

THE RIGHTS OF THE ACCUSED IN A GLOBAL ENFORCEMENT ARENA

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It is a commonplace that crime, no less than other industries, has become a global venture. Criminal networks routinely cross borders to produce or distribute commodities that range from drugs to endangered species, and to purge the ill-gotten profits of their taint. Indeed, crimes occur in borderless space. Money is laundered, bets are made, pornography is viewed over the Internet. Internet transmission of digital hallucinogens is just one new crime on the horizon.¹

With increased awareness of the global nature of crime has come increased international cooperation among law-enforcement officers. This includes informal joint ventures between nation-states; bilateral and multilateral conventions on extradition, evidence-gathering, and prisoner transfer; and coordination by international and regional agencies.²

The United States is a leader in international law-enforcement cooperation, posting more than 1,500 agents overseas and training police in Eastern Europe and elsewhere.³ A recent White House publication suggests that these efforts will lead to less crime and greater global security – to the best of all possible worlds.⁴ This sounds encouraging, until one recalls the source of the phrase. It is Voltaire's novel *Candide*. Candide frequently declares that his is the best

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1. See Tony Thompson, London Observer Service, *Technology Key Player in Future Crime*, S.F. EXAM., Oct. 31, 1999, at B-7.

2. See generally, Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1261-72 (1998) [Hereinafter "Amann, Whipsaw"]. See also generally, Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime*, 44 WAYNE L. REV. 1401 (1998).

3. See Amann, *Whipsaw*, *supra* note 2, at 1262-63 & n.367; See also Zagaris, *supra* note 2, at 1464 ("The sheer size of the United States, its huge economy, its diversity, the important role of the judiciary, and the power of organized crime, all guarantee that the United States will remain the place where many experiments are made in the fight against transnational organized crime.").

4. See WHITE HOUSE, INTERNATIONAL CRIME CONTROL STRATEGY 93 (1998) (stating that the international crime control strategy of the United States "will lead us to a more secure and law abiding world in which Americans as well as our friends and allies abroad can prosper in peace").

of all possible worlds, even as he suffers the worst calamities.⁵ He is the quintessential optimist.

I am afraid that I am more skeptical.

It may be that greater law-enforcement cooperation will increase global security. But one wonders. Few contend that efforts to combat international drug-trafficking, for instance, have been effective. With regard to money laundering, a crime that is often transnational, it is estimated that only 0.0062 of every dollar illegally earned from drugs is subject to a governmental removal action.⁶

It also may be that cooperation will aid protection of individual rights. Bilateral and multinational cooperation agreements include some provisions that work to protect individual rights.⁷ International human rights conventions, most notably the International Covenant on Civil and Political Rights,⁸ provide a basis for development of a spectrum of rights inhering to those suspected or accused of transnational crime.⁹

I am afraid, however that the threats to individual rights are more imposing, even menacing.¹⁰ There are a number of reasons for this.

5. See VOLTAIRE, *CANDIDE* (Pierre Malandain ed., 1989) (orig. pub. 1759).

6. Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 201 n.8 (1995) (quoting HERBERT E. ALEXANDER & GERALD E. CAIDEN, *THE POLITICS AND ECONOMICS OF ORGANIZED CRIME* 40 (1985)).

7. One commentator states that "[m]utual assistance in criminal matters may also be seen as a means of achieving better justice, of improving the quality of justice . . ." Bert (A.H.J.) Swart, *Human Rights and the Abolition of Traditional Principles*, in *PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW* 505, 507 (Albin Eser & Otto Lagodny eds., 1992). As a particular example, he states that treaty-based transfers of criminal proceedings may lead to better "social rehabilitation of offenders." *Id.*; See also Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. ____ (page proofs at 14-15) (forthcoming 2000) (on file with author) [hereinafter "Amann, *Harmonic Convergence*"] (noting that joint ventures in fighting crime may encourage convergence in criminal procedure norms).

8. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), reprinted in 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

9. See *id.* at art. 14 (guaranteeing equal, fair, public, and speedy trial before a competent tribunal; a presumption of innocence; the rights to be informed of the charges, to have the assistance of an interpreter, and to have adequate time and resources to prepare a defense; assistance of counsel, appointed if necessary; the rights to cross-examine adverse witnesses and to compel testimony from favorable witnesses; the rights to silence and to an appeal; and the right against double jeopardy).

10. See, e.g., Edward M. Wise, *Foreword: The International Association of Penal Law and the Problem of Organized Crime*, 44 WAYNE L. REV. 1281, 1300-01 (1998) (stating that the association had made organized crime the theme of its September 1999 international congress "mainly in order to sound alarm bells about the extent to which the world-wide legislative reaction to organized crime, in large part inspired by developments in the United States, stands in contradiction to the emphasis on proportionality and restraint, on respect for the rule of law and the rights of the accused, which lies at the heart of 'classical' criminal law"); Zagaris, *supra* note 2, at 1464 ("The area of most concern has been in the application of

International criminal cooperation – what United States courts recently have called “cooperative internationalism”¹¹ – has led to the greater use of electronic surveillance and undercover operations, techniques familiar in the United States, but once anathema to the rest of the world.¹² The insistence on uniform laws has led to the abolition of bank secrecy, not long ago considered an aspect of personal privacy.¹³ Fears of further governmental encroachment into individual privacy are at the heart of the current encryption debate.¹⁴

Considerations unrelated to criminal justice, such as the desire for greater economic discourse or continued foreign aid, may compel ill-advised cooperation detrimental to individual rights. In a joint United States-Chinese heroin-trafficking investigation, for example, Wang Zong Xiao, a defendant arrested and charged in China, was flown to San Francisco to testify for the government at the United States trial of other defendants.¹⁵ In the course of his testimony, Wang recanted his confession, which he said had been coerced, and asked for political asylum.¹⁶ The desire to proceed with the joint effort seemed to have

constitutional law and international human rights.”); Christine Van den Wyngaert, *Rethinking the Law of International Criminal Cooperation: The Restrictive Function of International Human Rights Through Individual-Oriented Bars*, in *PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW* 489, 489 (Albin Eser & Otto Lagodny eds., 1992) (“In a period in which states are showing a steadily growing political willingness to cooperate in criminal matters, especially with respect to certain forms of criminality like terrorism, drug trafficking, money laundering, etc., human rights protection of the individual who is confronted with such cooperation procedures is a legitimate concern.”).

11. *United States v. Balsys*, 524 U.S. 666, 693 (1998) (acknowledging that increased cooperation may pose threats to individual rights); *see id.* at 714 (Breyer, J., dissenting) (recognizing “powerful” similarity between the state-federal law-enforcement cooperation that prompted extension of U.S. Bill of Rights in mid-twentieth century and international cooperation now).

12. *See Wise*, *supra* note 10, at 1302.

13. *See* Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts – Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1464-65 (1996) (discussing how United Nations convention requires state parties to abolish bank secrecy for purposes of drug-trafficking investigations); Francis R. Monaco, *Europol: The Culmination of the European Union’s International Police Cooperation Efforts*, 19 FORDHAM INT’L L.J. 247, 262-63 (1995) (discussing how the European Convention Against Money Laundering authorizes states in the European Union to release banking information).

14. *See* Michael Hatcher et al., *Computer Crimes*, 36 AM. CRIM. L. REV. 397, 440-41 (1999) (discussing encryption debate); Jeri Clausing, *In a Reversal, White House Will End Data-Encryption Export Curbs*, N.Y. TIMES, Sept. 17, 1999, at 1st. bus. pg. (reporting on Clinton Administration’s retreat, from linkage of eased encryption export controls to its demands that the government receive “back-door key to unscramble communications when they suspect a crime has been committed”).

