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## Jefferson Memorial Lecture - Transnational Legal Process after September 11th

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# Jefferson Memorial Lecture Transnational Legal Process After September 11th

By  
Harold Hongju Koh\*

I come to you from Yale University, where, even as we speak, our campus is hosting the national collegiate final of that most popular American answer-and-question game show, *Jeopardy*. So I hope you will forgive me if, in the *Jeopardy* spirit, I start this lecture not with a question and an answer, but with an answer and a question. The answer is: “Same-sex sodomy, Affirmative Action, North Korea, Iraq, Guantanamo, Enemy Combatants, Juvenile Death Penalty, and the International Criminal Court.”

If that is the answer, what is the question? The question is: “What are all features of transnational legal process after September 11th?” Now if the relationship between my answer and my question is not immediately obvious, please sit back, make yourself comfortable, and let me elaborate.

Let me break this topic—transnational legal process after September 11th—into three parts: First, why do nations obey international law? Second, how does what I call “transnational legal process” contribute to national obedience with international law? And, third, what role can transnational legal process play in affecting the behavior of several nations whose disobedience with international law has attracted global attention after September 11th—most prominently, North Korea, Iraq, and our own country, the United States of America? For shorthand purposes, I will call these three countries “the axis of disobedience.”

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## I.

## WHY NATIONS OBEY INTERNATIONAL LAW

For most of my career as a lawyer, as a scholar, and in the government, I have focused on the questions of why nations obey international law and why they sometimes disobey it. And in my academic work, I have offered five cumulative explanations to that question: (1) reasons of power and coercion, (2) reasons of self-interest, (3) reasons of liberal theory—both rule legitimacy and political identity, (4) communitarian reasons, and (5) reasons of legal process.<sup>1</sup>

To illustrate what I mean, let me ask a simple question. How do we make anybody obey the law? Even here in Berkeley, the height of global civilization, how do we persuade scofflaws to obey the law in a domestic setting? How do we get persistent litterers or traffic violators to follow the law? If you ponder that question for a little while, I think you will come to the conclusion that the most complete answer is some combination of these five factors I have identified.

If you are faced here in Berkeley with persistent litterers or traffic violators, you first threaten them with coercion: reasons of power. You threaten them with sanctions, like a ticket, or jail time, or you deny them benefits—“no Peet’s coffee for you!” Second, you tell them that it is in their long-term self-interest to obey the law: reasons of self-interest. Third, you invoke liberal, Kantian ideals. You tell them that they should obey the littering and traffic rules because the rules are fair (“rule legitimacy”), and because they should see themselves as law-abiding individuals (“political identity”). Fourth, you make appeals to community. You tell them, “We are part of the same community,” and you ask them to act in the communal interest, not just in their narrow self-interest. Finally, violators can be encouraged to obey for reasons we lawyers understand best, which I call “reasons of process.” We try to enmesh law violators in processes, institutions, and regimes that force them to internalize the rules we want them to obey into their internal value set.

For example, as those of us who live in universities all know, the tactic that works best with a student who has a disciplinary problem is to put him or her on the school disciplinary committee. Why? Because participating in the process of law and enforcement makes students see why it is in their enlightened self-interest to obey the law, and it encourages them to try to incorporate the norm of obedience into their internal value set.

If you want to see this played out intuitively in another setting, consider why most people do not steal from one another. It is not because of coercion or fear of sanctions. After all, how often is a policeman standing by you when an opportunity to steal presents itself? In fact, over time, through a lifetime of participation in various processes, people come to internalize a normative set of

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1. See generally Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 626-32 (1998) [hereinafter Koh, *The 1998 Frankel Lecture*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (describing these reasons) [hereinafter Koh, *Why Do Nations Obey*].

values, a moral code or a religious faith, that makes them choose not just to comply with a norm against stealing but actually to *obey* it voluntarily. Internal value commitments promote a pattern of obedience to rules, a pattern that becomes constitutive of who they are. The real reason why I do not burglarize my neighbor is not because of coercion or because of self-interest, but because I have an internalized moral code. In my case, it is a Christian code, but others could just as easily substitute Jewish, Buddhist, Ba'hai, Muslim, or whatever creed they choose.

My claim, then, is that norm-internalization, and not coercion, is the ultimate reason why most people obey the law. If this is true locally, why shouldn't this also be true globally? So the key to obedience of international law, in my view, is participation in process, or what I call "transnational legal process." By so saying, let me distinguish two types of international process: The first is a so-called "international legal process" in the Benthamite sense, namely, a government-to-government, horizontal process where nation-states interact in intergovernmental fora, with the main goal of promoting compliance with international norms. The other strand I call "vertical process," or "transnational legal process," where state and nonstate actors interact in a variety of domestic and international fora with the goal of encouraging norm violators to accept norms into their internal value sets so that they obey those norms, not just comply with them, as a matter of domestic law.<sup>2</sup>

So, the core of my approach is as follows: Why do most nations comply with the rules of international law? In a nutshell, because most compliance comes from obedience; most obedience comes from norm-internalization; and most norm-internalization comes from participation in legal process, particularly transnational legal process.

## II.

### HOW TRANSNATIONAL LEGAL PROCESS PROMOTES OBEDIENCE OF INTERNATIONAL LAW

Transnational legal process is a process whereby public and private actors, including nation states, corporations, international organizations, non-governmental organizations, and individuals, interact in a variety of fora to interpret, enforce, and ultimately internalize, rules of international law.<sup>3</sup> The key elements of this approach are interaction, interpretation, and internalization. Those seeking to embed certain norms into national conduct seek to trigger *interactions* that yield legal *interpretations* that are then *internalized* into the domestic law of even resistant nation states.<sup>4</sup> Let me illustrate by giving you some concrete examples. First, suppose you were a human rights lawyer in Great Britain, and you were protesting the treatment of immigrants who were being detained by the

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2. For elaboration, see generally Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L. J. 1397 (1999) [hereinafter *Human Rights Law Enforced*].

3. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996).

