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RESPONSE TO HAROLD KOH'S CHILDRESS LECTURE – A UNITED STATES HUMAN RIGHTS POLICY FOR THE 21ST CENTURY

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In his Childress Lecture, Professor Harold Koh sets out to help define human rights principles and strategic choices for the U.S. government in this era, which he terms the "new age of globalization."[1] He outlines four basic principles, which he asserts should be the cornerstone for government officials working on international human rights. These principles are:

1. Telling the truth,

2. Consistency toward the past—promoting accountability mixed with reconciliation,

3. Consistency toward the present—and what he terms inside-outside engagement, and

4. Consistency toward the future—including early warning, preventive diplomacy, the use of force where necessary and building democracy.[2]

Professor Koh, who played an extraordinary leadership role as the Assistant Secretary of State for the Bureau of Democracy, Human Rights and Labor in the last two years of the Clinton Administration, discusses these principles, drawing both on his practical experience in government and his broader intellectual background with respect to these issues. In reviewing his essay, I will focus on two of these principles, amplifying key points he made.

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1. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 304 (2002).

2. *Id*. at 295.

I. TELLING THE TRUTH

Professor Koh writes that telling the truth is the "first and most important task" for the U.S. government in carrying out its human rights policies.[3] He rightly focuses on the annual State Department Country Reports on Human Rights Practices, which he says "now form the heart of U.S. human rights policy."[4] As he describes, these reports provide an official information base upon which policy judgments can be made. Yet the history of these reports suggests the importance of outside vigilance and scrutiny, both in the preparatory process and the reports' content.

The Country Reports were first prepared in 1976, pursuant to a congressional mandate. The first volume, covering eighty-two countries that received U.S. military aid, was sent only to Congress; it was not intended for public release. It contained many inaccuracies and factual distortions. Private groups filed a Freedom of Information Act lawsuit to secure its public release. They prevailed, and as a result the 143-page report eventually was made public. The report drew instant attention, including criticism from those who saw it as harmful to U.S. policy interests, in part because it covered only U.S. allies receiving military aid. The State Department expanded the reports in response to this criticism and within two years the Country Reports had grown to include 154 countries, and were over 850 pages, more than five times the length of the initial report.[5] Last year's report covered 194 countries. For sixteen years, beginning in 1982, the Lawyers Committee for Human Rights published an annual critique of selected chapters of the Country Reports in an effort to address the political biases in the reporting process, which too often resulted in omissions and distortions of fact.[6] In the early 1980's, the Lawyers Committee's critiques were particularly critical of the chapters on Central American countries that were key U.S. allies, particularly El Salvador.[7] In 1988, the Lawyers Committee took a broader look at the reporting process, conducting extensive interviews with State Department officials in a broader effort to strengthen the reporting process.[8]

3. *Id*. at 306.

4. *Id*.

5. *See* Michael E. Parmly, *Introduction*, *in* DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000 [hereinafter COUNTRY REPORTS 2000], *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/648.htm (released Feb. 23, 2001); DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979 (1980).

6. LAWYERS COMMITTEE FOR HUMAN RIGHTS, A CRITIQUE OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (1982-1997).

7. *Id*.

8. LAWYERS COMMITTEE FOR HUMAN RIGHTS, 1988 PROJECT SERIES NO. 4, HUMAN RIGHTS AND U.S. FOREIGN POLICY: BUREAUCRACY AND DIPLOMACY (1989).

Over time, these efforts by the Lawyers Committee and other non-governmental organizations (NGOs) made a significant difference, and, as Professor Koh suggests, the State Department's reporting improved dramatically. It improved so markedly that in 1998 the decision was made to discontinue publication of the annual critique. There are areas, however, where the scope and content of the Country Reports need to be re-evaluated and refined. One prominent area is with respect to the human rights of workers, which is an important element of the evolving effort to enforce economic and social rights. The reports currently include sections on the right of association, the right to organize and bargain collectively, prohibition on forced labor, the status of child labor, and other acceptable conditions of work. The reporting on each of these points could be more detailed, and additional sections could be added. There could, for example, be a section on workplace health and safety, which would provide information on local government laws and enforcement procedures with respect to these important rights.

