INTERNATIONAL PRACTITIONER’S NOTEBOOK

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RIGHTS & OBLIGATIONS OF PERSONS UNDER INTERNATIONAL LAW: INTERNATIONAL CRIMES, HUMAN RIGHTS, EXTRATERRITORIAL JURISDICTION & THE DECLINE OF STATE SOVEREIGNTY

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THE NEW DYNAMICS OF SELF-DETERMINATION

Valerie Epps

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I. INTRODUCTION

The term *self-determination* still teeters on the borders of evolving legal precept, expression of political will, and universal human aspiration. The concept never quite settles down into a black letter law pronouncement or a clearly understood political dynamic. Nor does it find full expression by being regarded merely as the rallying cry of the dispossessed. It is this very fact of the amorphous and evolving nature of the concept of self-determination that makes it both fascinating and frustrating.

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II. HISTORICAL DEVELOPMENT OF THE MEANING OF SELF-DETERMINATION

The term self-determination has undergone considerable historical transfiguration since it was first launched on the international arena by President Woodrow Wilson. After World War I, when the victorious powers were busy redrawing state boundaries, self-determination became the touchstone for the creation of new states that arose out of the rubble of the Austro-Hungarian and Ottoman empires. President Wilson stated: "National aspirations must be respected; peoples may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril." There is a certain irony to this statement as that was definitely the era of a few well-placed men disappearing into smoke-filled rooms with old maps and emerging with newly drawn borders although there were some plebiscites among sections of the male population of certain areas that were supposed to guide the line drawing.

The Covenant of the League of Nations did not mention self-determination though the Mandate System was supposed to work towards the development of colonial peoples. A series of treaties were signed after World War I for the protection of minorities within certain defeated states. Neither of these regimes, the Mandate system or the minority treaties, however, offered political participation as a right to the governed group. The right to separation from the larger state was firmly rejected by the Commission of Jurists in its ruling on the status of the Aaland Islands in 1920: "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, anymore than it recognizes the right of other States to claim such a separation."  

III. THE UNITED NATIONS CHARTER AND SELF-DETERMINATION

The United Nations Charter mentions self-determination twice. Article 1(2) mentions as one of the Purposes of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ." Article 55 notes that "stability and well-being . . . are necessary for peaceful and friendly relations among nations [which should be] based on respect for the


principle of equal rights and self-determination of peoples. . . .” Clearly, the United Nations system was based on the idea of equality of existing sovereign states and, to a lesser extent, on moving dependent states towards independence.

IV. DECOLONIZATION

The rapidly increasing demands for an end to colonialism were the occasion for raising self-determination to a right and for linking the right to political participation in governance. In 1960, the General Assembly declared that: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”3 This Declaration on the Granting of Independence to Colonial Countries and Peoples concludes, however, with a clear statement against reading the right to self-determination as a right to secession. “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”4 Much more recently the principle of *uti possidetis juris*, the principle whereby colonial countries claiming independence have to accept their preexisting territorial boundaries, has been declared part of customary international law by the International Court of Justice in its 1986 decision concerning the frontier dispute between Burkina Faso and the Republic of Mali5 and its 1992 decision on the land, island and maritime frontier dispute between El Salvador and Honduras.6 Although these decisions concerned issues of title to territory in border disputes, the principle of *uti possidetis* was affirmed because the fracturing of preexisting sovereign boundaries was seen as destabilizing the whole international system.7 A system that was, and continues to be, built on the sanctity of “the territorial integrity . . . [and] political independence”8 of sovereign states is unlikely to allow a doctrine to

4. Id. at para. 6.
7. “Its [the principle of *uti possidetis juris*] obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.” Supra note 5, at para. 20.
8. U.N. CHARTER, art. 2, para. 4.
develop that undermines part of the bedrock of the theoretical construct, namely the state with a defined territory, which is one of the traditional requirements for statehood.9

The move from a colonial system, which meant that vast numbers of people were ruled by alien governments, to the achievement of independent status for almost all of the old colonies and protectorates did not dismantle the state system. Rather it imposed rules on who had rights to govern. The notion of democracy had begun to take hold as a right attaching to persons within the framework of the state. In the decolonization era the right to self-determination became linked to an emerging democratic right, but the right is best understood in negative terms: it was the right not to be governed by foreigners. Professor Thomas Franck notes that “Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.”10 Whatever the democratic entitlement was, its initial formulation did not seek to dismantle the state.

V. BEYOND DECOLONIZATION

Once we move beyond the decolonization context, the scope of the rights encompassed by self-determination becomes unclear, and the question of the entity to whom the right attaches engenders fierce debate with, as yet, no resolution.

The introduction of the notion of rights in international law that attach to human beings as individuals has been one of the more remarkable developments of international law since the end of World War II.11 Although this movement had much earlier political antecedents, as our own Constitution and Bill of Rights bear witness, it is only in the latter half of the twentieth century that these human rights have become an accepted feature of international law.

11. There was, of course, a much older branch of international law known as Responsibility of States for Injury to Aliens under which states were obliged to treat aliens within their borders with a minimum level of due care but this obligation did not traditionally extend to a state’s own citizens.
VI. HUMAN RIGHTS AND SELF-DETERMINATION

Both the International Covenant on Economic, Social and Cultural Rights\textsuperscript{12} and the International Covenant on Civil and Political Rights\textsuperscript{13} contain an article on self-determination. Article 1 (of both Covenants) states: “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources . . . .” The debate since the introduction of the two Covenants has focused on two questions: What does the right to self-determination encompass? and who are the peoples that have this right?

Professor Hurst Hannum has carefully examined a variety of United Nations materials relating to the meaning of these terms as they were understood at the time of the drafting of the Covenants. He concludes that “a careful examination of the legislative history of the covenants leads to the conclusion that a restrictive interpretation of the right of self-determination comports with the views of the majority of the states that supported the right.”\textsuperscript{14} Self-determination at that time was understood “as a right belonging only to colonial peoples, which once it had been successfully exercised could not be invoked again, and it would not include a right of secession except for colonies.”\textsuperscript{15} Subsequent occasional discussion of the scope of the right of self-determination by the Human Rights Committee has failed to produce any agreement beyond the colonial context.\textsuperscript{16}

VII. SELF-DETERMINATION AND THE DEMOCRATIC RIGHT

What is it that the self determines? It has been suggested that the central right is “to determine . . . collective political status through democratic means”\textsuperscript{17} and this indeed may be a structural necessity for


\textsuperscript{14} Hurst Hannum, \textit{Rethinking Self-Determination}, 34 \textit{VA. J. INT’L L.} 1, 23 (1993).

\textsuperscript{15} \textit{Id.} quoting the contemporary Director of the U.N. Division of Human Rights John P. Humphrey, \textit{HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE} 129 (1984).


protection other rights falling within the scope of self-determination, such as the right to "freely pursue . . . economic, social and cultural development." Although the United Nations Charter does not impose or require democratic systems of governance, from a whole host of subsequent declarations, covenants, and other articulated human rights a convincing argument can be made that the right to participate in government is now an established norm of international law. Indeed the General Assembly's 1970 Declaration on Principles of Law Concerning Friendly Relations links self-determination with the requirement of a government representing the whole people while at the same time rejecting the right of secession if the government meets the requirement of representing the whole people.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.

Three questions naturally present themselves upon reading this Declaration. What rights do people have if the government does not represent them? Do they then have a right to secession? What, in fact, is a representative government for a group that, in some way or another, perceives itself as dominated by an alien group?

Professor Kirgis reads the language in the Declaration as indicating:

a right of 'peoples' . . . to secede from an established state that does not have a fully representative form of government, or at least to secede from a state whose government excludes people of any race, creed or color.

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19. See generally, FRANK, supra note 17.
21. Id. at 124, 9 I.L.M. at 1296.
from political representation when those people are the ones asserting the right [to self-determination].

The notion here is that discrimination against certain groups with regard to eligibility to participate in the political process may legitimize the claim to secession. Some writers go beyond participation in the political process and suggest much broader rights of participation. Professor Nanda writes of the "right to participate in all value processes—power, wealth and resources, respect and rectitude, enlightenment and skill, and affection and well-being." The lower the degree of participation in all of these aspects of life, the greater the right to secede. The underlying tacit premise of these lines of argument is that if the subgroup has full access to political participation or fully participates in all value processes, the claim to secession is illegitimate. While I do not dispute that the prevalence of claims for secession reduces where the subgroup does fully participate in the national life and that the world will be less tolerant of and less sympathetic towards subgroups with full participatory rights, I do not think that full participation should be the measure of the legitimacy of secessionary claims. My principal reason for rejecting full participation of the subgroup as the litmus test of legitimacy for secession is the argument based on numbers. If, for example, a particular subgroup who wishes to secede only make up ten percent of the population, that subgroup will never find itself living in a nation where its characteristics, however they may be perceived, are dominant and that is precisely what the subgroup may wish to achieve by secession. Conversely, where the dominant group perceives itself as likely to be outnumbered by the dominated group and likely to have to grant full participatory rights to all governed people it may well encourage secession, or at least full autonomy. Some writers have used this latter principle to explain why Israel will, in fact, eventually recognize a Palestinian state.

VIII. THE SELF OR THE PEOPLE

This takes us directly to the difficult issue of defining the self or the peoples to whom the right of determination attaches. Certainly it belongs to the citizens of a state but does it attach to any subgroups? There is a long trail of lawyerly scholarship that attempts to define groups which can claim a right of self-determination. Most of these writings


focus on particular characteristics that the group must possess in order to qualify for the right. Prime contenders in these lists of distinguishing characteristics are race, ethnicity, culture, religion, language, history, tradition, and mutual loyalties, though some authors have rejected an objective criteria test and recommended a psychological perceptions test. Some writers point out that the group must have ties to a specific area of territory otherwise the claim to recognition as a group is likely to fail. These writers often conclude that provided the group has at least a certain minimum combination of these characteristics then the group has a right to self-determination which might consist of a considerable level of autonomy from the dominant group or might consist of the right to secession. Though there have been examples of peaceful secession, for example, Singapore from the Malaysian Federation, secession is usually achieved in the wake of armed uprisings which are seen as threatening international peace and security, thereby undermining the United Nations system. The unsuccessful attempts by Biafra to secede from Nigeria and Katanga from the Congo were both accompanied by bloodbaths and were viewed as major contributors to destabilization. Thus, the resistance to claims of secession has continued, though less so in fully democratic states than in more autocratic systems of government.

IX. THE LEGITIMACY OF THE CLAIM TO SECESSION

Once a claim to secession has been voiced, the literature shifts to focus on criteria or methodology for judging the legitimacy of the claim. Authors have noted the lack of any formal machinery in the international arena where such claims can be presented and suggestions have been made to expand and develop some of the existing machinery to permit it to hear and determine such claims.

The suggested criteria for judging the legitimacy of a claim to secession are often related to the deprivation of human rights, particularly political rights, for the group claiming secession. Professor Kirgis isolates two key variables in the test for legitimacy of the claim: “the degree of representative government . . . and the extent of destabilization that the international community will tolerate. . . .” He concludes that “a claim of a right to secede from a representative democracy is not likely to be

24. Id.


considered a legitimate exercise of the right of self-determination. . . . Conversely, a claim to secede from a repressive dictatorship may be regarded as legitimate."28 "If a government is quite unrepresentative, the international community may recognize even a seriously destabilizing self-determination claim as legitimate."29

X. SUMMARY OF THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION

What has happened to this right of self-determination? It started out as a right attaching to dominated nations; it gradually transformed into a right of citizens within a nation; it then became indissolubly linked with the right of citizens to participate in governance within a nation; later the notion of participation was expanded to include full participation in the life of the nation; then the focus shifted onto the groups that were not experiencing full political or other forms of participation and self-determination was seen as attaching to those groups; and finally self-determination has become a declared right for a group to break away from the nation state and form a new state, at least when full participation (however that is defined) is not guaranteed to the group.

This evolution of self-determination has, to some extent, mirrored the developments in international law that have moved it from a nation state focus to a group and individual rights focus. The demise of sovereignty, which by now has been so frequently noted as to require little more than a mention, might be thought to be at odds with the movement towards ever more claims of sovereignty for ever smaller groups, but I am not sure that it is. Movements towards regionalism, such as the European Union, or supra-nationalism, such as the deployment of United Nations forces, is certainly a reflection of both functional necessity and a movement towards reducing national divisions, but it is worth noting that all of these larger-than-state structures operate almost entirely through state participation. The aspiration of a group within a nation to secede and form a new nation may be seen as an attempt to achieve greater participatory rights within the supranational structures, not as a rejection of those structures.

28. Id.
29. Id. at 310.
XI. FUTURE DEVELOPMENTS OF THE RIGHT TO SELF-DETERMINATION

The next move that I perceive is that the right to secede will be recognized as attaching to any self-declared group (provided it has claims to territory) even though it may have full political and other participatory rights. For example, the Quebecois, the Scots, the Basques, even the Northern Italians may be recognized as having legitimate claims to self-determination. This type of right is in fact much more likely to be recognized by fully democratic states, as opposed to dictatorial states, because democratic states have become accustomed to the notion of ruling by the consent of the governed. Many social scientists tell us how modern society fails to support the family and how modern men and women desperately seek a sense of connectedness. Perhaps smaller units, linked to larger structures, do provide a better quality of life for their inhabitants. Recently a student showed me a beautiful map of Europe drawn up in 1992 and neatly divided into seventy five states. The lines were allegedly drawn on ethnic and cultural lines. Ancient kingdoms such as Wessex and Aquitaine were resurrected. I couldn't help wondering if I was looking at a map of the past or a map of the future.

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is used to justify claims by groups ranging from internal autonomy to secession; hence the difficulty in finding an operational meaning of "self-determination" that can be applied in various situations.

Three-quarters of a century ago, former Secretary of State Robert Lansing remarked that the concept was "loaded with dynamite," and that "it will raise hopes which can never be realized." That statement was made in the aftermath of the 1919 Peace Conference at Versailles. Now, in the post-Cold War era, we are witnessing the unfolding of the explosive quality of self-determination to which he referred, as the international community confronts the challenge of ever-increasing ethnic-national self-determination claims, including, for example, those of the Kurds in Iraq and Turkey and of the Tamils in Sri Lanka, and similar other claims for secession in the Balkans, Caucuses, and several parts of Africa. These claims challenge the territorial approach to self-determination, that once a territory has achieved independence, it has reached a culmination of self-determination claimed.

As a marked departure from the past, there no longer is an international consensus today that the recognition of self-determination claims is to be limited to colonial and non-self-governing situations, although even then, a couple of decades ago, there were several of us who questioned both the validity and wisdom of that consensus. To illustrate, I wrote in 1981 that

[i]t is not the purpose of this paper to encourage and promote the right of secession. It seems desirable and necessary, however, to enhance awareness of the likelihood that the international community will, in the future, be faced with claims for territorial separation in non-colonial settings and that the absence of institutions, procedures, and strategies to implement the right of secession will leave few alternatives to violence . . . .

[T]he severe deprivations of human rights often leave no alternative to territorial separation. The world community


3. See e.g., BUCHHEIT, supra note 1; Nanda, supra note 1.
must respond efficiently and effectively to the consequences of such separation. There is a growing recognition of the close link between human rights and international peace and security. It is not premature to accord recognition to the right to secession in an effort to promote these goals.  

The fear that secessionist claims by various ethnic-nationalist groups will exacerbate the existing fragile international order have recently led some observers to call for placing severe limits on the scope of self-determination so as to regulate, control, and minimize its evil consequences. While it may be argued that this hypothesis remains untested and lacks validity, I do not wish to enter the debate here. Rather I would shift the focus from the discussion about secession, independence and statehood, which undoubtedly constitute important aspects of self-determination claims, and instead submit that in light of the degrees and range of self-determination claims in the United Nations era, it is necessary for international lawyers to study the mechanisms under which all these claims can be peacefully pursued and resolved.

II. The Challenge of Self-Determination

The basic questions pertaining to self-determination that need to be addressed have not changed. They are: 1) Who constitutes the self, the peoples who will determine their own future? 2) How is self-determination to occur and how are the identified peoples to exercise this right? and 3) What is the nature and scope of the self’s, the peoples’ determination? What shape will it take? What issues will it cover: economic, social, political (foreign policy, security, etc.)?