4. For elaboration, see Koh, *The 1998 Frankel Lecture*, *supra* note 1; Koh, *Why Do Nations Obey*, *supra* note 1; and Koh, *How is Human Rights Law Enforced*, *supra* note 2.

British government. What would you do? You would start by challenging the legality of the detention before the British courts. Suppose you lost. Is that the end of the story? Not any more. Today, any British lawyer worth his or her salt would appeal the British court's ruling to the European Court of Human Rights in Strasbourg, an international body, and try to win a judgment invalidating the British government's conduct under European human rights law. To use my terms, you would trigger an interaction in a European court that would promote an interpretation of European law that would lead, you hope, to the internalization of that international rule into British domestic law. So your ultimate approach would not be a horizontal one but a vertical one—internalization of an international standard into a domestic legal system through transnational legal process.

What does this have to do with our country, you ask? Let me take a second example. In the early 1980s, it came to light that the Reagan administration was supporting the Contras in their struggle against the Nicaraguan Sandinista Government, and that one of the chosen means was to mine the harbor of Corinto.<sup>5</sup> In 1984 the Nicaraguan Government filed a suit against the U.S. Government in the International Court of Justice in The Hague.<sup>6</sup> Many people assumed that this was just a publicity stunt, one that could have no conceivable impact on the United States. They did not appreciate that Nicaragua was not so much seeking an international judgment as it was seeking to enforce transnational legal process against a more powerful adversary.<sup>7</sup> By suing in this intergovernmental forum, and triggering an interaction, Nicaragua pursued the goal of obtaining a judicial interpretation that the United States was violating international law, an interpretation that it then hoped to internalize into U.S. domestic law. Nicaragua won a so-called "provisional measures" order from the ICJ, but instead of seeking enforcement, the Nicaraguans went to the U.S. Congress, where then-Senator Daniel Patrick Moynihan introduced a resolution that terminated future aid to the Contras for any actions that violated the ICJ ruling.<sup>8</sup> In response, the Reagan administration stopped mining the harbors almost immediately.<sup>9</sup> So, in my view, what happened here was a different kind of appeal, not an appeal to judicial process but to a transnational legal process, in which the Nicaraguans triggered an interaction, which led to an international legal interpretation, which was ultimately internalized into U.S. funding statutes, or domestic law. By in-

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5. Senator Barry Goldwater revealed President Reagan's authorization of the mining. See 130 Cong. Rec. 8537 (1984).

6. See Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, No. 70 (June 27).

7. The late Harvard law professor Abram Chayes, a former Legal Adviser to the State Department, appeared as Nicaragua's agent against the United States. For his personal reminiscence of the case, see Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985).

8. See Paul Gumina, *Title VI of the Intelligence Authorization Act, Fiscal Year 1991: Effective Covert Action Reform or "Business as Usual"?*, 20 HASTINGS CONST. L.Q. 149, 170 (1992) (citing legislation).

9. See David Rogers, *House Adopts Resolution to End U.S. Role in Mining of Nicaraguan Ports, Waters*, WALL ST. J., April 13, 1984, at 62. I am told that upon being told of the aid cutoff, Professor Chayes said, "We just got our provisional measures from Congress."

voking this process, a relatively powerless nation forced the most powerful nation of the world, the United States, into obedience with international law.<sup>10</sup>

This brings me to a third example, the most prominent Supreme Court cases of the last term: the Texas sodomy case, *Lawrence v. Texas*,<sup>11</sup> and the two Michigan affirmative action cases under the title case *Grutter v. Bollinger*.<sup>12</sup>

As most of you know, in 1986, in *Bowers v. Hardwick*, the Supreme Court of the United States upheld the Georgia law that outlawed same-sex sodomy between consenting adults.<sup>13</sup> The United States is not part of the European human rights system, so the losing attorneys could not formally appeal the U.S. Supreme Court ruling to a higher court. But the United States *is* part of a transnational legal process, which is, in good measure, a process of its own creation. And so, the lawyers sought to use that fact to revisit this decision at some later point. It turned out that even at the time of *Bowers v. Hardwick*, the Supreme Court had ignored a European case called *Dudgeon v. United Kingdom*, which struck down the prohibitions on same-sex sodomy.<sup>14</sup> And since *Bowers*, the European Court of Human Rights had reaffirmed its *Dudgeon* decision, not once, but twice.<sup>15</sup> So, the U.S. lawyers, particularly the LAMBDA Legal Defense Fund, waited, and then provoked another interaction, this time at the U.S. Supreme Court, by asking the Court to reconsider *Bowers v. Hardwick*. LAMBDA asked me and some colleagues to write an *amicus* brief on behalf of the former UN High Commissioner on Human Rights Mary Robinson, arguing that the U.S. Constitution's guarantees of privacy and equality encompassed the international understanding found in the European human rights cases.

In his decision in *Lawrence*, which overruled the *Bowers* decision, Justice Kennedy accepted our view, writing,

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* has been rejected [by the European Court of Human Rights]. . . . Other nations, too, have taken action consistent

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10. At this writing, a similar process is playing out with regard to the effort by the Government of Mexico to force reconsideration of U.S. state death sentences imposed upon 51 Mexican nationals who were arrested, convicted, and sentenced to death in U.S. courts without receiving the consular notification required under the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T., 77, U.N.T.S. 261. See Marlise Simons & Tim Weiner, *World Court Rules U.S. Should Review 51 Death Sentences*, N.Y. TIMES, April 1, 2004, at A1. In the case of one of those nationals, Osbaldo Torres, an Oklahoma appeals court stayed the execution, and the governor later commuted Torres's death sentence to life without parole. Both the court and the governor cited the decision of the International Court of Justice in The Hague and noted the violation of Torres's right to contact Mexican consular officials under the Vienna Convention on Consular Relations. In a special concurrence, one judge reasoned that the Oklahoma court was obligated to comply with the international court's decision, in light of the United States' treaty obligations under the Vienna Convention. See Adam Liptak, *Execution of Mexican is Halted*, N.Y. TIMES, May 14, 2004, at A2.

