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## Human Rights Policy in the Age of Terrorism

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## HUMAN RIGHTS POLICY IN THE AGE OF TERRORISM

JUAN E. MÉNDEZ\*

### I. INTRODUCTION

It is a privilege to be given the opportunity to comment on Harold H. Koh's Childress Lecture on *A United State's Human Rights Policy for the 21st Century*. Indeed, the choice of a topic could hardly have been more prescient: after September 11, 2001, the very possibility of an enlightened foreign policy, one designed at least in part to defend and promote human rights everywhere, is called into question. Saint Louis University and the organizers of the Childress Lecture deserve praise for tackling a difficult issue at a time when public opinion is so thoroughly imbued with an unquestioningly patriotic spirit. It will be hard for some time to have a serious debate about the content of the "national interests" of the United States, or about whether such interests are best served by war. It will be difficult for a long time to come to engage in a serious discussion about what are the demands of justice regarding the terrorist attacks on U.S. soil, or how to draw a line between justice and revenge. But precisely because it will take time, it is important to start now.

This reaction to Professor Koh's thoughtful address is written from the perspective of a citizen of the Third World who has had the good fortune of living in the United States since 1977 and the privilege of working with this country's foremost human rights organizations. The uniqueness of this perspective warrants two early disclaimers: I cannot speak for the human rights movement of the developing countries, and I certainly do not claim to speak for U.S.-based human rights organizations; they manage to get their points across without much difficulty in any event. On the other hand, most of my professional experience has taken place in close contact with the fascinating process of formulating and implementing human rights as a principal component of U.S. foreign policy. The advances and setbacks that marked that process, now more than a quarter century old, are—I think—an important

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framework within which to consider the challenges that the terrorist attacks of September 11 present to the human rights movement around the world.

In the light of those experiences, this Essay argues that the aftermath of September 11 creates the serious risk of undermining all the gains made by the American public and U.S. institutions in installing human rights as central to this country's foreign policy. If this risk is realized, then Professor Koh's proposal will meet an untimely and undeserved early demise. On the other hand, this essay also expresses the hope that the human rights movement, with the power of the idea of human rights and their place as core values embraced by the American public, can overcome this perilous moment and prevail again.

## II. THE RUSH TO WAR AND THE NEED FOR A PROPER CHARACTERIZATION OF SEPTEMBER 11

From the perspective of international human rights law, the attacks of September 11 are not only acts of terrorism, but also crimes against humanity, since they were designed to kill large number of civilians who took no part in hostilities.<sup>1</sup> Since there was at the time no state of war between the perpetrators and the United States, this characterization extends as well to the attack on the Pentagon, though most of its victims were not civilians. Even if we thought of these attacks in the context of armed conflict, the use of commercial aircraft full of civilians, turning those airplanes into weapons of mass destruction, and the indiscriminate nature of the attack, would suffice to consider them war crimes. The importance of labeling these acts as crimes against humanity or war crimes is the legal effect of such a characterization: as to them, the international community is collectively committed to their investigation, prosecution and punishment of their perpetrators, and offering reparations to the victims.

There does not appear to be much room for disagreement on this characterization. And yet, in his first appearance after the attacks, President

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1. Crimes against humanity are a special category of human rights violations. They involve murder, torture, disappearances, prolonged arbitrary detention, reduction to slavery and other grave offenses, when committed as part of a widespread or systematic attack directed against any civilian population. *Rome Statute of the International Criminal Court*, art. 7, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute]. Human rights organizations have long avoided the use of the word "terrorism" to categorize certain serious crimes, in large part because of the highly charged and ideological connotation of the concept. Nevertheless, even using a rigorous definition of terrorism, the acts of September 11 certainly fit it. For these purposes, I refer to the definition used by Professor Koh, which he in turn borrows from a U.N. General Assembly Resolution of Jan. 30, 2001. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 330 n.100 (2002); *Measures to Eliminate International Terrorism*, G.A. Res. 55/158, U.N. GAOR, 55th Sess., Agenda Item 164, at 2, U.N. Doc. A/Res/55/158 (2001).

George W. Bush called them “acts of war,” and not just terrorism.<sup>2</sup> Apparently President Bush and his advisers consider an act of terrorism less morally objectionable than an act of war. Terrorism, however, carries a much harsher and universal moral condemnation, no matter one’s cultural or philosophical starting point. Those who wage war in self-defense, or as a last resort to protect other human beings, as long as they fight in full compliance with the laws of war, deserve to be treated with respect. Terrorists, on the other hand, deliberately and wantonly break with every tradition of the laws of war: they resort to perfidy, they sow fear in the population, and they make the innocent pay for the real or supposed crimes of others.<sup>3</sup>

Undoubtedly, the characterization of September 11 as an act of war has had useful practical consequences. It has instantly created a state of consciousness in the American public that justifies the resort to warlike actions in response to the attacks of that date. It has also shifted attention completely away from what could have been a more useful, pragmatic and morally more solid response: a law enforcement operation to bring the accomplices of the suicidal attackers to justice. This is not to say that the United States does not have a *causus belli* for the operations now going on in Afghanistan. Under the protection of the Taliban regime, Al Qaeda posed a threat of further attacks, and that fact alone justified the legitimate exercise of self-defense on the part of the United States. But self-defense is limited by immediacy and proportionality, and at this point it is unclear if the heavy bombing, the use of proxy fighters and the effort to drive the Taliban out of power can all be justified by self-defense.

In January 2002, as this is being written, it seems superfluous to engage in any discussion of these points; events on the ground have moved the debate well beyond decisions as to what use of force is legitimate. Still, it is important to be able to draw a line between self-defense and *reprisal*. The sentiment among most Americans may well be in favor of exacting revenge for the attacks of September 11; we should not forget that those sentiments are at least in part spurred on by the irresponsible talk of political leaders and commentators that shower us with hourly barrages of saber-rattling from the safety of their television studios. In the end, however, we must reckon with the fact that reprisals are not permitted in international law. For that reason alone, we must keep in mind the distinction between self-defense and reprisal.

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2. Press Release, Office of the Press Secretary, By the President of the United States of America, *National Day of Prayer and Remembrance for the Victims Of the Terrorist Attacks on September 11, 2001* (Sept. 13, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010913-7.html>.

3. Combatants are prohibited from disguising themselves before or during an attack. It is perfidy to mislead the opponent into believing that one is a person protected from attack by the laws of war. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 37, 1125 U.N.T.S. 3.

Beyond international law, ethical considerations also require that we make that distinction: crimes against humanity like the attacks of September 11 create a demand for justice, not for reprisal.

The legitimacy of the U.S. response to the attacks of September 11 has immediate consequences for the question of what place human rights can have in American foreign policy. The United States can shape events in other lands and influence the way other States treat their citizens, and in fact almost invariably does so, whether it deliberately seeks to have a human rights policy or not. That influence, however, is most effective and favorable to human rights when the citizens of other societies perceive it as a genuine effort to uphold human rights for their own sake, and not as a tool for other foreign policy interests. In this instance, most citizens of other countries instantly sympathize with the grief felt by Americans for the death and destruction of September 11; however, that sympathy does not translate into support for the combat operations by the United States in Afghanistan. American leaders may characterize the war as a way of seeking justice; for the rest of the world, however, it looks a lot more like reprisal.<sup>4</sup> Of course, the foreign policy of the United States should not be guided by opinion polls in other countries. However, if there is eventually to be a human rights policy along the lines proposed by Professor Koh, its prospects of success will depend largely on whether the United States is perceived as an honest and impartial defender of human rights and fundamental freedoms, and not as a super-power that is all too eager to display its awesome destructive power on one of the world's poorest nations.

The question of the legitimacy of going *to* war must be followed by a serious discussion of the means and methods to be employed *in* war. In international law, these separate issues are treated under the familiar distinction of *jus ad bellum* and *jus in bello*. The point of the distinction is precisely to insist that both the resort to war and the way it is conducted must be guided by moral and legal principles. In other words, even if the resort to war can be justified, the belligerent is always and in all instances obligated to use means and methods of warfare that distinguish properly between military and civilian targets, that protect non-combatants from harm and that respect the life and dignity of those no longer taking an active part in hostilities.