Similarly, both internal and external dimensions of self-determination remain as valid today as before. It may be noted that the reference in the former is to a democratic form of government with wider participation, for it connotes regulation of relations between those who govern and the governed within a community, and the latter refers to the

4. Nanda, supra note 1, at 280.
6. See Kirgis, supra note 1.
7. See The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. No. 28, at 121 (1971) (Principle (e)) [hereinafter Declaration]. Principle (e) requires that a state must be possessed of a “government representing the whole people belonging to the territory without distinction as to race, creed or colour.” Id.
regulation of relations between a community which has defined itself and
the rest of the world, which may take any number of forms.\(^8\)

If the self is an ethnic nation or group which demands recognition
for the validity of its claim to self-determination, the characteristics would
be that a *people* thus defined can be identified as a social entity, that they
have a common ancestry, history, religion, language, culture, identity, or
any combination of these characteristics, and possess an awareness or state
of mind that they are not just a population but have a sense of identity. To
give it a political identity, it is likely to have political institutions, and the
issue arises as to some form of international recognition of its status as a
*people*.\(^9\) As to the scope of self-determination, it ranges from a claim to
preserve ethnic and cultural identity to a demand for separate statehood.

A demand for independent statehood could, in all likelihood, exclude other
ethnic groups and, within the claimant ethnic group, those who disagree
with the demand. What rights do these other ethnic groups and the
dissidents possess and how are their interests to be accommodated? A
major challenge of ethnic-national claims to self-determination is to the
traditional concept of international order based on international law norms
related to territorial integrity, state sovereignty, prohibition of the use of
force, and non-intervention in the internal affairs of states. The challenge,
in essence, is the balancing of these various conflicting and yet
complementary principles on the one hand and the principle of self-
determination on the other.

If the claim of self-determination means that it is a claim to
separation, independence, and statehood, then in addition to the problem
of likely international fragmentation and chaos, the issues pertaining to
creation and recognition of states in light of the existing criteria for
statehood, population, territory, government, and willingness and capacity
to enter into relations with other states, are to be applied.\(^10\) And on
recognition of states, existing norms of international law are far from
being precise, leaving their invocation and interpretation to each state,
with a great deal of state subjectivity.

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8. See Declaration, supra note 7, princ. (e), para 4, which acknowledges that the right of
self-determination may be implemented in any of the following forms: “[t]he establishment of a
sovereign and independent State, the free association or integration with an independent State, or
the emergence into any other [freely determined] political status . . .”

9. See generally discussion in Nanda, supra note 1, at 275-76.

10. See generally JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*
III. HISTORICAL PERSPECTIVE

I must begin with the history of self-determination, which arguably begins with the Peace of Westphalia in 1648. To provide a proper perspective, it will be appropriate to recall that President Woodrow Wilson introduced the concept to the League of Nations in 1919 as the right of every people to choose the sovereign under which they live. It may also be recalled that the League of Nations applied the doctrine in a limited fashion to ensure the protection of minorities.

In the Aaland Islands controversy a specially-appointed International Commission of Jurists said in an advisory opinion: "Positive international law does not recognize the right of national groups, as such, to separate themselves from the state of which they form part by the simple expression of a wish, any more than it recognizes the right of other states to claim such a separation." Accepting the Commission's recommendation, the League of Nations rejected a request by the representatives of the Islands for annexation to Sweden as an exercise of their right of self-determination.

Unlike the Covenant of the League of Nations, which did not mention self-determination, the United Nations Charter specifically refers to the principle in articles 1 and 55. Among other provisions, articles 2 and 56 directly obligate member states to implement the mandate of articles 1 and 55. Also, Chapters XI, XII, and XIII, which address questions of non-self-governing and trust territories, implicitly endorse the principle since they impose obligations on member states to give effect to the principle. Specifically, the goal of article 73 is to ensure, within due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses [and] to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

11. In this section I have relied on my prior work, Nanda, supra note 1, at 265-271.
As early as 1950, the United Nations General Assembly called upon the Economic and Social Council to request that the Commission on Human Rights “study ways and means which would insure the right of nations and peoples to self-determination.”

Article 1, common to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reads:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

3. The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

It should be recalled that the General Assembly already had adopted in 1960 the Declaration on the Granting of Independence to Colonial Countries and Peoples, which acknowledged that all “peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” It also, however, prohibited all attempts aimed at “the partial or total disruption of the national unity and the territorial integrity” of any state.

Subsequently, the General Assembly in 1970 unanimously adopted the Declaration on Principles of International Law Concerning Friendly Relations, which proclaims as one of seven principles the principle of equal rights and self-determination of peoples, “under which all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.”

18. Declaration, supra note 7.
19. Id. princ. (e).
The Declaration obligates a state to refrain from any forcible action which deprives peoples [claiming the right to self-determination] in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter . . . .

As to the issue of the territorial integrity of states, the Declaration states:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The logical reading of the Declaration is that a state must possess a government representing the whole people for it to be entitled to protection of its territorial integrity against secession.

The principle of self-determination was endorsed by two advisory opinions of the International Court of Justice. In the advisory opinion on Namibia, the Court affirmed the right to self-determination, stating that "the subsequent development of International Law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them." Subsequently, in 1975, in the Western Sahara case, the Court approved of "the right of the population of the Western Sahara to determine their future political status by their own freely expressed will."

20. Id. para. 5.
21. Id. para. 7.
23. Id. at 31.
25. Id. at 35-36.
This brief survey shows that in the United Nations practice, the principle of self-determination had acquired by the late 1970s the status of an enforceable legal right, but only in the context of colonial and non-self-governing territories. State practice reveals that the right was, in fact, until recently considered to be limited to these situations. In its response to claims for self-determination, the United Nations gave very restrictive interpretation of the concept, by limiting the self to territorial entities under colonialism or international trusteeship. To illustrate, secessionist attempts in 1960 in Katanga and in 1967 in Biafra failed.26 While considering the Biafra conflict, a meeting of the Assembly of Heads of State and Government, the supreme organ of the Organization of African Unity, condemned efforts at creating an independent Biafra and reaffirmed “adherence to the principle of respect for the sovereignty and territorial integrity” of Nigeria.27 Bangladesh was an exception for special reasons.28 Former United Nations Secretary General U Thant’s often-repeated words of 1970 reflect the then-prevailing attitude of the United Nations as an international organization being unequivocally opposed to accepting secession. He said that the United Nations “has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its Member State.”29

IV. CURRENT TRENDS

I would, however, submit that more recently the right of self-determination has been extended to non-colonial situations as well. During the Cold War, there was obviously no challenge to borders in Eastern Europe and the former Soviet Union. Those wishing to claim the right of self-determination were deterred by the dictatorial regimes. But with the collapse of the Soviet Union, a rush of claims in Yugoslavia, the Baltics, the Caucuses, in Georgia, Armenia, Azerbaijan, and Tajikistan, among others, challenged the international community, forcing it to take such claims seriously. Even the Organization of African Unity has reluctantly recognized the right of Eritrea to secede.30

26. For a brief history and analysis, see Nanda, supra note 1, at 272-74.


28. See generally Ved Nanda, A Critique of the United Nations Inaction in the Bangladesh Crisis, 49 DENV. L.J. 53 (1972); Nanda, supra note 1, at 274.


30. See generally Haile, supra note 1; Mutua, supra note 1.
This is not to say that states are reconciled to recognizing self-determination claims, especially those which seek secession. Nine Governments are genuinely and appropriately concerned with the threat of chaos in the international arena from the existence of too many separate states, as well as the domino effect of such claims and whether they will ignite dormant conflicts.

The conflict in former Yugoslavia is worth noting. The European Community established an Arbitration Commission comprising the presidents of five constitutional courts which was asked to consider the disputes from the federal government of Yugoslavia and the six republics. Based on the Commission's interpretation of international law, it gave ten opinions.

In response to a question on whether Yugoslavia had disintegrated or whether the republics had seceded, in Opinion 1, the Commission said that when the organs of a federal state do not meet the "criteria of participation and representativeness inherent in a federal state," when violence is prevalent, when the federal authorities fail to "enforce respect for . . . cease-fire agreements," and when the republics express their wish to be independent, a federal state is under these circumstances "in the process of dissolution." This undoubtedly is a pretty broad statement which lacks precision and fails to provide workable guidelines as to when parts of a federation can secede or when a federation is "in the process of dissolution."

In Opinion 2, the question posed was whether the Serbs in Croatia and Bosnia had the right to self-determination. After acknowledging that there was a lack of clarity in international law on the subject, the Commission said that it was nonetheless clear that any such right "must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the states could agree otherwise."

The Commission failed to provide guidance on what kind of self-determination rights the Serbs could have in Croatia and Bosnia. By equating the right to self-determination simply to secession and changes in boundaries, the Commission lost an opportunity to clarify alternatives to secession as a valid exercise of self-determination. Several years of bloody civil war followed. Why could the Commission not have recommended peaceful resolution of the disputes by a negotiated redrawing of the boundaries of Yugoslavia based upon plebiscites under

32. Id. at 1497-99.
international supervision? This, after all, was not a colonial situation and the Commission should not have invoked the concept of *uti posseditis juris*, which traditionally has been applied to international borders.

V. APPRAISAL AND RECOMMENDATIONS

I reiterate that claims to secession must only be considered as a last resort when it is clear that ethnic groups cannot live together and it is equally clear that the group claiming secession makes a compelling case because of its perceived deprivation of human rights within the larger community. The claim that it is deprived of its right to participate in all value processes, power, wealth, and resources, respect and rectitude, enlightenment and skill, and affection and well-being, should establish its right to secede. The proper context should also include the potential impact of secession upon the parent state and other states, and security and stability in an international or regional context.

It follows, therefore, that the international community should pay greater attention to internal aspects of self-determination. Claims to self-determination become violent, leading to civil wars, and are at times likely to spread regionally when there are no peaceful mechanisms for pursuing these claims and reconciling competing ones through the process of negotiation. The role of preventive diplomacy, early warning systems and peaceful settlement of disputes through mediation, conciliation, and negotiations need to be explored.

Whether self-determination takes the form of the creation of a state, a federal entity, or a confederation of states, ethnic power-sharing arrangements must be explored. Perhaps the traditional concept of sovereignty, which is already eroding, must be seen in a new light so that it can be shared between various ethnic groups. In some situations, cultural or linguistic autonomy should be considered adequate expression of self-determination.

Promotion and protection of minority rights and means for redressing grievances regarding violation of human rights need to be given greater consideration. The United Nations and regional organizations must play an active role. The stationing of United Nations peacekeepers in Macedonia in 1993 was a landmark decision, a useful model of preventive diplomacy. Regional efforts, such as undertaken by the Organization for


34. See e.g., An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping, Report by the Secretary-General, U.N. Doc. 5/24111 (1992).
Security and Cooperation in Europe, are promising. The OSCE's emphasis on the protection of minority rights, recognizing them as collective rights, and the establishment of a High Commissioner for National Minorities are important elements in its focus on internal aspects of self-determination.

Similarly, the OSCE aims at strengthening human rights and democratic institutions. Its efforts include the establishment of a conflict prevention center in Vienna. Although it covers only inter-state conflicts, it has played a role in addressing ethnic conflicts as well, such as those in Rumania and Hungary, Albania and the federal republic of Yugoslavia, Hungary and Slovakia, and Moldova and Russia. It will be essential that other regional efforts also move in this direction. It is equally important that they also pay attention to confidence building mechanisms.

Concerted international efforts are needed toward the promotion of respect for human rights, pluralism, democratic forms of government and the encouragement of constitutional frameworks within which claims for self-determination can be reconciled and resolved. Also, it is essential to explore the conferring of legal personality on and allowing formal participation of ethnic-national groups, nations and non-state actors including international organizations for specific purposes in the international arena. Such efforts will provide an effective preventive mechanism to violent claims for secession.

35. See generally ETHNIC SELF-DETERMINATION AND BREAK-UP OF STATES, supra note 1, at 64-66.
RUSSIAN MINORITIES IN THE NEWLY INDEPENDENT STATES

John Quigley *

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I. INTRODUCTION

One of the legal issues left by recent territorial change in eastern Europe is the status of persons of a former majority group who become a minority. This issue has presented particular difficulties where the remaining population is of an ethnic group that formerly held a predominant role vis-à-vis an ethnic group that, as a result of the territorial change, has become a majority. Thus, Serbs find themselves a minority in the new states of Bosnia–Herzegovina and Croatia, while Russians find themselves a minority in the new states formed out of the Soviet Union on Russia’s periphery.

The situation of these populations raises issues of appropriate treatment of minorities, and that of the status they should appropriately enjoy in the new states. In particular, does the fact that these populations are of an ethnic group that may have suppressed the national aspirations of the now majority ethnic group justify negative action towards them, or deprive them of rights they would otherwise enjoy as a minority group?

In addition, the situation of these populations raises questions regarding the status of territories because of potential claims to independence by the Serbs or Russians, and because of the potentiality that Yugoslavia or Russia might intervene militarily to protect their

compatriots. This article focuses on these issues as they have played themselves out in certain of the new states on Russia’s periphery.

II. PRECEDENT

The twentieth century has witnessed two previous situations in which loss of territory by states has left populations of their nationals in a minority position. The first is the breakup of the Austro-Hungarian empire in central Europe at the end of World War I, and the second is the breakup of the European colonial empires in Asia and Africa in the years following World War II. In each instance, nationals of the formerly dominant state found themselves in a territory in whose political system the leading role was played by groups that had formerly been in a subordinate situation.

When the Austro-Hungarian empire fell many Germans and Hungarians became minorities in states carved out of the empire. The borders drawn up for a new, truncated Hungary, for example, were so tight that fifteen million Hungarians found themselves outside Hungary, primarily in Slovakia, Romania, and Serbia. The situation of the minority populations resulting from the border-drawing at Versailles was deemed to require international attention. A body of law was created, backed up by a League of Nations enforcement mechanism to protect these minorities. The states conferring at Versailles drafted a separate treaty to protect the minorities in each state where they had come to exist. The new states undertook not to discriminate against the minorities and, in addition, to facilitate the perpetuation of their ethnic identity.

This minority protection system was, in motivation, less humanitarian than it was strategically oriented. The Versailles conferees

feared that suppression of Germans and Hungarians might prompt these minorities to seek assistance from Germany or Hungary, and that international tension could ensue. Unfortunately, the League did not follow through sufficiently to prevent precisely such a problem from becoming a precipitating factor in World War II, namely, the marginalization of Germans in the Sudetenland in Czechoslovakia, which provided a rationale for Germany's occupation of the Sudetenland in 1938.

Nonetheless, the League of Nations made significant efforts at protecting the minority populations. It reviewed petitions from those who alleged their rights had been infringed. Under the minority protection treaties, the Permanent Court of International Justice was given compulsory jurisdiction to resolve disputes, and the court heard a number of such cases. The court gave advisory opinions as well on minority issues. In one advisory opinion, it found Albania to have violated the rights of Albania's Greek minority when Albania ordered the closing of all private schools.

A similar situation might have developed again after World War II, when the borders of Germany were constricted on the east under the post-war settlement. A substantial portion of Germany, inhabited primarily by Germans, was ceded to Poland. However, the Germans were expelled and thus did not become a minority population of Poland. Their expulsion was rationalized on the basis that Poland needed land compensation for having lost its own eastern territory to the Soviet Union. The expulsion of resident Germans was also carried out from states that Germany had occupied, particularly from Poland, Hungary, and Czechoslovakia. One rationale for that expulsion was that resident Germans had collaborated with Germany's army. In any event, the expulsion reduced the minority populations that had existed between the wars. In all, some fifteen million Germans were expelled after World War II, many in conditions of severe deprivation. An estimated two million died in the process.

When colonialism ended in Asia and Africa in the 1950s and 1960s, a comparable issue emerged. In many, though not all, of the colonies, nationals of the colonial power had settled in substantial numbers, and while many of these voluntarily departed, others sought to

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remain. No international mechanism comparable to the post–World War I system was established to protect these Europeans. On occasion, the former colonial powers intervened during times of disturbances. In the Congo, Belgium intervened in 1964 at Stanleyville, and again in 1978 in Shaba province, on a rationale of protecting endangered Belgians and other foreigners.

