for the United States. Yet, the United States says that our responsibilities internationally are what make us not go along with an institution such as the International Criminal Court.

President Bush’s speech at the National Endowment for Democracy refers back to another speech about democracy, which was made in 1982 by President Ronald Reagan - when President Reagan launched what he described as a crusade for freedom worldwide, in which he committed the United States to a program of promoting democracy. In the current struggle with Islam, the word crusade isn’t used anymore, but it was the word that President Reagan used in 1982. But that crusade was born out of an effort to put the idea of electoral democracy ahead of the idea of human rights. It dealt with a very specific situation that President Reagan was concerned about in 1982.

The particular circumstances were the wars in Central America that were under way at that moment, and the United States was being criticized severely for its sponsorship of the armed forces of El Salvador, which were engaged in very severe human rights abuses. The United States was seeking to deflect that criticism, and there had had been an election in El Salvador. Partly because there were too few polling places, there were long lines of people waiting to vote, and the Reagan administration seized on that as an indication that things were going right in El Salvador, that there was a commitment to democracy. It also wanted to say that things were better in El Salvador than in neighboring Nicaragua, which was controlled by the Sandinistas. The Sandinistas, who had come into power in 1979, were saying that they weren’t going to have elections until 1985. So the Reagan administration seized on the idea that it would promote democracy -- and elections symbolized democracy -- and forget about all the death squad killings and massacres that were being committed in El Salvador.

In effect, Jimmy Carter, in 1977, had committed the United States to a policy of promoting human rights worldwide, and the Reagan administration shifted it from a policy of promoting human rights to a policy of promoting democracy. It had some good consequences and it had some not so good consequences. Probably the best consequence is that the Reagan administration, which had come into office very supportive of General Augusto Pinochet in Chile, ended in Reagan’s last year in 1988 by pulling the rug out from Pinochet and forcing him to go ahead with a plebiscite that he had scheduled, but which he realized at the last moment he would lose he wanted to cancel. That plebiscite,
which he did lose, ended the dictatorship, and the Reagan administration did that because it had been committed to electoral democracy internationally.

But the administration’s failure to be concerned with human rights had some not so good consequences, exemplified in the way subsequent administrations dealt with the former Soviet Union. If you look at the former Soviet Union today, of the 15 countries that emerged from the Soviet Union, only the three Baltic countries could be considered countries where democracy and human rights are fairly secure. Democracy and human rights are not secure in the other 12 countries that emerged from the Soviet Union, and a number of them are out and out dictatorships, such as Turkmenistan or Uzbekistan. United States policy over the years since the fall of the Soviet Union has not focused on promoting human rights. There have been calls for democracy, but when terrible human rights abuses take place, as in Chechnya, the United States has been largely silent during that period.

Part of the reason that democracy and human rights are more secure in the Baltic countries is that those countries have had the possibility of joining the European Union, and therefore they have had to conform their practices to the standards of the European Union. The European Union and the Organization for Security and Cooperation in Europe brought pressure on Latvia and Estonia to respect the rights of the large Russian minority, and that has helped to make the Baltic countries respectful of human rights.

So U.S. policy was set on this path of promoting democracy without promoting human rights, and to a large extent that has been the path that it has continued on under the Bush administration.

Unfortunately, there are some significant downsides to promoting a form of democracy that is not based on international law, and which mainly focuses on electoral democracy. I think one of the most important books to be published recently is by Yale Law Professor Amy Chua, who has focused on the downside of market democracies. Professor Chua argues in her book that one of the consequences has been to produce ethnic resentment and ethic violence in circumstances where these new democracies have what she calls “market dominant elites.” Ms. Chua draws on her own background as someone of Chinese origin who grew up in the Philippines, where a large part of the economy is owned by the Chinese, and where there is great resentment and often violence against the Chinese. The same is true in many other countries in Southeast Asia, Indonesia in particular, where there have been riots and pogroms against the Chinese minority. But it is true in many other parts of the world.

