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## The Future of Human Rights Discourse

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## THE FUTURE OF HUMAN RIGHTS DISCOURSE

RUTI TEITEL\*

### I. INTRODUCTION

It is a great pleasure to be invited to respond to Professor Harold Koh's Childress Lecture, *A United States Human Rights Policy for the 21st Century*. Harold became a dear friend during my days at the Yale Law School as an Orville H. Schell Fellow for International Human Rights, when it was also a privilege to teach his class in International Human Rights.

My paper shall discuss three principles proposed in Professor Koh's address. Professor Koh begins his address with a call for "truth." His second argument calls for justice and accountability. Lastly, Koh calls for greater transnational engagement in broader democratization efforts.

In this Response, I shall consider each of these in turn. The proposed principles of "truth" and "accountability" are forms of "transitional justice,"<sup>1</sup> that is, legal responses to past wrongs, taken *ex post* to redress violations of human rights. These proposals raise a profound question: To what extent would normalizing the transitional response in the law contribute to an improved human rights policy?

The question that arises is, to what extent would the application of these legal principles be ameliorative of the current status of human rights.<sup>2</sup> To answer this question, we need a theory that explains the present relation of these legal principles to international politics. What is impliedly at stake in both of these claims is the question of the purposes and effects of human rights in the advancement of enlightened foreign policy and, more particularly, of efforts to advance democratization and liberalization in international relations.

At minimum, as is further elaborated below, this Response contends that these principles do have an effect, by their contribution to an expanded global humanitarian regime. A strengthened humanitarian discourse appears to be

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1. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

2. There is a growing literature on these legal responses to inhumanity and political repression, chiefly in periods of political transition. *See generally* TEITEL, *supra* note 1. *See also* *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995).

particularly apt in the contemporary transformed world of post-transition heightened political violence.<sup>3</sup> It is in response to violence that transitional justice surges. In the last part of this Response, I explore the broader significance of the contemporary expansion in human rights discourse, including its ramifications for U.S. foreign policy, particularly in light of recent political events.<sup>4</sup>

## II. ON TRUTH

In the first part of his address, Professor Koh argues for the obligation to tell the truth, and elaborates upon several dimensions of the duty.<sup>5</sup> One might differentiate between internal and external dimensions, relating to the role of truth in American foreign policy, as well as in its own domestic policy. To begin, there is the obligation of the United States to “tell the truth” about human rights around the world. This obligation, as Professor Koh asserts, is being discharged today in State Department reports.<sup>6</sup> Moreover, it appears to be a duty well on its way to being satisfied, and in part through those practices, to have become a recognized aspect of customary human rights law.<sup>7</sup>

Beyond the duty of investigation of violations of human rights generally, Professor Koh proposes that there is a second obligation of “truth-telling.”<sup>8</sup> This dimension of the duty goes to the problem of the lack of transparency concerning the United States’ potential violations of international human rights law in its own policy. In discussing this aspect of the truth principle, Professor Koh addresses the U.S. obligation to adopt the language of international human rights, and to represent its own behavior in these terms.<sup>9</sup> However, by its

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3. See *infra* notes 55-61 and accompanying text.

4. Namely, the September 11 attacks on the United States, as well as the various military and political responses thereto. See *infra* notes 55-61 and accompanying text.

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

6. See 22 U.S.C. § 2304(b) (Supp. V 1999); 22 U.S.C. § 2151 (1994 & Supp. V 1999); U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (released Feb., 2000), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/> (last visited Mar. 12, 2002); U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000 (released Feb., 2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/> (last visited Mar. 12, 2002).

7. On customary law, see Statute of the International Court of Justice, 1945 I.J.C. ch. 3, art. 39, available at <http://www.icj-cij.org/ijcwww/ibasicdocuments/ibasictext/ibasicstatute.htm> (last visited Mar. 12, 2002) [hereinafter ICJ Statute].