This method of protection of the settler populations raised a suspicion that the former colonial power was seeking to foster its own interests. In both instances of Belgian intervention in the Congo, Belgium was suspected of trying to influence the outcome of events to its favor.8

III. RUSSIANS AS A MINORITY POPULATION

The breakup of the Soviet Union left twenty-five million Russians as ethnic minorities in newly independent states in the Caucasus, the Baltics, Central Asia, and on Russia's southwest frontier.9 Like the Germans after the two world wars, and the Europeans upon the demise of colonialism, these Russians were a suspect group. Resentment was directed against them for two centuries of Russian political domination. Some Russians settled during the Soviet period, many dispatched as technicians or specialists. Others are the descendants of Russians who pre-dated the Soviet period in these territories having settled as the Russian empire expanded southward in the nineteenth century.

Russians have been replaced in many jobs by members of the newly predominant ethnic group. Some of the states have required knowledge of the newly dominant language as a condition for holding certain jobs. Some have made it difficult for Russians to acquire citizenship.

Individual Russians have adapted to the new circumstances in varying ways. Some are more ready than others to learn the local language. Many feel themselves to be at too advanced an age to learn the language but want their children to do so, rather than to have them educated in a solely Russian–language environment.


The governments of the states in question have shown some restraint in pressing the use of the local language, not only because of pressure from the Organization on Security and Cooperation in Europe (OSCE), but as well from practical considerations. Russian remains the language of the region, and the small new states risk the danger of isolating themselves from economic, cultural, and scientific life if the population is unable to operate in Russian. Further, many of the Russian speakers in their territory possess skills important for the state’s economic development. As the first flush of nationalism has been replaced by the reality of stagnant economies, this consideration has assumed prominence. In post-independence Africa, the colonial languages have retained an important role, providing a lingua franca for Africans speaking many different languages. Russian can be expected to play a similar role in the territories of the former Russian Empire, as it allows communications across ethnic lines within each of the new states, as well as among them.

For the Russians, the motivation for maintaining the status of the Russian language is in part related to their identity and sense of belonging, but as well, and primarily, to a concern that they will be unable to make a living if they are required to achieve fluency in the local language. In a recent article, Hurst Hannum makes the important point that a desire for self-determination frequently springs from a defensive motivation. It serves as a protection for populations that are endangered because of pressure from some other population.

IV. THE LAW OF MINORITY PROTECTION

The minority Russians have received support from international organizations. The Organization on Security and Cooperation in Europe has assumed the role of defusing ethnic tensions through the practice of preventive diplomacy. It has viewed the status of minority Russians as an issue that could threaten the peace of the region. It created the post of High Commissioner on National Minorities, whose incumbent has urged governments in the newly independent states to ease requirements related

11. As of Jan. 1, 1995, the name Conference on Security and Cooperation in Europe was changed to Organization on Security and Cooperation in Europe.
12. ROB ZAAGMAN & HANNIE ZAAL, THE CSCE HIGH COMMISSIONER ON NATIONAL MINORITIES: PREHISTORY AND NEGOTIATIONS, IN THE CHALLENGES OF CHANGE: THE HELSINKI SUMMIT OF THE CSCE AND ITS AFTERMATH 95, 104 (Arie Bloed ed., 1994) (stating that the idea was to provide an impartial intermediary to mediate between the parties to reduce tension before it might lead to armed conflict).
to language use and to acquisition of citizenship.\textsuperscript{13} The OSCE has leverage in this endeavor because these new states seek admission to Europe’s political and economic institutions.\textsuperscript{14}

In assuming this stance of support for the Russians, the OSCE is being guided by, and is building upon, existing law protecting ethnic minorities. Ethnic minorities are, of course, entitled to be treated in a non-discriminatory fashion, but beyond that they are entitled to protection against efforts to limit the development of their culture. In perhaps the most important legal proposition on this issue, the International Covenant on Civil and Political Rights provides, “[I]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”\textsuperscript{15}

Ethnic conflict in eastern Europe has brought a proliferation of new documents from both the United Nations and European institutions to address minority rights, and to expand protection. In 1992, the United Nations General Assembly adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities\textsuperscript{16} which recognized for minority groups a right to enjoy their culture, to practice their religion, to use their language, to maintain their associations, and to participate in the public life of the state they inhabit.\textsuperscript{17} The OSCE adopted something akin to a bill of rights for national minorities\textsuperscript{18} and the Committee of Ministers of the Council of Europe opened for signature a Framework Convention for the Protection of National Minorities.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{14} \textit{See}, e.g., Russia, 23 Jane’s Defence Wkly. 19 (Mar. 25, 1995), \textit{available in} NEXIS, News Library (stating that President Eltsin agreed to the stationing of OSCE observers in Chechnia in hope of gaining trade concessions from the European Union).
\item \textsuperscript{15} International Covenant on Civil and Political Rights, art. 27, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
\item \textsuperscript{17} \textit{Id.} at art. 2.
\end{itemize}
The Council of Europe's 1992 European Charter for Regional or Minority Languages obliges states to promote minority languages in legal proceedings, education, culture, and the media. The Charter seeks the "facilitation and/or encouragement of the use of . . . minority languages, in speech and writing, in public and private life." The Charter requires states to make education available in minority languages.

The Parliamentary Assembly of the Council of Europe has reported on human rights in eastern Europe with particular attention to the status of minorities. The Parliamentary Assembly drafted an Eleventh Protocol to the European human rights treaty to deal with minority rights. However, differences over the coverage led to the shelving of work on a final text.

The instruments embodying principles of the law on protection of minorities suggest no exception where the minority group is made up of nationals of a state that formerly held sovereignty in the territory in question. Indeed, the history of minority protection from the League days suggests that one of the primary purposes of this body of law is to protect precisely such persons. The proliferation of legal instruments on point in the wake of the recent developments in eastern Europe confirms this conclusion and strongly suggests that it is not permissible to suppress an ethnic group because of perceived unfair treatment in the past by the state in which that ethnic group is a majority.

V. MINORITIES AND SELF-DETERMINATION

For the new states, one factor in their policy towards their Russian minorities is a fear that Russia might intervene, perhaps even militarily, in support of these Russians. These fears were heightened in April 1995 when Russian foreign minister Andrei Kozyrev, speaking of ill treatment

21. Id. at art. 7.
22. Id. at art. 9.
of Russians in these states, said "There may be cases when the use of direct military force will be needed to defend our compatriots abroad." Deputy Defense Minister Vladimir Churanov backed up Kozyrev's view, stating that Russian speakers were being humiliated in some of the new states, and that diplomatic measures might not always be sufficiently persuasive to correct the situation. By 1996, however, Russia's debacle in Chechnia brought greater caution on Russia's part and seemed to reduce the likelihood of military intervention in support of Russian speakers.

Minority protection, as it has come to be practiced in Europe, is not aimed at any right to political separation for a minority group. The OSCE viewed infringement of the status of minorities as a prime factor in hostilities, particularly in eastern Europe. Like the League of Nations before it, the OSCE European institutions viewed preservation of the peace as the primary reason for protecting minority rights. In a policy proclamation on minority rights, the Heads of State and Government of the Council of Europe stated "[w]e express our awareness that the protection of national minorities is an essential element of stability and democratic security in our continent." The Framework Convention for the Protection of National Minorities recited in its preamble that the protection of minorities was to be accomplished "within the rule of law, respecting the territorial integrity and national sovereignty of states."

National minorities were to eschew separation from the states whose territory they inhabited. This position was at odds with the classical idea of self-determination, which yields several options, one of which is political independence. Thus, the OSCE undertook the rather delicate task of promoting the rights of minorities, but only if the minorities remained with the political status quo.

For Russians in states on the periphery of the Russian Federation, the issue of possible political separation arose most sharply in Moldova.

28. Zaagman & Zaal, supra note 12, at 95 (stating that "it is ethnic conflicts which are currently the single most important cause of violent conflicts in Europe").
In most of these states, Russians found themselves dispersed through the state's territory, but in Moldova's eastern sector, Russians and Ukrainians formed a slight majority over ethnic Romanians, who constitute overall the majority population of Moldova. In 1990 a government formed claiming to represent this territory and succeeded in establishing control there. Other states refused to recognize the Transdnestr Republic as a state, and the OSCE worked to keep it within Moldova.

A similar situation arose in the Crimean peninsula, which was transferred from Russia to Ukraine in 1954. The majority population is Russian, and many desire separation from Ukraine. However, these Russians, unlike those in Moldova, have not sought an independent state, but rather an affiliation with Russia. Russia, however, has manifested little interest in incorporating Crimea, leading the Russians to demand republic status within Ukraine that, the Russians hope, might be organized as a federation. In addition, they sought a special relationship with Russia that would allow trade advantage and access to Russian higher educational institutions. In both Moldova and Ukraine, potential confrontation has been averted for the present. Negotiations are ongoing, leading in the direction of an anticipated arrangement whereby the minority entity would enjoy certain protections, and a measure of self-rule. In Moldova, the greatest fear of the Russians and Ukrainians is that Moldova might one day merge with Romania, leaving them a quite small minority. There is an understanding that if such a union should come about, the status of Transdnestr would be revisited.

One potential innovation in self-determination practice has been proposals, made with respect both to Transdnestr and Crimea, for an autonomy or self-rule arrangement for the minority territory, but with international oversight. Russians in Crimea sought an agreement between Crimea and Ukraine. The Ukraine government resisted such an agreement, fearing that it would be taken as implicit recognition by it of an international status for Crimea. Transdnestr Foreign Minister Valerii Litskay has said that proposals from the Moldovan side for a solution entirely within the framework of the Moldova constitution do not provide adequate guarantees that Moldova will not override whatever rights are written into an agreement between Moldova and Transdnestr, or into the


32. Signing of memorandum on Dnestr settlement postponed (BBC Summary of World Broadcasts, July 1, 1996), available in NEXIS, News Library.
Moldova constitution. The OSCE seems a likely candidate for such an oversight role.

International oversight, of course, is not a new concept for protection of minorities, but the specific modality proposed here would differ from past arrangements. An agreement would be drawn up between the central government and the minority entity, and a specific international actor would be empowered to entertain complaints by either side that the other was failing to observe the agreement.

VI. CONCLUSION

The striving of a population for self-determination, with an aim either of political independence or of an improved status within a state, is not necessarily a manifestation of chauvinism and xenophobia, or an inability to get along with others. In many instances, it reveals rather an effort at survival. Indeed, the nationalism reflected in the ruling circles of the new states on Russia's periphery is largely based on a striving for self-assertion in response to longtime domination by Russia.

An important aspect of the situation of the Russian minorities is that international institutions have intervened and have played an active role. The state practice suggests that rights of minorities are recognized as international norms, and that these rights apply to protect a minority population associated with a formerly dominant state. The newly independent states have manifested a willingness to accommodate the needs of the minority Russians. An initial striving to promote the local ethnic group at the expense of the Russian minority has given way to a policy of accommodating the interests of the Russian minority.

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UNIVERSALITY OF HUMAN RIGHTS: THE CASE OF THE DEATH PENALTY

Christina M. Cerna

THE ISSUE OF THE UNIVERSALITY OF HUMAN RIGHTS

Forty-five years after the adoption of the Universal Declaration of Human Rights the international community met in Vienna to elaborate the human rights agenda for the next twenty-five years. The second United Nations World Conference on Human Rights was intended to focus on the implementation of the human rights standards that had been adopted since the Universal Declaration, but found itself challenged instead by a number of Asian countries on the very issue of the universality of these rights, which they argued reflected Western values and not their own.

Paragraph 5, inter alia, of the Vienna Declaration and Programme of Action,1 reaffirmed the universality of human rights using the English language in such a way that only a non-native-English speaker could appreciate:

Paragraph 5: All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural

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systems, to promote and protect all human rights and fundamental freedoms.

What was the content behind the Asian challenge? The response to the Asian challenge set forth in the Vienna Declaration was obscured in the deliberate imprecision of the language. In two earlier attempts to comprehend the nature of the Asian challenge, I came to the following conclusions. First, that the Asians were in agreement with the West on certain “minimal standards of civilized behavior,” for example:

there should be no torture, no slavery, no arbitrary killings, no disappearances in the middle of the night, no shooting down of innocent demonstrators, no imprisonment without careful review. These rights should be upheld not only for moral reasons. There are sound functional reasons. Any society which is at odds with its best and brightest and shoots them down when they demonstrate peacefully, as Myanmar did, is headed for trouble. Most Asian societies do not want to be in the position that Myanmar is in today, a nation at odds with itself.

And second, that the disagreements resided in an area that I termed the “private sphere” which relates to the personal life of the individual. These rights have traditionally been covered by religious law and they still are in many countries. This private sphere, which deals with issues such as religion, culture, the status of women, the right to marry, to divorce, and to remarry, the protection of children, the question of choice as regards family planning, and other issues which are still highly controversial in the West, such as sexual preference, abortion, and euthanasia, is a domain in which the most serious challenges to the definition of human rights arise and, more particularly, to the universality of such rights.


4. Religious law, or Shari’a, is prominent in many Islamic states; Judaic law is prominent in Israel; Canonic law is prominent in the Holy Sea, and penetrates the legal thinking of many states with large Christian populations.

5. See Cerna, Universality of Human Rights, supra note 2, at 746.
So where does the death penalty fit into this discussion of the universality of human rights? The goals behind the imposition of the death penalty are basically two: retribution and deterrence. Society exacts its pound of flesh from the perpetrators of the most atrocious crimes set forth in the criminal law and which generally involve the violent, premeditated taking of life; this is retribution writ large, and is profoundly entrenched in Western conceptions of justice. *Lex talionis,* the principle or law of retaliation that a punishment inflicted should correspond in degree and kind to the offense of the wrongdoer, as an eye for an eye, a tooth for a tooth, is part of the Judeo-Christian baggage which informs our notions of morality and of what is right. If an offender has taken a life, it is considered just that he forfeit his life; there is symmetry and equality between the punishment and the offense.

So my first point is that I would place the death penalty into the area I termed the “private sphere.” Unless one believes in such religiously-charged definitions of justice it is not immediately or necessarily clear or self-evident what should be done with a wrongdoer who commits a homicide. Some countries seek to provide a form of compensation for the victim’s relatives in the form of monetary damages provided by the state (or the labor of the perpetrator) which gives them something tangible beyond the vaguer satisfaction arising from the imprisonment or execution of the wrongdoer. My point here is that if we remove the religious connotations from the concept of justice we are left with more pragmatic attempts to seek to compensate the victim. Justice, having removed God and the concomitant absolutes from the equation, is more difficult to define in human or human rights terms.

Take, for example, the case of a judge who errs and mistakenly sends an innocent man to the gallows. The judge has taken a life, is it just that he forfeit his own? It is unlikely that any society would devise such a solution.

If our notions of justice are culturally determined and informed by religious precepts, as I am suggesting that they are, then if we strip away

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6. Albert Camus, in his celebrated essay on capital punishment, *Reflections on the Guillotine,* refers to the “quasi-arithmetic” reply of society to wrongdoers, and denies that the law of retaliation is a principle.

That reply is as old as man; it is called the law of retaliation. Whoever has done me harm must suffer harm; whoever has put out my eye must lose an eye; and whoever has killed must die. This is an emotion, and a particularly violent one, not a principle. Law, by definition, cannot obey the same rules as nature.

these preconceptions, we find that there is no inevitability or necessity in requiring the death penalty for the taking of a life.

This brings me to the second point that I wish to make.

The law presents us with a paradox. The international community has reached consensus on the abolition of torture, no country in the world allows its police or other state agents to torture as a means of obtaining information or for any other reason. It is prohibited in all criminal codes in every country in the world. Yet the same international consensus has not been reached on the abolition of the death penalty which is arguably the most extreme form of torture.

The death penalty is specifically excluded from the international torture conventions. For example, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture in article 1 as:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(Emphasis added.)

Consequently, since the death penalty is considered a "lawful sanction" in many states, the international human rights organizations seeking the abolition of the death penalty cannot attack the death penalty, per se, since it is not defined as an arbitrary deprivation of the right to life, and it is explicitly excluded from the definition of torture.

The 1985 Inter-American Convention to Prevent and Punish Torture goes a step further than the United Nations in its definition of torture. In article 2 of this treaty, torture is defined as:

7. The International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the European Convention on Human Rights all include the death penalty as an exception to the arbitrary deprivation of the right to life. It should be noted, however, that each of these treaties has been "amended" by an additional protocol on the abolition of the death penalty which are only in force for the ratifying states parties.
any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities even if they do not cause physical pain or mental anguish.