If one thinks of a circumstance such as Rwanda, part of what took place there is that the Tutsi minority was a relatively economically successful minority, and the resentment against the Tutsi minority reflected that resentment against a market dominant elite in a democracy that had undertaken free market development.

It is not an example cited by Ms. Chua, but I would say that there was an element of this in Bosnia. If you think of the prolonged siege of Sarajevo, a siege that lasted three years,
one of the elements of that siege was that at that point, Sarajevo was a cosmopolitan city. It was a mixture of different ethnic groups, but by far the largest numbers were Muslim, and going back to the Ottoman Empire, Muslims held a somewhat privileged position in Bosnia. Those besieging the city were generally people from the countryside. They were rural combatants with strong resentments against that Muslim elite in Sarajevo. I think that is part of the explanation for the three and one half years in which that city was shelled and sniped at, killing about 10,000 persons in the city during that period and injuring several times.

[TAPE SWITCH]

...of the Jews in Russia. If you think of the imprisonment of Mikhail Khodorkovsky, which is applauded by the Russian population, and is part of the reason for President Putin’s overwhelming popularity, the fact that Khodorkovsky is Jewish, and a disproportionate number of the oligarchs in Russia are Jewish, is part of what makes the imprisonment of Khodorkovsky so popular in Russia today. Those kinds of resentments today are unleashed when we don’t have a commitment to law, to human rights and institutions that are capable of preventing abuses of power of that sort.

I think there are many downsides to the efforts to promote democracy without also promoting a culture of human rights. Richard Goldstone spoke about the development of a commitment to human rights in South Africa. A lot of things have not worked well in South Africa, but it really is a remarkable country in the sense that there is certainly market dominant elite in South Africa, the white minority of South Africa, and yet the black majority population, that is very deprived, has been willing to allow the processes of law, the democratic process, to deal with the inequities in South Africa and to deal with them by bringing about gradual change rather than engaging in ethnic violence. It is crucial that there should be a culture of human rights, and a commitment to the rule of law if we are to have the South African experience, and not to have the experience that we had in Bosnia, or the experience that we’ve had in Russia, or the experience that we’ve had in many other parts of the world.

The Bush administration’s argument that it is American success that should be emulated in the rest of the world seems to me to go very badly wrong. American success was achieved because over a couple of centuries, we built up the rule of law, we built up a respect for human rights in the United States. We’ve had some diversions from that since September 11, but overwhelmingly, we do have a continuing commitment to human rights in the United States. Our democracy works because of that commitment. It is that which we should be promoting in the rest of the world, and not the argument that you should copy us because we are rich and powerful.

Thank you.

[APPLAUSE]

[QUESTION AND ANSWER SESSION]
Andrew Kuper:  Thank you very much to both of our speakers.  I am going to ask one question before opening to the floor, and the question is really about where national democratic processes threaten to run into conflict with international law.  It is raised by both of your remarks.  In the case of setting up truth commissions, it is often the case that they have support from the local population.  Truth commissions sometimes grant amnesty, as in the South African case.  This does seem to run significantly counter to the attempt to hold everybody accountable under international law, regardless of the boundaries and the borders of states that are crossed.  So, what are we to do in those instances, those difficult instances, where the population seems to support a truth commission, perhaps with amnesty, and yet the international law community certainly wants to say that these are egregious crimes, and they must be prosecuted in fair trials?

Richard Goldstone:  Let me first say that in a perfect society, criminals should face justice and should be punished.  That is the right of victims to perfect justice.  Proper investigations, fair procedures and if found guilty, appropriate punishment.  But when you are dealing with societies that have come through oppression, societies that have been the subject of genocide and huge crimes against humanity, it’s just not possible.  There are too many criminals, and there are too many victims, and there aren’t enough courts to deal with them.  Take Rwanda for example.  There must have been at least 300,000 murderers in a population of seven million, who were actively involved in murdering their fellow Rwandan citizens.  In South Africa, there were tens of thousands of apartheid officials who were guilty of serious human rights violations.  How many can be brought into a court?  If you’ve got an International Criminal Court, is it ten people in a year?  Twenty people?  Certainly not 50.  So there has to be a compromise along the way.