But challenges also remain in maintaining the high quality and reliability of the Country Reports, especially as comparisons with recent changes in U.S. law and procedures after September 11 become more striking. One issue that is likely to draw unprecedented attention in the future is the State Department's reporting on military tribunals or state security courts in countries like Egypt, Columbia, Peru and Turkey. This interest will arise in light of the Executive Order signed by President Bush in November 2001 authorizing the use of similar Military Commissions in the United States.[9] The State Department's most recent report on Peru, for example, included an analysis of the case of Lori Berenson, a U.S. citizen who was tried for terrorism in a military tribunal in Peru.[10] The State Department concludes that she was tried "without sufficient guarantees of due process."[11] The report goes on to say:

> Proceedings in these military courts—and those for terrorism in civilian courts—do not meet internationally accepted standards of openness, fairness, and due process. Military courts hold treason trials in secret. Such secrecy is not required legally, but in some cases the courts deem that circumstances require it. Defense attorneys in treason trials are not permitted adequate access to the files containing the State's evidence against their clients, nor are they allowed to question police or military witnesses either before or during the trial.[12]

9. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

10. *Peru*, *in* COUNTRY REPORTS 2000, *supra* note 5, *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/wha/827.htm (released Feb. 23, 2001).

11. *Id.* §e (Denial of Fair Public Trial).

12. *Id.*

In this and other country chapters, the world will be watching closely to see whether the State Department's criticisms in future Country Reports are muted, to avoid negative comparisons to the U.S. government's own handling of this issue.

Professor Koh rightly says that it is equally important for the U.S. government to report on our own human rights conditions. The State Department has no mandate to do this as part of the Country Reports. However, the U.S. government does have a regular reporting obligation to the United Nations as a party to three international treaties: the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture.[13] Each of these treaties obligates the U.S. government to submit periodic reports describing legislative, judicial, administrative and other measures to give effect to those rights.

The U.S. government submitted its first ever periodic report on human rights to the United Nations (U.N.) in 1994. It assessed U.S. compliance with the International Covenant on Civil and Political Rights. Unfortunately, this report focused almost exclusively on the protections afforded by the letter of U.S. law, rather than focusing on whether treaty standards are met in practice. There are a number of important areas where such violations continue to occur; these include: 1) conditions of detention in many federal and state prisons that do not meet treaty standards; 2) improper practices by law enforcement officials including use of excessive force; and 3) racial profiling in policing and other differences in treatment between races in the criminal justice system.[14]

While some initial efforts have been made by U.S. officials to publicize U.S. ratification of these human rights treaties, the compliance reports are not widely disseminated and receive very little public attention. In addition, there have not been adequate efforts to involve appropriate state and local officials in the reporting process, even though many of the most troubling violations occur at the local level.[15] In this regard it would be useful, for example, for the federal government to work with the National Association of Attorneys

13. International Covenant on Civil and Political Rights [hereinafter ICCPR], *adopted* Dec. 19, 1996, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter CERD], *opened for signature* Mar. 7, 1996, 660 U.N.T.S. 212; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter CAT], June 26, 1987, S. TREATY DOC. NO. 100-20 (1988); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *Human Rights in the United States: Domestic Implementation of Treaty Obligations*, *in* IN THE NATIONAL INTEREST: 1996 QUADRENNIAL REPORT ON HUMAN RIGHTS AND U.S. FOREIGN POLICY 61 (1996) [hereinafter 1996 QUADRENNIAL REPORT].

14. 1996 QUADRENNIAL REPORT, *supra* note 13, at 61-68.

15. *Id.*

General, the National Governors Association and other similar state and local organizations whose offices might effectively contribute to this process.

The U.S. government needs to put a higher premium on telling the truth about human rights in the United States and in taking concrete steps to improve U.S. rights performance accordingly. As the Lawyers Committee has urged in recent reports to new Presidential administrations, a strong record of U.S. compliance with international human rights standards is an essential underpinning for our ability to press concerns about abuses elsewhere.[16] When confronted by the United States and others, governments with poor human rights records often try to turn the tables and charge their accusers with violations of human rights.