8. See Koh, *supra* note 5, at 306.

9. See Harold Hongju Koh, *Introduction*, U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (released Feb. 25, 2000) (contending for the U.S. commitment to “us[e] the universal language of human rights”), [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/overview.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/overview.html).

general unwillingness to join the human rights discourse, Professor Koh observes, the United States is in some measure failing to join the regime. The concerns here are twofold. At one level, the argument concerns the problem of the gap between American human rights practices and its normative policy. An added dimension of the claim concerns America's leadership role in the world in setting human rights norms. In this regard, the argument for truth-telling goes to the very legitimacy of the United States' human rights campaign. To whatever extent there is a failure to satisfy the truth-telling duty, one might conceive this to be a form of "tu-quoque;" or, unclean hands.<sup>10</sup> Or, it could be understood as a form of de facto cultural relativism, meaning, the oppression of ostensibly exceptional "American values." Together, these claims raise a twofold challenge both to U.S. practice, as well as to its leadership role in international relations.

The first claim goes to the independent basis for truth-tellings, and its potential role, and strategic value in the advancement of human rights. At present, there are arguments both for an individual "right" to truth and, relatedly, for attendant "obligations," on the part of states, and perhaps others to tell the truth.<sup>11</sup> These derive from recent developments in "transitional justice," developing standards regarding the legal responses to past official wrongdoing.<sup>12</sup> The logic of these truth claims' relation to human rights in the context of transitional justice, is that knowledge makes a difference for a state's democratic prospects. At present, this claim is largely vindicated in the contemporary importance of the practice of documentation of human rights. This transitional response appears to have become normalized, and converted into a norm of legal responses to human rights violations, even in nontransitional times. Indeed, one might say this has become a dimension of customary human rights law.<sup>13</sup>

To illustrate the potential for the proposed truth principle, Professor Koh offers the problem of the United States' death penalty policy.<sup>14</sup> American policy concerning the death penalty appears to be out of step with human rights law, as well as with political and legal developments around the world.<sup>15</sup>

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10. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 88 (2001).

11. As a matter of human rights law, the duty is situated in the state, even where private actors are implicated in the relevant wrongs. See Velasquez-Rodriguez, Inter-Am. C.H.R. (Ser. C) No. 4, at para. 166, OEA/ser. L/V/III.19, doc. 13 (1988), reprinted in 28 I.L.M. 291, 324 (1989) ("[T]he States must prevent, investigate and punish any violation of the rights recognized by the Convention and . . . restore the right violated and provide compensation as warranted.") (emphasis added).

12. See generally TEITEL, *supra* note 1.

13. See *supra* note 7 and accompanying text.

14. See Koh, *supra* note 5, at 309-11.

15. See generally *United States*, in HUMAN RIGHTS WATCH, WORLD REPORT 2002, <http://www.hrw.org/wr2k2/us.html> (last visited Apr. 1, 2002). See USA: Executions Would

Nevertheless, whatever one might say about U.S. policy as a normative matter, there is a real question about whether, and to what extent, this issue lends itself to resolution via the truth principle. Would the U.S. death penalty policy be affected by greater dissemination of knowledge regarding the death penalty? To what extent is the determinative factor in policymaking the issue of access to relevant information? In an open democracy, such as the United States, to what extent is knowledge likely to be the critical factor affecting decision-making concerning human rights policy?

Ultimately, the role of knowledge in decision making is complex, and goes to the question of how human rights policy is fashioned in the United States. Along what processes and mechanisms? Which political actors? The answers to these questions may well turn out to have empirical dimensions upon which more research is needed. Indeed, to date, contemporary comparative research regarding American and European policy on the death penalty has elucidated the relevance of the factor of the political actor, comparing in particular, the pivotal role of elites in deciding the issue in Europe, with more populist decision makers in the United States.<sup>16</sup> Understood in this comparative light, then, the relevant question would be, what might be the role of additional “truth” processes in the attempt to change the evaluation of the death penalty by populist forces in the United States? And, relatedly, given the political actors, what kind of knowledge would be useful in changing American policy concerning the death penalty?<sup>17</sup>

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Indicate Empty Rhetoric of State of the Union Address, AMNESTY INTERNATIONAL ON LINE, Feb. 13, 2002, <http://web.amnesty.org/ai.nsf/Index/AMR510322002?OpenDocument&of=THEMES/DEATH+PENALTY>. See also Pierre Sane, Secretary General, Amnesty International, An Open Letter to President Bill Clinton as the First Federal Execution Looms (Nov. 14, 2000), available at <http://web.amnesty.org/ai.nsf/print/AMR511642000> (last visited Mar. 11, 2002) [hereinafter Amnesty International Letter].

