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“The Role of Lawyers in Defending Human Rights”
The International Human Rights Framework Opportunities for Attorneys and Advocates

The Non-Profit Center
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Good morning. I am very pleased to be here with you, and I thank the International Justice Resource Center for inviting me to share some thoughts on a subject that is close to my heart. My thanks go also to the co-organizers of this important training conference, the ACLU of Massachusetts, Physicians for Human Rights and other involved entities and individuals.

For many years I have worked in the United States to ensure that all people have access to legal assistance, including particularly working class individuals who rely on legal services funded by the US government to ensure – for example – that they are not subjected to unsafe housing conditions or discrimination in the workplace.

During my term as president of the ABA I appointed several commissions and task forces, including a bi-partisan Task Force to examine the US government’s practice of surreptitiously recording private communications between attorneys and alleged terrorist suspects. Now as Chair of the ABA Center for Human Rights I oversee a number of human rights programs, including the *Justice Defenders Program* which provides *pro bono* legal assistance to human rights activists anywhere in the world who face retaliation as a result of their advocacy efforts. All too often, lawyers who take up the cause of human rights are themselves subject to harassment and persecution by governments and non-state actors.

In these remarks, I will first briefly discuss the ABA Center for Human Rights and its programs that work on establishing respect for human rights in the world through a just the rule

of law. Specifically, I will discuss the Center's *Justice Defenders* program and the *International Criminal Court Project*.

Second, I will give a brief overview of international human rights laws and their enforcement mechanisms.

Finally, I will address the reality that the practice of human rights law is not about a dichotomy between international versus domestic law, or that human rights law is some foreign concept that does not apply to your day-to-day work as a lawyer. Make no mistake: human rights law is at the core of U.S. law, and at the core of a just rule of law.

I. Global Trends and the Center's Work

As I have worked on human rights issues around the world, I have been encouraged by the increasing level of collaboration between lawyers across national borders, and the increasing prevalence of human rights law in domestic jurisdictions and the international arena. At the same time, I have seen an alarming rise in the use of judicial processes and discriminatory legislation aimed at silencing and punishing those who courageously advocate for and protect human rights.

For example, during pro-democracy protests last year in the kingdom of Bahrain, an inspiring lawyer named Mohammed al-Tajer found himself the subject of frivolous, trumped-up charges of "inciting hatred" in retaliation for his efforts to defend the rights of political dissidents. He was detained, held incommunicado, brutally tortured and tried in a military court characterized by procedural irregularities that violated basic tenets of international due process and fair trial rights.

The international community reacted with outrage to Mr. al-Tajer's case and numerous cases like his in Bahrain. Many organizations, including the American Bar Association, called on the government of Bahrain to, at a minimum, provide him with a fair trial in a regularly-constituted, civilian court. In response to the outrage expressed by the international community, Mr. al-Tajer's case was transferred to a civilian court earlier this year, and the most serious charges against him were dismissed.

The ABA was involved in this case by virtue of its *Justice Defenders Program*. As I mentioned, the *Justice Defenders Program* provides pro bono legal assistance to human rights

advocates throughout the world who are the subject of retaliation for simply exercising their basic, legally recognized human rights, such as freedom of expression, association, and the right to a fair legal process.

Our work occurs both remotely and in country, and once we learn from local defense counsel what their needs are, the ABA and its partners help fulfill those needs. Often the assistance is doing international legal research and drafting that can be added to defense counsel's domestic legal arguments. Other times, the ABA will submit expert declarations on international law to be filed with the local, regional or international court. And the ABA President may issue a stern "Rule of Law Letter" that is sent to an offending government pursuant to ABA Goal IV, which includes protecting human rights and the rule of law, and holding governments accountable. These efforts call international attention to the human rights violations occurring in a particular case or cases, and the ABA's assessment of how the law is being violated.

Finally, the *Justice Defenders Program* deploys trial observers to monitor court hearings in foreign countries to ensure that international due process and fair trial rights are respected, to raise publicity, and to put indirect pressure on the offending government to respect human rights. The *Justice Defenders Program* has engaged in such work in Belarus, Peru, Vietnam, Burundi and Swaziland, just to name a few.