11. 123 S. Ct. 2472 (2003).

12. 539 U.S. 306 (2003).

13. 478 U.S. 186 (1986).

14. 45 Eur. Ct. H.R. (ser. A) at 149, 161, ¶ 41 (1981).

15. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser.A) at 186 (1988); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser.A) at 485 (1993).

with an affirmation of the protected right of homosexual adults to engage in intimate, consensual sexual conduct.<sup>16</sup>

Justice Kennedy went on to say, “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate.”<sup>17</sup> In transnational legal process terms, LAMBDA triggered an interaction, which provoked a constitutional interpretation by our Supreme Court, which effectively internalized European human rights norms into U.S. Constitutional law.

To show that this was not just a fluke, only a few months earlier in the Michigan affirmative action cases, Justice Ruth Bader Ginsburg asked the Solicitor General,

[W]e’re part of a world, and this problem [of affirmative action] is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination. . . . [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?<sup>18</sup>

The Solicitor General basically answered, “Shut your eyes, and don’t consider it.”<sup>19</sup> But in rejecting that view, Justice Ginsburg’s concurring opinion with Justice Breyer pointed out that: “the Court’s observation that race-conscious programs ‘must have a logical end point,’ . . . accords with the international understanding of the office of affirmative action.”<sup>20</sup> By so saying, she, too, was essentially arguing for internalization of the global standard on affirmative action into U.S. equal protection law.

To give another well-known example, consider the death penalty. As you know, the Eighth Amendment to the U.S. Constitution bans cruel and unusual punishments.<sup>21</sup> That provision has been construed in light of “evolving standards of decency that marked the progress of a maturing society.”<sup>22</sup> The Supreme Court had recognized in the 1950s that that evolving standard ought to be determined by reference to international as well as domestic measures.<sup>23</sup> And in a number of Supreme Court cases, the Court had looked into international opinions to decide whether conduct was or was not unusual.<sup>24</sup> Two terms ago, in

16. *Lawrence*, 127 S. Ct. at 2483 (citing Brief Amici Curiae of Mary Robinson, et al., *Lawrence v. Texas*, 127 S. Ct. 2472 (2003)). Professors Kenji Yoshino, Ryan Goodman, and Robert Wintemute and an extraordinary group of Yale law students worked with me on this amicus brief.

17. *Id.*

18. Transcript of Oral Argument at 24, *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (No. 02-516), at [https://www.supremecourt.us/oral\\_arguments/argument\\_transcripts/02-516.pdf](https://www.supremecourt.us/oral_arguments/argument_transcripts/02-516.pdf).

19. *See id.*

20. 123 S. Ct. at 2347 (Ginsburg, J., concurring) (citing the International Convention for the Elimination of Racial Discrimination).

21. U.S. CONST. amend VIII.

22. *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958).

23. *See id.*

24. The Court made clear that the Eighth Amendment’s bar against cruel and unusual punishment embodies broad evolving “concepts of dignity, civilized standards, humanity and decency,” while effectively acknowledging that contemporary standards of “humanity” must consider practices

*Atkins v. Virginia*, the Supreme Court finally struck down the practice of executing persons who are mentally retarded.<sup>25</sup> In doing so, they took note of the fact that, within the world community, the imposition of the death penalty for crimes committed by the mentally retarded is overwhelmingly disapproved.<sup>26</sup> My colleagues and I also submitted a brief in that case.<sup>27</sup> We learned, much to our amazement, that the United States and Kyrgyzstan were the only countries *in the world* that permitted the execution of persons with mental retardation. And, when we filed the amicus brief so saying, the government of Kyrgyzstan immediately sent a letter to the *New York Times* saying, in effect, “In fact, we stopped executing people with mental retardation many years ago.”<sup>28</sup> Only the United States, the Kyrgyz implied, would engage in such a barbaric practice. The Kyrgyz letter supported our claim, for if, of all the nations of the world, only the United States applied a certain kind of punishment, then surely that practice must be “unusual” for purposes of the cruel and unusual punishments clause.

So once again, transnational legal process means triggering interactions, to seek a legal interpretation that has the result of internalizing a global standard into domestic law. That is the critical moment—the moment of norm-internalization, when domestic compliance becomes international obedience. Some have asked me, “Is your notion of transnational legal process an academic theory? Is it an activist strategy? Or is it a blueprint for policy makers?” Over time, my answer has become, “It is all three.” My time in the government confirmed the supreme irony that I had suspected when I was a professor: that in the world of policy making, those with ideas tend to have no influence, and those with influence tend to have no ideas. Too often we witness what I call the “tragic triangle”: decision makers react to crises, but without any theory of what they are trying to accomplish; activists agitate, but without any broader strategy about what pressure points they want to push; scholars have ideas, but they lack a

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of nations other than our own. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). In *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977), the Court determined that international practices regarding the death penalty for rape were relevant to “evolving standards” analysis. Five years later, in *Enmund v. Florida*, 458 U.S. 782, 797 n.22 (1982), the Court noted that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.” In *Ford v. Wainwright*, 477 U.S. 399, 409 (1986), the Justices noted “the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today.” Finally, in *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion), the Court held that the Eighth Amendment bars the execution of fifteen-year-old offenders. Following the reasoning of *Trop v. Dulles*, Justice Stevens, writing for the plurality, evaluated the “civilized standards of decency” embodied in the Eighth Amendment in part by looking to the prohibition of the execution of minors by the Soviet Union and nations of Western Europe and taking note of the views of “other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community.” In addition, both the plurality and Justice O’Connor’s concurrence found significant that three major international human rights treaties—including Article 68 of the Geneva Convention, which the United States had ratified—explicitly prohibited juvenile death penalties.

25. 536 U.S. 304 (2002).

26. *Id.* at 316 n.21.

27. See Brief of Amici Curiae Diplomats Morton Abramowitz et al. at 1-21, *McCarver v. North Carolina*, 2000 U.S. Briefs 8727 (N.C. June 8, 2001) (later refiled in *Atkins v. Virginia*).