15. *Wang Zong Xiao v. Reno*, 837 F. Supp. 1506, 1533 (N.D. Cal. 1993) [hereinafter “*Wang I*”], *aff’d sub nom. Wang Zong Xiao v. Reno*, 81 F.3d 808, 811 (9th Cir. 1996) [hereinafter “*Wang II*”].

16. *Wang II*, 81 F.3d at 811.

blinded the United States prosecutor to earlier indications that the confession might have been coerced and unreliable.¹⁷

The structure, or rather absence of structure, of transnational criminal law fosters inequity. In domestic criminal justice systems like that of the United States, the political and judicial branches, special-interest organizations, and defendants themselves participate, achieving a kind of balance between the need for public safety and the desire to protect individuals from undue or arbitrary governmental intrusion. It is at best a rough balance, one constantly threatened by uncritical reactions to fears of crime. In the transnational arena, there are few established institutions, and thus the threats loom larger.¹⁸

International criminal tribunals and regional judiciaries are exceptions to this general state of anarchy. These novel institutions¹⁹ adjudicate crimes that cross borders, either in actual fact or because the crimes outrage the international community. They do so with some consistency because they must adhere to founding statutes or conventions.²⁰ Nevertheless, there is room for concern. The laws governing the regional bodies were designed to regulate domestic criminal justice systems and are not always easily converted to the transnational context.²¹ In the *ad hoc* international criminal tribunals, procedural and evidentiary rules have undergone more than a dozen revisions.²² States have yet

17. *Wang I*, 837 F. Supp. at 1551-56 (discussing "clear indications" of coercion of Wang's testimony, including: discrepancies in Wang's statements to Chinese police; background knowledge of the role coerced confessions played in the Chinese criminal justice system; the "staged" nature of Wang's discussions with United States investigators; and Wang's "peculiar posture," suggesting injuries to his hidden left side, in a videotape of his Chinese confession).

18. See Van den Wyngaert, *supra* note 10, at 489 ("While it is often difficult to achieve this balance within a 'domestic' criminal justice system, it is all the more difficult in transnational criminal cases . . .").

19. The *ad hoc* International Criminal Tribunals for Rwanda and the former Yugoslavia have yet to mark their tenth anniversary, while the proposed permanent International Criminal Court is likely years away from operation. Even the oldest such institution, the half-century-old European Court of Human Rights, has just undergone a radical transformation into a full-time judiciary with compulsory jurisdiction. See Peter Leuprecht, *Innovations in the European System of Human Rights Protections: Is Enlargement Compatible with Reinforcement?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313, 319-20 (1998).

20. See Statute of the International Criminal Tribunal for Rwanda, SC Res., annex (Nov. 8, 1994), reprinted in 33 I.L.M. 1598 (1994); Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. S/25704, annex (May 3, 1993), reprinted in 32 I.L.M. 1159 (1993); Rome Statute of the International Criminal Court, art. 68(3), U.N. Doc. No. A/CONF.183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998); Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5-8, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

21. See Van den Wyngaert, *supra* note 10, at 491.

22. See *Basic Legal Documents*, (visited Nov. 8, 1999), <<http://www.un.org/icty/basic.htm>> (indicating that as of July 1999, the Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia had been revised sixteen times).

to agree on similar rules to govern the proposed International Criminal Court.²³ *Ad hoc* tribunal interpretations of statutory provisions, moreover, have drawn criticism. The furor over a ruling allowing the prosecution to withhold from the defense identities of certain witnesses provides one example.²⁴ Also troubling is the rejection of the defense claim that it had been denied equality of arms because one state had rebuffed orders to produce witnesses.²⁵

Most persons suspected or accused of transnational crime do not enjoy even this modicum of consistency; rather, they are investigated, tried, and sentenced according to the vagaries of whichever national system asserts jurisdiction.²⁶