16. See David Greenberg & Valerie West, *Siting the Death Penalty Internationally* (2000) (unpublished manuscript) (on file with author). Particularly important is the role of the Council of Europe, which in 1998 called for a ban on the death penalty. See *id.* Ultimately change in such state practices could affect the direction of customary law. See ICJ Statute, *supra* note 7, art. 39; FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); *Arizona v. Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 70 U.S.L.W. 3246 (U.S. Jan. 11, 2002) (No. 01-488) (comparing relative roles of judge and jury as decisionmakers for various elements of death penalty sentencing). On the potential role of knowledge in the judiciary, compare *Stanford v. Kennedy*, 492 U.S. 361, 369 n.1 (1989), where Justice Scalia asserted that the laws of other nations are of little relevance to the interpretation of the Eighth Amendment bar on “cruel and unusual punishment” in the context of executions of juveniles, with *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988).

17. There are possible developments at the present moment regarding the role for DNA evidence, but this is a limited role for truth, as it is directed more at select human rights violations in the administration of the death penalty, rather than to its abolition. See The Innocence Project, available at <http://www.innocenceproject.org> (last visited Mar. 12, 2002). For discussion of this

So understood, there are a number of areas where added knowledge might make the difference. For example, American support for the death penalty policy does appear to be, at least in part, a function of the extent to which the public is presented with alternative policy considerations.<sup>18</sup> Moreover, there are added transitional justice considerations concerning the administration of the death penalty; as in its application, American policy appears to violate numerous international rights norms.<sup>19</sup>

The same sorts of questions regarding the potential for truth-telling processes arise with respect to American human rights policy. Consider to what extent does the dearth of knowledge regarding these principles affect the direction of the United States' commitments in this area? Here, one might understand the relevant absence of knowledge at a broad level of generality, and in the context of America's historical isolation from other countries' human rights practices. This has implications for the normative impact of these state practices for the evolution of human rights law regarding the death penalty, as well as in other areas.

### III. ON JUSTICE

The second part of Professor Koh's address discusses the importance of principles of accountability. Here, Professor Koh identifies the significant momentum of recent decades for various forms of justice, in response to past regime wrongs.<sup>20</sup> Transitional justice policy recommendations have been used around the world, in particular, to shape democracies in processes of transformation from dictatorship to more liberalization.<sup>21</sup>

However, beyond its role in periods of political change, to what extent should this normative policy be extended to established democracies? The proposed extension in the application of transitional principles of justice to the United States at this time raises numerous questions. First, as a general matter, just how well has the transitional justice response worked? Second, where

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strategy's implications for the abolition movement, see Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995); Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative Reform of the Death Penalty?*, 63 OHIO ST. L.J. 417 (forthcoming 2002).

18. Such considerations include, for example, sentencing alternatives. See Joseph Carroll, *Poll Summary: Where America Stands on Death Penalty*, GALLUP NEWS SERVICE, Dec. 14, 2000, available at <http://www.gallup.com/poll/releases/pr001214b.asp> (last visited Mar. 12, 2002).

19. For racial considerations in the application of the death penalty, see Amnesty International Letter, *supra* note 15. Regarding the human rights problems in the execution of juveniles, see *Atkins v. Virginia*, 534 S.E.2d 312 (Va. 2000), *cert. granted*, 533 U.S. 976 (2001).

20. See generally TEITEL, *supra* note 1.

21. See *id.*

extended to the United States, would adopting the transitional justice response result in a more enlightened human rights policy?