28. See Baktybek Abdrisaev, Editorial, *Penalties in Kyrgyzstan*, N.Y. TIMES, June 30, 2001, at A14.



practical understanding of how to make those ideas useful to anybody else. And so, too often we witness decision makers making policy without theory, activists implementing tactics without strategy, and scholars generating ideas without influence.

My belief is that we can bridge the tragic triangle through the concept of transnational legal process. It functions both as a theory of explanation and a blueprint for action. I do not believe that the principles of international law are self-executing any more than I believe that principles of medicine are self-executing. Anyone knows that if you want to use medical theories to make a patient's body better, you should call a good doctor. Similarly, if you want to use legal theories to persuade a body politic to obey international law, you should call a lawyer who is skilled in the manipulation of transnational legal process.

### III.

#### TRANSNATIONAL LEGAL PROCESS AND THE "AXIS OF DISOBEDIENCE" AFTER SEPTEMBER 11TH

Let me now turn to the final part of this lecture: how the concept of transnational legal process helps to explain where we are after September 11th, particularly with regard to the three countries I mentioned earlier: North Korea, Iraq, and the United States.

As everybody knows, North Korea is one of the most isolated countries in the world. It is also one of the biggest scofflaws. In 1993, North Korea faced a crisis because it could not provide power and food to its own people. Instead of addressing those core concerns, the North Koreans started building nuclear weapons. Significantly, North Korea, headed by that strange dictator, Kim Jong Il, stands almost entirely outside the international legal system. So, if you look at my earlier list of factors that promote compliance, one encounters great difficulty in trying to appeal to such notions as political identity, rule legitimacy, or appeals to the international community. Faced with this tough choice, the Clinton administration chose to appeal to the North Koreans through a combination of self-interest and legal process. The administration decided that coercion was not a realistic option in a situation in which so many American soldiers and so many South Korean citizens would be put at risk by any military approach. Instead, the Clinton administration sought to enmesh the North Koreans in a multilateral diplomatic framework. Within this so-called "Agreed Framework," the United States, South Korea, and Japan would engage North Korea diplomatically, with a single message: If you give up your nuclear program, or reduce it, we'll give you, in return, involvement in the international community, increase in aid, and the expansion of cultural and economic links.<sup>29</sup>

The American hope was that by enmeshing the North Koreans in this framework of processes, institutions and regimes, the North Koreans would come to see their self-interest as working within the system. The hope was that

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29. See James T. Laney & Jason T. Shaplen, *How to Deal with North Korea*, FOREIGN AFF., Mar.-Apr. 2003, at 16.

the North Koreans would come to develop a more law-abiding political identity, and over time would come to internalize a rule of nuclear restraint into their internal value set, shifting eventually from a law-violating to a law-abiding approach.

So constructed, the Agreed Framework functioned moderately well for about a decade. While there is no doubt that the North Koreans violated it, neither should there be any doubt that it had a restraining effect on North Korea's nuclear behavior. Indeed, Deputy Secretary of State Richard Armitage recently testified that "there are dozens of nuclear weapons that North Korea doesn't have because of the framework agreement."<sup>30</sup> The North Koreans placed moratoria on tests of long-range missiles; they admitted that they had kidnapped Japanese citizens; they allowed greater inspections; and they started a bilateral dialogue with then South Korean President Kim Dae Jung.<sup>31</sup> In November 2000, in what appeared to mark a new thaw in the bilateral relationship, the North Koreans met in Pyongyang with a high-level delegation from the United States led by Secretary of State Madeleine Albright.<sup>32</sup> My point is that even if this transnational legal process approach did not work perfectly, it was working. It was based on the right idea: using process to get the North Koreans to accept international norms as part of their internal value set. Most fundamentally, it put into motion a transnational process that could have led, eventually, to the internalization of norms into the North Korean system.

In January of 2001, the Bush administration came in and abruptly abandoned this approach. They stopped negotiating, and instead began making coercive noises, naming North Korea as one of the three countries—along with Iraq and Iran—that formed the so-called "Axis of Evil."<sup>33</sup> Now, having met and spent a number of days with Kim Jong Il, I can tell you that he may be strange and cruel, but he is by no means stupid. He can certainly count to three. And when you are on a list of three "evil" countries, and the first labeled country has been attacked, you might well decide that your best option is to gain leverage by resuming the process of rebuilding nuclear weapons, which is exactly what he did.<sup>34</sup> That quickly led to the intolerable situation in which the North Koreans were once again "going nuclear," and we Americans were doing essentially nothing about it.

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30. See Testimony of Deputy Secretary of State Richard Armitage Before the Senate Foreign Relations Committee on North Korea, *FED. NEWS SERVICE*, Feb. 4, 2003 ("I think it's quite clear that from 1994 to now, Yongbyon itself did not produce more plutonium, which could be turned into nuclear weapons. And so, there are dozens of nuclear weapons that North Korea doesn't have because of the framework agreement, and we have to acknowledge that, I believe.").

31. See generally Laney & Shaplen, *supra* note 29, at 10-11.

32. I was lucky enough to serve on that delegation, which was the highest-level American delegation ever to visit North Korea.

33. See generally Laney & Shaplen, *supra* note 29.

34. See Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1492-93 (2003) (noting Kim Jong Il's decision to "build" more bargaining chips by lifting the freeze at Yongbyon, beginning to enrich plutonium to make nuclear weapons, ousting weapons inspectors, openly cheating on other international agreements, and . . . announcing North Korean withdrawal from the Nuclear Nonproliferation Treaty").

What happened next? After months of non-engagement, in April 2003, the Bush administration finally returned, you guessed it, to a transnational legal process strategy. After a series of false starts, the United States re-engaged the North Koreans within a new multilateral, diplomatic framework, which will likely include elements of the old Agreed Framework, while seeking to be more verifiable and less susceptible to North Korean blackmail.<sup>35</sup> In short, after diverting our policy toward counterproductive strategies of naked coercion, we eventually returned months later to where we began: to dealing with a noncompliant North Korea through a transnational legal process approach based on promoting self-interest and norm-internalization.