A systematic effort to put America's own house in order would help the United States rebut such charges and keep the pressure on countries where abuse is egregious. United States criticism of other governments rests on the principle of the international rule of law—a clear set of norms that apply to all nations. To preserve its credibility in criticizing others, the United States must be willing to be held fully accountable to those same norms.

By any reasonable measure, the United State's overall human rights record is exemplary. The American Constitution and legal system are sources of understandable pride. The international human rights system bears to a great extent the mark of American models and authorship.

Yet no government or society is perfect, and there are areas in which the United States lags behind international standards of rights protection. There is a wide gulf between the U.S. record of respect for human rights and the record of those whom we criticize. An acknowledgment of our own flaws is more credible than a defensive posture and could only heighten the contrast.

> For example, racial discrimination in our justice system, particularly in the administration of the death penalty, is one such problem area. There has also been a clear pattern of racial profiling in some state and local police forces. And some American prisons have been the site of abuse against women, including sexual harassment and rape of women prisoners by corrections staff.[17]

These and similar problems in law and practice should be identified and the obstacles to progress should be honestly addressed. The defense of the U.S. record in international forums should be a balanced one that reflects reality. A strongly self-protective stance would only contribute to a perception that America sees itself as above the law. The United States has more to gain

16. LAWYERS COMMITTEE FOR HUMAN RIGHTS, IN THE NATIONAL INTEREST 2001: HUMAN RIGHTS POLICIES FOR THE BUSH ADMINISTRATION 108 (2001) [hereinafter BUSH ADMINISTRATION POLICIES]. *See also* 1996 QUADRENNIAL REPORT, *supra* note 13.

17. BUSH ADMINISTRATION POLICIES, *supra* note 16, at 109-10.

from presenting a frank assessment of its flaws and how it is being addressed than by denying its existence.

One area where the U.S. government can go further is in its prosecution of torture, including both acts of torture abroad and those committed within the United States. As part of the implementation process, in connection with the U.S. ratification of the Torture Convention, the United States passed a federal statute which grants criminal jurisdiction to U.S. federal courts for acts of torture committed outside of the United States if the suspected torturer is physically present in the United States.[18] However, this statute has yet to be utilized. In one case, involving a Peruvian military officer named Anderson Kohatsu, the State Department apparently intervened to discourage federal prosecution.[19] In the future, such cases should be prosecuted as part of a broader global effort to develop an international system of accountability for the most serious human rights crimes.

This federal statute should also be expanded to include acts of torture committed inside the United States, which could be applied in cases like the brutalization of Abner Louima in New York, a case Professor Koh mentions in his article.[20] Legislation expanding the scope of the federal Torture Statute has been introduced in Congress and is now pending.[21] Its adoption should be a priority for rights advocates.

II. INSIDE-OUTSIDE: ENGAGEMENT WITH THE PRIVATE SECTOR

Professor Koh's third principle is consistency toward the present. Here he applies what he calls the technique of inside-outside engagement to apply pressure to countries that violate human rights. An important element of this strategy relates to the private sector, particularly multinational corporations

18. *Id.* at 115.

19. The following passage demonstrates the State Department's involvement:

> In March 2000, for instance, Ricardo Anderson Kohatsu, a Peruvian intelligence officer accused of vicious torture, was sent by the Peruvian government to testify to the Inter-American Commission on Human Rights in Washington, D.C. When NGO's denounced his presence and presented credible evidence, U.S. law enforcement officials detained him as he was about to leave the country. However, the State Department intervened to free Kohatsu on the questionable pretext that he was entitled to immunity under the headquarters agreement between the U.S. and the Organization of American States.

Reed Brody, *The Prosecution of Hissene Habre—An "African Pinochet,"* 35 NEW ENG. L. REV. 321, 334-35 (2001).