The status of cross-border defendants makes matters worse. In the domestic context, defense interests receive some attention from the advocacy and educational efforts of special-interest groups like the National Association of Criminal Defense Lawyers (NACDL). There is not yet an equivalent transnational defense bar association. Defendants themselves, diverse

23. Draft proposals have engendered some criticism. See, e.g., Lawyers Committee for Human Rights, *Pre-Trial Rights in the Rules of Procedure and Evidence*, Vol. 2, No. 3, International Criminal Court Briefing Series (Feb. 1999) (expressing concern that the ICC Statute does not protect persons suspected but not yet charged, and calling for additional procedural protections, particularly during interrogation and arrest).

24. See *Prosecutor v. Tadi*, Case No. IT-94-1-T, Trial Chamber Decision on the Prosecutor's Motion Requesting Protective Measures (ICTY Aug. 10, 1995), reprinted in 7 CRIM. L.F. 139 (1996). Compare Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996) (criticizing decision) with Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997) (supporting it).

25. See *Prosecutor v. Tadi*, Case No. IT-94-1-T, Appeals Chamber Judgment (ICTY July 15, 1999), (visited Mar. 31, 2000),

<<http://www.un.org/icty/tadic/appeal/judgement/main.htm>>. The Appeals Chamber ruled that the Trial Chamber had not caused Serbia's noncooperation; in fact, it had tried to help the defendant as best it could. Although it could "conceive of situations where a fair trial is not possible because witnesses central to the defense case do not appear due to the obstructionist efforts of a State," the Appeals Chamber ruled that such a situation had not occurred, at least in part because the defendant had not requested a stay to secure Serbia's cooperation. *Id.* ¶ 55. The ICTY's ruling is understandable, given its inability to force compliance from such a key state. The result, however, creates a risk of unfairness to the defendant. See *Representing the General*, CAL. LAW., Nov. 1999, at 17 (reporting complaint of the Los Angeles-based attorney for ICTY defendant Gen. Tihomir Blaski that "the brand of justice that's practiced at the ICTY puts the defense at a distinct disadvantage," in part because of noncooperation). Cf. Zagaris, *supra* note 2, at 1448 (criticizing transnational cooperation agreements that grant certain rights to governments but not to private persons).

26. Indeed, persons accused of crimes that outrage the international community may be tried in national courts, as exemplified by Spain's effort to prosecute former Chilean dictator Augusto Pinochet. See *Regina v. Bartle* (H.L. Mar. 24, 1999), reprinted in 38 I.L.M. 581 (1999) (ruling 6-1 that Pinochet is not immune from extradition to Spain for crimes after 1988, when English law first proscribed extraterritorial torture). See also Clifford Krauss, *Pinochet at Home in Chile: A Real Nowhere Man*, N.Y. TIMES, Mar. 5, 2000, at §1, p. 12 (reporting that although England released Pinochet for medical reasons, he still may face prosecution in Chile).

individuals with no common cause until they are in custody, are unlikely to band together.

They are, moreover, among the world's most despised individuals. Animosity is obvious with regard to fugitives accused of torture or other atrocities.²⁷ It applies as well to less notorious defendants. There is little tolerance or sympathy for those accused of importing heroin or bombing airliners. Fueling the animosity is xenophobia, evident in the media's emphasis on the ethnic origins and supposedly alien customs of transnational defendants. We read of "Colombian drug traffickers,"²⁸ of "Palestinian terrorists,"²⁹ of the "Russian mafia,"³⁰ and of "Chinese tongs" with secret-society origins.³¹ It thus becomes easier for us to care less about these defendants.

Yet we need to care. We need, in these cases as in others, to preserve the rule of law. We need to give proper due to the rights of these defendants, not only because that is the right thing to do, but also to assure that the rights of law-abiding individuals are not abridged without justification.³² We need to assure that transnational prosecutions are deemed fair and legitimate,³³ not in the least in order to maintain support both for the means by which we are fighting global crime and for the money we are spending to do it.