It will not surprise you that much the same analysis applies to the case of Iraq. Saddam Hussein ranked right up there with Kim Jong Il as one of the gross violators of international law in the world: of human rights treaties, disarmament treaties, and cease-fires. In 1991, as we all know, during the Gulf War, the United States and its allies used a coercive approach, but within a framework of international law, to force Saddam to leave Kuwait through Security Council resolutions that created an inspections regime that was initially working.<sup>36</sup> Over the years, that regime atrophied, until we arrived at a situation of massive Iraqi noncompliance.

In what was initially a worthwhile approach, the Bush administration went to the U.N. General Assembly and said we are ready to use coercion, if necessary, within the U.N. framework to enforce international law. Through the cooperation of British Prime Minister Tony Blair and U.S. Secretary of State Colin Powell, the United States brought both issues—use of force and disarmament—back within the Security Council framework. With United Nations Security Council Resolution 1441, the United States achieved a significant and unanimous diplomatic success.<sup>37</sup> I consider Resolution 1441, which was unanimous, to be a classic piece of transnational legal process. An interaction generated an interpretation that Iraq was in material breach of international law and set up a process—essentially a public trial of disarmament-type facts—that went on for about four months. The broader goal was internalizing a norm against weapons of mass destruction into the resistant Iraqi system.

In hindsight, the transnational legal process approach was working. For whatever reason, norm internalization seems to have been working. Whatever weapons of mass destruction were being held in Iraq, they were being removed.

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35. See Karen DeYoung & Doug Struck, *Beijing's Help Led to Talks: U.S. Cuts Demands on North Korea*, WASH. POST, Apr. 17, 2003, at A1.

36. See, e.g., S.C. Res. 678, U.N. SCOR, 45th Sess., at 28, U.N. Doc. S/RES/678 (1990), reprinted in 29 I.L.M. 1565 (1990).

37. See S.C. Res. 1441, U.N. SCOR, 57th Sess., U.N. Doc. S/Res/1441 (2002) ((1) deciding that "Iraq has been and remains in material breach of its obligations" through its failure to cooperate with inspectors and its failure to disarm; (2) affording Iraq "a final opportunity to comply with its disarmament obligations under relevant resolutions" by setting up an enhanced inspection regime and ordering Iraq to submit an accurate and complete declaration of its chemical, biological, and nuclear weapons programs; and (3) recalling that it had repeatedly "warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.") Seven days after, Iraq reluctantly confirmed its intent to comply with the resolution.

Moreover, the transnational legal process approach took the Bush administration much further than it might have preferred down a legal, U.N. path. At first, the Bush administration said that it did not need a new resolution; then it got Resolution 1441. Then they said they did not need inspections; but they eventually pursued inspections for four months. Then they said they did not need a second Security Council resolution; but they pursued a second resolution, which they ultimately did not get. In the spring of 2003, we arrived at the now-famous tragic impasse where the Bush administration, feeling the pressure of its own military timetable, initially pursued a second piece of transnational legal process—a second, follow-on U.N. Security Council resolution that would permit an attack on Iraq. We then witnessed the ensuing destructive game of “chicken” between Presidents Bush and Chirac, wherein the French proclaimed that they would veto any resolution that called for force, while President Bush announced that he would go to war whether he got a second U.N. resolution or not. These incompatible proclamations created a zero-sum situation, where the only resolution that the U.S. thought was relevant—one authorizing the U.S. to attack Iraq—was one that the French were pre-committed to veto. This impasse also made it pointless to seek the support of the nine countries who were necessary to get a Security Council majority, because even close U.S. allies, such as Mexico or Chile, were unwilling to subject their citizens to controversial votes that they knew would become meaningless once either the U.S. chose to make war anyway or the French vetoed that resolution.<sup>38</sup>

Sadly, we all know what happened next. The U.S. abandoned the quest for a second Security Council resolution, attacked Iraq with the support of only a thin “coalition of the willing,” and won a smashing military victory. The President quickly declared major combat operations over. But at this writing, months later, billions of dollars have been spent, many Americans and Iraqis have died, the United States seems mired in Iraq, and the American people and the world are recoiling from revelations of repugnant abuses of prisoners of war at the Iraqi prison at Abu Ghraib.<sup>39</sup>

Looking back, what went wrong? My point is that a transnational legal process solution was available but was tragically bungled. The Bush administration chose to frame the issue in bipolar terms: “either attack, or accept the status quo in which Saddam is building weapons of mass destruction.” The underexplored legal process solution was to *disarm Iraq without attack* through a strategy of multilateral disarmament, enhanced containment, and more aggressive human rights intervention that would have driven Saddam out and into a system of accountability.<sup>40</sup> Iraq could have been disarmed through multilateral inspections under a U.N. scheme, and Saddam could have been brought to an International War Crimes Tribunal of the United States’ making. So why didn’t this

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38. For a review of this history, see Koh, *On American Exceptionalism*, *supra* note 34, at 1516-19.

39. See generally *America and the Middle East: Fumbling the moment*, ECONOMIST, May 27, 2004.

40. See *id.* (elaborating upon this history and strategy).

third option materialize? For the simple reason that the Bush administration's goal, as it finally admitted, was not just disarmament, but regime change.

But again we ask a transnational legal process question: Why did the United States not do more to develop a "Milošević-type solution," where Saddam and his sons would be prosecuted for their offenses before some judicial tribunal? And why not invest that energy to create such a tribunal to avoid invasion and occupation, which is exactly what happened in Belgrade, when the United States drove out Slobodon Milošević without invasion? When the war began, both President Bush and Secretary Rumsfeld announced to the Iraqi high leadership, "you *will* be prosecuted," but that only raised the obvious question—where? The United States has unsigned the International Criminal Court (ICC) treaty, and Iraq is not a party to that treaty either.<sup>41</sup> To get a Chapter VII resolution from the Security Council that the United States has just snubbed will be very difficult. So what the Bush administration failed to see was that by rejecting a legal process approach, it limited itself to coercive solutions, which have now ironically diminished its capacity for global leadership under a banner of rule of law. A legal process approach would have allowed the United States to achieve all of its objectives: to oust Saddam without attack, to rid Iraq of weapons of mass destruction, to promote human rights, to remain within a legal framework, to leave open the possibility for U.N. support for reconstruction efforts, *and* still to hold Saddam accountable. Instead, the United States myopically rejected all of these options and left itself with a coercive, unilateralist approach that has now greatly diminished its capacity for global leadership.