The OAS treaty specifically excluded lawful measures from its definition of torture, but it included a proviso: "The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article." (Emphasis added).

The proviso explicitly allows abolitionists to challenge the death penalty by creating arguments that the manner of imposition of the death penalty, i.e. the suffering inherent in a slow, painful death, is tantamount to torture, or the delay in carrying out an execution due to defense driven appeals is tantamount to torture, insofar as the manner or the delay create a disproportionate amount of suffering for the wrongdoer.

In sum, we are left with the irony that the death penalty retentionist states now seek to impose capital punishment in such a way as to cause the condemned individual a minimum amount of suffering.

Last week, for example, a British pro bono lawyer contacted the Commission on behalf of an individual on death row in Missouri. Britain, which has abolished the death penalty, now provides technical assistance to United States lawyers working on death penalty cases. This lawyer was seeking to prove that "the combination and cumulative effect" of enduring a period in excess of thirteen and a half years on death row, the staying of three separate Warrants of Execution in the final days prior to the scheduled execution dates, the initiation and progression of the "Missouri execution protocol" to within one hour and forty-six minutes of a scheduled execution, and the issuance of seven Warrants of Execution in total, amounted to cruel, inhuman, and degrading treatment or punishment under the Eighth Amendment of the United States Constitution and under international human rights law.

All these stays were defense driven and hence one could argue that the delays in the imposition of the death penalty were voluntary, and
consequently could not be defined as torture. In addition, they were all acts incidental to or inherent in lawful sanctions. Some courts, however, have interpreted such acts, although pursuant to law, as violative of international human rights standards.

In 1993, the Judicial Committee of the Privy Council in London reversed an earlier holding and found that a delay in the imposition of the death penalty caused by the Appellant's legitimate right to appeal cannot be blamed on the prisoner. In *Pratt Morgan v. Attorney General for Jamaica* the Privy Council stated that:

It was part of the human condition that a condemned man would take every opportunity to save his life through use of appellate procedure. If it enabled the prisoner to prolong the appellate hearings over a period of years, the fault was to be attributed to the appellate system that permitted such delay and not to the prisoner who took advantage of it.

The logical conclusion is that it is the death penalty that should be abolished, in the same way that torture, which in earlier more barbaric times was considered a lawful and legitimate means of punishment, has now been abolished in the law. Of course, torture continues to be practiced in many countries in the world but the point is that it is not permitted in any legal system in the world. The first step is to abolish the death penalty, de jure, and then to abolish it de facto.

The third and final point I wish to make deals with the question of whether the international community is nearer to a consensus on the issue of prohibiting the imposition of the death penalty on juveniles under the age of eighteen? The international human rights treaties explicitly prohibit the imposition of the death penalty for crimes committed by persons below the

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8. I use the terms "torture" and "cruel, inhuman and degrading treatment or punishment" interchangeably.

9. Since 1978 some prisoners in the United States have challenged their conditions of imprisonment on death row as an infringement of their rights under the Eighth Amendment. In Texas, as a result of *Ruiz v. Estelle* (1982), a class action in which the Fifth Circuit Court of Appeals found that the vastly overcrowded conditions under which all Texan prisoners were held violated the Eighth Amendment, agreement was reached, in 1986, to improve conditions for death row prisoners. Hearing of the effects of the "death row syndrome," the European Court of Human Rights decided in July 1989, in the case of *Soering v. United Kingdom*, that it would be a breach of article 3 of the European Convention on Human Rights to extradite the prisoner, Soering, who would face the death penalty in Virginia because his inevitably long wait on death row would amount to inhuman and degrading treatment and punishment. See Roger Hood, *The Death Penalty, A World-Wide Perspective* (Clarendon Press 1996). The above-mentioned Soering case (1989) can be found in 11 E.H.R.R. 439 and reprinted in 11 Hum. RTS. L.J. 335 (1990).
age of eighteen, unlike their tolerance of the death penalty generally. Consequently, has this norm, prohibiting the execution of persons for crimes committed under the age of eighteen, achieved universality?  

The Inter-American Commission on Human Rights had the opportunity to consider this issue in a case brought before it against the United States in 1985. The petitioners, James Terry Roach and Jay Pinkerton, had been sentenced to death for crimes which they were adjudged to have committed before their eighteenth birthdays.  

Since the United States is not a party to the American Convention on Human Rights, the Commission applied the American Declaration on the Rights and Duties of Man, an instrument comparable to the Universal Declaration of Human Rights, which is considered to have binding legal force within the inter-American system.  

The petitioners alleged that the United States had violated article I (the right to life), article VII (special protection of children) and article XXVI (prohibition against cruel, infamous and unusual punishment) of the American Declaration by executing persons for crimes committed before the age of eighteen. The facts in the case were not in dispute between the parties.  

The petition for James Terry Roach was filed on December 4, 1985. The Commission requested the United States Secretary of State and the Governor of the State of South Carolina to issue a stay of execution pending the Commission's examination of the case. The requests were denied and after the United States Supreme Court denied certiorari in the case, Roach was executed on January 10, 1986.  

The petition for Jay Pinkerton was filed on May 8, 1986. The same appeals were made requesting a stay of execution to the United States Secretary of State and to the Governor of Texas. The requests were again denied as was Pinkerton's writ certiorari by the United States Supreme Court on October 7, 1985. Pinkerton was executed on May 15, 1986. On February 23, 1987, the United States Supreme Court announced that in its

10. See, e.g., article 6(5) of the International Covenant on Civil and Political Rights: “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.” See also article 4(5) of the American Convention on Human Rights: “Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.”  

next term it would take up the case *Thompson v. Oklahoma*, for the first time considering the constitutionality of the execution of juvenile offenders.

The issue as framed by the Commission was whether the absence of a federal prohibition within United States domestic law on the execution of juveniles who committed capital crimes under the age of eighteen violated human rights standards applicable to the United States under the inter-American system. Article I of the American Declaration protects the right to life but is silent on the issue of capital punishment. Article 4(5) of the American Convention on Human Rights specifically prohibits the imposition of the death penalty on persons who were under the age of eighteen at the time the crime was committed. However, since the United States had not ratified the American Convention, it is not bound by its provisions.

The petitioners had argued that the United States is bound by a norm of customary international law which prohibits the imposition of the death penalty on persons who committed capital crimes before the age of eighteen. They alleged that this customary norm could be derived from widespread state practice which had been codified in certain treaties. They asserted that "the greater the number of parties to a treaty, the greater the inference that it rises to the level of customary international law."  

The United States, in response, argued that no such customary norm existed and that it could not be considered legally bound by a conventional norm without its consent (i.e. expressed through ratification of a treaty).

The Commission reviewed the elements necessary for the formation of a norm of customary international law: consistent state practice and opinio juris, and then cited the rule set forth by the International Court of Justice to the effect that a customary rule does not bind states which protest the norm.

The Commission concluded that the petitioners’ argument was unconvincing. It found that a norm of customary international law, even if it were held to exist, would not be binding on the United States because the United States had protested the norm. The Commission found evidence that the United States had protested the norm in light of the fact that the Carter Administration had proposed a reservation to the American Convention on Human Rights when it transmitted this Convention (and three others) to the United States Senate for ratification. The proposed reservation, as regards


the Roach case, stated: “U.S. adherence to Article 4 is subject to the Constitution and other laws of the U.S.”

For a norm to be binding on a state which protested the norm it must have acquired the status of *jus cogens*, the Commission continued. The Commission found that in the member states of the OAS a universal norm of *jus cogens* is recognized which prohibits the state execution of children. The norm, it stated, is accepted by all the states of the inter-American system, including the United States. The Commission found evidence for the recognition of this norm in the response of the United States Government to the petition which affirmed that: “[a]ll states, moreover, have juvenile justice systems; none permits its juvenile courts to impose the death penalty.”

The Commission found that the case arose, not because of doubt concerning the recognition of an international norm as to the prohibition of the execution of children but because the United States disputes the allegation that there exists consensus as regards the age of majority. Specifically what is at issue here is the United States law and practice, as adopted by different states, to transfer adolescents charged with heinous crimes to adult criminal court where they are tried and may be sentenced as adults.

Since the federal government did not preempt the issue, the states, under the United States constitutional system, were free to exercise their discretion as to whether or not to allow capital punishment and to determine the minimum age at which a juvenile may be transferred to adult criminal court where the death penalty could be imposed. Thirteen states and the District of Columbia had abolished the death penalty in 1987, and the others which permitted capital punishment had retained death penalty statutes which 1) prohibited the execution of persons who committed capital crimes under the age of eighteen, or 2) allowed for juveniles to be transferred to adult


15. Inter-Am. C.H.R., OEA/ser. L./V/.II.71, doc. 9 rev. 1 (1987), at para. 54. The concept of *jus cogens* is included in article 53 of the Vienna Convention on the Law of Treaties which states: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

16. *Id.* at para. 56.

17. *Id.*

18. *Id.* at para. 57.
criminal court where they could be sentenced to death. The Commission concluded that

[w]hereas approximately ten retentionist states have now enacted legislation barring the execution of under-eighteen offenders, a hodgepodge of legislation characterizes the other states which allow transfer of juvenile offenders to adult court from age seventeen to as young as age ten, and some states have no specific minimum age.19

It was this diversity of state practice within a federal system which the Commission found violative of articles I (the right to life) and II (the right to equality before the law) of the American Declaration. The fact that some states had abolished the death penalty, whereas another state, Indiana, potentially allowed it to be applied to juveniles as young as ten years of age, was impermissible in the view of the Commission, when the most fundamental human right, the right to life, was at stake. The violation was not one committed by the States of South Carolina or Texas, but rather the federal government:

For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of state officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards the most fundamental right — the right to life — results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively.20

The United States Government rejected the Commission's decision in this case, which it considered not legally binding, but the United States

19. Id. at para. 58.
20. Id. at para. 63.
Supreme Court, in its 1988 decision in *Thompson v. Oklahoma*, held that the execution of juveniles under the age of sixteen violated the prohibition against cruel and unusual punishment in the Eighth Amendment.

By way of conclusion, I wish to reiterate an earlier point. The international consensus on the abolition of torture marked a sign in the progress of civilization. Such a similar international consensus needs to be reached on the issue of the abolition of the death penalty. The obstacles to such a consensus are to be found in our outmoded, religion-burdened concepts of justice. The attempts of nongovernmental human rights organizations to achieve the abolition of the death penalty by means of arguments suggesting that the manner in which it is imposed or the delay in its imposition is tantamount to torture is ludicrous when the imposition of the death penalty itself is the most extreme form of torture imaginable, but is excluded from the definition of torture by means of a legal fiction. Similarly, it is equally barbaric to impose the death penalty on capital offenders who committed atrocious crimes under the age of eighteen, but it is wishful thinking to argue that this prohibition has achieved the status of a norm of customary international law. We need to look at crime and punishment in a new way that does not rely for a concept of justice on the law of retaliation.
UNIVERSALITY OF HUMAN RIGHTS AND THE DEATH PENALTY—THE APPROACH OF THE HUMAN RIGHTS COMMITTEE

Markus G. Schmidt *

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The application of the death penalty has occupied a number of United Nations human rights treaty bodies, and in particular the Human Rights Committee established under article 28 of the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR). Article 6 of the ICCPR does not disavow capital punishment, but limits the imposition of a capital sentence to the most serious crime. Moreover, a capital sentence can only be pronounced upon conclusion of a trial in which all the guarantees of due process have been scrupulously observed under article 14 ICCPR.

The present article focuses on the approach of the Human Rights Committee vis-à-vis the death penalty. This will be done by reference to the Committee's periodic state reporting procedure, governed by article 40 of the ICCPR, and by reference to the Committee's jurisprudence on the death penalty, by now well established, under the First Optional Protocol to the ICCPR.

The Human Rights Committee is a body of eighteen independent experts of universal composition. Of the 132 states parties to the ICCPR, many still retain the death penalty on their books, although some are de facto abolitionist or have not carried out executions in many years. Other states parties, however, do resort to capital punishment. Given the wording of article 6 of the ICCPR, the Committee cannot be openly

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abolitionist. The adoption of the Second Optional Protocol on the Abolition of the Death Penalty in 1990, however, has given the Committee some leverage to press states parties on the death penalty issue; many Committee members have put probing questions on the death penalty to State party representatives, some of which will betray their abolitionist leanings. Thus, the tendency of the past six to eight years has been to question states parties which do carry out executions rather critically on their attitude towards the death penalty. This is true both for the state reporting procedure under article 40 of the ICCPR and the Optional Protocol procedure.

I. THE DEATH PENALTY IN THE PERIODIC STATE REPORTING PROCEDURE

The Committee first addressed the issue of the death penalty in general terms in its General Comment 6[16] on the right to life, adopted in July 1982. In it, it suggested that while the Covenant did not prohibit the death penalty, the article refers to abolition in terms which strongly suggest (paragraphs 2 and 6 of the provision) that abolition is desirable. It concluded that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40 ICCPR.¹

This philosophy has permeated the Committee's comments on states parties' periodic reports, in as far as the death penalty is concerned. The following examples are illustrative:

In its Comments on the Third Periodic Report of Japan, the Committee expressed serious concern over the number and the nature of crimes punishable by the death penalty under the Japanese Criminal Code. It recalled, in language that could be termed by now as standard, that the terms of the Covenant tend toward the abolition of the death penalty and those states which have not already abolished the death penalty are bound to apply it only for the most serious crimes.²

Commenting on the Second Periodic Report of Cameroon, the Committee was concerned that, in spite of a recent reduction, the number of offenses punishable by the death penalty in the Criminal Code [was] still excessive, in particular aggravated theft or traffic in toxic or dangerous wastes, and at the number of death sentences handed down by the courts.³

³. Id. at 37.
It is noteworthy that the Committee claimed the authority to determine what, in its opinion, constitutes a most serious crime for the purpose of article 6. By doing so, it is progressively limiting the number of offenses for which the death penalty may legitimately be imposed. Admittedly, the Committee's observations and concluding comments in no way bind states parties to the Covenant, but states do pay attention to these statements and frequently try to implement them at the domestic level.

The Committee criticizes states parties' resort to capital punishment regardless of the legal system they adhere to. Commenting on the second periodic report of Yemen, whose legal system is based on Islamic law, the Committee deplored that, on the basis of the information before it, executions of persons below the age of eighteen had taken place and deemed this to be a clear violation of article 6, paragraph 5, of the Covenant.4

Perhaps the Committee's most detailed criticism of the application of the death penalty was formulated upon conclusion of the examination of the initial report of the United States in March 1995. In its Comments, the Committee expressed

[a] concern about the excessive number of offenses punishable by the death penalty in a number of States, the number of death sentences handed down by the courts, and the long stays on death row which, in specific instances, may amount to a breach of article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain states. It also deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded.5

In another section, the Committee criticized the United States reservations entered in respect of articles 6, paragraph 5, prohibition of execution of minors, and paragraph 7, exemption of the death row phenomenon from the scope of application of the provision—the so called Soering reservation and urged the United States Government to withdraw

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5. Id. at 54.
them. In this context, the Committee was undoubtedly mindful of the objections to said reservations deposited by a number of European states after United States ratification of the Covenant in the summer of 1992. It went on to urge the Government to revise federal and state legislation with a view to restricting the number of offenses carrying the death penalty strictly to the most serious crimes and with a view eventually to abolishing it. The Government was further exhorted to take steps to ensure that no one is sentenced to death for crimes committed under the age of eighteen. Finally, the Committee considered the determination of methods of execution had to take into consideration the prohibition against causing avoidable pain and urged that the Government take all necessary steps to ensure respect of article 7 of the Covenant.

At the same time, the case of the United States exemplifies the limits of the Committee's capacity to influence a state's attitude vis-à-vis the death penalty, let alone its domestic politics. While the United States representative thanked the Committee for its carefully worded recommendations and promised to convey them to the Clinton Administration, he made it equally clear that the issue of withdrawal of the U.S. reservations to articles 6 and 7 and of a possibly more restrictive resort to capital punishment were non-negotiable politically. But even in such a situation, the Committee's recommendations should not be dismissed as pious or nave formulae — if they are taken up by sizable segments of civil society and repeatedly placed before executive and legislative bodies for consideration, the long-term effect may be far from negligible. Finally, repeated public criticism may ultimately shame a Government into action.

