

4-24-2002

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Recommended Citation

Aryeh Neier, *Presidential Leadership: An Essential Ingredient*, 46 St. Louis U. L.J. (2002).
Available at: <https://scholarship.law.slu.edu/lj/vol46/iss2/8>

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PRESIDENTIAL LEADERSHIP: AN ESSENTIAL INGREDIENT

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As a distinguished scholar-practitioner, Harold Hongju Koh came to his post as Assistant Secretary of State for Human Rights with the best possible preparation. His performance fulfilled the high expectations of proponents for human rights. Though I count myself among his many admirers, I devote this Essay to a couple of points on which I take issue with the views he expresses.

The first has to do with the question of early warning. I touch on this only briefly because it is the subject of a new book by Samantha Power, *A Problem From Hell*.¹ It is not possible here to do justice to the issues Ms. Power discusses in her excellent book on the American response to genocide. Suffice it to say that the evidence Ms. Power collects about several recent genocides—the Cambodian holocaust of the mid-1970’s, the Iraqi “Anfal” in which Kurds were slaughtered in 1987-88 at the end of the Iraq-Iran war, the Bosnian disaster of 1992-95 and the Rwandan genocide of 1994—is at odds with Harold Hongju Koh’s view that the issue is “getting the right information into the right hands at the right moment, before large-scale abuses actually take place, in time to generate the political will necessary to head off the explosion of atrocities.”² Unfortunately, it appears the problem in responding to genocide is not an absence of information or the question of who has the information on a timely basis. Nor is political will to respond generated spontaneously by getting these things to come together. The Bosnian case is the most glaring example. Far from a shortage of information, Americans and everyone else were saturated with news coverage of what was taking place. Thanks to satellite communications, the siege of Sarajevo led the nightly news almost every evening for an extended period. After a few weeks in which their existence was concealed, journalists such as Roy Gutman and Ed Vulliamy ensured that we knew all about death camps such as Omarska and Keratem. Mass rape was widely reported. Yet it took more than three years, close to 200,000 deaths and the forcible expulsion of about two million people from their homes and communities until the United States and its NATO allies

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1. SAMANTHA POWER, *A PROBLEM FROM HELL* (2002).

2. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 323 (2002).

acted. Leadership was the missing element. Had there been leadership, enough information was known in good time about Cambodia, about the Kurds in Iraq and about Rwanda so that action could have been taken. Without it, nothing was done.

Mr. Koh writes that “if there is reason to believe that atrocities are about to happen, the United States should engage in preventive diplomacy—by which I mean diplomacy backed by force”³ I agree. But as I am sure Mr. Koh would concur, such diplomacy can only be effective if the threat of force is credible. At the time the Rwandan genocide took place in 1994, the war in Bosnia and the news of carnage there had been underway for two years. I am skeptical that diplomatic efforts by the United States or the European powers could have succeeded in preventing the Rwandan genocide at that point. Their unreadiness to intervene forcefully to halt a genocide in the center of Europe made it unlikely they would do what was required to prevent a genocide in the center of Africa. This was well understood by the Rwandan government officials who planned and organized the genocide. As it was, the United States led the effort in the United Nations Security Council to evacuate United Nations (U.N.) troops stationed in Rwanda. This was not a sign that our government lacked information; rather, it suggested awareness that the situation was deteriorating rapidly and reflected a desire to avoid an engagement that might lead to deeper involvement. The Rwandan genocide began just six months after eighteen American soldiers were killed in Mogadishu.⁴ Eagerness to avoid a repetition of such an event seems to have been the main concern of the United States. To back up preventive diplomacy with a credible threat of force would have required leadership by a President who gave higher priority to stopping genocide.

The second point on which I take issue involves China. Mr. Koh writes that: “In the end, we delude ourselves if we believe that a country as large and powerful as China will change its conduct simply because one other country happens to impose unilateral economic sanctions upon them.”⁵ I acknowledge that there is only scant evidence to contradict Mr. Koh on this point. One reason for this lack of evidence is that not much by way of economic sanctions has ever been imposed on China. Hence, the question of whether such sanctions would work is largely a matter of speculation. The same may be said, however, for Mr. Koh’s contrary proposition. He states that: “The only

3. *Id.* at 324.