At this point, it may be too early to judge the extent to which all American military operations in Afghanistan are in compliance with these simple rules. There are troubling signs that at least some of them raise serious questions in

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4. This is how I perceive the state of public opinion in the Third World on this matter from conversations with human rights activists, journalists and democratic politicians in the course of recent travels in Argentina, Brazil, Colombia, Costa Rica, Guatemala and El Salvador. Though admittedly impressionistic, it coincides with news accounts about opinion polls in those and other countries.

this regard.<sup>5</sup> And yet the attitude of the Bush Administration and the Pentagon is to disregard any such information as “unsubstantiated” without any serious effort to examine them or to provide the means for a further inquiry. Unfortunately, this refusal to respond to valid questions about specific episodes is nothing new. There has been no serious self-examination of the destruction of an insane asylum in Grenada during the U.S. attack on that island country in 1983.<sup>6</sup> There has been no account of how the poor Panamanian neighborhood of Chorrillo was burned to the ground in the course of the attack on the headquarters of the National Guard during the December 1989 invasion of Panama.<sup>7</sup> No serious inquiry was ever made on the killing of Iraqi soldiers who were returning to Baghdad, hours after the cease-fire in the Persian Gulf War.<sup>8</sup> In the bombing of Yugoslavia during the war over Kosovo, there have been inadequate explanations of the destruction of the Chinese Embassy and a television station, and even less of the use of cluster bombs.

This refusal to conduct serious inquiries or to answer simple questions is a serious mistake. Independent monitors and investigators do not assume any wrongdoing on the part of the Pentagon; they simply apply to American military actions the same standards and burdens of persuasion that are applied to other forces when they provoke civilian casualties in suspicious circumstances. By refusing to respond seriously to such inquiries, American military authorities only breed the now pervasive sentiment abroad that, if American servicemen violate the laws of war, their commanders will cover up

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5. See Press Release, Human Rights Watch, *Afghanistan: U.S. Bombs Kill Twenty-three Civilians: Rights Groups Urge Immediate Investigation*, Oct. 26, 2001, <http://www.hrw.org/press/2001/10/afghan1026.htm>; Press Release, Human Rights Watch, *Afghanistan: New Civilian Deaths Due to U.S. Bombing*, Oct. 30, 2001, <http://www.hrw.org/press/2001/10/afghan1030.htm>; *Cluster Bombs in Afghanistan*, HUM RTS. WATCH BACKGROUNDER, Oct. 31, 2001, <http://hrw.org/backgrounder/arms/cluster-bck1031.htm>. The United States government must also assume responsibility for the crimes that may be committed by Northern Alliance soldiers fighting with American strategic support. Press Release, Human Rights Watch, *U.S.: Don't Support Legislation Against War Crimes Court*, Oct. 5, 2001, <http://www.hrw.org/press/2001/10/icc1005.htm> (discussing the previous record of the Northern Alliance). In particular, there should be serious investigations into the early news reports about the killing of Taliban soldiers out of combat. The Pentagon should offer a thorough explanation about the circumstances in which hundreds of non-Afghan Taliban prisoners lost their lives in the prison riots of November 25 and 26, and about the inhumane conditions of detention of other prisoners held by a U.S. ally through March. Dexter Filkins, *Marooned Taliban Count Out Grim Hours in an Afghan Jail*, N.Y. TIMES, Mar. 14, 2002.

6. James M. Perry & John J. Fialka, *As Panama Outcome Is Praised, Details Emerge of Bungling During the 1983 Grenada Invasion*, WALL ST. J., Jan. 15, 1990, at A12.

7. David Gonzalez, *12 Years Later, Scars of the U.S. Invasion Remain*, N.Y. TIMES, November 3, 2001, at A4, available at 2001 WL 29618001; David Corn, *Questions for Powell*, 272 THE NATION 5, January 8, 2001, available at 2001 WL 2132172.

8. Seymore Hersh, *Overwhelming Force: What Happened in the Final Days of the Gulf War*, THE NEW YORKER, May 22, 2000, at 49-82.

those crimes. The next time an American diplomat raises serious questions about the adherence to the laws of war by any other country or military force, his or her credibility will be seriously impaired by this pattern of refusal to engage in serious self-examination. Alternatively, the Administration will find itself watering down its critique of others' behavior, in order to avoid being asked about its own response to American military conduct. Either way, the harm done to the cause of human rights and to our ability to protect lives and rights adequately will be enormous.

### III. CIVIL LIBERTIES AT HOME AND CREDIBILITY ABROAD

Until now, and with the exception of the death penalty, the United States could justifiably take the moral high ground in criticizing other countries' standards of free expression, fair trial guarantees and general treatment of persons subject to its jurisdiction. No country could fairly respond that the United States was applying on those matters a standard that it was unwilling to apply in its own domestic jurisdiction. This premise, from which a credible human rights policy could flow, is also at the risk of no longer being true after September 11. The savage attacks have had a traumatic effect on all Americans and produced many irresponsible calls to cut corners in the fight against terrorism. Debates over the morality of engaging in torture to exact confessions (or over handing prisoners to foreign torturers to the same end) have been as frequent as they have been shallow and mean-spirited; they have been as morally unsustainable as the arguments we have long heard from authoritarian figures in countries experiencing turmoil and repression. These proposals take advantage of the genuine fear we all experience that the trauma of September 11 can be repeated. Those who make them bargain that Americans are now ready to trade freedom for security. It is important to engage the debate from the perspective that we can have, and are entitled to, both.

The impact of these ideas and debates over the possibility of promotion of human rights through foreign policy should not be overestimated. Human rights initiatives by the United States will be judged by what actually becomes law, not by proposals made by private citizens in the course of free debate. The fact, however, that the Bush Administration does not adequately distance itself from some of those ideas affects the credibility of human rights initiatives abroad.

There is no question that the rest of the world understands the need by the United States to take some emergency measures that are clearly consistent with international human rights law. Examples of these are the extended scope of judicial warrants for wire-tapping telephones, to follow the conversations of a suspect even if he or she changes telephone numbers frequently. Similarly, developing informants among networks believed to be associated with terrorism and even infiltrating those networks with government agents is

necessary and in principle not inconsistent with human rights standards. The main risk in all of these actions is that security forces can easily fall into the trap of racial and religious profiling, a practice that would indeed violate fundamental principles of non-discrimination.

Other measures actively pursued by the Bush Administration are much more questionable from the standpoint of constitutional rights and, for that same reason, create a problem for the credibility of future human rights initiatives abroad. For example, despite repeated calls from the press, the Department of Justice has refused to give information about the estimated 1,200 persons arrested since September 11 in connection with on-going investigations. The Attorney General partially relented after repeated press inquiries, and released some very cursory information on more than 600 persons still in custody. All of them, according to Mr. Ashcroft, have been charged with either a criminal or an immigration offense. Significantly, the public is still uninformed about the identities of these persons, about their relationship to the crimes of September 11, or about the evidentiary basis for their continued arrest. The fact that all of those arrested since September 11 are non-Americans probably explains the relatively muted criticism among the public at large. But we do not need to be reminded that most human rights standards apply not only to citizens but also to all persons under the State's jurisdiction, and no one is more under a State's jurisdiction than when he or she is a prisoner of that State. When Peru, Egypt, Nigeria and Russia in the 1990's arrested even smaller numbers of persons, without offering any names, identities or explanations as to the probable cause of the arrest, and subjected them to military tribunals,<sup>9</sup> the State Department was more than justified in issuing strong condemnations.

The amendments to federal criminal procedure and immigration laws enacted in the aftermath of September 11 also deserve criticism.<sup>10</sup> Immigrants can now be held for seven days without filing criminal or immigration-related charges (previously the limit was twenty-four hours). The Attorney General wanted authority to detain immigrants indefinitely and settled for the seven-day limit as a concession to Congressional opposition. In fact, however, since the Attorney General can initiate deportation proceedings and then suspend them indefinitely, this concession is pretty much meaningless. Prolonged arbitrary detention of non-citizens would be a violation of internationally

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9. John Shattuck, *Human Rights at Home*, N.Y. TIMES, Dec. 25, 2001, at A27.