Turning to the United States, the final member of the "axis of disobedience," our greatest surprise should be how quickly after September 11th we turned the story from the non-compliance of others with international law, to our own non-compliance. Examples abound: first and most obviously, the U.S. signing of the International Criminal Court Treaty; second, the U.S. attitude towards the Geneva Conventions—including its actions in Abu Ghraib, its decision to create zones in Guantanamo in which people are being held without Geneva Convention rights<sup>42</sup> as well as to designate certain U.S. citizens within the United States as enemy combatants;<sup>43</sup> and third, the death penalty, which

41. In one of his last acts, President Clinton signed the Rome Statute of the International Criminal Court on December 31, 2000. See *Clinton's Words: "The Right Action,"* N.Y. TIMES, Jan. 1, 2001, at A6. In May 2002, however, the Bush administration purported to unsign the treaty and notified the United Nations that it did not intend to become a party to the Rome Statute. See Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

42. See Koh, *On American Exceptionalism*, *supra* note 34, at 1509.

43. At this writing, the legality of that status is being litigated before the U.S. Supreme Court in the case of two U.S. citizens now being held on U.S. soil in a military brig: Jose Padilla (the so-called "dirty bomber") and Yasser Hamdi, a Louisiana-born soldier captured in Afghanistan, brought to Guantanamo, and eventually to the United States. Both cases raise the question whether the U.S. courts should permit U.S. citizens to be held indefinitely and without counsel on U.S. soil based on ambiguous statutory authority, and whether such citizens can be placed in the essentially rights-free status of "enemy combatant," as distinct from the rights-bearing statuses of "prisoner of war" or "criminal defendant."

has become a growing irritant in the relationship between the United States and the European Union, even in the war against terrorism. What we are witnessing is nothing less than an assault by our government on the transnational legal process that we created after World War II in our own perceived national interest.

Remember the history. After WWII, the United States constructed a world public order devoted to liberal internationalism. Its effectiveness was muted by the intense bipolarity of the Cold War. But after the Berlin Wall fell—from 1989 to 2001—an era of global optimism ensued in which the United States tried to revive the notion of using global cooperation to solve global problems, such as war crimes, global warming, trade imbalances, absence of democracy, development, AIDS, transnational crime, and drugs. The approach adopted by the United States was simple: more diplomacy, more human rights, more democracy, more legal process. To maintain this structure of global cooperation, the United States supported the creation of an elaborate legal framework, a legal exoskeleton if you will, to constrain and facilitate its own actions. Then came September 11th, the classic global problem to be solved by global cooperation. But the Bush administration chose to respond to that crisis not within the existing post-war framework—not by using the existing legal exoskeleton—but instead by creating a new architectural counter-response, what I call “The Bush Doctrine.”

Three years later, five elements of the Bush Doctrine have clearly emerged:<sup>44</sup>

1. *Achilles and his heel.* After September 11th, the United States became intensely aware that, like Achilles, we are a superpower, but with super-vulnerability. To respond, the Bush Doctrine has resolved to use our superpower status to protect our super-vulnerability.

2. The chosen means, the promotion of *Homeland Security*, in both the defensive and preemptive sense. To protect our vulnerability, we employ domestic security, immigration control, security detention, information awareness, even while asserting under international law a novel right forcibly to disarm any country that presents a gathering threat to our security.

3. This concept is supported by a dramatic *Shift in our Focus on Human Rights*. In 1941, Franklin Delano Roosevelt had set the global standard for human rights by setting our sights on the four freedoms: freedom of speech, freedom of religion, freedom from want, and freedom from fear.<sup>45</sup> Yet Bush administration officials have reset our human rights priorities to say that only one freedom really counts, and that is freedom from fear. They have created a two-pronged strategy of *extralegal zones*, predominantly in Guantanamo, where they have effectively asserted that no law applies, and *extralegal persons*, so-called “enemy combatants,” who may, like Jose Padilla, be U.S. citizens held on American soil.

44. For elaboration, see Koh, *On American Exceptionalism*, *supra* note 34, at 1497-1500.

45. Franklin Delano Roosevelt, Eighth Annual Message to Congress (Jan. 6, 1941), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2855 (Fred L. Israel ed., 1966).

4. *Top-down democracy promotion.* Our strategy for democracy-promotion has shifted from “bottom-up democracy” to “top-down democracy.” Since the U.S. invasion of Afghanistan, democracy-promotion efforts have shifted toward *militarily imposed democracy*, characterized by United States-led military attack, prolonged occupation, restored opposition leaders and the creation of resource-needy post-conflict protectorates.<sup>46</sup> Globally, a four-pronged strategy seems to be emerging: “Hard,” militarily imposed democracy promotion in Iraq and Afghanistan; “soft,” diplomatic democracy promotion in Palestine; optimistic predictions of “domino democratization” elsewhere in the Middle East; and reduced democracy-promotion efforts elsewhere.

5. *Strategic Unilateralism/Tactical Multilateralism.* Fifth and finally, if the Clinton administration had pursued its foreign policy goals through what my friend Strobe Talbott has called “Strategic Multilateralism and Tactical Unilateralism,” the Bush administration has shifted instead to an approach characterized by “Strategic Unilateralism and Tactical Multilateralism.” Avoiding genuine multilateral consultation, the United States has acted alone, enlisting for multilateral “cover” those other nations it can persuade or coerce to go along.