Close observers of the Committee's practice under article 40 ICCPR have charged — and not without some justification — that it has not always been consistent in its calls for the abolition of the death penalty, and that it may have applied a double standard with regard to abolition. While the suggestion of abolition was put to the United States delegation, this was not done in the cases of Yemen and Cameroon. In still other instances, the Committee has recommended that states parties consider ratifying the Second Optional Protocol to the Covenant, aiming at the Abolition of the Death Penalty.

7. See Annual Report, supra note 4, at 56.
The Committee has viewed with concern the movement, in some states parties to the Covenant, towards re-introduction or extension of the death penalty, mostly against a background of rampant violent crime or anti-Government terrorism. Thus, the death penalty was recently re-introduced in Chile and in El Salvador; in Guatemala, its scope was extended. In the case of Peru, where the death penalty was re-introduced and extended in the 1993 Constitution to a wider range of offenses than in the 1979 Constitution, the Committee recalled its General Comment 6[16] of July 1982 and concluded that extension of the scope of application of the death penalty raises questions as to its compatibility with article 6 of the Covenant.9 On another occasion, it has argued that the re-introduction of the death penalty by a State which had previously abolished capital punishment would raise serious issues under article 6, paragraph 6.

II. THE DEATH PENALTY UNDER THE OPTIONAL PROTOCOL PROCEDURE

Since 1987, the Committee has been seized of numerous individual complaints involving capital punishment under the Optional Protocol procedure. Over the past decade, it has been able to set out numerous principles which, in their combination, limit the capacity of states parties to carry out capital sentences. At the same time, it should be pointed out that on no issue has the Committee been divided to such an extent as over the death penalty, as is borne out by the ratio decidendi of, and the numerous individual opinions appended to, many decisions addressing the so-called death row phenomenon, as well as the views dealing with the complex issue of extradition to face the death penalty.10

The Committee has consistently held that in capital cases, the obligation of states parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. From this premise, it has developed a number of principles for the conduct of capital cases in domestic courts, and which states parties are expected to respect. While this article does not permit a detailed analysis of the Committee’s jurisprudence on the death penalty,11 the most important statements are covered hereafter. Thus, on the issue of legal

10. Regrettably, the Summary Records of plenary debates on complaints examined under the Optional Protocol are confidential, so that no specific examples can be given.
11. Cf. the overview of the Committee’s jurisprudence in MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE (2nd ed. 1994) (discussing article 6 of the ICCPR in one of its chapters); SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (2nd ed. 1997).
representation of prisoners under sentence of death, the Committee has stated that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. This, it added, applies to the trial in the tribunal of first instance as well as to all appellate proceedings.  

The right of the accused to be present during his appeal has been addressed by the Committee in several capital cases. It found violations of article 14, paragraph 3(d), where the accused was not allowed to attend the hearing of his appeal despite his manifest desire to do so, or where he was represented by a lawyer whom he had not been able to instruct and who, without consulting with his client, had abandoned one or several grounds of appeal, thereby leaving the accused without effective representation. In a recent case concerning Jamaica, the Committee held that while it had no competence to question counsel’s professional judgment that there was no merit in the appeal, counsel should nonetheless have informed his client of his intention not to raise any grounds of appeal, so that the latter could have considered any other remaining options open to him.  

In what is by now firmly established jurisprudence, the Committee holds that violations of the fair trial provisions in article 14 ICCPR in a capital case entail, if no further appeal against the sentence is possible, a violation of the right to life:

[t]he imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6.  


the right to review of conviction and sentence by a higher tribunal. 15

The question of what constitutes the most serious crime within the meaning of article 6, paragraph 2, ICCPR, has been discussed in several communications, but only one final decision is available as of the autumn of 1996. In a recent case concerning Zambia, the complainant had been sentenced to death for aggravated robbery involving the use of firearms. Considering that in the circumstances of the case, no person had been either killed or wounded, and that the domestic courts could not take these elements into consideration when imposing the death sentence, the Committee concluded that the mandatory imposition of the death sentence in the circumstances was incompatible with article 6, paragraph 2. 16 While it is obviously difficult to generalize from a single decision, one may read between the lines that the Committee interprets the terms most serious crime in a restrictive manner; while states may retain some margin of discretion as to what constitutes a most serious crime, it is clear that the list is being narrowed down progressively.

Extradition to face the death penalty is a phenomenon which has occupied numerous judicial instances and human rights organs in recent years. The Human Rights Committee is no exception. In three decisions adopted in 1993 and 1994, respectively, the Committee was called upon to determine whether the extradition by a country which has abolished the death penalty to a country retaining capital punishment may be deemed a violation of article 6 ICCPR. 17 In all three cases, the defendants, United States citizens, had been either convicted of a capital offense in United States courts or were facing capital charges in United States tribunals; they fled to Canada, where they were apprehended; and detained pending judicial determination of the United States’ request for their extradition. After the Supreme Court of Canada had held that they could be extradited under the 1976 Extradition Treaty between the United States and Canada, the complainants turned to the Human Rights Committee. While the Committee majority held that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the applicants’ extradition without seeking assurances that the death penalty would not be imposed and respectively carried out in the United States, an important Committee


17. This issue is dealt with in more detail in the contribution of William Schabas to the symposium.
minority held that by allowing the authors’ extradition, Canada, a state only retaining capital punishment for some offenses under military statutes, was violating its obligations under article 6 by exposing individuals under its jurisdiction to capital punishment in another state.\textsuperscript{18}

The three preceding cases have tested the Committee’s consensual decision-making procedure to its very limit. This becomes clear when one compares the number of individual opinions appended to the decisions in these cases, admittedly on different legal issues, to any other case previously decided by the Committee. This author submits that the Committee majority has been considerably more restrictive in its approach than other national highest appellate jurisdictions recently called upon to determine similar legal issues, e.g., the Hoge Raad of the Netherlands\textsuperscript{19} or the Conseil d’Etat of France.\textsuperscript{20} In the perhaps most far-reaching judgment, the Italian Constitutional Court recently held that an individual may not be extradited to a state which retains the death penalty even if the receiving states gives assurances that the death penalty, if imposed, would not be carried out. The absolute guarantee [of the right to life] is not satisfied by a system that allows a decision on extradition to countries with the death penalty to be taken on a case-by-case basis, where the discretion to evaluate the guarantees given by the requesting state lies with the extraditing authorities.\textsuperscript{21} While this judgment may not be representative, it is clear that the trend goes in the direction of the highest domestic appellate instance refusing extradition to a country retaining the death penalty if no satisfactory assurances are received from the receiving country that the death penalty, if imposed, would not be carried out.\textsuperscript{22}

Another issue which has caused considerable discussion and dissent within the Committee concerns the so-called death row phenomenon, i.e. whether prolonged detention on death row can be deemed to constitute cruel, inhuman, and degrading treatment within the


\textsuperscript{21} Italian Constitutional Court, judgment of 27 June 1996, reported in BULLETIN OF LEGAL DEVELOPMENTS 197-198 (Sept. 16, 1996).

\textsuperscript{22} See THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 644-645 (Harris ed. 1995), for the chapter written by Markus G. Schmidt.
meaning of article 7 ICCPR. In its first decision which addressed the problem, the Committee did not accept the authors' argument that detention on death row for over ten years constituted treatment contrary to article 7:

[i]n principle prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary.23

The Committee's approach in Pratt and Morgan must be contrasted with the judgment of the European Court of Human Rights in the case of Soering v. United Kingdom, in which the court held that the length of detention prior to execution, the conditions of incarceration on death row, as well as the complainant's mental state would bring the treatment on death row within the scope of application of article 3 of the European Convention on Human Rights and Fundamental Freedoms.24

In 1992, the Human Rights Committee had the opportunity to fine-tune its jurisprudence on the death row phenomenon in the cases of Barrett and Sutcliffe. The complainants, who had been on death row for over thirteen years and argued that the length of their detention on death row violated article 7. The Committee reiterated its statement from Pratt and Morgan quoted above and added:

[i]n states whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence. Thus, even prolonged detention under a severe custodial regime cannot generally be considered to constitute cruel and inhuman treatment if the convicted person is merely availing himself of appellate remedies.25

Significantly, one Committee member appended an individual opinion, noting that a very long period [of detention] on death row, even if partially

due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the state party from its obligations under article 7.26

Although the Committee has confirmed its jurisprudence on several occasions since 1992, the repeated changes in the formulation it has chosen for its decisions, and a fresh look at the death row phenomenon by the highest judicial instances of some states parties, including the Supreme Court of Zimbabwe27 and the Judicial Committee of the Privy Council in London,28 have contributed to renewed and sometimes sharp exchanges between Committee members on the compatibility of prolonged detention on death row with article 7. In its latest decision, adopted in March 1996, the Committee acknowledges that it is aware that its jurisprudence has given rise to controversy. The detailed arguments that follow by and large confirm the Committee’s previous jurisprudence, but at the same time some formulations in the operative part of the decision might lock the Committee into a straightjacket, permitting it no differentiated treatment of cases in which the length of detention exceeds every reasonable limit.29

The compatibility of methods of execution of a capital sentence with international or regional human rights instruments has, to date, not been addressed by any of the regional human rights bodies. At the universal level, the Human Rights Committee was faced with it in 1993 in the case of Ng v. Canada. The complainant, awaiting extradition from Canada, argued that, if extradited to California and sentenced to death, he would face death by gas asphyxiation in the gas chamber, which he contended was contrary to article 7 ICCPR. The Committee began by noting that any method of execution provided for by law must be designed in such a way as to avoid conflict with article 7. It then noted that, by definition, every execution of a sentence of death could be considered to constitute cruel and inhuman treatment within the meaning of article 7. As article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes, however, the execution of the sentence must be carried out in such a way as to cause the least possible physical mental

26. Id., as per individual opinion of Ms. Christine Chanet.
29. See Hum. Rts. Comm., Communication No. 588/1994 (Johnson v. Jamaica), Views adopted on 22 March 1996, para. 8.2 to 8.6. Some formula, such as “Life on death row, harsh as it may be, is preferable to death,” could for example be read as ultimately legitimizing periods of detention on death row exceeding twenty years. Two complaints currently pending under the Optional Protocol procedure and awaiting a decision on the merits may soon require further clarifications by the Committee.
suffering. On the basis of the detailed information provided by the defendant's representative, which had not been contradicted by the State party, the Committee concluded that asphyxiation by cyanide gas would not meet the test of least physical and mental suffering.30

The Committee's reasoning was criticized by two Committee members who appended their individual opinion to the views. They rightly point out that every known method of judicial execution in use today, including execution by lethal injection, has come under criticism for causing prolonged pain or the necessity of having the process repeated.31 Furthermore, if one method of execution is deemed incompatible with article 7 ICCPR, the state party concerned may simply change the method of execution or provide for a choice between two or several methods; this is indeed what occurred in California, where the law now provides for a choice between execution by lethal injection or by gas asphyxiation.32

Finally, the Committee has not hesitated to request interim measures of protection in many capital cases placed before it for consideration under the Optional Protocol. The basis for requests of stays of execution is Rule 86 of the Committee's rules of procedure, which provides that a state party may be asked not to take measures which would cause irreparable harm to the petitioner. Since the spring of 1987, numerous requests for stays of execution have been addressed to states parties in capital cases, occasionally in urgent situations in which the execution of the petitioner was scheduled within hours. Mechanisms have been devised by the Committee's Secretariat to process and transmit such requests as quickly as the situation warrants. The Committee has been careful to add that a request for interim measures does not imply, in any way, a determination of the admissibility or the merits of the communication. Thus, if consideration of a case is concluded with an inadmissibility decision or a merits decision finding no violation of the Covenant, the State party may in principle proceed with the execution.

States parties have displayed a commendably high degree of compliance with the Committee's requests for stays of execution. Requests under Rule 86 have been issued in approximately 150 communications involving the death penalty since 1987; in all but two cases have stays of execution been granted by the states parties concerned. In one instance concerning Trinidad and Tobago, the petitioner was

32. Execution by cyanide gas asphyxiation was held to be unconstitutional in Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996).
executed despite a request for a stay of execution transmitted to the State party authorities one day prior to the scheduled execution. Apprised of the matter, the Committee plenary decided to schedule a public hearing on the issue; it expressed its indignation over the state party’s failure to comply with the request under rule 86 and adopted an unprecedented decision to this effect, which was published in the Committee’s Annual Report.

In the second case of non-compliance during the summer of 1996, concerning Guyana, the confidentiality of the proceedings was similarly waived. While this procedural device obviously cannot help the victim, it does have its use for future cases: no state party likes to see itself criticized or placed on what amounts to a blacklist in public documents of the United Nations General Assembly. On balance, the application of rules on interim measures of protection has been efficient and prevented many executions from being carried out. It might be added here that in many of the capital cases from Caribbean States examined by the Committee, to which the tenor of the judgment of November 2, 1993 of the Judicial Committee of the Privy Council applies, namely that death sentences should be commuted to life imprisonment if the appellate process has not been completed in five years, the request for interim measures of protection under rule 86 of the Committee’s rules of procedure has the effect of carrying the complainants beyond the five-year threshold while their case is pending before the Committee, thus providing a ground for commutation.

Since 1991, the Committee has endeavored to follow up on all those final decisions in which it found violations of the ICCPR, so as to improve the record of states parties’ compliance with its recommendations. In numerous capital punishment cases in which the Committee concluded that the State party had violated the complainant’s right to a fair trial, it recommended the author’s release; in other cases, notably where judicial proceedings were deemed unduly prolonged in violation of article 14, paragraph 38, of the ICCPR, it recommended the commutation of the death sentence. It is interesting to note that it was the death penalty cases decided since 1989 which incited the Committee to establish what might be termed a follow up fact-finding capacity for the Committee’s Special


34. Id. at 70.

35. It is clear that the procedure under the Optional Protocol can be abused by complainants simply with a view to carrying them beyond this five-year threshold—this has been pointed out by some States parties to the Optional Protocol and was discussed in a working paper prepared for the Committee’s 57th session in July 1996 (not made public).
Rapporteur for the follow-up on Views. This procedure is designed to facilitate a dialogue between the Committee and state party authorities, with a view to ultimately improving any given state party’s compliance with the Committee’s recommendations.

The first such follow-up mission took place in Jamaica in June 1995. During his mission, the Special Rapporteur for the follow-up on Views thoroughly discussed the status of implementation of Views adopted in respect of Jamaica with high-level government and law enforcement officials and representatives of the judiciary. He was informed of the constitutional and legal constraints which had made it difficult to implement the Committee’s recommendations fully. Nonetheless, a number of death sentences had recently been commuted. The facilitation of this type of follow-up dialogue is in itself a novel and welcome development. If it further facilitates implementation of the Committee’s recommendations and results in the commutation of sentences and/or the release of convicted prisoners, the quasi-judicial nature of the Optional Protocol procedure will be enhanced significantly.

III. Conclusion

The preceding sections demonstrate that in spite of the permissibility of the death penalty under article 6 of the Covenant, the Human Rights Committee has used both the reporting and the Optional Protocol procedure in an endeavor to significantly limit states parties’ resort to capital punishment. The Committee has necessarily done so in a circumspect way—this is only natural, given that many states (and indeed most states parties to the Covenant) retain capital punishment, and that the trend towards abolition is slow and perhaps not even irreversible, as the re-introduction of the death penalty by some states in recent years shows. But the Committee has formulated such an impressive number of procedural safeguards which must be observed before a capital sentence can be imposed and executed that many states parties stop and pause to reflect before imposing the ultimate punishment.

In some instances, the Committee’s comments under article 40 of the ICCPR or its recommendations in decisions adopted under the Optional Protocol have sparked national debates on the desirability of the maintenance or the abolition of the death penalty. If, in the process, states’ parties also realize that the imposition and execution of capital sentences seldom fulfills the objective of deterrence, the Committee will have made a major contribution.

36. See Annual Report, supra note 4.
Welcome. The purpose of our panel this morning is to look at some difficult questions related to nature and the role of international law applicable in non-international conflicts. Most of the world's conflicts today are not international. They take place within the boundaries of a single state. They often involve contests between the authorities of a state and other groups who seek power, or between armed groups that do not necessarily function under state authority. Consider some recent cases: Rwanda, Afghanistan, Angola, Liberia, Chechnya, and Somalia. The list could go on.