10. *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Initial attempts to have a serious debate about the Administration's proposals were reportedly curbed by the Democratic Leadership in the Senate, probably under the notion that the opposition could not afford to look unpatriotic at a time like this. *See also* Jake Tapper, *Sole Dissenter*, Oct. 27, 2001 at [http://salon.com/politics/feature/2001/10/27/feingold/index\\_np.html](http://salon.com/politics/feature/2001/10/27/feingold/index_np.html).



recognized standards, and yet it could encourage countless authoritarian regimes around the world to do the same. It is also a serious breach of American and international standards to eavesdrop on conversations between criminal defendants and their attorneys, even if the information thus obtained is not to be used in court.<sup>11</sup> The selection of more than 5,000 aliens of Islamic background for investigation and questioning smacks of prosecutorial decisions adopted on the basis of racial and religious “profiling.”<sup>12</sup>

The one initiative that has been widely criticized by U.S. democratic allies around the world is the Executive Order creating military commissions to try foreigners at the President’s discretion, if he has “reason to believe” they are linked to Al Qaeda.<sup>13</sup> Spain has announced that it will refuse to extradite suspected Al Qaeda members it has arrested unless the United States gives assurances that they will be tried in civilian courts and will not be subjected to the death penalty. Other European democracies have let it be known that, because of the international law rule applying to extradition and human rights under the European system of protection, they would have to demand the same condition if they ever capture an Al Qaeda member that the United States wants extradited. The reason is simple: military jurisdiction to try civilians for offenses not directly linked to combat violates a cardinal rule of international human rights law. Military commissions whose members serve at the discretion of the President by definition do not meet the standard of an independent and impartial judiciary. The violation of this most basic rule of due process in criminal matters is compounded by the provisions in the

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11. The Department of Justice announced this rule permitting the Bureau of Prisons to monitor communications between lawyers and their clients on October 31, 2001. Lawyers Committee for Human Rights, *Lawyers Committee Condemns Attack on Attorney-Client Privilege*, November 14, 2001, [http://www.lchr.org/protect/domestic\\_terrorism\\_measures.htm](http://www.lchr.org/protect/domestic_terrorism_measures.htm). Criminal defendants and persons in detention have the right to confidential communications with their attorneys. *Human Rights Committee, General Comment 13, Article 14, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 21st Sess., at 14, U.N. Doc. HRI/GEN/1/Rev.1 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm> (last visited Apr. 5, 2002); see also “soft-law” but authoritative instruments: *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, Supp. No. 49, Annex, Principle 11, 76th mtg., U.N. Doc. A/43/49 (1988); *Basic Principles on the Role of Lawyers*, U.N. Doc. A/CONF.144/28/Rev.1, at 118 (1990) (adopted by the 8th U.N. Congress on the Prevention of Crime and Treatment of Offenders); available at [http://www.unhchr.ch/html/menu3/b/h\\_comp44.htm](http://www.unhchr.ch/html/menu3/b/h_comp44.htm) (last visited Apr. 5, 2002); <http://www1.umn.edu/humanrts/instree/i3bprl.htm>. The principle is also well established in U.S. constitutional law. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

12. See Robin Toner, *Civil Liberty vs. Security: Finding a Wartime Balance*, N.Y. TIMES, Nov. 18, 2001, at 1A1; Pam Belluck, *Hue and Murrur over Curbed Rights*, N.Y. TIMES, Nov. 17, 2001, at B8.

13. Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 37 WEEKLY COMP. PRES. DOC. 1665 (Nov. 13, 2001).

Executive Order that allow these commissions to use secret evidence against the accused, to operate in closed hearings, to deny the defendants access to counsel of their own choosing, to deny them any form of judicial review or appeal other than to the President or the Secretary of Defense, and to apply the death penalty by a two thirds majority of their members and not unanimously.<sup>14</sup> In wartime, prosecution of enemy soldiers who commit war crimes is allowed before military courts, as long as these are the same courts applying the same procedures as would be applied to the party's own officers. The Executive Order, however, does not limit its jurisdictional scope to combat-related violations. In addition, these procedures would afford a lower standard of due process than what applies in martial courts and general military court jurisdiction.<sup>15</sup>

As Harold Koh has stated elsewhere,<sup>16</sup> this proposal is as wrong-headed as it is unnecessary: if there is one country in the world whose courts are fully capable of operating efficiently *and* affording all fair trial guarantees, it is the United States. Federal courts have a near perfect record in dealing with terrorism: Tim McVeigh and his accomplice were tried without major violations of due process, and the application of those guarantees did not hinder the possibility of finding them guilty. The federal courts of New York managed to prosecute and convict all those involved in the early attack on the World Trade Center, in 1993,<sup>17</sup> as well as persons detained abroad and brought to trial in the United States for the attacks on U.S. embassies in Africa and on the USS *Cole*.<sup>18</sup> International human rights law allows for suspension of some rights during a state of emergency that is duly declared, but only in the measure strictly required by the exigencies of the situation. There is no need in this case to suspend the operation of the courts that have jurisdiction to hear these cases, since those courts have suffered no impairment in their capacity to function. In addition, a criminal conviction and imposition of a penalty,

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14. *Id.* §§ 4, 7.

15. See William Glaberson, *Tribunal v. Court-Martial: Matter of Perception*, N.Y. TIMES, Dec. 2, 2001, at 1B6.

16. See Harold Hongju Koh, *We Have the Right Courts for bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39.

17. Peg Tyre, *An Icon Destroyed; The Men Behind the 1993 World Trade Center Bombing Fumbled Their Way Toward the First Terrorist Attack on Domestic Soil. Today's Attack was Clearly Carried Out By a Different Kind of Group*, NEWSWEEK WEB EXCLUSIVE, September 11, 2001, at 2001 WL 24138865; Tom Perrotta, *City Has Recent History of Terrorism and Trials*, 226 NEW YORK L.J. 13 (2001); Dave Williams, *The Bombing of the World Trade Center in New York City*, INT'L CRIM. POLICE REV. No. 469-471 (1998), available at [http://www.interpol.int/Public/Publications/ICPR/ICPR469\\_3.asp](http://www.interpol.int/Public/Publications/ICPR/ICPR469_3.asp).

18. *US Embassy Bombing Suspect Warned US About Yemen Attack*, AGENCE FRANCE-PRESSE, January 18, 2001, available at 2001 WL 2323929; Vernon Loeb, *Nine Alleged Plotters Held In Yemen; FBI's Cole Investigators Are Withdrawn Due to Threat*, WASH. POST, June 19, 2001, at A14.

because of their long-term effects, are exactly the kind of measures that are clearly beyond the exigencies of the situation.

The United States rightfully criticized the creation of special military courts to try civilians in other countries. In Peru under Fujimori, for example, the autocratic regime used the excuse of the fight against the Shining Path insurgency to institute “faceless courts,” both military and civilian in composition.<sup>19</sup> Inter-governmental monitoring bodies like the United Nations (U.N.) Human Rights Committee, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights all pronounced those courts as flagrant violations of Peru’s obligations under international human rights treaties.<sup>20</sup> If the rule in international law is clear in this regard, why should the United States escape similar criticism? And more importantly, why should other authoritarian regimes listen the next time the United States tries to nudge them in the direction of respect for fundamental guarantees of due process?

#### IV. MULTILATERALISM

President Bush deserves praise for having taken his time to respond to the attacks of September 11, instead of rushing to a blind and irrational act of retaliation. Given the mood of those days and the ill-advised proposals of many commentators and experts with past service in international and security affairs, the President’s measured but determined response avoided what could have been a catastrophic retaliation.<sup>21</sup> Also right from the start were his public statements distinguishing the terrorists from Islam as a major world religion and from Muslim peoples generally, including his well-publicized visit to a mosque in Washington to show that Americans who profess the Islamic faith are not to be blamed for the crimes of a few fanatics. The numerous acts of discrimination and violence against Arab-Americans that erupted in the days following September 11 would almost certainly have been more serious and widespread had the President not taken this stance.

In the same sense, the Administration has correctly perceived that the instant sympathy towards the United States felt around the world because of

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19. Craig Mauro, *Secretive Tribunals Helped Peru Defeat Terrorism—At a Cost*, ASSOCIATED PRESS, December 26, 2001, at A31; Jude Webber, *Critics Liken Bush’s Tribunals to Peru’s ‘Faceless’ Judges Trials*, HOUS. CHRON., Nov. 18, 2001, at 35.