27. A keen example of how animosity may hinder justice is the case of John Demjanjuk, who often was referred to as "Ivan the Terrible." See Richard J. Wilson, *Using International Human Rights Law and Machinery in Defending Borderless Crime Cases*, 20 *FORDHAM INT'L L.J.* 1606, 1634 (1997). Following his extradition from the United States to Israel in 1986, Demjanjuk was convicted of war crimes and spent seven years under sentence of death before his conviction was reversed on the basis of new evidence demonstrating he had been misidentified. See *United States v. Gecas*, 120 F.3d 1419, 1466 n.51 (11th Cir. 1997) (Birch, J., dissenting), *cert. denied*, 524 U.S. 951 (1998). Subsequent United States litigation revealed that the branch of the U.S. Department of Justice established to find and expel Nazi war criminals had failed to disclose evidence tending to exculpate Demjanjuk. *Id.* (discussing *Demjanjuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993) (*vacating* prior denial of writ of habeas corpus on account of "prosecutorial misconduct that constituted fraud on the court")), *cert. denied*, 513 U.S. 914 (1994)).

28. See, e.g., Douglas Farah, *Colombian Drug Cartels Exploit Tech Advantage*, *WASH. POST*, Nov. 15, 1999, at A17.

29. See, e.g., Tracy Wilkinson, *Plea by Clinton Unleashes Ire Among Israelis*, *L.A. TIMES*, Dec. 16, 1998, at A1.

30. See, e.g., Richard C. Paddock, *A New Breed of Gangster Is Globalizing Russian Crime Corruption*, *L.A. TIMES*, Sept. 23, 1998, at A1.

31. See, e.g., Larry D. Hatfield, *Chinatown Tong Unity Raises Eyebrows*, *S.F. EXAM.*, Feb. 5, 1993, at A1.

32. *Cf. In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) ("If we are ever to develop an orderly international community based on recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.")

33. For an insightful discussion of how dilution of criminal justice standards in an effort to contain conflict in the North of Ireland delegitimated British rule see Susan Coutin, *Ethnographies of Violence: Law, Dissidence, and the State*, 29 *L. & SOC'Y REV.* 517, 529-37 (1995).

Some limits on the exercise of repressive power already exist. For example, extradition treaties and other international criminal cooperation agreements sometimes include provisions requiring that the conduct under investigation be considered a crime in both states, although this double criminality requirement recently has been relaxed.³⁴ Some treaties respect a state's refusal to hand over its own nationals.³⁵ Others prohibit transfers of fugitives if they will be prosecuted for political offenses or if they will suffer discrimination for impermissible reasons such as race, ethnicity, or religion.³⁶

Other principles, however, operate to block the protective effect of such provisions. Most stem from the abiding resistance of many states to the application of international norms within their borders. To demonstrate this I could aim at an easy target, like China, which regularly argues that its internal affairs are none of the international community's business. There, executions number in the thousands each year, and the coercion of confessions is reportedly routine. Yet China recently adopted new codes of criminal law and criminal procedure. These articulate a number of rights alien to many Chinese but familiar to Westerners; for example, the right to counsel and a presumption of innocence.³⁷

Furthermore, states with a long tradition of such rights do not necessarily welcome international norms that may differ from domestic law. The United States, for example, has been reluctant to ratify human rights treaties, and has done so only after attaching reservations or declarations that gut safeguards.³⁸ The United States also maintains that key provisions are not "self-executing," and thus have no mandatory domestic effect absent implementing legislation.³⁹ Although President Clinton recently characterized resistance to international

34. See Van den Wyngaert, *supra* note 10, at 490-95; Jonathan O. Hafen, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191, 194, 197-214 (1992).

35. See Swart, *supra* note 7, at 531-34.

36. See Van den Wyngaert, *supra* note 10, at 494.

37. See Amann, *Harmonic Convergence*, *supra* note 7, at 49-55 (analyzing developments in Chinese criminal justice system).

