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Phillip R. Trimble

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HUMAN RIGHTS AND FOREIGN POLICY

PHILLIP R. TRIMBLE*

The promotion of human rights fits comfortably into the rhetorical projection of United States foreign policy from the point of view of conservative as well as liberal politicians, and it has been an enduring element of our cultural consciousness. As expressed in the seventeenth century by John Winthrop, we have regarded ourselves as a “City upon a Hill,”¹ an example to be emulated by the rest of the world. Our lessons have included popular sovereignty, democratic liberalism and free market capitalism. In the twentieth century, as a nation we promoted the rule of law and human rights, taking the lead in establishing the institutional structures that provide the framework for contemporary international relations—the United Nations (U.N.) Charter, the World Bank, the International Monetary Fund and the World Trade Organization—and introducing human rights considerations into some of their deliberations. We took a leading role in the creation of two separate spheres of a new international human rights law: (1) the 1948 Universal Declaration of Human Rights (UDHR),² which laid the foundation for the development of substantive civil law principles, and (2) a new phase of international criminal law with the Nuremberg and Tokyo war crimes tribunals.

Harold Koh and his colleagues in the Clinton Administration continued and enhanced this American tradition. Now, in his article, *A United States Human Rights Policy for the 21st Century*,³ Professor Koh has provided an ambitious blueprint for future administrations to follow in continuing our country’s support for international human rights into the twenty-first century. From the perspective of a human rights advocate, the Koh principles are unimpeachable. But there are other perspectives that also reflect American values and influence U.S. foreign policy, such as international military security, multinational business, investment and trade, and economic

* Professor of Law Emeritus, University of California, Los Angeles.

1. John Winthrop, *A Modell of Christian Charity*, in AMERICAN SERMONS: THE PILGRIMS TO MARTIN LUTHER KING JR. 42 (Library Classics of the United States, Inc. ed., 1999) (1630), available at <http://www.mtholyoke.edu/intrel/winthrop.htm> (last visited Apr. 3, 2002).

2. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/RES/217 A (III) (1948), available at <http://www.un.org/Overview/rights.html> (last visited Apr. 3, 2002).

3. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

development assistance. In light of these potentially conflicting considerations it is unrealistic to expect that pure human rights principles can always be implemented. Indeed, to the contrary, in some situations the pursuit of human rights objectives may well be undesirable.

I. THE INTERNATIONAL CIVIL LAW OF HUMAN RIGHTS

Professor Koh is correct to emphasize the importance of collecting and reporting information to the entire human rights enterprise. Especially in the early years, the human rights movement's most verifiable achievements consisted of "shaming" abusive governments in the hope that negative publicity would translate into an enforcement mechanism for change. The problem of enforcement is still a significant⁴ problem facing the protagonists of human rights, and shaming is still a principal enforcement technique. In that regard, the State Department's annual country reports on human rights practices and religious freedom provide, as Professor Koh suggests, an important "official . . . information base" for United States policy-making, and a resource for international institutions, media and non-governmental organizations (NGOs) around the world.⁵ They provide a powerful supplement to the international chorus constructed by human rights institutions and NGOs for the purpose of "shaming" abusive governments. And their credibility depends on the perception of the concerned community that the government is "telling the truth."

On the surface that imperative is not controversial. Yet, it is important not to underestimate the complexity of achieving this objective. First, those who collect the information and compile the reports are diplomats and officials of the State Department; they are not judges. They are by profession trained to understand the cultures they encounter on their own terms. They value good relations with their foreign counterparts and are adept at the art of compromise. Their understanding of "the truth" inevitably is conditioned by their professional role, and will not infrequently be quite different from that of a human rights advocate. If publishing the truth about Saudi police practices and treatment of women has an impact on something important, like investment decisions or travel restrictions on its elite, then we can also be certain that Saudi Arabia will exert counter-pressure to revise the report. It should not be surprising to see a resulting report reflecting a measure of obfuscation and ambiguity, for which diplomats are properly trained.