Particular circumstances vary widely, but these situations are often marked by great violence and brutality on all sides. Violence is often deliberately directed against civilians, prisoners, cultural sites, and other types of persons or property that would be protected by the law of war in international conflicts.

The reason for organizing this panel is my strong belief that international law does not now play an effective role in restraining these conflicts. There are many reasons for this. I hope we will talk about some of these here. I hope the panel will also have some practical suggestions about what can be done. I will sketch a bit of the legal background and then introduce our panelists.

The most familiar text applicable in all non-international armed conflicts is article 3, common to each of the 1949 Geneva Conventions. Common article 3 provides that "in the case of armed conflict not of an international character occurring in the territory" of a party to one of the Geneva Conventions, each party to the conflict shall observe certain minimum standards. Persons who take no active part in hostilities must be treated humanely: murder and torture are banned, there must be no
summary executions, and so on. By its terms, article 3 seems to apply to both sides, even those that do not represent a State. But there is a threshold legal question whether a particular situation constitutes an *armed conflict* triggering common article 3. And, clearly, common article 3 is not being applied in many situations where it ought to be.

Then there is protocol II to the 1949 Geneva Conventions. Protocol II was designed to lay down standards of conduct in civil war situations, but its threshold of application is high. It applies only to armed conflicts between national armed forces and "dissident armed forces or other organized armed groups" that have command structures, that control territory, and that can carry out "sustained and concerted military operations." Protocol II has been applied in a few situations; perhaps our panelists will have something to say about its strengths and weaknesses.

Finally, there is human rights law, both customary and conventional. However, human rights law is subject to a variety of possible qualifications or derogation in conflict situations.

We have a distinguished and experienced panel to discuss these issues today. Ambassador Michael J. Matheson is the Acting Legal Adviser of the Department of State. He was a leading figure in developing the mandates of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Recently, he led the United States delegation that successfully negotiated a protocol strengthening the land mine provisions of the Weapons Convention. Mike will give a short overview from his perspective of a senior United States' government lawyer.

Dr. Luke Lee of the Department of State's Refugee and Migration Bureau has done a great deal of work on the special problems of protection of displaced persons, among the most vulnerable of all groups in internal conflicts.

Professor Leslie C. Green has a long and distinguished career as a scholar in this area. Professor Green now holds the Stockton Chair at the Naval War College; I believe he may be the first non-United States citizen to do so. Professor Green will address problems of enforcing the law in these conflicts.

Our last speaker will be Professor Theodore Meron, another leading authority in the field, known not least for his remarkable book on the role of the law of war in Shakespeare's Henry the Fifth. Ted may talk about current proposals to articulate a set of minimum humanitarian standards applicable in all situations.
LOW-INTENSITY CONFLICT AND THE LAW

L.C. Green

The term low-intensity conflict is relatively new in military and political language and is employed more or less synonymously with non-international conflict, especially when such a conflict becomes of international concern. The rubric non-international conflict itself is a refined term for what were formerly known as revolutions or civil wars, particularly when these have developed into major operations with the likelihood or reality of atrocities being committed against non-combatants, whether civilians or those hors de combat, a fact that is often more common in non-international than international conflicts, especially when ideological, ethnic, or religious differences are in issue. It is for this reason that it must be borne in mind that the term low-intensity has no relation to the severity or violence of the conflict. It is a term used to indicate that the conflict is not between recognized states nor that any major power is directly involved.

According to the classical writers and generally accepted customary international law these conflicts were outside the purview of international law since they were regarded as being totally within the domestic jurisdiction of the state in which they were being waged. Nevertheless, even Grotius, who regarded war as being limited to an engagement between sovereign states by way of their armed forces, conceded that if an over-mighty prince so ill-treated his subjects that they were compelled to rise up against his rule, other princes had a legal right, and perhaps were even under a duty, to come to the assistance of those subjects and even displace the prince against whom they were revolting. It must be recognized, however, that such intervention might well be little more than a cover for predatory activity by the savior, intent upon adding the territory in question to his own. Even so, it was generally considered that such intervention could only take place in the most exceptional of

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2. Id. at Lib. II, Cap. XX, § XL.
circumstances since, as indicated by Vattel, all states were equal, regardless of their size, so that no prince possessed jurisdiction over the acts of another.

It was not only classical writers who recognized that in extreme circumstances intervention might be legitimate when all humanitarian principles as then understood were being infringed. In the Middle Ages, princes were issuing codes of conduct for the behavior of their soldiery even though, to a very great extent, the campaigns in which they were involved were internal and dynastic rather than international. Thus, as early as 1385 Richard II of England issued orders concerning the rights of justice of commanders over their own men, and by the fifteenth century such military codes tended to forbid pillage and the destruction of private property as well as postulating respect for monasteries and priests, women, children, the infirm, and others and had developed sufficiently even for Shakespeare to have Fluellen, in Henry V, refer to a law of armes.

It is often said that the first war crimes trial was that conducted by representatives of a group of Hanseatic cities against Peter of Hagenbach at Breisach in 1474. In fact, the conflict in which Hagenbach's offenses were committed was a non-international conflict waged by some of the inhabitants of territory controlled by the Count of Anjou who were seeking their independence. In the course of suppressing their revolt, Hagenbach committed a number of atrocities which would now be classified as crimes against humanity and which the tribunal condemned as contrary to the laws of man and of God.

What may be described as the first modern statement providing a code of law for the behavior of the military was drawn up by Professor Lieber of Columbia College and promulgated by President Lincoln for the Government of Armies of the United States in the Field, 1863, which was to a great extent the outcome of his concerns during the Civil War:

3. VATTEL, Introduction to Le Droit des Gens ou Principes de la Loi Naturelle § 18 (Charles G. Fenwick trans., Carnegie 1916) (1758): ("Strength or weakness counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.")


6. WILLIAM SHAKESPEARE, HENRY THE FIFTH act 4, sc. 7.


Ever since the beginning of our present War, it has appeared clearer and clearer to me, that the President ought to issue a set of rules and definitions providing for the most urgent cases, occurring under the Laws and Usages of War, and on which our Articles of War are silent.\(^9\)

While the Lieber Code is intended to apply to American forces whenever and wherever they may be engaged, it has been pointed out that

The first section of the Code [Arts. 1-30, 'Martial Law, Military Jurisdiction, Military Necessity, Retaliation'] appears on the whole to be ill organized and less convincing than it might have been had Lieber followed the plan of organization he had used in his previous lectures and writings. The sources of this section of the Code are, however, unmistakable - a quarter century of Lieber's thought modified to some degree in the light of the practice of the United States, particularly as concerned military occupation and relationships with the Confederate forces during the Civil War.\(^10\)

It is not necessary to specify the conduct which Lieber considered to be contrary to the law of war, nor the fact that his hope that it would form the basis for similar codes to be adopted by the European powers\(^11\) soon came to fruition.\(^12\) What is important is that it was applied during the Civil War and enforced against those guilty of breaches. Perhaps the most significant instance of enforcement of the law during this particular non-international conflict was the trial of Wirz in 1865.\(^13\) The charges against him were similar to those later brought against the Nazi war criminals at the end of World War II, and arose out of atrocities committed allegedly on his orders or as a result of orders conveyed by him against Northern prisoners. Already in this conflict we see a military tribunal guided by its Judge Advocate to apply the rules concerning superior orders and


\(^10\) BAXTER, supra note 9, at 23.


\(^12\) Id. at 72-73.

command responsibility which were later established in relation to an international conflict:

With what detestation must civilized nations regard that government whose conduct has been such as characterized by this pretended confederacy. An ordinary comprehension of natural right, the faintest desire to act on principles of common justice, would have dictated some humane action, would have extorted from some official a recognition of international rules of conduct . . . . It was not . . . ignorance of the law; it was the intrinsic wickedness of a few desperate leaders, seconded by mercenary and heartless monsters, of whom the prisoner before you is a fair type . . . . It is urged that during all this time [Wirz] was under General Winder’s orders . . . .

A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result then both the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist both are guilty . . . . Strongly as it may strike you that strict justice would require the punishment of the arch-conspirator himself . . . you cannot stop the course of justice or refuse to brand [the accused’s] guilt as the law and evidence direct . . . . [The accused] executed the bloody work with an industry which was almost superhuman and with a merriment which would have shamed a demon . . . .

There could be no collision where the subordinate was only anxious to surpass an incomparable superior . . . . If [the accused] still answer that, admitting the facts charged, he did these things in the exercise of authority lawfully

14 Winder was Provost Marshal of the Confederacy.


16. He had apparently stated that he would “dance on the grave of every Yankee.” Wall v. Mcnamara, 1 Term Rep. 536 (1779).
conferred upon him .... I answer him in the language of Lord Mansfield .... 17

In trying the acts done by military officers in the exercise of their duty .... great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears, by the evidence to have been upright .... [T]he principal inquiry to be made .... is, how the heart stood, and if there appears to be nothing wrong8 there, great latitude will be allowed for misapprehension or mistake. But if the heart is wrong, if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment, or other injury complained of, they shall not cover themselves with the thin veil of legal forms, or escape, under the cover of a justification the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust.19

In fact, the tribunal decided that the crimes alleged against Wirz were so outrageous that a pardon which had apparently been extended to him was considered to be null and void. This decision indicates that as early as the American Civil War it was recognized that the laws and customs of war, derived from the Lieber Code and the generally accepted rules relating to armed conflict going back to feudal times,20 were applicable in a non-international conflict and could be used to punish offenses considered unacceptable by a civilized force.

While accepting that they had no right to intervene in civil wars, third states claimed the right to secure observance of the law even during a non-international conflict when their own interests were damaged. Thus, during the Spanish Civil War a number of European and Mediterranean Powers adopted the Nyon Agreement21 directed against unknown submarines which were attacking merchant vessels legitimately trading with the Spanish government. In this case the law was enforced not

17. Id.


19. Id.


against the parties to the conflict, but the officially unidentified powers whose vessels were indulging in these unlawful attacks against neutral shipping.

Perhaps the first attempt to provide an international instrument with relevance to non-international conflicts was the Genocide Convention of 1948. This created a new crime in international law, that is to say an offense defined by international law, imposing an obligation upon the parties to enact legislation for its prevention and punishment.

Genocide embraces a number of specified acts intended to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, and may be committed in both peace and war. While during an international conflict the intent of each belligerent is to destroy or disable as many of the personnel of the adverse part as possible, because they are personnel of that party and thus an identifiable group, the fact that an international conflict is involved tends to render this type of destruction lawful, provided the generality of the laws and customs of war are observed. In a non-international conflict, particularly as experienced since 1945, there is often evidence of atrocities intentionally directed against a national, ethnic, racial or religious group, as such, and the conflict in the former Yugoslavia with its ethnic cleansing is a clear example of this in operation.

Unfortunately, the method of enforcement envisaged by the Convention is somewhat ineffective. Genocide is not a crime that is capable of being committed by an individual acting on his own. Since it is directed at an identifiable group, it is almost certainly to be carried out as part of state policy and this is where the difficulty becomes evident. Until such time as there is an international tribunal with jurisdiction over this offense, it is punishable only in the courts of the state in which it has been committed. To the extent that it is state policy, it is unlikely that the local authorities will be prepared to take the steps necessary to try and punish those of its leaders who have instituted the policy. In so far as it has been committed during a non-international conflict, trials may well be instituted by the government of those of its opponents who have committed this crime, or by the revolutionary authority if it should capture governmental representatives responsible or, more likely, if it has succeeded in its endeavors, in which case it is likely to try the former rulers for any number of offenses which they may well describe as genocide.

More directly concerned with providing legal principles to operate during non-international conflicts are the 1949 Geneva Conventions.

22. G.A. Res. 260 (III); Schindler and Toman, supra note 8, at 231.
relating to humanitarian law during war.24 Article 2 common to the four
Conventions makes it clear that they are intended for inter-state situations.
However, there is a new principle introduced by Article 3, which is to be
found equally in each of the Convention. By this, in the event

of an armed conflict not of an international character
occurring in the territory of one of the High Contracting
Parties, each Party to the conflict shall be bound to apply,
as a minimum . . . [to] persons taking no part in the
hostilities, including members of armed forces who have
laid down their arms and those placed hors de combat by
sickness, wounds, detention, or any other cause . . .
[certain minimum rights to ensure that they] shall in all
circumstances be treated humanely, without any adverse
distinction founded on race, color, religion or faith, sex,
birth or wealth, or any other similar criteria.

The four Conventions include an obligation for parties to inform
each other of the laws they adopt to ensure their application, while those
on prisoners of war and civilians impose a further obligation "to provide
penal sanctions for persons committing, or ordering to be committed, any
of the grave breaches" defined therein. However, the definition of grave
breaches does not overlap the minimal rights detailed in Article 3. But to
the extent that there is such overlap, it might be contended that, even in a
non-international conflict in the territory of one of the contracting parties,
the legislation would operate to penalize such breaches. It must be noted,
however, that Article 3 makes it clear that its provisions "shall not affect
the legal status of the Parties to the conflict." This means that the
governing authority of the territory concerned retains the right to treat its
opponents as traitors or terrorists and subject them to the full rigors of the
law as established in national legislation, even though this might be less
than envisaged in Article 3.

Whatever lacunae regarding enforcement this may lead to, the
situation has been remedied somewhat by developments in the field of
human rights and recognition of crimes against humanity, which must not
be confused with breaches of the Universal Declaration of Human Rights
or either of the two Covenants, none of which imposes an enforceable

24. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed
Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the
Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug.
12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12,
1949, 75 U.N.T.S 135; Convention Relative to the Protection of Civilian Persons in Time of
War, Aug. 12, 1949, 75 U.N.T.S. 287.
obligation upon the parties. However, constant reiteration in United Nations documents, together with assertions of their significance by both writers and states, as well as reference to them in World Court judgments, leads to the conclusion that these amount to *opinio juris ac necessitatis* and constitute either customary international law or general principles of law recognized by civilized nations.\(^{25}\)

More important than any of these documents is the concept of crimes against humanity. This was first postulated as *black letter law* in the London Charter establishing the International Military Tribunal for the Prosecution of the Major War Criminals of the European Axis at Nuremberg.\(^{26}\) While it is true that this was formulated\(^{27}\) for the purposes of the Tribunal and to deal with such offenses as had been committed during the Holocaust and the Nazi occupation of Europe, the concept has been greatly widened. There is much to be said in favor of adopting the view expressed in its Interim Report\(^{28}\) by the Commission of Experts appointed by the Security Council to investigate the alleged atrocities committed during the civil war in Rwanda.

If the normative content of "crimes against humanity" had remained frozen in its Nuremberg form, then it could not possibly apply to the situation in Rwanda that existed . . . because there was not a "war" in the classic sense of an inter-state or international armed conflict.\(^{29}\)

However, the normative content of "crimes against humanity" — originally employed by the Nuremberg Tribunal for its own specific purposes in connection with the Second World War — has undergone substantial evolution since the end of the Second World War.\(^{30}\)

"[C]rimes against humanity" as a normative concept finds its very origins in "principles of humanity" first invoked in the early 1800s by a state to denounce another state's

25. Statute of International Court of Justice art. 38.
27. G.A. Res., art. 6(c). *See also* at Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 205 (1946).
29. *Id.* at para. 113.
30. *Id.* at para. 114.
human rights violations of its own citizens.\textsuperscript{31} Thus, "crimes against humanity as a juridical category was conceived early on to apply to individuals regardless as to whether or not the criminal act was perpetrated during a state of armed conflict or not and regardless of the nationality of the perpetrator or victim.\textsuperscript{32}

Secondly, the content and legal status of the norm since Nuremberg has been broadened and expanded through certain international instruments adopted by the United Nations since 1945. In particular, the Genocide Convention of 1948 affirms the legal validity of some of the normative content of "crimes against humanity" as conceived in article 6 (c) of the Nuremberg Charter, but does not overtake it. The International Convention on the Suppression and Punishment of the Crime of Apartheid\textsuperscript{33} . . . refers in article 1 to apartheid as a "crime against humanity."\textsuperscript{34}

Thirdly, the Commission of Experts on [crimes in] the former Yugoslavia . . . has stated\textsuperscript{35} that it considered crimes against humanity to be: "gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim." This view finds support in the writings of publicists.\textsuperscript{36}

\textsuperscript{31} See, e.g., Green, \textit{International Law and the Control of Barbarism}, in Macdonald et al., \textit{The Role of Law in the International Behavior}, 17 \textit{ISRAEL Y.B. HUM. RTS.} 149 (1987).