38. See William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK J. INT'L L. 277 (1995). Accord Wilson, *supra* note 27, at 1606 ("[T]he United States . . . has staunchly refused to make itself a party to any international human rights instrument which might subject it to review of allegations of individual violations of human rights, whether in the criminal process or any other.").

39. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) & cmt. h (1987). See generally Diane Marie Amann, Cynthia R.L. Fairweather & Vivian H. Rhoe, *Using International Law to Defend the Accused*, 1 CAL. CRIM. L. REV. (Feb. 2000) (visited Feb. 18, 2000), <<http://www.boalt.org/CCLR/>>.

norms as a "New Isolationism,"⁴⁰ the United States long has resisted pressure from outside. Indeed, in the area of law enforcement, the Executive Branch, by the positions it has taken in transnational criminal litigation, has fostered isolationism.

Nor is the United States judiciary without blame. In transnational criminal cases the United States Supreme Court has followed a policy of extreme deference to the political branches, lest its decisions upset foreign relations.⁴¹ In the area of extradition, courts adhere to a rule against inquiring into the fairness of the requesting state's legal system.⁴² Courts have sustained legislation depriving defendants of standing to challenge violations of international law that had been incorporated into statutory law.⁴³ Although United States courts sometimes look to international law to determine the scope of the United States Constitution, a number of sitting Justices contend that international norms play no role in constitutional interpretation.⁴⁴

Against this backdrop the holdings in 1990s trilogy of United States Supreme Court opinions in transnational cases are not surprising. First came *United States v. Verdugo-Urquidez*,⁴⁵ in which the Court refused to accord the Fourth Amendment's protections to a noncitizen defendant against whom the United States government intended to introduce evidence obtained in a warrantless search in Mexico.⁴⁶ Then, in *United States v. Alvarez-*

40. See David E. Sanger, *Clinton Says 'New Isolationism' Imperils U.S. Security*, N.Y. TIMES, Oct. 15, 1999, at A1.

41. See *Balsys*, 524 U.S. at 697 ("Because foreign relations are specifically committed by the Constitution to the political branches, U.S. CONST., art. II, § 2, cl. 2, we would not make a discretionary judgment premised on inducing them to adopt policies in relation to other nations without squarely confronting the propriety of grounding judicial action on such a premise").

A classic expression of such deference, albeit outside the criminal context, occurs in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936).

42. Compare Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991) (supporting this rule of noninquiry, enunciated in *Neely v. Henkel*, 180 U.S. 109 (1901)) with *Wilson*, *supra* note 27, at 1619-23 (criticizing rule).

43. See, e.g., *United States v. Mena*, 863 F.2d 1522 (11th Cir.) (sustaining 46 U.S.C. § 1903(d), which precludes use of international law to challenge searches and seizures pursuant to Maritime Drug Law Enforcement Act, 46 U.S.C. § 1901 *et seq.*, *cert. denied*, 493 U.S. 834 (1989)).

44. See *Amann, Whipsaw*, *supra* note 2, at 1259-60 n.356. Cf. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding executions of sixteen year-olds constitutional without mention of international norms, though those same norms informed dissent. See *id.* at 389-90, 405 (Brennan, J., dissenting)).

45. 494 U.S. 259 (1990).