To begin, in partial answer to these questions, one must recognize the relatively modest contributions of transitional justice.<sup>22</sup> Instances of accountability are few, and do not always translate to developments in prospects for democratic transition, although this evaluation ought to be temporized.<sup>23</sup> Moreover, the question of justice, while it ought not be limited to periods of political transition, should also not be divorced from its political context. Accordingly, transitional justice associated with periods of political flux, should not necessarily become the normalized response in the international realm. Indeed, the aims of law and justice in the international realm are not necessarily the same as those in domestic law. In the international realm, given the confluence of diverse societies, what is commonly at stake are competing legalities.<sup>24</sup>

The more significant question raised by the extension of the principle of transitional justice goes to its aims. What is human rights law for? What is its impact on foreign affairs? The United States has generally been an outlier here. Indeed, American resistance to the human rights discourse suggests that, for the most part, America operates as if it does not regard itself as “needing” human rights law at present. This suggests a broader issue that Professor Koh’s address impliedly engages: namely, what are the broader ramifications of the contemporary human rights regime for contemporary international politics? Is there something beyond “justice talk” that would place demands upon a country in the position of the United States? How might this affect current foreign policy?

In the contemporary moment, there has been a significant upsurge in a discourse of transitional justice; in part, explainable by recent political developments. At present, states in various stages of transition—post-cold war, post-colonial, post-authoritarian—are dealing with often long-postponed responses to repressive regimes. Moreover, the recent transitions have, for the most part, been peaceful, political transformation has been characterized by its occurrence in, and through the law. Hence, the significance of transitional justice.

The legal responses have taken a variety of forms. Many of these responses are national in character; others are international<sup>25</sup> and

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22. See Ruti Teitel, *Bringing the Messiah Through the Law*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 177 (Carla Hesse & Robert Post eds., 2000). See Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365 (1999) (discussing the limited effectiveness of international criminal prosecutions).

23. See generally Teitel, *supra* note 22.

24. See generally *id.*

25. See TEITEL, *supra* note 1, at 27-29.

transnational.<sup>26</sup> Of late, there has been a dramatic expansion of the humanitarian law regime—the historic law of war—which has resulted in a standardization of the law of war regime to international adjudicatory processes of political controversies. But, this near-normalization of transitional justice raises numerous normative questions about the propriety of international criminal law for the resolution of political conflicts.<sup>27</sup>

The most significant dimension in this paradigm shift point is that the discourse is one of “justice,” and that this discourse is *sui generis*, and ought not simply be confounded with a discourse of “rights.” At present, there appears to be an extraordinary expansion of humanitarian law, in what might aptly be understood as a merger of two regimes: the “justice” regime associated with the law of war, together with the “international human rights” regime.<sup>28</sup> Nevertheless, “justice talk” is not simply coterminous with “rights talk.” Whereas the discourse of international human rights is a relatively modern phenomenon,<sup>29</sup> the discourse of international criminal justice relates to a much older part of public international law. Historically, the discourse of justice is a traditional part of the rationale of the law of war in international affairs.<sup>30</sup> Whereas, at present, the discourse of international criminal justice relates less to the behavior of states, than the protection of the rights of persons and peoples.

Indeed, the shift to a humanitarian law regime, and the discourse of justice signals a rule of law that is both constraining and enabling of government power. In the foreign policy context, the discourse of justice is easily politicized, perhaps even more so than a discourse of rights. There are many illustrations, both historical and contemporary. The recent instances of humanitarian responses in Kosovo, the Balkans and Rwanda suggest that the justice response is not necessarily linked to other forms of humanitarian intervention, but rather, that there is a highly political dimension to this form of human rights discourse. While in the Balkans and Rwanda, the discourse of international justice was deployed in lieu of other intervention; in Kosovo, justice was just one element of a broader NATO military intervention.<sup>31</sup>

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26. See generally *infra* notes 43-54 and accompanying text.

27. See *infra* text accompanying notes 34-42.

28. See Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. (forthcoming 2002).

29. For a historical perspective, see Ruti Teitel, *Human Rights Genealogy*, 66 FORDHAM L. REV. 301 (1997).

30. See generally HUGO GROTIUS, RIGHTS OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND OF NATIONS (A.C. Campbell, A.M. trans., 2d ed. 1979); PERCY BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS: A HISTORY AND COMMENTARY (1908).