I would suggest that there is no substitute for bringing the leaders to court.  That is the least a decent society must do.  It is tokenism in a way, but in a good way, because it demonstrates that there is no impunity for criminals, and the most guilty should get priority, in my book, in being brought to justice and being punished.  But you can’t bring them all, and that’s where I think truth commissions and other forms of justice are important, because they are better than nothing.  The truth and reconciliation committees in South Africa and Chile and other countries have at least brought some acknowledgment to the victims, they’ve stopped denials.  The massive evidence that has come before these commissions stopped the denials and at least established a basis of the history, getting the history right, and not having two and three and four histories in a society.

Aryeh Neier:  I have a somewhat different approach to the issue.  My approach would be to look at the particular kinds of crimes that were committed in a given country, and how they were committed.  It seems to me that the question of a truth commission very much relates to the nature of the criminality.  The truth commission idea caught on as a result of what happened in Argentina.  In Argentina under military rule, the characteristic crime was disappearances, that is, kidnappings and torture of the victims.  The kidnappings were conducted by men in plain clothes and in unmarked cars, and victims were taken to
secret locations and tortured to get the names of others. After the torturing was through, the bodies were secretly disposed of, and many of them were taken up in planes and the bodies were dumped out over the South Atlantic.

The nature of those crimes was that everything about them was intended to deceive. There was no acknowledgement of the criminality as it was being committed. The Argentines who lost family members demanded to know what happened to their relatives. They were epitomized by a group called the “Mothers of the Plaza de Mayo” who marched around in a circle every Thursday afternoon in front of the presidential palace, wanting to know what happened to their children. The government’s explanation was that they had left the country, or had gone to join some secret guerilla group, and that they didn’t know what had happened to them. But the mothers demanded the truth about what had happened to them. The government maintained a pretense of legality throughout, and truth became very important to the victims, or the survivors of the victims. In that circumstance, the idea of a truth commission can be very powerful, that is, finally penetrating the web of lies and showing exactly what was done, who did it, and so forth.

Now think of two very different circumstances. Think of Rwanda and again come back to the siege of Sarajevo. There was no mystery about what was going on in Rwanda -- it was broadcast on the radio. Everything was out in the open. This was genocide without any attempt to preserve a pretense of legality. The siege of Sarajevo was on television worldwide every single day. Truth isn’t a particularly powerful weapon when dealing with those kinds of crimes.

I would also say that in somewhere like Rwanda, when you get to the ultimate crime, genocide, a truth commission seems a rather puny response to genocide. There have been cases where truth commissions exist side by side with trials. In the case of Sierra Leone right now we have a joint United Nations, national criminal court that is prosecuting those who were the leaders of the horrendous crimes that took place in Sierra Leone, and there is also a truth commission. So the court can only deal with a small number of people. As Richard said, the question of capacity is a very important factor. The truth commission supplements the court. In Argentina, there were criminal trials and there was a truth commission. In South Africa, there were a few criminal trials for those who refused to acknowledge and disclose fully their crimes. So, using them in combination can be a very good approach.

But in Sierra Leone, what really matters to people are the criminal proceedings, not the truth commission. When you’ve had people who are going around and cutting off people’s arms and legs, and committing the other horrendous crimes committed there, a truth commission doesn’t do it. It wasn’t done with a pretense of legality, and it wasn’t done with the intention of deceiving. It was all visible, and they want those people punished for committing those crimes. I think the circumstance of the criminality matters a great deal in determining the right approach.
Noel Lateef: Thank you both for those insightful remarks, and thank you Andy for moderating so ably. My question goes to your appraisal of the centrality of a responsible media to promoting democracy through international law. I recently had the pleasure of speaking to Roger Ailes, the president of Fox News, and I asked him what role he saw the media as playing, and if it had any responsibility to educate the public. Mr. Ailes responded in short that, “the business of the media is to stay in business.” A corollary concern is the complexity of international law. The Dayton Accord that brought an end to hostilities in Bosnia were 300 pages long, and I think Henry Kissinger could probably credibly claim on television that he was one of only three people who had read the accords in their entirety. Your comments?