20. Koh, *supra* note 1, at 308-09.

21. The federal statute that was passed in 1994 is codified at 18 U.S.C. § 2340A. The legislation is a bill introduced by Representative Maxine Waters, H.R. 3158. E-mail from Elisa Massimino, Director, Lawyers Committee for Human Rights, to Mike Posner, Executive Director, Lawyers Committee for Human Rights (Feb. 25, 2002, 6:26pm) (on file with Saint Louis University Law Journal).

that rely on global supply chains and global markets.[22] His hypothesis is that U.S. government engagement with these multinational corporations can be "a potent way to promote global human rights."[23]

He argues that a key to this strategy is demonstrating that "corporate social responsibility in human rights is not just good, but also good for business in at least four ways."[24] He asserts that corporate social responsibility: 1) strengthens the rule of law and the capacity of civil society organizations; 2) increases the opportunity for dialogue between corporations and local civil society, giving local groups a greater stake in the foreign corporation's financial success; 3) enhances corporate reputation among NGOs, consumers and the media; and 4) diminishes security risks.[25]

While this may be a useful way to frame initial conversations with global companies, it is essential for rights advocates to take concrete steps to put corporate social responsibility into practice. This will require multiple efforts to create greater corporate transparency and accountability. Achieving these objectives will not come easily. And neither of the two human rights partnerships Professor Koh mentions, the U.N.'s Global Compact or the Global Sullivan Principles, has yet demonstrated meaningful breakthroughs in terms of either transparency or accountability.[26]

In the last decade, many multinational companies, especially those in labor-intensive, low-wage industries, such as apparel and toys, have moved their manufacturing bases abroad. They rely on a global network of contractors and suppliers who operate largely in less developed countries in Asia and Latin America. In these regions, violations of internationally recognized labor rights are commonplace, including the use of child labor, forced labor, discrimination in the workplace, onerous overtime requirements, infringement of local wage law and inadequate health and safety protections. In this environment, there is a need for the enforcement of international labor standards to ensure that workers who manufacture products in the global marketplace are treated with dignity and respect. This can be achieved most readily today by holding global manufacturers accountable for upholding basic labor rights among all of their principle suppliers and contractors.

In the absence of new and effective means of international and national enforcement mechanisms, multinational corporations are left to voluntarily police themselves. Until recently, almost all global manufacturers took the view that they bore no responsibility for working conditions in the factories of their suppliers or contractors. Gradually, this view is changing, driven, in part,

22. Koh, *supra* note 1, at 319-20.
23. *Id.* at 320.
24. *Id.*
25. *Id.*
26. *Id.*

by increased media attention and the resultant consumer pressure. In the last ten years, this has forced many global manufacturers to adopt internal codes of conduct, which address child labor, workplace health and safety conditions, wage and overtime issues, discrimination and other persistent problems. According to the Organization for Economic Co-operation and Development (OECD), there are now some 246 codes of corporate conduct in existence.[27] While this movement has served as a catalyst for new voluntary workplace codes of conduct, these codes vary widely in the degree to which they are enforced, monitored and, ultimately, provide meaningful protection to the workers themselves.

Many of these efforts, undertaken in most cases by individual companies, demand not only stricter self-regulation but also monitoring of workplace conditions by "independent experts." To some, this may be seen as unnecessarily privatizing the enforcement of labor rights—a role traditionally performed by government. Unfortunately, many governments have demonstrated a lack of capacity, and often the will, to enforce such rights. Even in the United States, effective regulation and protection of workers has been eroded at the low-wage end of the labor market. "Sweatshops" are a global phenomenon. As a result, voluntary multi-stakeholder enforcement mechanisms—focusing primarily on workplace monitoring—are developing.

One evolving model for creating greater transparency and accountability for workers is the Fair Labor Association (FLA), which the U.S. government helped to initiate as part of its Anti-Sweatshop Initiative, which Professor Koh mentions. In 1996, in an effort to end sweatshop conditions in the manufacture of apparel and footwear around the world, President Clinton brought together an informal group of apparel and footwear companies, unions and human rights, labor rights and consumer organizations (including the Lawyers Committee), called the Apparel Industry Partnership (AIP). Through the AIP, these disparate groups developed an industry-wide code of conduct and monitoring principles aimed at establishing a common industry standard to enforce labor rights.