4. See Samantha Powers, *Bystanders to Genocide*, THE ATLANTIC ONLINE (Sept. 2001), at <http://www.theatlantic.com/issues/2001/09/power.htm> (last visited Apr. 8, 2002); Lieutenant Commander Glenn T. Ware, *The Emerging Norm of the Humanitarian Intervention and Presidential Decision Directive 25*, 44 NAVAL L. REV. 1, 27-28 (1997); Major James W. Herring, Jr., *We Wish to Inform You That Tomorrow We Will be Killed With Our Families*, 162 MIL. L. REV. 236, 238-39 (1999) (book review).

5. Koh, *supra* note 2, at 322.

way to bring about a long-term change in Chinese behavior is to organize an ongoing, sustained, multilateral and bipartisan engagement with China that repeatedly emphasizes the communal values of the global system”⁶ I am uncertain whether Mr. Koh would agree that the engagement that has been underway with China meets this standard. What can be said, however, is that it has been sustained, multilateral and bipartisan—though perhaps lacking in an emphasis on values—but there is no evidence that it has produced any change in Chinese conduct. Certainly, it has not modified Chinese treatment of dissent. As Beijing’s response to the Falun Gong movement indicates, its conduct has not been modified in the slightest by engagement.⁷

It should be noted that the Chinese government has manifested its own belief in the efficacy of economic sanctions by imposing them on governments and corporations that criticize its human rights practices. Over the years, it has played the United States against Europe, taking its business away from Airbus when Europe was too outspoken about human rights and from Boeing when it was our government that caused annoyance. In 1996, China threatened to take its business away from the General Electric Company unless a subsidiary, NBC, issued an apology for the comments of a broadcaster covering the Olympics who pointed out—without providing any details—that the country had human rights problems.⁸ The apology was given. A few months earlier, Beijing cancelled a visit by German Foreign Minister Klaus Kinkel and threatened to take its business elsewhere because the Bundestag adopted a resolution critical of China’s policies in Tibet.

President George H.W. Bush imposed sanctions on China in 1989 following the June 3-4 crackdown on protests in Beijing’s Tiananmen Square.⁹ Those sanctions—which did not include denial of most favored nation status (MFN)—were violated by the Administration that imposed them almost before the ink on the declaration announcing them was dry. A debate on MFN began as the anniversary of the crackdown approached. By coincidence, the date for the annual presidential waiver of the Jackson-Vanik Amendment to the 1974 Trade Act happened to be June 3. That timing was a key factor in setting off the debates about MFN.

Each year for a few years, as June 3 approached, China released a few well known political prisoners and announced some other measures intended to show that its human rights practices were improving, such as ending martial

6. *Id.*

7. For information on the Falun Gong, see Koh, *supra* note 2, at 318 n.69; Erin Chlopak, *China’s Crackdown on Falun Gong*, 9 No. 1 HUM. RTS. BRIEF 17 (2001).

8. See *NBC Apologizes for Costas’ China remarks at Olympics*, AUSTIN AMERICAN-STATESMAN, August 23, 1996, at C2, available at 1996 WL 3441828; *Apology Issued For Bob Costas*, GREENSBORO NEWS & RECORD, August 23, 1996, at C6, available at 1996 WL 5782775.

9. See Deb Riechmann, *U.S. Courted As Crackdown Grew*, THE COLUMBIAN, June 4, 2001, at A4.

law in Lhasa, Tibet and its commencement of negotiations with the International Committee of the Red Cross to allow the Swiss organization to visit its prisons. Then, as Mr. Koh points out, President Clinton announced in 1994 that he was delinking trade and human rights.¹⁰ Thereafter, he would issue the annual waiver required under Jackson-Vanik without regard to the human rights situation. China responded by rearresting its most prominent political prisoner, Wei Jingsheng,—who had been released the previous year when China was trying to persuade the International Olympics Committee to designate Beijing as the site for the 2000 Olympics. Also, China ended its discussions with the International Committee of the Red Cross (ICRC) about access to its prisons. This is what I have in mind when I refer to “scant evidence” that sanctions, or at least the prospect of sanctions, promote change. Admittedly, it is not much to go on. But it is all we have.