Richard Goldstone: Of course, we’re talking about democracy here and in most oppressive societies, you don’t have a free media. South Africa was a very strange society, because in our worst apartheid days we had a fairly free media. There were constraints, but certainly the media played a role, a very important role, in publicizing what apartheid governments did and in helping bring down the system. But in democracies, clearly the media has a very important educative role – who else? What worries me in a number of democracies, particularly in the United States, is the regionalism of media.

I’ve been amazed when I’ve traveled around this country at how little international news there is in newspapers. I think you can count on the fingers of one hand the newspapers in this country that have good foreign news coverage, and there is a difference. I’ve noticed in Europe, for example, that on Sunday people in even the smallest towns go and get their Sunday newspapers, and they are pretty good newspapers, whether it’s in France or in England and many other European countries. I’ve been amazed at how many people in this country rely on television for their news, and what does the television give them? Motor collisions in their village, news about their cities very frequently, but not about other cities in the United States, let alone in the international community.

So there is a huge role for education that the media have, especially in new democracies like South Africa. I think our media is not doing a great job. It is providing soap operas and the sorts of things that get them advertising, and I think in a way it is a huge opportunity that is being lost in the older democracies, and perhaps even more in the new democracies.

Aryeh Neier: Of course I am in favor of responsible media, but I actually attach more significance to having diverse media. Part of the reason is that it seems to me very important that a particular medium, which may express the views of the government, should not be too powerful. When one point of view is heard, and it is not countered by other points of view, we are in a dangerous situation. I’ll use the example of Rwanda again. Notoriously, radio television Mille Collines incited the genocide and actually helped organize the genocide. But I doubt that it could have had so important a role if there had been many media with many points of view. It’s one thing if all you hear is one point of view, one argument. It’s quite another thing if you have a cacophony of views, even if you have media that are irresponsible.
I’d rather have a lot of irresponsible media, than just have one point of view broadcast. In the former Yugoslavia, Radio Television Serbia reached most of the population of Serbia, and there was very little in the way of an opposing point of view. At a certain point, Radio B92 came along, but that was limited to the city of Belgrade, and it wasn’t in Belgrade that the enthusiasm for the war took place. In Serbia, it was egged on in the provincial parts of the country. The same was true in Croatia, where the official radio station helped foment the conflict. So, diverse media seems to me to be particularly significant.

**Question:** First of all, let me thank you for two superb presentations. This audience is privileged to have you both addressing us this evening. I will be very concise. I wonder if you might address the Bush Doctrine concept of pre-emption in the context of international law.

**Aryeh Neier:** International law essentially says that you have a right to engage in self-defense. It also says that other than self-defense, the Security Council of the United Nations has to authorize on conflict. I happen to believe that there is another form of international armed conflict that is authorized by international law. I think there is a duty under the Genocide Convention to prevent and suppress genocide, and therefore, where there is the imminent possibility of genocide, I think that military intervention is justified.

As far as self-defense is concerned, I think one can argue about what is involved. Do you actually have to be attacked, or does the attack have to be imminent? A credible argument could be made that if the attack is imminent, you have a right not to wait until you are attacked, but to attack. The question is, when the attack is not imminent, when you are not preventing something like genocide, when it is not authorized by the Security Council, do you have a right to go to war under those circumstances? The Bush national security strategy says yes, and I would say no.