\textsuperscript{32} \textit{Id.} at para. 115.

\textsuperscript{33} The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, 13 \textit{I.L.M.} 50. It should be noted that not all the major powers have ratified this instrument.


\textsuperscript{35} This quotation seems to have been take from the Interim Report since this wording does not appear in the Commission's Final Report, U.N. SCDOC.S/1994/674 (1994), but it forms a summary of paragraphs 84-6 of that Report.

Although there is a tendency among them to consider that many of the crimes against humanity committed in a non-international conflict do not need to be discriminatory and directed at any particular group.\footnote{In fact, it was not the Tribunal which established the nature of crimes against humanity, but the Charter setting up the Tribunal which resulted in this interpretation. \textit{The Role of Law in Establishing Norms of International Behavior, in The Rule of Law in the International Law and Policy of Human Welfare} 239 (1978).}

The Commission of Experts on Rwanda [likewise] considers that “crimes against humanity” are gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons irrespective of war and the nationality of the victim . . . .\footnote{U.N. SCDOC.s/1994/674 (1994).}

By this reiteration of the concept of discrimination, the two Commissions seem to have made it clear that genocide, which is essentially a discriminatory offense, is in fact a crime against humanity hardly a necessary undertaking. The philosophy required to bring the concept of crimes against humanity into line with current thought cannot be argued with, in which case, provided the necessary tribunal exists, there would be little difficulty in asserting that such crimes committed during non-international conflicts are amenable to criminal prosecution. Since it is generally accepted that war crimes are subject to universal jurisdiction and there is a somewhat similar approach developing, if not already existing, with regard to crimes against humanity, it would lead to the conclusion that such offenses can be tried in any state in which an offender is found. The two ad hoc tribunals established in connection with crimes in the former Yugoslavia and Rwanda enjoy concurrent jurisdiction with such national tribunals, although the latter must give way to the claims of the former should these be lodged, as has in fact already ensued as between Germany and the Yugoslav tribunal and Tanzania and that for Rwanda. In addition, a Spanish judge has ruled that the torture and disappearance of Spanish nationals in Argentina during the dirty war in that country, a clear non-international or low-intensity conflict, amount to crimes against humanity grounding jurisdiction in Spain and imposing an obligation on all countries to recognize any warrant for arrest issued in respect of the alleged offenders. Moreover, a French court has sentenced Captain Alfredo Astiz of the Argentine Navy to life imprisonment for murdering two French nuns in 1977. However, the Argentine Under-
Secretary for Human Rights has made it clear that the Argentine Government will not cooperate in any way in regard to allegations against any Argentine subject charged with offenses during this particular low-intensity conflict, since "a foreign court has no jurisdiction over events that took place on Argentine soil."39 This does not mean, however, that any state in which such Argentine citizens may be found is prevented from recognizing the validity of an attempt by an accusing state to obtain the extradition of such accused by giving effect to such an international warrant or proceed to try the accused itself by exercising universal jurisdiction in respect of alleged crimes against humanity.

The most important developments in the law concerning non-international conflicts were effected by the 1977 Protocols annexed to the 1949 Geneva Conventions.40 Protocol I introduces a most fundamental change in the law of armed conflict. So long as an internal conflict is directed towards self-government, the Protocol provides for its recognition as an international conflict governed by the Conventions and the Protocol, as well as the ordinary law regarding international armed conflicts. By article 1(4), an armed conflict includes one:

in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations41 and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.42

However, in the practice of the United Nations not all conflicts in which one of the parties claims to be seeking self-determination fall within the framework of this provision. To qualify as a national liberation movement so engaged, the entity making the claim must be recognized as such by the regional organization in the area in which it is operating. This would exclude the various guerrilla movements of Latin America, none of

41. U.N. CHARTER, art. 1. "The purposes of the United Nations are . . . (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, . . . ." See also U.N. CHARTER, art. 73(b).
which is recognized by the Organization of American States, and which movements in any case are revolutionary groups seeking to replace the local government rather than to overthrow domination, alien occupation or a racist regime. Equally, the Irish Republican Army, though it claims to be seeking self-determination from alien occupation, is not so recognized by either the Council of Europe or the North Atlantic Treaty Organization, the members of which regard the movement as being terrorist.

The same denial is extended to, for example, the struggle by the people of Chechniya seeking to break away from Russia; the various Kurdish groups trying by force of arms to separate from their various rulers; or the Sikhs aiming to establish a State of Kalistan distinct from India. Each of these claims to be fighting for self-determination, but none of them is accepted as a national liberation movement, nor regarded as falling within the scope of article 1(4) of Protocol I.

Moreover, the Protocol and the Conventions do not come into force automatically as they do with an international armed conflicts. Instead, by article 96(3) of the Protocol the authority representing the “people engaged against a High Contracting Party” must make a unilateral declaration of adhesion and compliance, sent to the Swiss government as depositary, undertaking to apply the Conventions and the Protocol during the conflict. While this entails:

the Conventions and the Protocol [being] brought into force for the said authority as a Party to the conflict with immediate effect [with that] authority assum[ing] the same rights and obligations as those which have been assumed by a High Contracting Party . . . and the Conventions and Protocol [becoming] equally binding upon all the Parties to the conflict.

the Protocol is silent as to the position if the governing authority has failed to ratify the Protocol or refuses to consider the national liberation movement as anything but a band of traitors. Moreover, its right to do so seems to be confirmed by article 4 of the Protocol for “the application of the Conventions and of the Protocol . . . shall not affect the legal status of the Parties to the conflict. . . .”

However, both parties would still be bound by the minimum conditions of humanitarian law, leaving it open, should that possibility arise, for the partisans of either to be tried for genocide or crimes against

43. Geneva Conventions, supra note 40, art. 3(1).
44. Protocol I, supra note 33, at art. 96.
humanity, especially in the light of the widened interpretation given to the concept of crimes against humanity already mentioned.

Should all the requirements in article 96 be satisfied, with the governing authority equally bound, both the national liberation movement and its opponent would become subject to all the provisions of the Conventions and Protocol including those relating to grave breaches. In addition, since such a conflict is now regarded as equivalent to an international armed conflict the laws and regulations, both customary and conventional, governing such a conflict would be operative, thus subjecting the members of both antagonists to any prosecution and punishment for war crimes that they might commit, including those relating to command responsibility or superior orders.

At present, with the vastly reduced number of colonial territories awaiting liberation, there are few areas which may be truly regarded as satisfying the conditions of article 1(4) with regard to self-determination. In the future, there is likely to be a proliferation of situations which were formerly regarded as civil wars or revolutions, thus reducing the possible significance of article 1(4), and the fact that the revolutionary authority describes itself as a national liberation movement seeking self-determination does not alter the legal position in any way.

To some extent, this type of situation is covered by Protocol II, which seeks to extend that part of humanitarian law which serves to protect non-combatants — a need that, in view of the ideological hatreds often aroused in such a conflict, is often more important in a non-international than an international armed conflict. But, acknowledging that internal order is a matter of domestic jurisdiction, the scope of Protocol II is somewhat limited. In the first place, the Protocol does not apply “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts,” even though the armed forces whether regular or in the form of some national guard are needed to suppress them and restore governmental authority. Second, the threshold for operation of the Protocol is even higher than that required to bring article 1(4) of Protocol I into operation. For Protocol II to apply, the conflict must be between governmental armed forces “and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

45. Protocol II, supra note 40, at art. 1(2).
46. Protocol I, supra note 40, at art. 1(1).
Protocol I does not require that the national liberation movement waging its war for self-determination be in control of any part of the national territory. It would suffice if all operations are directed from outside such territory so long as the conditions of article 96 are complied with. For Protocol II, however, the threshold is such that the Protocol cannot really come into operation until the conflict takes on the form of a civil war somewhat similar to that waged in Spain between the Republican government and the Nationalist authorities. For the dissidents merely to declare *no go* areas, as the Irish Republican Army tends to do, is insufficient.

Another failing of the Protocol is that it prescribes no method for its implementation and is silent on enforcement. Nor is there any provision as to breaches or their punishment, nor even to any obligation upon a governing authority to take steps to ensure that the humanitarian principles embodied therein are observed. Presumably, however, the reference in the article to the dissidents being *under responsible command* suggests that, to the extent that any liability might arise, some measure of command responsibility does in fact exist. While Protocol I calls upon the parties to disseminate and educate both the military and civilian populations,7 article 19 of Protocol II merely states “[t]his Protocol shall be disseminated as widely as possible.” In fact, when at Geneva during the drafting of the Protocol it was suggested that there should be a provision similar to that in Protocol I, the representative of one South American country, where revolutionary activity has not been rare, made it clear that there was no way his government would agree to any suggestion that it was obliged to inform its population as to what its rights might be in the event of an attempt by that population to resort to force aimed at the overthrow of the government.

To some extent this view finds some support in article 3 of the Protocol, a provision relating to state sovereignty which is somewhat wider than that to be found in Protocol I:

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

47. *Id.* at art. 83.
2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.48

There is no indication in the Protocol as to what is meant by *all legitimate means* open to the governing authority to maintain its position. Since silence cannot be construed as imposing any limitation on a sovereign's freedom of action,49 this leaves it open to that authority to apply any means, under its national law - and this is traditionally not open to third party criticism - which it may consider necessary to achieve its purpose. Further, since the Protocol is an international instrument between states, it only confers rights upon the parties thereto. If a party to the Protocol involved in a non-international conflict were to ignore the provisions of Protocol II, the only rights arising in respect of that breach are the normal rights attending a breach of treaty, and, as the World Court has indicated, while a state may have the competence to bring an action, it can only succeed if it has itself suffered damage as a result of the breach.50

Virtually all states in the modern world are parties to human rights instruments or have declared adherence to the principles embodied in such documents, and there has been constant reiteration of their significance in resolutions adopted by both the General Assembly and the Security Council, as well as other international organs, sufficient to maintain that these principles now amount to customary law and perhaps even *jus cogens*.51 This means that, regardless of any obligations that might arise from Protocol II, there are certain obligations binding upon the parties engaged in a non-international conflict. Further, since the Protocol is additional to the 1949 Conventions, to which almost all states are party, the minimum rights embodied in article 3 of those agreements operate whatever be the position concerning Protocol II. Finally, it should be borne in mind that much of Protocol II is little more than a reaffirmation of the basic principles of humanitarian law binding on all states, military authorities, and civilian populations, breach of which would in many instances amount to crimes against humanity. When they do, all offenders, regardless of rank, status, or nationality, become amenable to


49. *See, e.g.*, S.S.Lotus, 1927 P.C.I.J. (ser. A) No.10; Hudson, 1934 WORLD COURT REPORTS 1, 163.


trial by any state in the territory of which they may be found, and this is especially so in the light of the extended interpretation now being given to crimes against humanity.

In addition to the means of enforcing the law in non-international or low-intensity conflicts outlined here, there is always the overriding power of the Security Council to declare that a particular situation amounts to a threat to the peace, a breach of the peace, or an act of aggression calling for enforcement action under chapter VII of the Charter and overriding the normal reservation regarding domestic jurisdiction embodied in article 2(7) of the Charter, as may well result from the presence of alien volunteers intervening on behalf of either the government or the dissidents. In this regard it should be noted that there is no effective way in which the Security Council may be held to have exceeded its competence. Moreover, in view of the new significance accorded to respect for human rights there is strong ground for believing that such intervention might be tolerated internationally, as it has been in some parts of the African continent. It has even been suggested that there might be created a standing army of African soldiers to intervene to protect civilians threatened by the collapse of a local nation state, and where civilian casualties are likely to be extremely high. Such a force "would not be allowed to take sides, but would set up safe areas where civilians could be protected."

However, the establishment of such a safe area and protection of the civilians therein — hopefully more effectively than was the case in Bosnia — would almost certainly be regarded by one of the parties to the conflict as taking sides. Such intervention could be defended on the ground that it did not impinge upon article 2(4) of the Charter, since there was, theoretically at least, no threat to the territorial integrity or political independence of the state concerned. It would nevertheless appear that moving in because of the collapse of a nation state was in fact a denial, however temporary, of its political independence. Determination as to whether this is in fact so, however, would be by decision of the Security Council, which would probably decide that, in view of the significance of human rights, the intervention was clearly consistent with the purposes of the United Nations, which include "respect for the principle of equal rights and self determination of peoples," the

52. See, e.g., Lockerbie Aerial Incident (Libyan Arab-Jamahirya v. U.K.), 1992 I.C.J. 3, 15; see also, id. at 114, for a similar Order re Libyan request against United States.

53. See infra remarks concerning possible assumption of power on behalf of the United Nations.

54. THE TIMES (London), 1 Sept. 1996.

55. U.N. CHARTER art. 1, para. 2.
intervention having been directed to protecting the equal rights of the
civilian population and to enable the entire people to exercise its right to
self determination by way of a more acceptable administration.

In the course of its fifty years of existence the United Nations has
on a number of occasions made use of national contingents provided by
members to act as peacekeepers or interposition forces aimed at keeping
the contestants apart, but without any right to intervene, even in the event
of their witnessing acts which are clearly contrary to humanitarian law,
although this does not mean that local commanders or the states sending
them have not taken such an initiative, as the United States sought to do
without success in Somalia.

Most significant has been the reaction of the Security Council to
events consequent upon the break-up of the former Yugoslavia or
following the *mysterious* death of the President of Rwanda in an air crash.

After Yugoslavia broke up into a number of independent states,
conflict broke out between Serbia and Croatia, Serbia and Bosnia
Herzegovina and Croatia and Bosnia Herzegovina. While these conflicts
subsisted they were clearly international armed conflicts subject to the
rules pertaining thereto. In Bosnia Herzegovina, however, dissident
ethnic/national groups made up of local Serbs and Croats took up arms
against the largely Muslim Bosnian government seeking either to establish
an independent state of their own within *Bosnian* territory, or with the
intention of seceding and adhering to Serbia or Croatia as the case might
be. In addition, dissident Muslim groups also took up arms against the
Bosnian government. These conflicts were clearly non-international, even
though many of the officers involved had been officers in the former
Yugoslav Army and in the earlier stages at least had received support and
arms from the Croatian and particularly Serbian governments. While such
assistance subsisted it might have been difficult to determine which
breaches of the law were committed during an international conflict
constituting war crimes, and those perpetrated during a low-intensity
conflict, and which, though they might amount to genocide or crimes
against humanity, would not fall within the normal understanding of the
rubric war crimes. When assistance from Croatia and Serbia ended, the
conflicts reverted to their status as non-international. The situation
remained under some measure of legal control however, since the
government of the former Yugoslavia had ratified the Geneva Conventions
and the two Protocols and the governments of Croatia and Bosnia had
announced their adherence thereto. To that extent, therefore, the conflicts
were subject to those instruments, fully in the case of the international
conflicts involved and, to the extent already analyzed, to the non-
international conflicts in Bosnia as well.
In so far as Rwanda is concerned, there were no similar problems of classification. There it was a simple case of the larger ethnic group, the Tutsis, taking up arms against the ruling minority ethnic group, the Hutus. During this conflict extensive atrocities were committed, especially by forces and officials owing allegiance to the overthrown Hutu administration.

In Bosnia Herzegovina the warring parties, and particularly the Serbs, pursued a policy of *ethnic cleansing* involving the expulsion of non-Serbs from their homes and from territory under Serb control. Many of the expellees died from starvation and exposure, while there was evidence that massacres on a fairly large scale were being perpetrated against expelled Muslims as a matter of policy. Even if the deaths are ignored, it is difficult to deny that such a policy would cause, in the terminology of the Genocide Convention, "serious bodily or mental harm to members of the group[s]" affected. Similarly, in Rwanda extensive massacres of Tutsis by Hutus, and vice versa, ensued, including raids on refugee camps in neighboring countries. Such offenses were, in accordance with the terminology of the Genocide Convention, to be tried by the authorities of the territories in which the offenses were committed. Any such trials, however, were more likely to be based on a demand for vengeance than a pursuit of justice. If such acts of vengeance were to be avoided or minimized, some means of establishing an international criminal tribunal would have to be resorted to.