In November 1998, a number of the AIP partners formed the FLA.[28] Key provisions of the FLA agreement and its Workplace Code of Conduct call for elimination in the workplace of forced and child labor, harassment, abuse and discrimination.[29] The code also enforces health and safety standards, recognizes the right of employees to freedom of association and collective

27. Gary Gereffi et al., *The NGO-Industrial Complex*, FOREIGN POL'Y, July/Aug. 2001, at 57.

28. For more information on the Fair Labor Association, see the FLA website at http://www.fairlabor.org.

29. *Id.* at *Workplace Code of Conduct*, *http://www.fairlabor.org/html/CodeOfConduct/index.html* (last visited Feb. 18, 2002).

bargaining, sets wage standards, imposes limitations on work hours and establishes requirements regarding overtime compensation.[30] The FLA accredits monitors (including NGOs) to conduct independent inspections of factories. Eventually it will evaluate companies for compliance with its code and monitoring standards and serve as a source of information for the public about working conditions.

This rapid movement towards the development and enforcement of voluntary workplace standards is a relatively recent and untested phenomenon with many issues still to be resolved.[31] However, it is clear that any developments they engender toward increased transparency and accountability—whether it is for companies, governments or other stakeholders—are key in ensuring sustainable improvements. Monitoring systems will be most effective in the long-term if they involve local unions and other organizations and individuals who are most intimately familiar with the everyday problems faced by workers. In many places, however, trade unions are prohibited or restricted and there are a limited number of other local organizations ready and able to assume this role. Consequently, assistance in developing such capacity is needed. Monitoring the enforcement of rights must be sustained over an extended period of time; there is no quick fix or easy solution to improving factory conditions. Ad hoc factory exposés are a useful tool in highlighting the problems but are not the most effective mechanism for ensuring long-term global change. Improved worker and management education and training is also key to the long-term enforcement of rights. Not only government, but consumers, unions, NGOs and companies all have an essential role to play in supporting the rights of workers around the world.

Beyond support for such voluntary public-private initiatives, the government also has an important role to play in using the technique of inside-outside engagement that Professor Koh describes to put increased pressure for reform on countries that violate human rights. One means of doing this is to focus on the long-term benefits of explicitly linking trade benefits to improved human rights conditions, particularly working conditions. Tentative steps were taken in this direction by the Clinton Administration in 1999 with the development of a textile quota agreement with Cambodia, which requires the Cambodian government to improve labor conditions in order to be able to increase exports of garments to the United States.[32] The early signs are

30. *Id*.

31. Other initiatives currently being developed in this field, which focus on improving workplace conditions, include the European Ethical Trading Initiative, Social Accountability International and the university students' Workers Rights Consortium.

32. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE: U.S. AND CAMBODIA REACH BILATERAL TEXTILE AGREEMENT, Jan. 21, 1999, *at http://www.ustr.gov/regions/asia-pacific/releases.shtml*. The "United States and Cambodia have agreed to extend their Bilateral Textile Agreement for an additional three years, through December 31, 2004." Press Release, Office of

encouraging that this has opened the door to a constructive workers' rights debate within the country.

However, such direct links between trade and labor are rare in U.S. trade history, and the recent passage of trade promotion authority by the House (by a one-vote margin) signals that they may become even rarer.[33] Trade promotion authority, formerly known as "fast track," grants the President greater authority to negotiate trade deals—such as expansion of the North American Free Trade Agreement—without having their terms negotiated by Congress. While open markets and expanded trade can indeed benefit many, the divide between the rhetoric and the reality is widening.[34] Trade can and should be a key element in encouraging greater compliance with human rights, but the expansion of trading rights must not be at the expense of those who need it most.

the United States Trade Representative, U.S.-Cambodian Textile Agreement Links Increasing Trade with Improving Workers' Rights, *at* http://www.ustr.gov/releases/2002/01/02-03.htm (last visited Apr. 7, 2002).

33. Bipartisan Trade Promotion Authority Act of 2001, H.R. Res. 306, 107th Cong., 147 CONG. REC. H8972-02 (2001) (enacted), *available at* 2001 WL 1555768.

34. The one-vote victory for trade promotion authority resulted in part from promises by the White House of separate protectionist measures, such as limits on apparel and textile imports from Caribbean and Latin American countries that effectively grant benefits to one region while taking from another. Joseph Kahn, *Wheeling, Dealing and Making Side Deals; Vow to Scrap Latin Textile Deals Wins Vote on Bush Trade Powers*, N.Y. TIMES, Dec. 8, 2001, at C1.