**Richard Goldstone:** I’ll concur.

**Question:** I would like to go back to what was said before. I am Italian, and I was also struck by the words of Mr. Kuper in the beginning about the media situation in my country. I would say that something even more complicated is happening in Italy. The only thing that is known commonly is that [Prime Minister Silvio] Berlusconi owns three out of the seven major national channels as prime minister. But the problem in Italy that we have, for instance, is that 11 out of 630 members of the chamber of deputies have not been elected because of a very tricky electoral law. For two and half years we’ve been going without two judges on the constitutional court and two members of the council of the supreme magistrate have not been elected properly.

So the role of media is very important, but in a country where you have real problems when it comes to democracy, sometimes the media plays a role, but there are more complicated issues that need to be dealt with. My question is, given that we are talking
about promoting democracy and international law, wouldn’t it be, to a certain extent, useful – because we’ve heard when democracy goes wrong in a big democracy like the United States – to try to find ways to establish a kind of democracy compliance mechanism according to international law, that might in fact help critical and very extreme situations like the ones discussed so far, but also situations where people believe they live in a democracy, like in Italy, which might have a slight problem of conflict of interest, but indeed has an institutional and structural problem when it comes to the enjoyment of civil liberties and rights?

Andrew Kuper: Just to add to that question, insofar as there is a sort of international norm of democracy to which both of you referred, that Thomas Franck spoke about all the way back in 1992, I think the question is really about what are the good enforcement mechanisms of that. Could there be a democracy compliance panel of some kind, or should that be attached to the UN in a certain way, with international recognition of democracies being one criterion?

Richard Goldstone: The only comment I would make is that what has really happened since the Second World War, with an increasing pace – I’m an optimist, not a pessimist – I think the world has made tremendous strides. Education is helping, and has changed. Before the ad hoc tribunals were set up by the Security Council, there were no references in newspapers to international humanitarian law. It was taught as an esoteric subject in some law schools in some democracies. Today, one reads about it all the time, whether it’s the trial of Milosevic, or whatever.

When the United States went to war in Afghanistan, when NATO fought over Kosovo and in the Iraq war, there were statements daily about protecting civilians. Whether they succeeded 80 percent or 100 percent isn’t the point I am making. There is now a consciousness and it is having a dramatic effect, and humanitarian law is being taught in universities across the world. So there has been a tremendous advance, and one of the reasons is that national sovereignty is yielding more and more to human rights violations.

At the end of the Second World War, it was internal affairs. No country, no international organization had any right to criticize how a government mistreated, ill-treated or murdered its own people. It was their business. South Africa got away with it for many years with apartheid, saying ‘it’s got nothing to do with you. The way we treat our black people is our internal affairs, not the business of the United Nations or anybody else.’ That is no longer heard. It is no longer an argument. Some violators try and raise that argument, but it is no longer on. And with the United Nations, NGOs, human rights groups regarding it as their business, and it is accepted around the world that it is their business, and it is the business of government to look at other governments, I think this is a new world we are living in, and I don’t think we should get too gloomy about it. Terrible things are happening, but I think some good things are happening as well.

Andrew Kuper: Aryeh, do you worry that democracy as a criterion for the UN to be looking at or for other governments to be looking at is going to diminish attention to
these sorts of international rights norms? Is that you’re argument? And if so, should we be suspicious of democracy compliance mechanisms?

**Aryeh Neier:** No, I wouldn’t be suspicious of democracy compliance mechanisms. I would just argue for a rich view of democracy. It seems to me that a rich view of democracy includes the idea that democracies live by law, and that norms and rules of international law are critical for the way in which democracies relate to each other and for the way that they ought to relate to their own citizens. I don’t want to have anything I said interpreted as not attaching significance to the advance of democracy, it is really the kind of democracy that seems to me to be very significant.

On the particular question, I don’t have a good answer to it, so I am not going to answer that question. I’d need to do a lot more thinking about those issues before I could answer the very specific question that was put to us.

**Andrew Kuper:** Then perhaps we’ll convene again another time for that. I’m afraid we are out of time.

Thank you very much.

[APPLAUSE]

[END TRANSCRIPT]