Second, telling "the truth" may not always be the most prudent course of action in the national interest. In this regard, it is important to keep in mind the fundamental anomaly, if not inconsistency, in thinking of foreign policy and

4. A more significant problem is acceptance of human rights norms. See *infra* text accompanying note 11.

5. Koh, *supra* note 3, at 306.

diplomatic pressure as enforcement mechanisms for human rights. Most fundamentally, foreign policy is inherently an unprincipled enterprise, reflecting compromises of values and objectives on an ad hoc basis. Human rights, on the other hand, embody principle, universally and consistently applied. Foreign policy is about politics; human rights is about law. It is neither realistic nor desirable for the values of human rights advocacy to be perpetually paramount to all other values sought to be protected by American foreign policy. The range of those other values covers a full spectrum, from the crass, like protecting a corporation's investment position, to important national objectives such as protecting an unfettered supply of oil, an open trade environment, nuclear non-proliferation, and—especially after September 11—defense, intelligence and police cooperation in combating terrorism. It would, for example, seem prudent to moderate criticism of Russia's practices in Chechnya in exchange for cooperation in Central Asia helpful to supporting the war in Afghanistan.⁶ Accordingly, a blueprint for American human rights policy in the twenty-first century must acknowledge that human rights are but one of many values promoted by American foreign policy, and will not always receive prominent treatment.

A second fundamental problem in achieving the ambitious agenda outlined by Professor Koh is the awkward fact that, empirically, human rights are not universal, notwithstanding the assertions of their proponents and their overly optimistic inferences from the 1993 Vienna Declaration on Human Rights.⁷ This problem has been with us from the beginning. The UDHR was adopted at a time before most contemporary states existed, and before the full dimensions of cultural differences were in the educated public consciousness.⁸ The Declaration was also a product of political compromise, masking fundamental disagreements under general language and conflicting "rights."⁹ And of course, as a General Assembly resolution, it did not purport to be legally binding so a vote in its favor carried no political cost.¹⁰

Since then, of course, enormous progress has been made in drafting, and bringing into force legally binding treaties covering all aspects of human rights. These accomplishments should not be underestimated. Nevertheless, they reflect the limitations inherent in the "top-down" approach to achievement of human rights goals and there are two significant defects in the treaty-making process. First, many states have adopted broad reservations, precluding

6. Of course, if a Human Rights Report does not make any significant difference to anyone, then telling the truth does no harm. I am inclined to believe, however, that the reporting exposure over time does have an impact.

7. *Vienna Declaration and Programme of Action*, U.N. GAOR World Conference on Human Rights, 48th Sess., U.N. Doc. A/CONF.157/23 (1993).

8. G.A. Res. 217A (III), *supra* note 2.

9. *See generally id.*

10. *See generally id.*

coverage of politically or culturally sensitive topics, like gender equality. Second, many states that have ratified the important treaties have little dedication to the rule of law in the first place. These states collectively include those which are the worst violators of human rights, such as Iraq, China and the Sudan. The uncomfortable fact is that many governments become parties to conventions that they simply do not intend to implement beyond the most formal measures.

That phenomenon calls attention to the critical importance of the “inside-outside” approach outlined by Professor Koh.¹¹ If rights are to be realized, it is often more than simply a matter of formal law, such as by assuring that the norms have been adopted and are enforced in the same manner as ordinary domestic laws. For any domestic incorporation of international norms to be effective, the host society must embrace a culture of respect for rights and the rule of law. This in turn, in some cases, entails fundamental cultural change.

The process of cultural change is, of course, complex and varies from society to society. Nevertheless, there are some elements that could be addressed as a matter of U.S. foreign policy. These include nourishing through the development assistance program community organizations and other elements of civil society. Such support may not easily fit the contours of traditional “economic development,” but a flourishing civil society undoubtedly creates a demand for human rights.

United States foreign policy could also devote substantially more resources to exposing populations in human-rights deprived countries to Western culture in the form of film, radio, television and popular literature, which could indirectly promote the ideas of choice, new values, alternative social roles (especially for women) and the desirability of human rights. People-to-people diplomacy could also be boosted. The Peace Corps could be expanded. Wide-ranging exchange programs, involving business people, technicians, students at all levels, academics, artists, journalists and others, could expose people to the ideas and values of each other’s cultures. At a governmental level we could expand training military, police and judicial figures.