31. See Teitel, *supra* note 22, at 179; *United Nations: Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, May 3, 1993, 32 I.L.M. 1159.



Indeed, to whatever extent the discourse of justice can be considered to imply a “rights” discourse, the relevant human rights at stake are neither political or social rights, but rather constitute the most minimal and threshold of rights: These are the rights against persecution and annihilation—rights preservative of bodily integrity.

Moreover, individual human rights protecting against “persecution” and “ethnic cleansing” link up the rights of individuals with the rights of “peoples,” to remain in their territories. The significance of this rights protection is that it goes beyond the prevailing view of international human rights linked up to the protection of preexisting national borders. Just as the state sovereignty principle reinforced the commitment to nationalism that defined the old international law system, at present, there is an evident link between the new system of protecting human rights against ethnic cleansing, and the reconceptualization of the meaning of stable borders associated with globalization. This is the new global rule of law.

A related question concerns these international legal developments bearing to U.S. human rights policy. Professor Koh has engaged this issue more directly in his other writings, specifically, the question of whether, and to what extent, international human rights law, particularly, customary law should be considered to constitute a part of internal domestic law.<sup>32</sup> There is presently an extensive debate in the United States upon the relevance of international law to its domestic legal system.<sup>33</sup>

But, this question gets back to the issue of the role of human rights law; and impliedly, relatedly, and more specifically, to what extent the United States regards itself as needing human rights law? This, in turn, again raises the question of what human rights law is for? The inconsistency of the United States’ approach towards the recently expanded justice discourse may well reflect the tensions implicit in the contemporary expansion of human rights law. Indeed, the American posture regarding human rights law, particularly, its “exceptionalism,” may be an important indicator of the relationship of human rights law to political realities.<sup>34</sup>

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32. For the historical eighteenth century view, see Blackstone. For the modern view, see Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

33. There is a growing literature on both sides of the debate. Compare Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). See Henkin, *supra* note 33.

34. See *The Politics and Political Uses of Human Rights Discourse: A Conference on Rethinking Human Rights*, Columbia University, Nov. 8-9, 2001, available at <http://www.sipa.columbia.edu/REGIONAL/IAS/eventspage/events%20page.htm#Conferences> (last visited Mar. 12, 2002).

Here, we need to acknowledge the extent to which the turn to a discourse of “justice” is not fully continuous with politics.<sup>35</sup> What, therefore, is the meaning of current humanitarian policy, whereby democratizing developments in foreign affairs correlate with the expansion of international criminal justice? These somewhat paradoxical developments point in various directions suggesting a plausible role for the principle of international justice as a limiting principle, namely, as a check on the unlimited actualization of the prevailing principle of self-determination in the international sphere. International law and justice processes can be used to limit the political principle of self-determination, as these always have the potential for secession and destabilizing transition.

The spread of democratization, together with the attendant difficulty of obtaining consensus among a larger number of states,<sup>36</sup> constitutes the present political circumstances that are the basis for the current turn to law, and relatedly to judicial rather than political mechanisms of decision-making in foreign affairs. Illustrative in this regard are the determinations regarding the humanitarian crises in the Bosnian and Rwandan political contexts and circumstances, and, in particular, the determinations made by the Security Council (as opposed to the General Assembly),<sup>37</sup> as the Chapter Seven peacemaking powers were the jurisdictional bases for the convening of the International Criminal Tribunal for the Former Yugoslavia and Rwanda.<sup>38</sup> These adjudicatory processes comprised the primary form of intervention by

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35. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Of course, there are also continuities of the law and politics. For discussion of this rule of law dilemma, see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009, 2016-30 (1997). See also DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

36. In recent decades, the number of member states in the United Nations General Assembly has grown to 189. See *The U.N. in Brief*, available at <http://www.un.org/Overview/brief.html> (last visited Jan. 16, 2002).

37. It was widely conceded at the time that obtaining any form of agreement in the General Assembly would be very difficult. Letter from Boutros Boutros-Ghali, Secretary General of the United Nations, to the President of the Security Council (May 24, 1994), available at <http://www.ess.uwe.ac.uk/comexpert/Intr.htm>.

38. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, S.C. Res. 827, U.N. SCOR, adopting U.N. Doc S/25704 at 36, Annex, and U.N. Doc. S/25704/Add.1 (1993), available at <http://www1.umn.edu/humanrts/icty/statute.html>; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), as amended by S.C. Res. 1166, U.N. SCOR, 3878th mtg., Annex, U.N. Doc. S/RES/1166 (1998), available at <http://www.un.org/Docs/scres/1998/sres1166.htm> (last visited Apr. 1, 2002); *Statute of the International Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), available at <http://www.un.org/Docs/scres/1994/9443748e.htm> (last visited Apr. 1, 2002).

the international community in these conflicts. Seen from a historical vantage point, these instances of adjudications pose profound questions about the apparent contemporary displacement of more political international responses, by the law, and more specifically the international criminal law.

Indeed, the limits of the law in response to atrocities are conceded by Professor Koh,<sup>39</sup> implying that where there is a chance to avert such human rights violations, such as genocide, military intervention may be justified.<sup>40</sup> This role of the new humanitarian law is not fully transparent, though it is becoming more so.<sup>41</sup> Nevertheless, this sort of humanitarian intervention needs to be subject to some form of rule of law, lest it become politicized.<sup>42</sup>

#### IV. ON GLOBAL RULE OF LAW

Beyond the truth and justice principles applicable to states, Professor Koh's address also contends for a broader view of accountability in the new global society. In the third part of Koh's address, he turns to the challenge of globalization. Here, importantly, Professor Koh seeks to reconcile human rights ideology with globalization. Koh contends for alternative forms of accountability generated by transnationalism, such as principles of corporate responsibility and the roles of transnational networks,<sup>43</sup> where he advocates ways to effect social justice through "networks of concern."<sup>44</sup> To be sure, globalization has resulted in the reallocation of structures, processes that highlight the role of diverse non-state actors, such as transnational corporations.<sup>45</sup> These developments raise many questions, regarding what

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39. See Koh, *supra* note 5, at 311-15.

40. *Id.* Indeed one might say, in this regard, that the new justice regime plays a twofold role, as it both constrains state power, but also enables justified intervention.

41. Though it has become more so, insofar as the responses are relegated to the international community.

42. For example, see the multiple Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, including S/2000/177 (Mar. 3, 2000), available at <http://www.un.org/Docs/sc/reports/2000/177e.pdf>; S/2000/538 (June 6, 2000), available at <http://www.un.org/Docs/sc/reports/2000/538e.pdf>; S/2000/878 (Sept. 18, 2000), available at <http://www.un.org/Docs/sc/reports/2000/878e.pdf>; and S/2000/1196 (Dec. 15, 2000), available at <http://www.un.org/Docs/sc/reports/2000/1196e.pdf>.

43. See Koh, *supra* note 5, at 319-22. See also generally Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998) (discussing transnational networks).

44. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

45. See Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 193 (1997). See generally, ULRICH BECK, *WHAT IS GLOBALIZATION* 102-03, 132 (2000) (discussing the "transnational" state).

obligations corporations are prepared to undertake, and what mechanisms of accountability.<sup>46</sup>

Professor Koh importantly observes the complexity of the new transnationalism, in particular, the processes he describes—of incorporation of international law into domestic law. Accounting for this process requires new interpretive principles regarding the force of international law as its effects in global society go beyond direct (first order) regulation of consenting states. This is seen, in particular, in the contemporary debate regarding the weight of customary international law in domestic law.<sup>47</sup>

It is also important in this regard to recognize that the reallocations of power associated with globalization are occurring in a number of directions, both disaggregatory, and also centralizing of authority, in a variety of transnational and international mechanisms. This has several implications. At the same time as globalization is proceeding, there is a parallel expansion of internationalism that needs to be recognized—in particular, the degree to which many transnational developments are themselves predicated on precedent changes in international law. The Pinochet litigation serves as a case in point.<sup>48</sup> While the extradition of General Pinochet is generally regarded as a precedent in transnationalism, and universal jurisdictions, the transnational elements in the case depended on international developments law such as English adoption of the International Convention Against Torture.<sup>49</sup> Indeed, the Pinochet extradition, while it is represented as an instance of domestic incorporation of universal jurisdiction, could not have happened, if not for precedent developments in international law—namely, the adoption by England of the Convention, according “crimes against humanity” universal jurisdiction.<sup>50</sup> “Crimes against humanity” offenses are for the most part

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46. Here, too, there is a growing literature. See PAUL KENNEDY, *PREPARING FOR THE TWENTY-FIRST CENTURY* (1993) (discussing the complexity of corporate responsibility in globalization).