If this is the emerging approach, what is wrong with it? First, instead of promoting universal values, the United States has promoted double standards by which other nations are held accountable to human rights standards from which the United States exempts itself. The recent horrors at Abu Ghraib show that the United States is now reaping the whirlwind of its strategy of condoning wide-scale departures from traditional prisoner-of-war protections. By treating these legal regimes as a nuisance to be disregarded in the war against terrorism, the Bush administration forgot the critical role that these legal protections play both in protecting our troops from violations and in protecting our country from needless humiliation by conduct that most Americans find abhorrent.<sup>47</sup> Second, by engaging in this unilateralism, the United States has diminished its standing in the international regimes in which it takes part, limiting its “soft power” or its power to persuade in the global arena.<sup>48</sup> We see this diminished standing in our mounting incapacity to mobilize other countries to help us in the daunting task of rebuilding Iraq. Third and most sadly, this strategy has converted us from the major supporter of the post-war global legal exoskeleton into the most visible

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46. See Chibli Mallat, *Focus on Human Rights Offers Hope of Reconciliation*, TIMES (London), Mar. 29, 2003, at A13.

Welcome to the post-modern war. Even before it started, this war appeared surreal, not least for the idea that the United States and Britain were “liberating Iraq” while refusing to involve any Iraqi in the process of change. . . . Even [hawkish Iraqis] are uneasy about American plans to rule Iraq “directly,” echoing a universal rejection in the Arab world of American or British occupation.

*Id.*

47. See, e.g., Charlie Savage, *As Threats to US Changed, So Did Prison Tactics*, BOSTON GLOBE, May 16, 2004, at A1.

48. See JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* 9 (2002) (“Soft power rests on the ability to set the political agenda in a way that shapes the preferences of others. . . . If I can get you to *want* to do what I want, then I do not have to force you to do what you do *not* want to do. If the United States represents values that others want to follow, it will cost us less to lead”).

outlier trying to break free of the very legal framework we created and supported for half a century.

So this, in a nutshell, is my diagnosis: the United States has unwisely avoided the channels of transnational legal process with respect to North Korea, Iraq, and its own conduct. But if that is the problem, what is the solution? Quite simply, the United States and those within it who are committed to the rule of law should now invoke transnational legal process as a way to address the continuing problems in each case.<sup>49</sup> In North Korea, as I have already said, the obvious solution is to negotiate another Agreed Framework—a transnational legal process solution that continues the process of norm-internalization with respect to a ban on nuclear weapons that was so unwisely abrogated when the Bush administration took office. Now that we have occupied Iraq, our goal must similarly be norm-internalization: the promotion of a domestic constitutional reform that internalizes international human rights norms into the emerging Iraqi legal system, with the goal of promoting a fundamental transformation in the character of the country.

And what about the United States? On the one hand, America is the toughest case because it is the most powerful nation in the world. On the other hand, there are so many legal, political, and social channels through which norms can seep into U.S. law—what I have elsewhere called channels of legal, political and social internalization—that the United States should be the most permeable society of the three to international influence.

Our efforts to renounce transnational legal process have only triggered a counter-response. Take, for example, the International Criminal Court (ICC). The Bush administration unsigned that court's treaty, hoping that that would be the end of America's relationship with it. But we should realize that every future act by which the United States cooperates with the ICC constitutes a *de facto* repudiation of the political act of unsigned. Over time, the new prosecutor's office in the ICC can internalize guidelines for responsible prosecution. Advocates of the ICC within the United States can try to develop support for it. Most of all, the United States can engage in case-by-case cooperation with the ICC over particular cases, such as the prosecutions recently brought with respect to Uganda and the Congo or by honoring requests for the provision of classified information within U.S. control. My point is that as much as the Bush administration may wish to be free of the legal exoskeleton that the United States has helped create, already that legal framework is visibly pushing back. A successor administration could gradually reengage with the Court on a piecemeal basis, restoring our national respect for and within that evolving institution.

Similarly, with regard to the Geneva Conventions and Guantanamo, U.S. conduct has not gone unchallenged, but rather, has been aggressively litigated in a variety of fora, not just in U.S. courts, but in the Inter-American Commission on Human Rights,<sup>50</sup> before the British courts,<sup>51</sup> and increasingly, before the U.

49. For a fuller account, see Koh, *On American Exceptionalism*, *supra* note 34, at 1501-26.

50. Jess Bravin, *Panel Says U.S. Policy on Detainees in Cuba Breaks International Law*, WALL ST. J., Mar. 14, 2002, at B2; Inter-Am. Comm'n on Human Rights, Request for Precautionary



S. Supreme Court. At this writing, three cases have been argued before the U.S. Supreme Court this term—the Guantanamo cases arising from the D.C. Circuit,<sup>52</sup> the José Padilla case in the Second Circuit<sup>53</sup> and the Yasser Hamdi case in the Fourth Circuit.<sup>54</sup> Each of these cases asks whether U.S. conduct is consistent with the Geneva Conventions as well as the U.S. national interest and tests the extent to which our Supreme Court will internalize these international standards into U.S. law.

And what about the death penalty? As I speak, advocates of transnational legal process are bringing suits throughout the United States in an effort by the government of Mexico to force reconsideration of U.S. state death sentences imposed upon 51 Mexican nationals who were arrested and convicted and sentenced to death in U.S. courts without receiving the consular notification required under the Vienna Convention on Consular Relations.<sup>55</sup>

Similarly, landmark litigation is currently pending before the U.S. Supreme Court challenging the constitutionality of the juvenile death penalty under both domestic and international law.<sup>56</sup> At this writing, the United States and Somalia are the only two countries in the world that permit the execution of juveniles, inasmuch as they are the only two countries that have not ratified the U.N. Convention on the Rights of the Child.<sup>57</sup> Since 1989, the United States has carried out more publicly reported executions of juvenile offenders than any other country in the world. In 1999, the only country other than the United States to admit to executing a juvenile offender was Iran.<sup>58</sup> As abolition of the death penalty has become a cornerstone of European human rights policy, Central and Eastern European countries who aspire to enter the European system have increasingly calculated that the benefits of joining the European political and economic sys-

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Measures, Detainees in Guantanamo Bay, Cuba (Mar. 12, 2002), available at [http://www.photius.com/rogue\\_nations/guantanamo.html](http://www.photius.com/rogue_nations/guantanamo.html) (last visited June 8, 2004).