These projects do not necessarily focus specifically on human rights, but indirectly help create an environment in which their premises—such as the preeminence of individual choice—are introduced and demand for rights increased. Funding programs of these types also enable the United States to avoid directly challenging another government while creating conditions for more successful “top down” intervention later. In the long run, dissemination of ideas through civil society may be the most effective tool for social change, including human rights implementation. The emphasis of human rights foreign policy should thus focus on this level and not worry so much about the politics

11. Koh, *supra* note 3, at 316-22.

of the U.N. Human Rights Commission or photo opportunities accompanying various declarations at high level meetings.

II. THE INTERNATIONAL CRIMINAL LAW OF HUMAN RIGHTS

The Clinton Administration revived attention to another, entirely different part of the human rights universe—international criminal law—by leading the U.N. Security Council to establish War Crimes Tribunals for the former Yugoslavia and for Rwanda and by signing the treaty creating an International Criminal Court (ICC).¹²

International human rights law deals primarily with the responsibility of governments for the treatment of its citizens and the attendant civil liability of governments and government officials.¹³ In that sense it is like domestic constitutional and tort law. International criminal law, on the other hand, deals with the criminal responsibility of government officials and ordinary soldiers for acts committed in war, civil war and other armed conflict. The substance of the law governs the conduct of war, such as the treatment of prisoners and civilian populations and the regulation of weapons. This body of law traces its origins to customary international law codified in conventions at the 1899 and 1907 Hague Peace Conferences, the Geneva Conventions of 1949 and the Geneva Protocols of 1977.¹⁴ The crimes defined internationally in these treaties have been generally applied by states through domestic military or other courts. Until the ICC there was no generally available international tribunal with jurisdiction to try these internationally-defined crimes.

After World War II, the victorious Allies established the Nuremberg and Tokyo International Military Tribunals, with authority to try German and Japanese officials for “war crimes” and “crimes against humanity.”¹⁵ Subsequently, the U.N. International Law Commission (ILC) spent more than

12. Rome Statute of the International Criminal Court, December 31, 2000, 37 I.L.M. 999, available at <http://untreaty.un.org/English/notpubl/rome-en-c.htm> [hereinafter Rome Statute].

13. It also imposes obligations on governments with respect to activity within the “private” sphere, but, except for the Torture and Genocide Conventions, does not define and require punishment of an international crime. See also *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., U.N. Doc. A/RES/39/46 (1984), available at <http://www.un.org/documents/ga/res/39/a39r046.htm> (last visited Apr. 3, 2002); *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260 (III) A, U.N. Doc. A/260 (III) A (1948), available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm (last visited Apr. 3, 2002).

14. For a brief description of these achievements, see Women’s Int’l League for Peace and Freedom, *The Laws of War—Also Known as International Humanitarian Law*, at <http://www.peacewomen.org/un/icj/warlaw.html> (last visited Feb. 9, 2002).

15. Rome Statute, *supra* note 12, art. 5. They were also tried for “crimes against the peace,” which was undefined, but referred to waging a war of aggression. The new ICC will have jurisdiction over such crimes “once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.” *Id.*

four decades attempting to draft an international criminal code with jurisdiction for an international court. That work was fruitless until the end of the Cold War. At that time, the U.N. Security Council was no longer disabled by the threat of U.S. or Soviet vetoes and responded to the atrocities in the Balkans and in Rwanda by establishing ad hoc war crimes tribunals to deal with those specific situations. The crimes over which they had jurisdiction built on the definitions applicable in the Nuremburg and Tokyo trials and in the ILC draft code. Finally, in 1994, the U.N. General Assembly created a Preparatory Committee to draft a statute for a permanent international criminal court, which produced the 1998 Rome Statute for the International Criminal Court.¹⁶