20. Loayza Tamayo, Inter-Am. C.H.R. (Ser. C) No. 33, at para. 37 (1997); Castillo Petruzzim, Inter-Am. C.H.R. (Ser. C) No. 52, at para. 16 (1999).

21. As just two examples of irresponsible remarks by persons who should know better, Laurence Eagleburger, a former Acting Secretary of State speaking on national television, called for an “irrational response;” and in his column of September 28, 2001, Thomas Friedman, a highly respected commentator, urged the Bush Administration to use to Russian mafia to kill Al Qaeda members. Thomas L. Friedman, *Foreign Affairs: Talk Later*, N.Y. TIMES, Sept. 28, 2001, at A31.

the attacks on New York and Washington must be translated into a broad coalition to act in many different ways against international terrorism. Among other diplomatic initiatives, the United States sought and obtained Security Council resolutions identifying these attacks as threats to the peace and security of nations.<sup>22</sup> The resolutions do not call on U.N. member States to act militarily against Al Qaeda and governments that harbor terrorists, but unmistakably proclaims that States targeted by international terrorism have a right to act in self-defense.<sup>23</sup> It could be argued that the resolutions are superfluous, since the right to use force in self-defense is clearly stated in the U.N. Charter and its exercise does not need a decision by the Security Council. Nevertheless, it stands as a demonstration of U.S. commitment to act in coordination with the rest of the world. The Administration also acted quickly to obtain pronouncements by the organs of various security treaties to which the United States is a party, including the first-time-ever invocation of NATO's provision that an attack on one member can be considered an attack on all other members.<sup>24</sup> Even though these decisions do not carry immediate operational consequences for the war effort in Afghanistan (only a few small allied contingents and the Afghan rebel force known as Northern Alliance are presently fighting alongside U.S. forces), they are significant political gestures of solidarity with the United States.

For our purposes, however, the decision to act in a multilateral fashion is significant if it is more than an act of collective rubber-stamping of what the United States will do anyway. When nations act in concert with other nations the decision-making is more complicated and cumbersome, but the measures thus adopted enjoy not only formal legality in international law, but also moral and political legitimacy around the world. Multilateral bodies can and do make mistakes; but consultations and collective decision-making add a safeguard of deliberation and consensus without necessarily making action impossible.

It remains to be seen, at this point, to what extent this spirit of multilateralism will continue to guide the American response to terrorism. It is encouraging that the United Nations was asked to organize a transitional government in Afghanistan to replace the ousted Taliban regime, and to that

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22. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001).

23. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001).

24. North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243, 246 (invoking U.N. CHARTER art. 51 for the right of individual or collective self-defense). Statement of Lord Robertson, NATO Secretary General (Oct. 2, 2001), *available at* <http://www.nato.int/docu/speech/2001/s011002a.htm>. The Western Hemisphere nations that are signatories, with the United States, of the Rio Treaty on Reciprocal (military) Assistance (TIAR in Spanish), issued a similar proclamation.

effect sponsored conversations between several Afghan factions in Bonn, Germany. The new government was inaugurated shortly before Christmas. If tribal warfare and acts of revenge by the different factions that form the Northern Alliance is to be prevented, American and British forces on the ground must be willing to cooperate fully with U.N. peacekeepers and civilian monitors in protecting persons and structures from random violence, and in supporting the establishment and authority of new governmental institutions. The Pentagon's initial reluctance to support a peacekeeping force in Afghanistan to protect the delivery of urgent relief services is problematic, given the general agreement about the severity of the refugee and displaced persons crisis.<sup>25</sup> As of this writing (early January 2002), the United Kingdom and Germany have deployed forces to ensure the security of the new Afghan government; the extension of this peacekeeping force to protect relief services, however, has not been decided.

So far, the multilateral approach has not extended to the human rights-related components of U.S. strategy. There has been no change in the hostility that the Administration and its supporters in the United States show to the creation of an International Criminal Court (ICC), even though the treaty that created it enjoys the support of all democratic nations in the world.<sup>26</sup> There is an urgent need to revise the American position on the ICC as an important tool to combat impunity for genocide, war crimes and crimes against humanity wherever they occur. But it is also in the interest of the United States to have recourse to an alternative tribunal—and one that does not displace legitimate exercise of jurisdiction by American courts<sup>27</sup>—for those occasions in which extradition to the United States cannot be obtained but surrender to an international court with comparable due process guarantees is possible.

The Administration has also shown no interest in the creation of an ad hoc court like those set up by the U.N. for the Former Yugoslavia and Rwanda, even though both of those courts enjoyed decisive support—of a bipartisan nature—from the United States. The idea has been proposed and discussed by American experts in international law.<sup>28</sup> There are problems with it: one is that

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25. Eric Schmitt & James Dao, *Bush Administration Says It's Too Early to Deploy International Peacekeepers*, N.Y. TIMES, Dec. 1, 2001, at B2. See generally Michael R. Gordon, *U.S. and Britain at Odds Over Use and Timing of Peacekeeping Troops*, N.Y. TIMES, Dec. 2, 2001, at 1B4.

26. Rome Statute, *supra* note 1. As of this writing, more than forty-five States—of the sixty needed for the treaty to go into effect—have ratified it. The most recent ratifications have come from the United Kingdom and Switzerland, two important allies of the U.S. On Dec. 31, 2000, President Clinton signed the treaty, but the Bush administration has announced it will not ratify.

27. See Rome Statute, *supra* note 1, art. 16-20.

28. See Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23; Koh, *supra* note 16. Though I agree with Professor Koh that there is no need to displace the jurisdiction of federal courts to an international court in the matter of the September 11 attacks, it seems to me that his comparison of Ms. Slaughter's proposal with the

courts created by the Security Council do enjoy preeminent jurisdiction over all domestic courts, and in this case there is no reason to believe the regular courts of the United States (as opposed to secret military commissions) are incapable of affording a fair trial. Another problem—though this could eventually become an advantage—is that the U.N. would insist that the jurisdiction of a special court not be limited to the events of September 11, but also extend to all breaches of the laws of war committed by all sides in military actions taken in response to them. The prospect of non-American officials investigating the behavior of American soldiers would trigger such opposition from the Pentagon and from American isolationists that the idea would be doomed from the start. At this point, and even though the debate seems pointless, it is worth stating the obvious: if we are confident that our troops operate in full compliance with the laws and customs of war, why should we worry about inquiries by independent and impartial adjudicators? The anti-ICC and war-crimes-tribunals-for-others-but-not-for-us position would be more convincing if there was a serious effort at self-examination by American military authorities of the conduct of their own troops. As exemplified earlier in this essay, responses to fair questions about incidents in the current as well as in recent wars have been so dismal that one suspects the American military's hostility is not to *foreign* investigations into possible war crimes, but to investigations, period.

A successful human rights policy by a major world power depends on multilateralism in the same way the fight against terrorism needs the support of other peace-loving nations. The United States can flex its muscle in criticizing human rights violations by other nations and at times can even threaten to use its considerable trade and assistance benefits as a bargaining chip to obtain improvements in another country's human rights record. But the experience of the last twenty-five years shows that those measures are most effective when they are used as part of a larger strategy that seeks the involvement of other democratic allies and is justified on the findings of highly respected inter-governmental monitoring bodies. At the same time, resort to multilateralism cannot be opportunistic. To be credible in its human rights overtures, the American government must have a consistent strategy that combines its own initiatives with approaches to international fora, especially those created with the specific purpose of monitoring human rights.

At the same time, this will require reassessment of the United States reluctance to sign and ratify human rights treaties, or to sign them with so many reservations as to render them meaningless in actual legal effect. As Professor Koh's lecture in this Issue points out, the rest of the world increasingly considers it hypocritical for the United States to lecture other

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Executive Order creating special secret military courts is unfair. The latter is already positive law, and is infinitely more dangerous to the rule of law than an international ad hoc court.

nations about their adherence to universal standards while refusing to accept those standards to guide its own performance. In recent years, this glaring inconsistency has become an important limitation on the effectiveness of U.S. human rights initiatives. The Administration's policy toward inter-governmental human rights bodies is still unclear. Before September 11, some key posts in missions to multilateral bodies were vacant, and since then all other matters have understandably been subordinated to the priority of fighting terrorism.