The Center's International Criminal Court (ICC) Project is our newest project, and it has grown quickly since its inception late last year. The ABA has strong pro-ICC policy going back to 1978, twenty years before adoption of the Rome Statute, the international multi-lateral treaty that established the ICC.

The Project's purpose is to strengthen, regularize, and broaden the US-ICC relationship through various forms of engagement. To date, 121 nations have ratified the Rome Statute. The US has not yet ratified the Statute, and is not a full member of the ICC, yet it does provide significant assistance to the operations of the Court. To help expand the US-ICC relationship the ICC Project – working closely with the ICC itself, the US government, and stakeholders, will employ three types of engagement to fulfill its mandate. One in particular is relevant to today's conference.

The first prong of the Project is practitioner engagement and training, in which the Project will train ICC lawyers and staff on critical lawyer skills and on specific areas of relevant law. Also, the Project will create forums for American and international criminal practitioners to engage on various legal skills and topics, such as victims rights and trial advocacy, all in order for the two to learn from each other.

Not only will these efforts help the ICC learn from their American counterparts valuable lessons of the practice of law that will help them, but American lawyers will become more knowledgeable and comfortable with the ICC, which will ultimately lead to the American legal profession concluding that the US ratifying the Rome Statute is in the interest of the United States and the world.

II. International Human Rights Law and International Enforcement Mechanisms

I move now to international human rights law and the institutions and mechanism in place to uphold such laws. I begin at the beginning of human rights law.

After the horrors of World War I and II and the utter disrespect for human rights on gruesome display during the worldwide conflict, the international community came together not only to recognize the concept of human rights – a concept that had developed centuries before – but also to protect human rights through the rule of law. From the battlefield to the negotiation table, the international community created the landmark document on human rights: the Universal Declaration of Human Rights.

WWII also saw the onset of accountability for mass atrocities or, legally speaking, individual criminal responsibility of military and civilian leaders alike for the perpetration of the core international crimes: crimes against humanity and war crimes. International and domestic war crimes and crimes against humanity trials occurred in the decade after the end of WWII. Soon after WWII, the Genocide Convention and Geneva Conventions were adopted. In the years and decades to follow, a number of other fundamental international documents were created, such as the International Covenant on Civil and Political Rights (or ICCPR) and the Convention Against Torture.

The sudden and steady development of the field of international human rights law did not just occur on the international arena, but occurred regionally as well. There are the European

Convention of Human Rights, the American Convention of Human Rights, and the African Charter of Human and Peoples' Rights. These conventions developed further with subsequent Protocols being passed. Regional development continues today with the Association of Southeast Asian Nations now in the process of creating its own human rights instruments. Taken together, these international and regional human rights instruments, treaties and conventions make up what is now called "international human rights law."

In a symbiotic manner, the development of international human rights law occurred simultaneously with, and helped foster, the development of two other important areas of international law: international humanitarian law or the law of armed conflict, and international criminal law. Much of these areas of law has been incorporated into the laws and constitutions of countries around the world, making them legally applicable as domestic law in such countries.

An important point to note here is that the fundamental parts of these conventions and treaties are applicable to and in countries around the world, such as the United States, even if the country has not ratified them or passed implementing legislation. Through a process of consistent practice by a majority of nations, or world States, done out of a legal obligation to follow such laws, these conventions and treaties are binding on all countries as customary international law. For example, a country cannot pass laws or effectively permit arbitrary arrest and detention to occur just because they did not ratify and pass implementing legislation on the ICCPR.

Today at this conference you will hear not just about these international and regional human rights laws but, more importantly, about the tribunals and mechanisms tasked with enforcing the respect of, and adherence to, these laws. These mechanisms include the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, and the African Commission and Court of Human and People's Rights, just to name the most prominent ones. Other lesser known forums include the UN Working Group on Arbitrary Detention and the Committee on Torture.

Some of these institutions and processes do not have binding legal authority over States and individuals, but some do. Some of these institutions and processes do not have procedures that are particularly accommodating to individual complaints, but some do. Regardless of the varied multitudes of institutions and the varied multitude of procedures applicable at these institutions, what you will learn today is that these laws and institutions are directly applicable to

you and your work. Not only do these laws and institutions provide a legal platform for your clients and those that you work for to protect their human rights, but the jurisprudence and standards emanating from these courts can, and should, be incorporated into your work.