After fifty years, and in no small part because of the Clinton Administration's dedication to the objective, the world soon will have a permanent criminal court to deal with genocide, war crimes and crimes against humanity. On the surface this seems like a major landmark in the development of international human rights, a pillar of criminal law comparable to the pillar of civil law consisting of the UDHR and the core international Covenants and Conventions. President Clinton signed the ICC convention shortly before leaving office, thereby marking the U.S. contribution to its creation.¹⁷

Nevertheless, the ICC is not likely to play a significant role for the foreseeable future in U.S. foreign policy. Conservative Republicans have strongly opposed U.S. adherence on the grounds that U.S. military personnel would be subject to politically motivated prosecutions, even as they participate in U.N. Peacekeeping Operations. President Bush has announced that he will not send the treaty to the Senate for its approval.¹⁸

III. THE IMPLICATIONS OF SEPTEMBER 11, 2001

The implications of the September 11 attacks on the United States overwhelm the subject of this Childress Lecture, but some aspects of the Bush Administration's reaction carry implications for international human rights diplomacy.

In creating a legal framework in which to examine the September 11 attacks, one can view them as a crisis of foreign policy, military security and war. Or they can be viewed as a problem of law enforcement and criminal justice involving crimes both under domestic law and under international criminal law. The two approaches are not mutually exclusive; but neither quite captures the reality of the situation. The attacks were not "war" in the classic sense of a national army attacking another, or even in the sense of civil war

16. *See generally id.*

17. *See* Bill Richardson, *Shunning the International Criminal Court Would Be Wrong*, INT'L HERALD TRIB., Aug. 22, 2001, at <http://www.iht.com/articles/29991.html>.

18. *Id.*

that became so common in the late twentieth century. Nor were the attacks common crimes in the sense of acts deviating from societal norms. They were attacks on the norms themselves; an assault on the United States as a society and on its government, its foreign policy, its economic success and dominance, and its reflection of modern culture. Accordingly, the attacks can be viewed from three different, but not mutually incompatible, perspectives: as a domestic crime, as an international crime or as an act of war. The Bush Administration responded on all three fronts. Most prominently, it treated the attacks as an act of war and responded within the legal authority provided domestically by an act of Congress and internationally by the inherent right of self-defense reflected in Article 51 of the U.N. Charter.¹⁹ Its legal claims on both counts were soundly based and uncontroversial. In treating the attacks as international crimes, on the other hand, the Administration's responses was constitutionally unusual and controversial, and may raise problems for U.S. human rights diplomacy.

The September 11 attacks, of course, were crimes under U.S. domestic law, and the perpetrators could be tried as ordinary criminals, as was the case of the perpetrators of the earlier World Trade Center bombing and the bombing of the U.S. embassies in Nairobi and Dar Es Salaam. Such trials would not be easy: most of the participants and evidence are abroad, and perhaps not in jurisdictions willing to cooperate with extradition and information sharing; much of the evidence would probably be based on intelligence sources and methods that cannot be disclosed in open court or shared with the defendants; and finding an impartial jury would be challenging. Moreover, one could readily imagine a reincarnation of the O.J. Simpson trial, in which protracted proceedings could degenerate into a trial of U.S. foreign policy or the merits of globalism. In any event, even though American lawyers may not doubt that the United States could conduct a fair trial of Osama bin Laden, it is likely that many foreign observers would not be as generous.

Consequently, some commentators have suggested an international trial of some sort, perhaps an ad hoc tribunal established by the Security Council or a tribunal established by special international agreement.²⁰ The crimes committed on September 11 were not only U.S. domestic crimes; they were also international crimes, namely, crimes against humanity and war crimes. These are crimes of the sort that the rejected International Criminal Court (ICC) could deal with once it is established and of the sort dealt with by special War Crime Tribunals established by the U.N. Security Council for the former

19. U.N. CHARTER art. 51.

20. The International Criminal Court, which the Bush Administration rejected, *see supra* text accompanying note 18, would also deal with crimes against humanity and war crimes. *See* Rome Statute, *supra* note 12, art. 5.