46. The Chief Justice and four colleagues rejected the contention that "every constitutional provision applies wherever the United States Government exercises its power." *Id.* at 269. Lower courts also have limited the extent to which the Fourth Amendment protects United States nationals. See *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987) (Kennedy, J.) (United States-foreign search overseas need comply only with the law of the foreign country, and not with United States law); See also *United States v.*

Machain,⁴⁷ the Court, over the objection of the Mexican government, interpreted the United States-Mexico extradition treaty to allow the kidnaping of a defendant, at the behest of United States agents, in order to procure the defendant's presence in a United States court. Finally, in *United States v. Balsys*,⁴⁸ the Court held that a witness in a United States court may not invoke the Fifth Amendment privilege against self-incrimination if she fears that her compelled testimony would be used against her in a foreign, rather than a domestic, criminal proceeding.⁴⁹

Not all United States judges are at fault. Some United States courts do consult international norms to determine the scope of United States constitutional provisions.⁵⁰ In the *Wang* case discussed earlier, the United States courts insisted that the Chinese witness receive asylum.⁵¹ Other judges have refused to sanction certain extradition efforts and certain evidence-gathering procedures.⁵²

Furthermore, not all states have followed the path of most resistance. Indeed, in some cases, states are moving toward more acceptance. The forty-one members of the Council of Europe, for example, must conform their domestic criminal justice systems to the rules articulated by the European Court of Human Rights.⁵³ Another example is Canada, which has interpreted its Charter of Rights and Freedoms to constrain the investigative activities of Canadian agents abroad.⁵⁴

Juda, 46 F.3d 961, 968 (9th Cir.) (applying *Peterson* to allow evidence obtained after United States and Australian agents, without warrants or magisterial review, twice burglarized and bugged defendant's ship), cert. denied, 514 U.S. 1090, 515 U.S. 1169 (1995).

47. 504 U.S. 655 (1992).

48. 524 U.S. 666 (1998).

49. *Id.* at 697-98. For a fuller discussion of this opinion, see Diane Marie Amann, *International Decisions: United States v. Balsys*, 92 AM. J. INT'L L. 759 (1998).

50. See, e.g., Mark Andrew Sherman, *Indirect Incorporation of Human Rights Treaty Provisions in Criminal Cases in United States Courts*, 3 ILSA J. INT'L & COMP. L. 719 (1997); Hans A. Linde, *Comments*, 18 INT'L LAW. 77 (1984); Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981).

51. *Wang Zong Xiao v. Reno*, 81 F.3d 808 (9th Cir. 1996), *aff'g* *Wang Zong Xiao v. Reno*, 837 F. Supp. 1506 (N.D. Cal. 1993).

52. See Zagaris, *supra* note 2, at 1464 (attributing such rulings to judicial disapproval of the "United States Executive's unwillingness to provide for due process for defendants and third parties in evidence gathering.")

53. See Amann, *Harmonic Convergence*, *supra* note 7, at 19-23 (discussing Court); Van den Wyngaert, *supra* note 10, at 490 (stating that European human rights regime has "penetrate[d] into the day-to-day 'legal culture' of both practitioners and academics in the member states").

54. *R. v. Cook*, (visited Feb 18, 1999) <http://www.droit.umontreal.ca/doc/csc-scc/en/pub/1998/vol2/html/1998scr2_0597.html>.

How can we guarantee that the rights of those accused of transnational crimes are honored?

We need to give dignitary interests their due, to ensure that even in cross-border criminal cases individuals do not suffer unfair or arbitrary governmental intrusion. The balance between the needs for public safety and private autonomy must be restored.⁵⁵ The International Association of Penal Law recently suggested principles that may guide this process: maintaining the rule of law; adhering to the legality principle; using the least invasive investigative techniques; interposing judicial supervision of investigations; prosecuting only when *mens rea* and individual culpability can be securely established; making punishment proportional to the crime; and assuring the presumption of innocence.⁵⁶

We need to establish a defense lobby. There is a need for an organization, along the lines of the NACDL, that will both advocate for the interests of the internationally accused and train its members to represent defendants in transnational cases with skill.⁵⁷ The fledgling International Criminal Defence Attorneys Association, founded in Montréal in 1997, has made a good start.⁵⁸ The association concentrates on redressing one of the great failings of the

55. Accord Swart, *supra* note 7, at 506 ("In the interest of combatting crime, states should engage in the closest international co-operation possible. Basic individual rights set a limit, that cannot be transgressed.").