47. Much of the debate appears to have gone off in the direction of the positive/natural law debates, namely framing the question: to what extent is international law, law? See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

48. See *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte*, [2000] 1 A.C. 61 (H.L. 1998), reprinted in 37 I.L.M. 1302 (1998), vacated by *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 2), [2000] 1 A.C. 119 (H.L. 1999), reprinted in 38 I.L.M. 430 (1999); *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (1999).

49. See generally *id.*

50. See Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 HUM. RTS. Q. 927 (1999); Menno T. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940, 946 (2001).

defined, first and foremost, as a matter of international law.<sup>51</sup> In this regard, the “incorporation” process of lawmaking described by Professor Koh appears to work in both directions: to be sure, domestic law and state practice influence developments in international law, but the converse is also true.

Of course, there are important differences between the progress in developments via transnationalism versus internationalism, particularly in terms of the accountability concerns previously discussed. If, the globalization debates are relevant indicators, there may well be legitimacy problems in relegating critical decision-making to the private sector. Without adequate safeguards, there is a lack of transparency and accountability. By contrast, international fora, while often unwieldy, carry their own form of legitimacy. International fora imply numerous levels of deliberative processes which constitute a form of accountability.<sup>52</sup> To whatever extent, we may now be at an apparent crossroad regarding normative policy on decision making structures, there are reasons to prefer internationalism.

Finally, some of the problems, or “discontents,” of globalization need to be more fully aired.<sup>53</sup> Namely, one would need to acknowledge the extent to which the supposed globalization of democratic freedoms and market economy have somehow gone hand in hand with a justice discourse. However, rather than the present political changes as an opportunity for contestation of economic and social realities, the role of law here seems primarily preservative of the existing status quo regarding property relations, and, as such, is aimed at maintenance of the underside of globalization. Further, there are significant questions regarding security that also appear in some degree to be associated with globalization. These questions, as well as a greater engagement with issues of social justice, need to be more fully the subject of human rights discourse.<sup>54</sup>

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51. See *U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, Nov. 26, 1968, 8 I.L.M. 68 (1969). See generally GEOFFREY ROBERTSON QC, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (2000).

52. Thus for example, see *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 and U.N. Doc. A/CONF.177/20/Add.1 (1995).

53. See generally SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* (1998).

54. On development generally, see THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999). On the link between terrorism and poverty, see Kofi Annan, U.N. Secretary General, Address to the Center for Preventive Action at the Council On Foreign Relations (Mar. 6, 2002). See also Barbara Crossette, *Annan Says Terrorism's Roots Are Broader Than Poverty*, N.Y. TIMES, Mar. 7, 2002, at A13 (“Speaking at the Center for Preventative Action at the Council on Foreign Relations, Mr. [Kofi Annan] also said the world's failure over a decade to act on warning signs in Afghanistan, battered by political, economic and natural disasters, resulted in the catastrophe of Sept. 11.”).

#### V. POST SEPTEMBER 11—DEMOCRATIZATION, DEVELOPMENT AND HUMAN RIGHTS

In the concluding part of his address, Professor Koh turns to consider the responses to the September 11, 2001 attack on the United States. He proposes the promotion of democratization and global freedom as appropriate responses to the challenge of global terrorism.<sup>55</sup>