#### V. CONDITIONS FOR A SUCCESSFUL HUMAN RIGHTS POLICY

In spite of the ominous signs of departure from a policy of promotion and protection of rights everywhere, Harold Koh's proposal deserves to be discussed in detail and in depth in policy-making circles. The guiding principles that he offers are not only sound; they are also well-thought-out distillations of the relevant experience of the last twenty-five years. They have a serious chance of being effective because they very accurately reflect the priorities and new horizons of human rights protection in the current stage of development of the universal human rights movement. For example, the movement's attention has shifted markedly—but relatively recently—from putting a stop to the worst violations towards insisting on accountability for gross violations.<sup>29</sup> Koh's guidelines also reflect the broad interest among human rights activists to work on the private sector's (business) responsibilities for contributing to a culture of human rights compliance.<sup>30</sup> Similarly, in ways that were not true a quarter century ago, human rights activists around the world now value democracy and the rule of law—beyond the formality of elections—as the most stable and enduring way of protecting rights in each domestic jurisdiction.<sup>31</sup>

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29. Efforts in Eastern Europe, South and Central America, South Africa, Yugoslavia and Rwanda are examples of a relatively recent trend towards accountability for gross violations of human rights. Different mechanisms such as truth commissions, domestic trials, and international tribunals, among others, have been used to investigate and disclose the truth about violations that took place, to identify and punish the perpetrators of those acts, to offer reparations and to prevent the recurrence of those acts. Accountability for gross violations is now pursued both as a matter of basic justice and as a means to overturn patterns of impunity.

30. A human rights culture is permeating the private sphere. Working conditions, child labor and environmental practices, among others, are becoming important factors for investors and consumers. Corporations can play a key role in protecting those and other rights, as their economic power is a potentially important bargaining chip in molding political will to prevent or deter human rights abuses.

31. *See generally* THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA (Juan E. Méndez et al. eds., 1999); DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS (Harold Hongju Koh & Ronald C. Slye eds., 1999); DAVID BEETHAM, DEMOCRACY AND HUMAN RIGHTS (1999). The Inter-American Democratic Charter approved by the General Assembly of the Organizations of American States in September 2001 is a concrete outcome in terms of discussing

For that reason, this response will not dwell too long on the principles enumerated by Professor Koh, except to offer the following “friendly amendments.” First, on the matter of accountability, it should be clarified that truth and justice are in no way inimical to the idea of reconciliation as a goal of a policy to reckon with abuses of the recent past. It is heartening to see that Professor Koh emphasizes *telling the truth* in absolute terms.<sup>32</sup> This is because past efforts by national societies in transition to democracy to engage in public acknowledgment of recent human rights tragedies did not necessarily enjoy support from Washington.<sup>33</sup> However, efforts to bring the perpetrators to justice through fair prosecutions and trials should also be supported as a desirable reestablishment of the rule of law. In that sense, I have some reservations about “promoting accountability *mixed with* reconciliation,” because the formulation seems to imply that prosecutions and reconciliation are mutually exclusive, or that they can coexist only very uncomfortably.<sup>34</sup> There are highly respected opinions to that effect in the literature on transitional justice.<sup>35</sup> Along with others, however, I disagree: true reconciliation can only come after a process of recognition of the plight of the victims and atonement by the victimizers for their crimes. Moreover, such a process requires truth-telling and justice-making, both to be pursued in good faith and to the best of the newly democratic State’s possibilities.<sup>36</sup>

Secondly, the proposal to engage private sectors, especially transnational business enterprises, and recruit them to promote human rights abroad should be tempered with some realism as to its likelihood of short-term success. There is, of course, every reason to campaign hard and confront business leaders with their responsibility as “good corporate citizens” for the creation of

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the relationship between democracy and human rights. *Inter-American Democratic Charter*, at II, San Jose Costa Rica Doc. AG (XXXI-0/01)/RES/1838 (June 5, 2001).

32. See generally Koh, *supra* note 1.

33. See Jerome J. Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration’s Human Rights Policy*, 2 HARV. HUM. RTS. Y.B. 25 (1989); Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589 (1996).

34. Koh, *supra* note 1, at 295 (emphasis added).

35. See Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425 (1992); ALEX BORAINÉ, *A COUNTRY UNMASKED* (2000); ADAM MICHNIK, *LETTERS FROM FREEDOM: POST-COLD WAR REALITIES AND PERSPECTIVES* (Irena Grudzinska Gross ed., 1998).

36. Juan E. Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 259 (1997); Juan E. Mendez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1*, (A. James McAdams ed., 1997). See also ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR AND THE STRUGGLE FOR JUSTICE* (1998); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2543 n.14 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990).



humane conditions wherever they invest. This strategy presupposes that one has to approach that dialogue without preconceptions or negative stereotypes about business leaders and their degree of sympathy or intolerance for human rights causes. The experience so far, however, is that this dialogue will not be easy for some time to come. Instinctively, business leaders regard human rights organizations—especially those in the countries where they invest—as troublemakers. Their attitude is to ignore them for as long as possible, and then to enter into, at best, a very wary dialogue, much the same way in which they regard labor unions. They are also instantly opposed to policy tools that the human rights movement uses: the promise of benefits of bilateral and multilateral relations in exchange for specific human rights performance, and the implicit and sometimes explicit threat of sanctions for the opposite behavior. Business leaders (like diplomats in the 1970's, when human rights policy was initially implemented) believe and want the public to believe that “quiet diplomacy” always succeeds. The fact that United States and international corporations are a very dynamic force for trade and development does not make them automatically a force for democratization and human rights—at least not until the present dialogue can be carried out to deeper and more meaningful levels. The Clinton Administration took an approach to this issue that naively assumed business to be on the side of human rights, and that there was never a conflict between the profit motive and human rights protection.<sup>37</sup> In my view, Koh's lecture does so as well. It would be good to continue this engagement, and to conduct it even more aggressively, but it is necessary to do so with a higher dose of realism about the initial point of departure of our interlocutors in the business world. Such realism would result in more practical and effective ways to recruit business leaders to the cause of human rights.

I turn now to some fundamental conditions for the legitimacy and prospects of success of a strategy to include human rights in a great nation's foreign policy. As it will be readily understood, the following ideas are intended to complement Professor Koh's suggestions, and are not meant to imply that he has ignored them. For the reasons set forth in the first part of this essay, however, the events since September 11 call into question the very existence of those conditions, which is why it is important to spell them out.

#### A. *Pursuit of Human Rights for their Own Sake*

When we argue that human rights should occupy a *central* position in the design and implementation of foreign policy, we mean they should not be promoted and defended only when they do not risk collision with other foreign policy interests. They are certainly not the only interest of the United States in

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37. A good example of this Clinton Administration approach is the matter of U.S.-China relations.

its relations with the world, but neither should they be an afterthought. There are powerful sectors in the United States whose ideological approach to foreign relations is either of isolationism and detachment, or of assertion of U.S. presence through flexing diplomatic and military muscle. Both sectors are well represented in the administration of George W. Bush, though it would be unfair to say that other, more sensible views are excluded. The risk is therefore high that human rights will be used only when convenient to other interests; the fear is that they will be put aside when they are thought to be in conflict with the “national interest of the U.S.,” however vaguely defined; and that they will be rhetorically twisted and manipulated to serve as an argument for policies abroad that bear little resemblance to human rights promotion and protection.