Yugoslavia (ICTY)²¹ and for Rwanda (ICTR).²² The Bush Administration, however, decided to proceed unilaterally. Although the FBI and domestic law enforcement agencies treated the attacks as domestic crimes from the beginning and conducted investigations in that manner, the Bush Administration eventually elected to treat the attacks as also being violations of the laws of war. However, instead of seeking an international tribunal, the Administration maintained its preference for unilateral action based on domestic law and unilateral interpretations of international norms.

By Military Order, the President provided for trial by military tribunals of any non-citizen that the President determined was a member of Al Qaeda or was a person who engaged in, aided or abetted, or conspired to commit acts of terrorism, or was a person who knowingly harbored a terrorist.²³ Such individuals could be tried for “violations of the laws of war and other applicable laws by military tribunals.”²⁴ The procedures would be established by the Secretary of Defense.²⁵ They would not necessarily carry safeguards provided by the Bill of Rights, and the only appeal would lie to the Secretary or the President.²⁶ Moreover, the Order seems intended to effect a suspension of the writ of habeas corpus in that it provides that the defendant “shall not be privileged to seek any remedy or maintain any proceeding . . . [in] any court . . .” including federal, state, foreign and international tribunals.²⁷

In executing the Order, the President relied on his constitutional authority as President and as Commander in Chief,²⁸ in addition to implied statutory authority under the Uniform Code of Military Justice.²⁹ The Order declares that the attacks created “a state of armed conflict that requires the use of the United States Armed Forces.”³⁰ The reference to the “laws of war” suggest that the military tribunals would try defendants for international war crimes and crimes against humanity, which the ICTY, ICTR and ICC have dealt with. Nevertheless, it may be questioned whether the September 11 attacks and U.S. response fully add up to “war” for purposes of invoking the Geneva Conventions and the body of law (which in any event is customary international law) comprising war crimes. The concept of crimes against

21. U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993).

22. U.N. SCOR, 49th Sess., 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994).

23. Press Release, Office of the Press Secretary, President Issues Military Order (November 13, 2001) [hereinafter Press Release], available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

24. *Id.* § 1(e).

25. *Id.* § 4(b).

26. *Id.* § 4(c)(8).

27. *Id.* § 7(b).

28. U.S. CONST. art. II, § 2, cl. 1.

29. See generally Press Release, *supra* note 23.

30. *Id.* § 1(a).

humanity seems broader, and the U.N. Human Rights Commissioner opined that the attacks amounted to such crimes.³¹ Absent an international tribunal, however, it will be up to the United States, acting through these special military courts, to elaborate the meaning of its jurisdictional charter. The reference to “other applicable laws”³² may also suggest possible trials for violations of regular federal and state criminal laws. Such a sweep would seem anomalous for a military tribunal and gives added fuel to the extensive critical reaction to the Order.

Critics especially deplored the insensitivity to normal constitutional guarantees. It is nevertheless not so clear that the Order is constitutionally deficient. Since the eighteenth century Presidents have occasionally established military tribunals for the purpose of trying civilians for violations of the laws of war. Given that practice, it is at least arguable that the Bill of Rights applies differently to those tribunals than to an ordinary criminal trial. In addition, the question of whether the writ of habeas corpus may be suspended without Congressional authorization seems open to debate. There are two elements of the Order that nevertheless seem more questionable than others. Military tribunals historically have tried belligerents (meaning, persons associated with the enemy), thus to the extent that the Order covers terrorists generally, beyond those connected with the September 11 attacks, it departs from precedent. Moreover, to the extent that it purports to cut off access to foreign and international tribunals, it seems clearly beyond the President’s (and the United States’) authority. A possible problem for the Administration’s approach may come from the reluctance of Spain and other European governments to extradite suspects because of their belief that the military tribunals will not meet international human rights standards.³³ Such a reaction would starkly pose the political choice that governments must make between human rights values and those of military security.

The September 11 attacks may also offer a concrete test, although hypothetical, of how the ICC might address these problems. The ICC would probably not have been an effective alternative, even if the Statute had been in

31. See Naomi Koppel, *UN Rights Chief Decries Terror Acts*, THE ASSOCIATED PRESS, Sept. 25, 2001, available at 2001 WL 28012152.