The proposal is, no doubt, right. There needs to be a renewed emphasis on democracy-building and rule of law, although this is, no doubt, a very long-term solution to the problems of terrorism. Virtually all of the Middle East is struggling with the challenges of modernism and democratic reform.<sup>56</sup> September 11 may well be a signal to the rest of the world about the present status of this process. Accordingly, in this regard, Professor Koh advises greater involvement in the promotion of the “right to democracy.”<sup>57</sup> There are difficult questions ahead for the United States and other established democracies about what their role is to be in this process. To be sure, after decades of aid for assistance in building rule of law in transitional democracies, we need to evaluate our successes, but also our failures, and factor in lessons from other regions.<sup>58</sup> The nature of this process is, no doubt, all the more problematic because much of the region is skeptical about, and even opposed to, such foreign aid. Demands for autonomy should be respected, so long as the human rights of ethnic minorities within these states are respected.<sup>59</sup> And, there also needs to be an adequate regard for the international concern of the exportation of terrorism.

The above suggests an important role for the developing human rights discourse. Indeed, human rights discourse emerges as a potentially powerful counter discourse to the separatist ideology that nourishes terrorism. In the struggle against terrorism, what is needed is a universalizing discourse with

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55. See Koh, *supra* note 5, at 332 (referring to the “*globalization of democracy* as an antidote to the *globalization of terror*.”). See also *Measures to Eliminate International Terrorism*, G.A. Res. 55/158, U.N. GAOR 6th Comm., 55th Sess., Agenda Item 164, at 1-4, U.N. Doc. A/RES/55/158 (2001), available at <http://www.un.org/documents/ga/res/55/a55r158.pdf> (Jan. 30, 2001) (defining terrorism).

56. See AHMED RASHID, *JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA* (2002).

57. See LOUIS HENKIN, *THE AGE OF RIGHTS* (1990). On the rights to democratic governance, see Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 53 (1992).

58. See generally CAROTHERS, *supra* note 54.

59. See generally Igor I. Lukashuk, *The United Nations and Illegitimate Regimes: When to Intervene to Protect Human Rights*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 143 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Thomas M. Franck, *Intervention Against Illegitimate Regimes*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra*, at 159. See generally BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* (1999).

transnational force. Human rights discourse constitutes the leading contender because of the force of its ideology, global reach and broad appeal.

Human rights discourse's potential is directed precisely at the problem of ideology that offers the basis for radical fundamentalism—namely, the constitution of political identity in contemporary global politics. The discourse of human rights is aimed specifically at the problem of ethnic and religious persecution.<sup>60</sup> This discourse ought to help to respond to the current attempts to ethnically cleanse and/or segregate on a religious or ethnic basis. In this regard, simple adherence to the longstanding principle of state self-determination will not work. Whether in the Middle East or elsewhere in present global politics, this highlights the basis for the present emergence of the new humanitarian regime which incorporates human rights; indeed, the enforcement of rights protecting against ethnic cleansing could usefully be considered to constitute enforceable limits on principles of sovereignty and self-determination.

This implies a very delicate balance. The international community's protection of threshold rights against persecution internal to states, whether in the Middle East or elsewhere, has global repercussions. While, at some level, the protected rights are those of individuals, they are also rights of the ethnic collective, as well as rights which protect the stability of populations and property.<sup>61</sup> As such, the now emerging humanitarian principle therefore constitutes a comprehensive rule of law for the new global politics.

## VI. CONCLUSION

These comments have sought to engage some of the proposed strategies advocated in Professor Koh's inspiring Childress address. Most important is the question of what is to be the bearing of human rights ideology in U.S. foreign policy and the extent to which human rights can meet the challenges of the twenty-first century. Here, we should recognize that human rights law neither constitutes a pure discourse of political power, nor, conversely, does it only reflect an expression of powerlessness. Relatedly, human rights law is not merely a set of rights, nor, is it just a set of coercive sanctions. Moreover, no doubt, a dimension of human rights law is not static, but plausibly involves a transformative politics. At this early point in its development, the human rights regime might aptly be considered to constitute a discourse, and as such,

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60. See *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. GAOR, Annex I, paras. 129-33, U.N. Doc. S/1994/674/ (1992) (defining ethnic cleansing).

61. See *id.* para. 130. (“[E]thnic cleansing is a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”).

can be used for a range of foreign affairs purposes, from preserving the political status quo, to other more emancipatory and ameliorative purposes.