There is nothing speculative about this scenario. Many persons occupying key positions in the Bush Administration are veterans of the ideological wars of the 1980’s, when Ronald Reagan and Alexander Haig arrived in Washington vowing to undo the human rights policy of the Carter years, to relegate human rights concerns to the bottom of the agenda and to substitute them for a concern for “terrorism.”<sup>38</sup> It must also be said that this early approach experimented with an important shift midway through Reagan’s first term, in large part because of the success of the then incipient human rights movement in challenging it. After a landmark address by Reagan to the British Parliament, the Reagan Administration embraced human rights more positively and launched its own brand of a foreign policy that included such rights.<sup>39</sup> Democracy promotion was made a centerpiece of that policy and, though at first the emphasis was too much on the formalities of elections, there is no question that this approach contributed effectively to today’s recognition of the “democratic entitlement” as central to the universal human rights agenda.<sup>40</sup>

Still, the banner of electoral democracy was not strong enough to force American officials to recognize the seriously undemocratic character of the forces they supported abroad, like the armed forces of El Salvador and Guatemala, or the autocratic rule of Mobutu Sese Seko in Zaire (now Congo). Support for these undemocratic—and in some cases murderous—forces had the effect of needlessly prolonging war and suffering in Central America and

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38. See National Security Decision, Ronald Reagan, Directive No. 30 (Apr. 10, 1982); National Security Decision, Ronald Reagan, Directive No. 138 (Apr. 26, 1984); National Security Decision, Ronald Reagan, Directive No. 180 (July 19, 1985); and National Security Decision, Ronald Reagan, Directive No. 207 (Jan. 20, 1986), *all available at* <http://www.fas.org/irp/offdocs/nsdd>.

39. Ronald Reagan, Speech to the House of Commons (June 8, 1982), *available at* <http://odur.let.rug.nl/~usa/P/rr40/speeches/empire.htm>.

40. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

repression and instability in Africa.<sup>41</sup> In Central America, peace only came when U.S. interest seemed to wane and the U.N. and democratic Central American leaders were allowed to search for a peace process by themselves.<sup>42</sup> It also resulted in discredit to human rights when those officials (some of whom are back in key posts in the new Administration) lied to Congress and to the American people about a variety of matters: the responsibility of allies for the murder of the Jesuit priests, their housekeeper and her daughter in San Salvador in November 1989, the extent of covert actions in Nicaragua and the real record of the U.S.-supported *contras*, the failure of U.S. advisors to curb abuses by those under their tutelage, and the retention of paid intelligence agents known to be torturers and killers.<sup>43</sup>

### B. Consistency

A corollary of the previous condition is that a human rights policy should call a human rights violation by its name, without exaggerating it, without soft-pedaling it, and without a determination of whether it was committed by a State or force that is perceived to be a “friend” or a “foe” of the United States. Admittedly, this was a much more serious problem when the Cold War dominated American (and others’) reflexes about trouble spots in the Third World. It is now much more possible to act affirmatively in those places without fear of giving an advantage to an ideological and security competitor like the Soviet Union was until 1989. On the other hand, the public debate after September 11 has been full of ideas that revive the 1980’s debates about “totalitarian” and “friendly authoritarian” regimes.<sup>44</sup>

The views of security experts are much better publicized in the mass media these days than those of foreign policy analysts and, of course, much more than those of human rights experts. This may well reflect the mood of the Nation after September 11, as well as the need felt by the American public to be reassured that there are ways to deal with the terrorist threat. It should be

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41. See CHRISTIAN SMITH, *RESISTING REAGAN: THE U.S. CENTRAL AMERICA PEACE MOVEMENT* (1996).

42. *Id.*

43. The elite Atlacatl Battalion of the Salvadoran Army, a showcase of U.S. training, is a case in point. Only weeks after its inauguration its soldiers murdered more than 150 old men, women and children in several hamlets known as El Mozote. See Mark Danner, *THE MASSACRE AT EL MOZOTE: A PARABLE OF THE COLD WAR* (1994). Towards the end of its ten-year existence, it crowned this dismal record with the murder of the Jesuit priests in 1989. As for paid intelligence agents, in the late 1990’s it was revealed that a Guatemalan colonel named Alpirez, a valued asset of the CIA, was personally involved in the disappearance, torture and murder of Efraim Bamaca, a guerrilla leader married to American attorney Jennifer Harbury.

44. Robert D. Kaplan, *The Faceless Enemy*, N.Y. TIMES, Oct. 14, 2001, at 11 (reviewing PAUL R. PILLAR, *TERRORISM AND U.S. FOREIGN POLICY* (2001) and ANTHONY H. CORDESMAN, *TERRORISM, ASYMMETRIC WARFARE, AND WEAPONS OF MASS DESTRUCTION: DEFENDING THE U.S. HOMELAND* (2001)).

obvious, however, that over-reliance on the ideas of security experts carries the danger that those ideas will preempt concern for civil liberties and international human rights and undo most of what has been gained since the 1970's in the global promotion of freedom. For example, Robert D. Kaplan, a senior fellow at the New America Foundation, writes:

if the war on terrorism goes on for many years, all kinds of back-room maneuvering will be required, as was the case during the cold war. The subtlety necessary for waging the cold war—in which we supported odious regimes on one hand and made deals with the Soviet Union and China on the other—made it far less popular among many Americans than it now appears. As with the cold war, defeating the enemy will prove impossible without the help of governments that do not necessarily reflect our values . . . . And if we are hamstrung by absolutist definitions of friend and foe, and democracy and dictatorship, our chance of victory will be diminished.<sup>45</sup>

This view is a simplistic and untested assimilation of the terrorist threat to the challenge posed by Communism for most of the twentieth century. It also credits deception, power politics and the support of unsavory regimes with a success in winning the Cold War that is unsupported. In fact, it can be argued that the introduction of a human rights policy, even though inconsistently applied, provided the West with a moral superiority over totalitarianism that eventually assured the 1989 outcome. The quick abandonment of consistency for the sake of expediency in the immediate struggle against terrorism can result in a Manichean (and cynically deceptive, as Kaplan admits) view of friends and enemies.<sup>46</sup> Democratic forces that share our values will not be supported unless they offer an immediate military advantage in the fight against terrorism. On the other hand, despots and autocrats, even if they are exporters of terrorism, like the current leadership in Pakistan, will be given a pass for any human rights violation they may commit as long as they profess to be on our side in the struggle. The United States, and unfortunately also the democracies of Europe, have openly renounced criticism of Russia for the brutal way in which it conducts its war in Chechnya.<sup>47</sup> China will enjoy a long-term suspension of criticism, even of a friendly “quiet diplomacy” type, for its subjugation of Tibet, its suppression of the democracy movement, and its lack of freedom of expression and association.<sup>48</sup> Saudi Arabia and Kuwait will not have to expect any reminder that their treatment of women is

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45. *Id.*

46. *Id.*

47. See statement by German Chancellor Gerhard Schroeder on Sept. 26, 2001, *quoted in* Joseph Fitchett, *U.S. Policy on Terrorism: Think Globally and Don't Interfere Locally*, *INTERNAT'L HERALD TRIBUNE*, Sept. 28, 2001, at 10; Gwynne Dyer, *Russia's Integration Behind Putin's Burst of Generosity*, *THE SOUTHLAND TIMES (NEW ZEALAND)*, Nov. 19, 2001, at 6.

48. See Michael Ignatieff, *Is the Human Rights Era Ending?*, *N.Y. TIMES*, Feb. 5, 2002, at A25.

universally objectionable; from now on we will only defend women's rights against regimes we consider supportive of terrorism, like the now-defunct Taliban.

On the question of consistency, President Bush has offered a reassuring definition of terrorism in a recent speech to the U.N. General Assembly when he said, "In this world there are good causes and bad causes, and we may disagree on where the line is drawn. Yet, there is no such thing as a good terrorist. No national aspiration, no remembered wrong can ever justify the deliberate murder of the innocent."<sup>49</sup> This is a welcome statement; it may yet prove useful in establishing the *bona fide* character of the United States as a peace broker in the conflict between Israel and Palestine, which in turn would contribute enormously to reduce the conditions that are invoked to breed international terrorism in parts of the Islamic world. It should be applied immediately to correct the behavior of direct allies of the United States, like elements in the Afghan Northern Alliance, and General Pervez Musharraf, the military ruler of Pakistan. The United States should publicly force the former to investigate, prosecute and punish violations of the laws of war that have been denounced in the past few weeks, like attacks on civilians, the elimination of Taliban soldiers who were *hors de combat* and the extremely suspicious circumstances of the prison riot of late November where hundreds of surrendered soldiers lost their lives.<sup>50</sup> Musharraf must be told that his current honeymoon with Washington requires him to take steps towards democratizing his country and to renounce support for terrorism against India in Kashmir.<sup>51</sup>

The President's speech to the U.N. may signal a new era, and a final abandonment of the morally bankrupt tendency in the 1980s to label "terrorist" any force fighting an "ally" of the United States, no matter how unsavory that ally was, and "freedom fighter" any violent group doing the bidding of the United States.<sup>52</sup> Thus, RENAMO in Mozambique and UNITA in Angola,<sup>53</sup>

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49. President George W. Bush, Remarks by the President to United Nations General Assembly, *President Bush Speaks to United Nations* (Nov. 10, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html>.