51. See *Abbasi & Anor v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] E.W.C.A. Civ. 1598, 2002 WL 31452052.

52. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 72 USLW 3171 (U.S. Nov. 10, 2003) (No. 03-334), argued April 20, 2004.

53. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), cert. granted, 72 USLW 3488 (U.S. Feb. 20, 2004) (No. 03-1027), argued April 28, 2004.

54. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), cert. granted, 72 USLW 3434 (U.S. Jan. 9, 2004) (No. 03-6696), argued April 28, 2004.

55. *Simons*, *supra* note 10.

56. See *Roper v. Simmons*, 112 S.W.3d 397 (S.C. Mo. 2003), cert. granted, 72 USLW 3310 (U.S. Jan. 26, 2004) (No. 03-633) to be argued in October 2004 term.

57. Article 37(a) of the Children's Rights Convention states that "capital punishment . . . shall [not] be imposed for offences committed by persons below eighteen years of age." Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR, Supp. (No. 49), art. 37(a), U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. *But see* *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding, by a five-to-four vote, that the Eighth Amendment does not prohibit execution of juvenile offenders who committed their offenses at age sixteen).

58. See AMNESTY INTERNATIONAL, THE EXCLUSION OF CHILD OFFENDERS FROM THE DEATH PENALTY UNDER GENERAL INTERNATIONAL LAW (July 2003), available at [http://web.amnesty.org/abolish/reports/exclusion\\_child\\_offenders.html](http://web.amnesty.org/abolish/reports/exclusion_child_offenders.html) (last visited June 8, 2004). AMNESTY INTERNATIONAL, REPORTED EXECUTIONS OF CHILD OFFENDERS SINCE 1990 (July 18, 2003) [hereinafter AMNESTY REPORT], at <http://web.amnesty.org/library/index/engact500042003> (last visited June 8, 2004).

tem far exceed any benefits that might result from the occasional use of the death penalty against juveniles.<sup>59</sup> Thus, from 1994–2003, Amnesty International recorded twenty executions of child offenders in only five countries: Democratic Republic of the Congo, Iran, Pakistan, Nigeria, and—the leader, with 13—the United States.<sup>60</sup> Of these, “[t]he only country that openly continues to execute child offenders within the framework of its regular criminal justice system is the USA.”<sup>61</sup> Even within the United States, executions of child offenders since 1973 have been carried out in just seven states, with over two-thirds being committed by Texas and Virginia.<sup>62</sup> Given these facts, any commonsense understanding of a ban against “cruel and unusual punishments” should now include a practice that is deemed not just unusual, but illegal by all but five countries in the world and all but a few states even in this country. Thus, *Roper v. Simmons*, a case that will be heard by the U.S. Supreme Court early in the 2004 Term, presents the next major challenge for transnational legal process. In that case, as in the September 11th cases, the Court will decide whether to internalize foreign and international law into its constitutional analysis. In particular, the Court will have to decide whether, under evolving standards of decency, state executions of child offenders now violate the Eighth and Fourteenth Amendments of the U.S. Constitution.

How these cases are resolved remains to be seen. But there should be no doubt that in each of these areas, the battleground will be the realm of transnational legal process. In each area—North Korea, Iraq, the ICC, the Geneva Conventions, Guantanamo, the death penalty—the question will be the same: whether interactions can be brought in appropriate fora that will lead to interpretations of international law that will eventually internalize these global norms into the domestic law of the resisting nation.

#### CONCLUSION

In closing, I hope I have convinced you that same-sex sodomy, affirmative action, North Korea, Iraq, Guantanamo, enemy combatants, the juvenile death penalty, and the ICC are all features of transnational legal process after September 11th.

But increasingly, in a post September 11th world, I believe we are facing a new kind of Jeopardy—to coin a phrase. On the one hand, the United States has long recognized and urged a norm-based approach to international cooperation, what I call a strategy of “norm-based internalization.” But in recent months, the United States has been trying to break free from the very legal structure—the

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59. As the Death Penalty Information Center has chronicled, steps have recently been taken to abolish or impose a moratorium on the death penalty in such countries as Poland, Latvia, Azerbaijan, Georgia, Bulgaria, Estonia, and Lithuania. See generally RICHARD C. DIETER, ESQ., INTERNATIONAL PERSPECTIVES ON THE DEATH PENALTY: A COSTLY ISOLATION FOR THE U.S. (Oct. 1999), available at <http://www.deathpenaltyinfo.org/article.php?did=127&scid=30> (last visited June 8, 2004).

60. AMNESTY REPORT, *supra* note 58.

61. *Id.* at sec. 5.

62. See DEATH PENALTY INFORMATION CENTER, JUVENILES AND THE DEATH PENALTY, available at <http://www.deathpenaltyinfo.org/article.php?did=205&scid=27> (last visited June 8, 2004).

very legal exoskeleton it created after World War II—by pursuing a Bush Doctrine that rests instead on a narrow theory of coercive, power-based internationalism.<sup>63</sup>

We will see how this tension is resolved in the months ahead. But I, for one, believe that as a nation conceived in liberty, and dedicated to certain inalienable rights, the United States has very strong impulses to address the world not just in the language of power, but more fundamentally, in the language of power coupled with principle. We, as scholars, lawyers, thinkers and activists who care about the rule of law, should not just be bystanders at this pivotal time. Each of us should do what we can to use transnational legal process after September 11th to prod this country that we love to follow the better angels of our national nature.

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63. To see the tension between America's approach to norm-based internationalism and coercive, power-based internationalism, see President Bush's speech to the U.N. General Assembly on Sept. 23, 2003, available at <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html> (last visited June 8, 2004).