III. How International Human Rights Apply to American Lawyers

I turn now to the final topic of my remarks --- the relationship between international and domestic American law, particularly how international human rights law has application to your work, day in and day out. Let me begin by giving you a fact pattern:

An organization formed to provide legal assistance to minorities employed staff to educate people about their rights. This led to litigation filed by attorneys – paid for by the organization – challenging discrimination in schools and other institutions on grounds of their minority status. The state prosecuted the attorneys for violating a local statute that prohibited the direct solicitation of legal clients on the grounds that absent such restrictions, lawyers would “stir” up frivolous litigation in order to make a profit.

Now, it may seem that this fact pattern deals with trumped up charges in some foreign country where the government is trying to suppress fundamental human rights, namely the freedom of expression and freedom of association. However, this fact pattern comes from the US Supreme Court case of *NAACP v. Button*. The NAACP was formed to challenge pervasive discrimination against racial minorities. In its analysis of the constitutionality of Virginia’s ban on client solicitation by lawyers, the Supreme Court articulated the following legal principle:

The First Amendment protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all governments, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.

The Court found that the overreaching Virginia statute created a chilling effect on lawyers and non-lawyers alike by threatening criminal prosecutions against those who are protecting what they believe are legal rights. On this point, the Court said:

It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement

against unpopular causes. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute [371 U.S. 415, 436] broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. . .

Now you may be wondering why I chose a 1963 US Supreme Court case to discuss international human rights law. I did so for a simple reason: years later, the UN Human Rights Committee, which is the governing body responsible for reviewing alleged violations of human rights found in the International Covenant on Civil and Political Rights, would reach the same legal conclusion on freedom of expression and association, and form very similar jurisprudence as that of *NAACP v. Button*.

This relationship between American and international human rights law is not surprising. Our Declaration of Independence and Constitution are some of the first legal instruments ever to announce the moral and legal rights of all mankind. The legal recognition and protection of the most fundamental international human rights – such as freedom of expression, equality of all under the law, and freedom of liberty – are first found in the instruments that founded our country.

Similarly, the development of our robust body of American statutes and case law on core freedoms and rights directly influenced the development of international human rights law. Of course, the laws and jurisprudence of other countries also impacted international human rights law. However, the United States has uniquely helped in the creation and development of international human rights laws, and when you hear about such international human rights laws in today's conference, it is very likely that it is US law that underpins those laws.

Yet, this is not the most important point that I ask you to take from my remarks.

Yes, the United States plays a central role in the formation and growth of international human rights law, not to mention international criminal law and international humanitarian law. But this relationship is not a linear one, where international human rights law grew out of American law, not to have a similar impact years later on US law.

This relationship is about a circle, and you are here today to learn how to help complete that circle. In today's American legal environment, there are those who shun international law, believing it to be beneath American law. Others think that American law and international law are just separate, one not having influence or a connection with the other. The result often is that international law is treated by some US courts as inapplicable or unpersuasive, and this is particularly the case when it involves international human rights law.

The conclusion of "inapplicable" or "unpersuasive" could not be further from the truth. American law not only influenced international law, but international law is a part of American law, and international law can help push American law forward. Where American law is falling behind, international law can help spur change here at home. The same holds true when international law falls behind American standards.

I conclude with this.

I urge you today to make international law, especially international human rights law, an integral part of your practice.

What you are engaging in at this conference is not just an academic exercise, but an exercise on broadening your practice of law, the exercise of finding ways in which international human rights law can help you more effectively serve the people you represent --- people who look to you to protect them from those who would deny them their fundamental rights, and their dignity as human beings.

I encourage you to find ways to incorporate international human rights law and jurisprudence into your work. I encourage you to use both traditional arguments but also new, creative advocacy for persuading a court of law to find international human rights law persuasive, and applicable, to your client's situation.

While the International Covenant on Civil and Political Rights, for instance, may not have US implementing legislation that makes it directly applicable in federal, state and local courts, it is still international human rights law that US courts should pay attention to.

It is your responsibility – our responsibility – as lawyers to be at the forefront in completing the circle between American and international human rights law; to utilize in our advocacy all internationally recognized and respected human rights principles; to do our very best to protect the human dignity and rights of those who look to us for help

That is why we became lawyers.