50. Nicholas Watt, *War in Afghanistan: Robinson Calls for Deaths Inquiry*, THE GUARDIAN (LONDON), Nov. 30, 2001; Barry Bearak et al., *Uncertain Toll in the Fog War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002.

51. Though it is too early to tell, it is fair to say that pressures from India and perhaps also from the United States are forcing Pakistan to take the right steps to avoid a major conflict between nuclear powers, among other things by outlawing and arresting persons suspected of terrorism. David E. Sanger, *Bush's South Asia Strategy: Keeping Terrorism as Villain*, N.Y. TIMES, Jan. 7, 2002, at A1.

52. See Ronald Reagan, Remarks at a White House Reception for Private Sector Supporters of United States Assistance for the Nicaraguan Democratic Resistance, Mar. 21, 1986, available at <http://www.reagan.utexas.edu/resource/speeches/1986/32186a.htm> (last visited Mar. 27, 2002).

53. Kurt Shillinger, *A Revealing Tale of 2 African Elections*, CHICAGO TRIBUNE, Dec. 10, 1999, at 31; Howard W. French, *Exit Savimbi and the Cold War in Africa*, N.Y. TIMES, Mar. 3,

and the *contras* in Nicaragua, were hailed as freedom fighters despite their amply documented record of atrocities. Meanwhile, the Republican administration did nothing to obtain the release of Nelson Mandela from prison, but rather gave ammunition to the *apartheid* regime to stay in power because the white supremacists of South Africa were staunch anti-Communists.<sup>54</sup> Officials in the Reagan Administration, now serving again under President Bush, should not be allowed to forget that their attack on terrorism did not extend to what in Latin America was aptly labeled “State Terrorism” –the campaign of executions, torture and disappearances waged against their own people by the now discredited (but at that time considered “friendly authoritarian”) regimes of Pinochet in Chile, Videla in Argentina, and the unaccountable armed forces of Honduras.<sup>55</sup>

### C. *Human rights conditionality*

The relative success of the enterprise of promoting and protecting human rights everywhere through U.S. foreign policy can be attributed to the wisdom of Congress in establishing laws that the State Department must follow in designing and implementing policy towards other countries. Several statutes direct the Executive Branch to make foreign assistance to other nations conditional on the human rights performance of their governments.<sup>56</sup> In fact, the same statutes provide for ample discretion on the part of the Executive Branch to decide when and when not to apply these sanctions, subject to oversight by the relevant committees of Congress. As a result, there have not been too many actual suspensions of aid for these reasons.<sup>57</sup> Nevertheless, the debate generated in Congress and in the media over the possibility of sanctions has always been a powerful tool to promote changes in the behavior of governments.

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2002; Mahmood Mamdani, *Uganda Turn Off Your Tunnel Vision*, WASH. POST, Jan. 6, 2002, at B03.

54. ALLISTER SPARKS, *THE MIND OF SOUTH AFRICA* 348 (1990).

55. See STATE ORGANIZED TERROR: THE CASE OF VIOLENT INTERNAL REPRESSION (P. Timothy Bushnell et al. eds., 1991); Ana Baron, *Kissinger fue clave en el apoyo de EE.UU. a la dictadura argentina*, CLARIN, Jan. 6, 2001, available at <http://www.clarin.com> (last visited Feb. 6, 2002) (citing documents declassified by the State Department).

56. The most significant statute is § 502(b) of the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 1304 (1994 & Supp. V. 1999)). By its terms, the United States is mandated not to provide foreign assistance to any country whose government engages in a “consistent pattern of gross violations of internationally recognized human rights.” Other statutes oblige the U.S. representative in international financial institutions to vote against loans to countries under the same standard. The U.S. Trade Representative is bound by law to condition trade benefits on the observance of labor rights.

57. Henry J. Steiner & Philip Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 1315-34 (2d ed. 2000).

At the same time, there has been little consistency in the decisions made to suspend military aid, military sales, development assistance, economic support funds and other material instruments of foreign policy over the years.<sup>58</sup> Lack of consistency has conspired against the success of the policy, by alerting repressive governments that the way to avoid sanctions need not necessarily involve actual improvement in human rights performance. Sometimes all it takes is an ability to give the U.S. Administration rhetorical tools to proclaim improvements even if they are not real, or to offer reasons why it would not be in the “national interest of the United States” to apply sanctions in a particular case.

For those reasons—and given the anti-terrorist campaign in which the United States is presently embarked—it is to be expected that this arsenal of carrots and sticks will be used even more assiduously in the near future for purposes other than the protection and promotion of human rights. Also, we can expect that they will be used in even more arbitrary and inconsistent ways than has been the case so far. In the months and years ahead, therefore, it will be necessary to insist on the need for this legislation to be taken seriously by every administration. The credibility of the effort to promote human rights values around the world will depend on the prudent use of these instruments. If waivers are to be used, it is important that they are carefully and clearly explained to the public. If sanctions are to be applied, it is even more important to be able to justify them in terms of the severity of the situation to be addressed, and in comparison to similar situations where the United States can exert its influence.

It will also be important to invite other democratic nations to incorporate human rights values into their own foreign policies. For a long time U.S. efforts in this direction were hampered by the fact that repressive countries could rely on trade, military and development assistance to flow to them from other large countries. The European Union, among other large donor blocs and countries, now conditions development assistance on democratic values and human rights performance.<sup>59</sup> On this matter, multilateral approaches are also important. It would be wise, therefore, for a U.S. foreign policy centered on human rights to apply the laws in the American books on conditionality, but also to seek the active solidarity of other powerful nations with the victims of abuses in other lands.

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58. LARS SCHOULTZ, *BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA* (1998).

59. *See, e.g.*, Council Regulation 443/97 of 29 October 2001 On Operations to Aid Uprooted People in Asian and Latin American Developing Countries, arts. 1, 3, 11, 2001 O.J. (L 287) 3, available at <http://europa.eu.int>.

*D. Accurate Reporting*

The annual Country Reports on Human Rights Practices issued by the Department of State have become an important indication of the commitment of the United States to universal standards of protection of rights.<sup>60</sup> Whatever else the United States may say or do about human rights violations in other countries, the high quality and accuracy of the Country Reports have made them an important tool. They are highly regarded by readers around the world because they present a truthful picture of the situation in each country. Since there is a great degree of uniformity in their format, they also provide a fair standard to make comparisons, not only between countries but also in measuring improvements or setbacks in a single country over several years.

At first, some of the Country Reports were neither objective nor truthful, and for that reason U.S.-based human rights organizations annually published critiques of them as a way to generate a useful debate about the state of human rights in key countries around the world.<sup>61</sup> This practice of alternative reports undoubtedly contributed to the improvement, year by year, in the quality of the official State Department reports. In that process, diplomatic personnel in every American embassy abroad were charged with gathering information from all sources and drafting early versions of the annual report. The staff of the Bureau of Human Rights also became more proficient each year in double-checking the accuracy of the drafts and providing a uniform structure and format. As Professor Koh states, in recent years the Country Reports have become so accurate and reliable that the Lawyers Committee for Human Rights has decided to discontinue the practice of writing critiques.

It must be stated that the improvement in the quality of reporting began in the 1980's, as the Reagan Administration waged rhetorical battles with U.S.-based NGOs about the true state of human rights in many countries. In spite of the highly charged nature of the subject matter, the professionalization of the reporting process transcended politics. The State Department bureaucracy embraced the concept of human rights, understood the value of truthfulness in reporting, and now engages in a serious, credible annual exercise. In the process, the Country Reports have become indispensable reading material for other government agencies, Congress, human rights advocates, and even for foreign officials, journalists and other decision-makers. They now contribute significantly in each country to the development of domestic human rights policies; they objectively support the findings of domestic monitors, even if those findings are unpopular with the governments. In that sense, they are a

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60. 22 U.S.C. § 2304.