56. See Wise, *supra* note 10, at 1303. In a recent article, a former United States prosecutor argued for adoption of ethical rules by which prosecutors would consider factors like potential harm to innocent third parties in choosing appropriate investigative techniques. See generally Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 *FORDHAM L. REV.* 723 (1999). Although the proposal has merit, imposition of a proportionality requirement by an external entity, rather than by internal policy, would seem more likely to encourage adherence.

57. Even absent a defenders' association, skilled counsel are likely to push systems toward fairer proceedings. See, e.g., Amann, *Harmonic Convergence*, *supra* note 7, at (discussing how attorneys from nongovernmental organizations have injected new procedures like cross-examination into some national systems); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 *MICH. L. REV.* 1047, 1069-72 (1994) (linking origins of privilege to emergence of defense counsel).

58. See *International Criminal Defence Attorneys Association (ICDAA) website* (visited Feb. 15, 2000), <<http://www.hri.ca/partners/aiad-icdaa/>> [hereinafter "*ICDAA website*"]. The association's membership includes 120 individuals, and several nongovernmental organizations and bar associations, from twenty-three countries. Telephone interview between author and Élise Groulx, ICDAA president, Feb. 8, 2000 [hereinafter Groulx interview].

international criminal tribunals: the absence of any defense organ.⁵⁹ It has wide-ranging plans to improve the lot of defendants.⁶⁰

We need to work toward the development and elaboration of common norms of criminal justice, based on the principle that individuals have certain fundamental rights. Here we, as United States lawyers, need – and here again I borrow a phrase from *Candide* – to tend our own garden.⁶¹ This means that when an international criminal justice norm provides the individual greater protection than does domestic law, we must work to persuade United States courts to embrace the more protective norm. When we fail to do so, we should file petitions in regional courts and before supranational bodies like the Human Rights Committee.⁶² Even if the decisions of those bodies prove unenforceable, they will serve a norm-setting function and aid movement toward a customary international law that is readily understood and applied.⁶³

If we can do these things to improve cross-border criminal justice, perhaps one day we will enjoy the best of all possible worlds.

59. See ICDA website, *supra* note 58. Cf. Lawyers Committee for Human Rights, *supra* note 23, at 11 (stating that experiences in the *ad hoc* tribunals had “shown that there is a need to ensure that the defense is provided with adequate resources, facilities and expertise,” and thus calling “for the establishment of a legal assistance unit within the Registry that would be charged with supporting fair trial rights before the ICC, in particular the right to counsel) (emphasis in original).

60. According to its president, the association intends eventually to train lawyers, and to work to better policies and practices relating to the defense, in national as well as supranational systems. To date, it not only has lobbied for a defense unit in the proposed International Criminal Court, but also has filed with the International Criminal Tribunal for Rwanda an *amicus* brief on the right to counsel of choice and has cosponsored a conference at The Hague. Groulx interview, *supra* note 58; see ICDA website, *supra* note 58.

61. VOLTAIRE, *supra* note 5, at 163 (“il faut cultiver notre jardin.”)

62. See Amann, *Harmonic Convergence*, *supra* note 7, at 18 n.106 (discussing potential for regional courts to “play a role in developing an international body of constitutional criminal procedure”); see also Van den Wyngaert, *supra* note 10, at 495:

In view of the political tensions that may arise over particular international cooperation cases, especially when the discrimination clause is invoked with respect to an extradition request emanating from a state with which the requested state has strong political ties, it may be better to have the case decided by an international judicial body than by domestic judicial or administrative authorities.

63. Cf. Lawyers Committee for Human Rights, *supra* note 23, at 4 (predicting that rules established by the ICC “will have a significant impact on domestic criminal procedure . . . because it will be legally and political difficult to justify a two-tiered system of rights, one for ICC and another for purely domestic purposes.”)