There is, of course, substantial evidence that countries much smaller than China can be changed by economic sanctions for human rights abuses. The best examples are South Africa, where the U.S. Congress imposed sanctions in October 1986 over President Ronald Reagan’s veto;¹¹ and Poland, where the Reagan Administration unilaterally imposed sanctions following the declaration of martial law by the regime of General Wojciech Jaruzelski on December 13, 1981. The latter is a particularly instructive example because the Reagan Administration carefully calibrated the sanctions, modifying them as Warsaw made improvements and finally ending them in February 1987 when the last political prisoners were released.¹² And, more recently, there is the example of Yugoslavia. It is hard to say exactly what part was played by economic sanctions in the electoral defeat of Slobodan Milosevic in September 2000 and his overthrow a couple of weeks later when he refused to concede defeat. All that can be said was that the desire by Serbs to be free of the sanctions was one of a number of contributing factors.

The approach I favor for China—now, I regret to say, politically irrelevant—was embodied in legislation that Congress considered and adopted in 1992. Inspired by the Reagan Administration’s way of dealing with Poland after martial law, it would have imposed tariffs selectively on China. These would have been adjusted according to the way the human rights situation developed. Congress adopted this approach, but we have no way of knowing whether it would have worked because President George H.W. Bush vetoed it on September 28, 1992. The House of Representatives voted to override, but

10. See Koh, *supra* note 2, at 317.

11. “The Comprehensive Anti-Apartheid Act [of 1986], passed over President Ronald Reagan’s veto, banned new investments and bank loans to South Africa and prohibited bilateral trade in a number of goods.” Chronology of Foreign Policy-Related U.S. Trade Actions, at <http://usinfo.state.gov/journals/ites/0997/ijee/ejchron.htm> (last visited Apr. 8, 2002).

12. See Aryeh Neier, *Economic Sanctions and Human Rights*, in REALIZING HUMAN RIGHTS 291 (Samantha Power & Graham Allison eds., 2000).

the Senate vote of 59 to 40 fell short of the two-thirds majority required to enact the measure. Then-candidate William Jefferson Clinton denounced the President, his opponent in the elections that November, for “coddling tyrants” from Belgrade to Beijing. Upon election to office, however, President Clinton declined to intervene significantly in what Belgrade was doing to Bosnia until another three years had elapsed, and, in the interim, ended all efforts to influence Beijing’s behavior by threats of economic sanctions.

Though Clinton’s policies towards Belgrade and Beijing, as well as his policy toward Kigali, leave me unenthusiastic about his overall human rights record, I readily acknowledge that it had its attractive features. At the top of the list, I place his policy towards Kosovo which represented a determination to ensure that Milosevic would not be permitted to do again what he had done to Bosnia; and the designation first of John Shattuck and then of Harold Hongju Koh to serve as Assistant Secretary of State for Human Rights. My long-term colleague from our days when we both served on the staff of the American Civil Liberties Union in the 1970’s, Mr. Shattuck served, not always comfortably, during the period in which the policies involving trade with China unhampered by human rights considerations, non-intervention in Rwanda and greatly delayed intervention in Bosnia were formed and implemented. Mr. Koh’s service covered the latter Clinton years when what I consider the more affirmative action toward Kosovo was the highlight of the Administration’s policy on human rights.

As I feel certain Mr. Koh would agree, questions of the magnitude of relations with China or military intervention cannot be resolved by an Assistant Secretary of State. They take place in the context of a political process and must be decided by the country’s political leader, the President of the United States. An Assistant Secretary of State can contribute to the process by ensuring that the right information is available at the right time, but only the President can supply the leadership that Mr. Koh refers to as “political will.”¹³ It does not detract from what Harold Hongju Koh achieved, nor from what his predecessor, John Shattuck, did when he held the office of Assistant Secretary of State for Human Rights, to point out that the President they served was flawed.

13. Koh, *supra* note 2, at 323.