The terrorist attacks on the United States were a “crime against humanity” under international law, the United Nations human rights chief said Tuesday.

Mary Robinson said she felt there was no doubt that the attacks constituted “a widespread, deliberate targeting of a civilian population”—one of the definitions of a crime against humanity set down in U.N. treaties. The attackers had “crossed a line” beyond terrorism, said Robinson, the U.N. High Commissioner for Human Rights.

Id.

32. Press Release, *supra* note 23, § 1(e).

33. T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.: Allies Oppose Death Penalty and Bush’s Plan for Secret Military Tribunals*, WASH. POST, Nov. 29, 2001, at A23, available at <http://www.washingtonpost.com>.

force on September 11 and even if the United States were a party. It is debatable whether the September 11 atrocities are within the jurisdiction of the Court, and in any event the Court's jurisdiction could be precluded by an investigation and prosecution of the defendants (assuming that they would be Osama bin Laden and others in the Al Qaeda network) by Saudi Arabia, Afghanistan or another state.

The investigation or prosecution must be "genuine," and not for "the purpose of" shielding the defendant, or with "unjustified delay," or not "conducted independently or impartially, and . . . conducted in a manner . . . inconsistent with an intent to bring the person concerned to justice."³⁴ These elaborate principles of complementarity, which would serve to protect U.S. personnel serving abroad, could also permit a trial in a foreign court, so that the ICC might never get the case. Moreover, although the U.N. Commissioner for Human Rights, Mary Robinson, opined that the attacks were crimes against humanity, the text of the Rome Statute presents some ambiguity. To be covered the acts would have to be "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."³⁵ Their status as "war crimes" is also contestable.

The most immediate shift in the Bush Administration's foreign policy since the September 11 attacks was its shift from a penchant for a unilateral foreign policy toward multilateral engagement in its multiple responses to the attacks. Although that shift seems to have been temporary, achievement of the long-term goal of suppressing terrorism will require multilateral cooperation on a grand scale. The most daunting challenge to American foreign policy is the creation of a series of coalitions—to wage the war, to track down terrorists assets, and to suppress future terrorist conspiracies that may threaten the United States. It will be a challenge to Congress as well as to the Executive Branch, requiring, for example, more generous appropriations for foreign policy oriented programs and reconsideration of unproductive economic sanctions legislation.

The most important, and most difficult, challenge in the long term for the country—Congress as well as the President—is to create an anti-terrorism coalition, in Europe, Asia, Africa and the Middle East, that can suppress terrorist conspiracies at their roots. This cannot be done by the United States and NATO from outside, but must be done internally through effective police, law-enforcement and education by governments, many of which we have been at odds with over a whole range of issues. To induce neutral, indifferent and even traditionally hostile governments to effectively stop terrorists conspiracies, to deploy sufficient police effort to law-enforcement, to share

34. Rome Statute, *supra* note 12, art. 17 § 2(a)-(c).

35. *Id.* art. 7 § 1.

intelligence information and to cooperate securely in trans-border investigations will require significant inducements. This will be the hard part.

First, we will need to reestablish or substantially upgrade diplomatic relations with states that have been anathema to us in the past (for instance, Iran, Iraq, Libya, Lebanon and Syria, just to name some in the Middle East). Second, we will need to offer inducements for genuine cooperation, not only from key states like Iran, but also from states that may not in fact turn out to be willing to match action on the ground with public rhetoric. This will require money to support the foreign police and intelligence help we seek. For these appropriations of foreign assistance Congress will have to be generous to a greater degree than in the past. Third, we will need to change failed policies based on economic sanctions and isolation in favor of inducements to cooperation and interaction. This, too, would require Congressional action as well as new Executive policy. Fourth, the President and political, social and religious leaders throughout the country should mount serious public educational efforts to help the American people better understand the extent and basis of the anger against our country and the conditions abroad with which our foreign policy is designed to deal. Finally, while we affirm our support for Israel, we need to move decisively to create the state of Palestine, acting if necessary through the U.N. Security Council in the manner employed to create the state of Israel.