61. Human Rights Watch (HRW) and Lawyers Committee for Human Rights (LCHR) published joint reports in the early and mid-1980s. Later LCHR continued publishing the Critiques, while HRW published annual reports on the Administration's policies toward certain countries.



source of important moral support for the victims of abuse, and provide a protective cover to human rights defenders who often conduct their work in difficult circumstances.

The country reports have sometimes had the effect of highlighting the inconsistency of U.S. policies towards some countries. Although it would be desirable that American relations with repressive governments were always consistent with the condemnation of their practices made in the country reports, it is better to have that inconsistency than to make the country reports tailor the truth to serve what are perceived to be U.S. interests in those countries. Reporting on human rights practices around the world must continue to live up to the present high standard if promotion and protection of fundamental freedoms is to be effective.

*E. Self-criticism and root causes of violations*

Even when the United States criticizes policies of repressive governments (or of repressive actors and institutions in democratic regimes), public opinion in those countries often distrusts the intentions of different American administrations.<sup>62</sup> This in turn conspires to limit the effectiveness of American statements and measures. One reason for this distrust is that American officials almost never acknowledge any history of past American support for those repressive state agents or institutions. Year after year, the State Department acts as if it was writing on a clean slate, especially when it comes to U.S. support for repressive policies in the past. This is not to say that all human rights violations of the present can be traced to American mistakes of the past; that would be an extreme and simplistic view of the world, and one that unduly relieves actual perpetrators of atrocities—and the societies in which they commit them—from their own responsibilities.

It would, however, lend credibility to U.S. efforts to promote human rights if there were some acknowledgment that past support for undemocratic forces, whatever the context in which it happened, is no longer countenanced and will not be countenanced in the future. Acknowledgments of past error, like the one made by President Clinton regarding the international community's failure to respond adequately to the genocide in Rwanda in 1994, have been all too rare.<sup>63</sup> It has been almost impossible in our day to elicit some recognition from relevant actors—for example, that U.S. plots to bring about a *coup d'etat* in Chile in 1973 was fairly interpreted by General Pinochet as a blank check to

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62. *La Argentina y los derechos humanos*, LA NACION (ARGENTINA), Mar. 14, 2002.

63. Holly J. Burkhalter, *The Question of Genocide: The Clinton Administration and Rwanda*, 11 WORLD POL'Y J. 44 (1994).

engage in criminal policies towards dissidents.<sup>64</sup> We are still waiting to hear some expression of regret from high officials in the Reagan Administration that defended the Argentine military regime as a “friendly authoritarian” government, and turned a blind eye to the tragedy of forced disappearances of thousands of victims.<sup>65</sup>

More pertinent to the issues of the day, there is hardly any debate about U.S. responsibility for the Frankenstein-like creation of a monster that later became the Taliban and Al Qaeda, when it was expeditious to the struggle to prevent the Soviet Union from establishing a foothold in Afghanistan. In the United States, policies are always formulated on the basis of the immediate need, with little effort to learn the lessons of recent history. Such a short memory span will probably condemn the United States to repeat its mistakes. It is even more troubling to see a rush to engage again in support for the “dirty war” tactics of allies, on the grounds that the present emergency justifies it. Since September 11, there have been numerous proposals to lift the ban on assassinations and on hiring foreign agents known to be engaged in torture and killings.<sup>66</sup> The prohibition on murder of foreign leaders was imposed on the CIA as a result of the revelations of the committee chaired by Senator Frank Church in the 1970’s.<sup>67</sup> The restriction on employing torturers and killers as “foreign assets” came about in the late 1990’s, when it was revealed that a Guatemalan colonel in the payroll of the CIA had been involved in the murder of a guerrilla leader married to American attorney Jennifer Harbury.<sup>68</sup> In recent weeks, and as the campaign in Afghanistan started, many voices called for the lifting of those restrictions.<sup>69</sup>

There is also the tendency to disregard the long-term contributing factors to present-day challenges when designing and implementing responses. The extreme poverty and hopelessness that results from the anarchic process of

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64. Evo Popoff, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT’L L. REV. 363 (2001).

65. David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*, 75 MINN. L. REV. 1009 (1991).

66. Friedman, *supra* note 21; Walter Pincus & Dan Eggen, *New Powers Sought for Surveillance; Assassination Ban May Be Lifted for CIA*, WASH. POST, Sept. 17, 2001, at A01.

67. Church Committee to Study Governmental Operations with Respect to Intelligence Activities, *Alleged Assassination Plots Involving Foreign Leaders*, S. Rep. No. 94-465 (1975) and Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), issued by President Gerald Ford.

68. Linda Greenhouse, *Widow Argues for Right to Sue Officials*, N.Y. TIMES, Mar. 19, 2002, at A19.

69. The BBC reported in October that the restrictions may have been quietly lifted. *See CIA’s Licence to Kill*, BBC NEWS, Oct. 23, 2001, available at [http://news.bbc.co.uk/hi/english/world/newsid\\_1613000/1613423.stm](http://news.bbc.co.uk/hi/english/world/newsid_1613000/1613423.stm); *Fighting a ‘dirty war,’* BBC NEWS, Sept. 21, 2001, available at [http://news.bbc.co.uk/hi/english/world/americas/newsid\\_1555000/1555760.stm](http://news.bbc.co.uk/hi/english/world/americas/newsid_1555000/1555760.stm).

globalization does not justify the resort to fanaticism and terror. Likewise, communities that have been marginalized and humiliated by war and occupation, and by unjust settlement of disputes, do not have for that reason a right to irrational reactions. But it does not take much of an effort to see that poverty and humiliation is the breeding ground where intolerance, irrationality and fanaticism grow. In this sense, the urgency of military answers to terrorism should not obscure the vision of our policy-makers; they should realize that a purely military solution to today's problems will cause such destruction and hopelessness as to ensure the future reproduction of the Talibans and Al Qaedas.

If for no other reason than the need to prevent future terrorism, U.S. policies to promote and protect human rights in other lands should incorporate a serious concern for the material conditions in which democracy and human rights can flourish. Those conditions are directly linked to the urgent reduction of extreme poverty and to the promotion of equality and non-discrimination and the creation of economic opportunity.

### III. CONCLUSION

At present, it would seem like a quarter century of a bipartisan policy designed to promote human rights and freedoms everywhere may not survive the current emergency. There are, of course, serious grounds to consider the post-September 11 events a challenge that requires extraordinary measures. Yet, the tendency to present the situation in the starkest terms is both misleading and dangerous. Despite the extreme gravity of the losses suffered on September 11, the United States is not facing a threat to "the life of the [N]ation," such as would justify exceptional measures in accordance with international human rights law.<sup>70</sup> The domestic measures adopted by the Department of Justice affecting civil liberties are presently directed mostly against non-Americans, but they affect the quality of life for *all* persons living in this country. More significantly, they constitute an unnecessary and unlawful departure from the proudest American traditions of rule of law.

Similarly, American interest in promoting and protecting the rights of persons around the world will probably take a very low priority in the current climate, especially if that interest is perceived as in conflict with the more urgent designation of allies and adversaries according to each country's attitude towards the campaign against international terrorism.

If either of these pessimistic scenarios materializes, the suicidal attackers of September 11 will have won an important victory. Their main objective, and that of their masterminds, was to provoke the United States into

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70. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., art. 4, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

abandoning its tradition of tolerance and pluralism and to conjure up the ugly face of repression.

On the other hand, civil liberties in the domestic setting and human rights promotion as part of foreign policy have one thing in common: they both stem from values that Americans cherish and try to practice every day. For that reason, it is perhaps safe to remain confident that in the long run civil liberties and human rights will survive the current menace and endure as long-term practices and policies of this country.<sup>71</sup>

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71. Ignatieff, *supra* note 48; *see also* Roberta Cohen and Kenneth Roth, Letters To the Editor, in *Human Rights: The Long View*, N.Y. TIMES, Feb. 7, 2002, at A28.