Acting on instructions from the Security Council, the Secretary General of the United Nations established two Commissions of Inquiry to seek out evidence of genocide, war crimes and crimes against humanity committed in both the former Yugoslavia and Rwanda, and, in the light of their reports, he proposed to the Council that international ad hoc tribunals be established to try offenders and submitted a draft statute for each of two distinct bodies. A problem soon arose concerning the competence of the Security Council to establish such a court since the Charter is silent on the matter. This issue of jurisdiction was raised in the case of Dusko Tadic, the first to be charged before the Yugoslav tribunal. In the course of its rejection of the plea, the Appeal Chamber, having ruled that the Council would certainly have been able to establish such a tribunal to deal with issues arising from an international conflict as being in breach of or threatening the peace, continued:

56. In fact, Rwanda announced its intention to bring thousands of Hutu to trial.
58. *Id.*, para. 30.
But even if it were considered merely as an 'internal armed conflict', it would still constitute a 'threat to the peace' according to the settled practice of the Security Council [the constitutionality of which it was beyond the competence of the Tribunal to question] and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts. . . .

Here we have an instance of a specially created tribunal deciding that the organ of the United Nations establishing it possesses a power not apparent from the text of the Charter by construing the acquiescence of the membership as equivalent to *opinio juris ac necessitatis*, and perhaps even constituting a de facto amendment of the Charter itself. The Chamber then proceeded to find that the establishment of the Tribunal is fully within the competence of the Council, since it:

matches perfectly the description in Article 41 of 'measures not involving the use of force.' The measures set out in [that] Article are merely illustrative *examples* which obviously do not exclude other measures. All the Article requires is that they do not involve 'the use of force.' It is a negative definition . . . . Logically, if the organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of 'collective measures' that they are collectively undertaken. Action by Member States on

59 Id.
60. Id. (italics in original).
behalf of the Organization is but a poor substitute faute de mieux, or a 'second best' for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force. In sum, the establishment of the International Military Tribunal falls squarely within the powers of the Security Council under Article 41 . . . . The Security Council of the United Nations has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of international peace and security, i.e., as a measure contributing to the restoration of peace in the former Yugoslavia . . . . Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard, and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations . . . . [T]he Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.\(^6^1\)

This may be considered a somewhat extensive interpretation of the powers of the Security Council since there is nothing in the Charter to indicate any likelihood of the Council establishing a court additional to the International Court of Justice, although it may perhaps be contended that since the Charter describes the Court as the "principal judicial organ of the United Nations,"\(^6^2\) it leaves the way open for further tribunals to be set up. But the World Court is a civil tribunal and there is nothing in the Charter indicating a competence to establish criminal courts. Moreover, to establish such a court is inconsistent with the traditional attitude of states which has not been excessively favorable to the establishment of a tribunal having jurisdiction to try governmental leaders and hold them personally responsible for what may be claimed to be the illegal activities of the states they administer.

It was also claimed that the Tribunal was not properly set up since it was not \textit{established by law}. The Appeal Chamber rejected this contention, holding that:

The important consideration in determining whether a tribunal has been "established by law" is not whether it was

\begin{itemize}
  \item \textit{Id.} at paras. 32-40.
  \item U.N. CHARTER art. 92.
\end{itemize}
pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedure, and that it observes the requirements of procedural fairness. . . .

This suggests that if a revolutionary authority which had not yet created a proper legislative body established a tribunal by executive decree with the sole object of trying the president and other members of the overthrown administration, such a tribunal would be considered as established by law, provided it conducted itself in accordance with acknowledged principles of justice. We might question here, therefore, whether the tribunal established in Angola for the trial of mercenaries would be considered one established by law. Similarly, did the tribunal envisage by article 227 of the Treaty of Versailless to try Wilhelm II satisfy all these conditions since it was implied that the mere constitution of the tribunal would assure “him the guarantees essential to the right of defense . . . [and as i]n its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemnity of international undertakings and the validity of international morality[?]

It is not really of major significance from the point of view of the relevance of law to low-intensity or other non-international conflicts whether one accepts the Tribunal’s interpretation of Chapter VII of the Charter and the competence of the Security Council thereunder. The General Assembly has confirmed the existence of both tribunals and no member of the United Nations has contested this. Some, in fact, have already given effect to the obligation embodied in the relevant statute recognizing that, while there is concurrent jurisdiction as between the Tribunal and national courts, the former enjoys primacy. Thus, although German law grants jurisdiction to German courts to try those found on German soil who may be accused of crimes against humanity, German law was amended so that Tadic was surrendered to stand trial before the Tribunal at The Hague. Similarly, Tanzania extradited Akeyasu so that he might be tried by the Rwanda Tribunal.

63. Para. 45 “to Tadic case.”
64. See, e.g., Green, The Status of Mercenaries in International Law, in ESSAYS ON THE MODERN LAW OF WAR ch. 9 (1985); Lockwood, Report on the Trial of Mercenaries, 7 MANITOBA L.J. 183 (1972).
66. Statute of the Yugoslavia Tribunal art. 9 (2); Statute of Rwanda Tribunal art. 8 (2).
The various jurisdictional problems concerning the Yugoslav Tribunal did not arise in relation to the Tribunal for Rwanda for there was never any doubt that the conflict on that territory was anything but non-international. Moreover, the Rwanda Tribunal was not granted jurisdiction to try offenses against the laws and customs of war.

As to substantive issues of jurisdiction, the Yugoslav Tribunal has jurisdiction over violations of the laws and customs of war, genocide, and crimes against humanity. Its competence concerning the laws and customs of war relates to incidents perpetrated during the international conflicts occurring in the former Yugoslavia.

The Statute of the Yugoslav Tribunal indicates that violations of the laws and customs of war shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, town or villages, or devastation not justified by military necessity;

(c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education; the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property. 67

Except for the last two items, it is submitted that this enumeration, together with other unspecified breaches of the laws and customs of war, in fact constitute crimes against humanity. It may be suggested, therefore, that it would perhaps have been better had the Statute not referred to this collection of offenses in any way. Had this been the case, many of the jurisdictional issues relating to the Yugoslav Tribunal might have been averted, for, in the light of the new attitude to crimes against humanity, there is little doubt that these crimes would now be regarded as subject to universal jurisdiction.

67. Statute of the Yugoslavia Tribunal, art. 3.
As to genocide, although the Convention provides for local jurisdiction pending the establishment of an international tribunal possessing jurisdiction over this offense, the international tribunals, though ad hoc and created for a limited purpose, satisfy this requirement. It may also be argued that genocide is in fact the gravest of all crimes against humanity and, therefore, it might have been as well that the Tribunals should simply have been endowed with jurisdiction over crimes against humanity and nothing else. However, in view of the universal horror resulting from the *ethnic cleansing* that took place in the former Yugoslavia and the openly inter-tribal massacres perpetrated in Rwanda, it was probably considered useful to indicate that genocide was so horrendous a crime as to warrant specific condemnation, rather than simply to include it in the generality of crimes against humanity.

Both Statutes, confirming the accepted practice with regard to crimes against international law, particularly those committed during conflict, confirmed that the status of an accused would not provide immunity and that individual responsibility would attach to anyone planning, instigating, ordering, or aiding and abetting in the planning or preparation of crimes within the tribunal’s jurisdiction, as well as to any superior who knew or had reason to know that a subordinate was about to commit any crime within the tribunal’s jurisdiction and who failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators, while at the same time it was made clear that superior orders could not be pleaded by way of defense.

The issue of competence in the case of the Yugoslav Tribunal with regard to crimes against humanity was really beyond question, once it was decided that the Security Council could establish it. The tribunal had no option but to try those charged with such crimes committed in the former Yugoslavia during those conflicts which were non-international, for article 5 of the Statute expressly conferred such jurisdiction over crimes against humanity “when committed in armed conflict, whether international or internal in character, and directed against the civilian population.” As regards its general competence, article 1 provided that it “shall have the power to prosecute persons responsible for serious violations of

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68. During the trial for genocide of Jean-Marie Akayesu, defense counsel cited the killing of at least one million, the prosecution claimed that 800,000 of these were Tsutsis, while the defense contended that “800,000 Hutus and 200,000 moderate Tsutsis have been killed in the 1994 massacres rather than the other way around.” THE TIMES (London), Sept. 1, 1996, at 27.

69. Statute of the Yugoslavia Tribunal art. 7 (2); Statute of the Rwanda Tribunal art. 6 (2).

70. Statute of the Yugoslavia Tribunal, art. 7(1), (3), (4); Statute of the Rwanda Tribunal, art. 6 (1), (3), (4).
international humanitarian law committed in the former Yugoslavia since 1991... and international humanitarian law includes grave breaches of the Geneva Conventions and Protocol I, war crimes in the traditional sense, genocide, and crimes against humanity.

Many of the persons indicted by the Yugoslav Tribunal, including Tadic, Radic, Mladic, and Karadzic were charged with offenses which involved both personal as well as command responsibility. Among the charges leveled against Mladic and Karadzic were genocide, crimes against humanity, unlawful confinement of civilians and destruction of sacred sites, as well as unlawful shelling of civilian cities, including Sarajevo, together with seizure of a number of United Nations peacekeepers and holding them as hostages. The crime of genocide cannot really be committed by a single individual acting alone, even though he may be committing his offenses in accordance with his own discriminatory prejudices. Nor is it likely to be initiated by a person holding inferior rank, for it is a question of executive or command decision on a highly sensitive policy issue. The same is true of any decision to seize and hold hostage United Nations personnel.

The first person to appear for trial before the Rwanda Tribunal Jean-Marie Akeyasu, was similarly charged with offenses involving personal and command responsibility. As the former mayor of Taba, he was charged with genocide, murder, and crimes against humanity arising from the massacre of local Tsustis, including the killing and mutilation of pregnant women. Overall, he was charged with prime responsibility for what had happened.\(^\text{71}\)

Even if we ignore the existence of the two specially created tribunals, it may probably be said that it is now well established that crimes committed during a low-intensity or non-international armed conflict which amount to crimes against humanity are, like war crimes committed in an international conflict, subject to universal jurisdiction, amenable to trial in any country wherein the offender may be found.

In so far as either of the tribunals has authorized issue of an Indictment, that Indictment is universally valid and the named accused is liable to arrest wherever he may be found and then handed over to the tribunal for trial,\(^\text{72}\) even though the members of the Implementation Force in Bosnia appear unwilling to recognize the validity of such an instrument. It is thus, at least theoretically, impossible for anyone so indicted to claim asylum.

\(^{71}\) N.Y. TIMES, Sept. 27, 1996.

\(^{72}\) Statute of the Yugoslavia Tribunal, arts. 19(2) & 29; Statute of the Rwanda Tribunal, arts. 18(2) & 28.
Equally significant with regard to the applicability of universal jurisdiction in respect of crimes against humanity committed during a non-international conflict has been the decision of Judge Baltazar Garzon in Madrid. An allegation was brought by a Spanish woman alleging that her husband and two sons were tortured and disappeared during the dirty war in Argentina. Judge Garzon ruled that, regardless of the Argentine amnesty concerning such offenses and which, in any case, enjoyed no validity in Spain, he possessed jurisdiction over cases of torture and murder committed against Spanish citizens in Argentina during the period of civil disturbance. In his view, these acts amounted to crimes against humanity which were subject to universal jurisdiction, so that any warrant he might issue would be entitled to international recognition and enforceable universally. Similarly, in relation to the same low-intensity conflict in Argentina, France has sentenced Captain Alfredo Astiz of the Argentine Navy to life imprisonment for the unlawful killing of two French nuns in 1977. It must be noted, however, that Argentina’s Under-Secretary for Human Rights has made it clear that the Argentine Government will not cooperate in any way with such proceedings, since “a foreign court has no jurisdiction over events that took place on Argentine soil.”

But this does not mean that any person named by a state as responsible for criminal activities amounting to crimes against humanity during Argentina's dirty war and found outside Argentina will not be handed over to a demanding country by the host state.

As to genocide as defined by the Convention, the lacuna concerning jurisdiction may be filled by acknowledging that genocide is a crime against humanity and so, regardless of the Convention nomenclature, clearly subject to universal jurisdiction.

Where war crimes are concerned, in a mixed situation involving both international and non-international conflicts, it may well be advisable to ignore these completely and lodge charges in accordance with the law concerning crimes against humanity, into which category at least the more serious war crimes would fall, and, if desired, to charge with genocide as well. In this way, any dispute concerning the applicability of the law of war with regard to any aspect of the conflict would be avoided, while at the same time ensuring that any crimes which might in the course of the

74. In the case of State of Israel v. Eichmann, 36 I.L.R. 5 (1961/2), the Israeli authorities did not prosecute him for genocide as such, since the Convention, with its international definition, was adopted after he had committed his crimes. Instead he was charged with a series of crimes which amounted to genocide in the ordinary meaning of that term as generally understood by the time of the trial.
international conflict amount to war crimes or grave breaches will in relation to the non-international conflict be equally subject to trial.

From an extra-judicial point of view other means exist for ensuring enforcement of the law in a non-international conflict. In the first place, it is open to the Security Council to decide, as it has done in establishing the tribunals for the former Yugoslavia and Rwanda, that the conflict constitutes a breach of the peace or a threat thereto, requiring enforcement action under chapter VII. In addition, events in Iraq following the 1991 Gulf War between that country and the Coalition forces, as well as in Bosnia, demonstrate that, when circumstances relating to a continuance of hostilities or denial of human rights are involved, the world community, or groups of states acting on their own or in the name of an international organization may decide that, for humanitarian reasons, it has become necessary to resort to measures which would normally, or under a narrow interpretation of the domestic jurisdiction reservation in article 2, paragraph 7, or the injunctions in article 2, paragraph 4, of the Charter be condemned as unwarranted intervention.

In Iraq no-fly zones were established to protect the Kurdish minority from abuse by the Iraqi government against which it was waging a conflict directed at securing independence. When the various Kurdish groups fought as between themselves, and one requested aid from the Iraqi government which aid was given, the United States, claiming to be enforcing protection of the Kurds in accordance with Security Council resolutions relating to the earlier invasion of Kuwait, protection of the civilian population and the restoration and preservation of peace in the area, unilaterally extended the no-fly area and attacked military installations in southern Iraq, even though the operations affecting the Kurds were taking place in the northern parts of the country.

Where Bosnia Herzegovina was concerned, an attempt was made to stop the fighting and prepare the way for the establishment of an elected government through the medium of arrangements set out in the General Framework Agreement for Peace drawn up in Paris in 1995. The United Nations peace-keeping force in the country was replaced by an Implementation Force (IFOR) deployed under NATO (North Atlantic Treaty Organization) auspices. The Force’s remit was to ensure compliance with the cease-fire by all parties and supervise the election of a

75. "All Members shall refrain in their international relations form the use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations."

democratic administration representing the various interests. The contingents making up IFOR were not authorized to intervene on behalf of the various ethnic groups, even against violence committed in their presence, although some local commanders acting on their own initiative did resort to protective intervention measures. Most significant, however, was the fact that the IFOR command interpreted their task under the Paris Agreement as precluding IFOR members from arresting persons who had been indicted by the ad hoc tribunal for the former Yugoslavia,\textsuperscript{7} such persons had been accidentally come upon, as in fact happened in the case of one intelligence officer who had been entrapped by altered road signs which diverted him from a route described as safe. He was sent to The Hague, but the charges against him were dropped. Some of the persons against whom indictments have been issued have participated in discussions with IFOR representatives concerning the application of the Paris Agreement, but this has not been considered sufficient to warrant their being arrested, despite the issuance by the Tribunal of internationally valid warrants.\textsuperscript{8}

It is submitted that there is enough legal authority to enforce the law in non-international conflicts without having recourse to any specially created tribunals. Since virtually all the breaches committed during such a conflict amount to crimes against humanity and frequently include genocide, there is sufficient evidence to support the contention that all such offenses are subject to universal jurisdiction, so that offenders may be tried by any country in which they may be found. This is not to suggest that the jurisprudence of the two ad hoc Tribunals which have been established is insignificant. Their creation has been accepted by the world community, and any problems that may have existed with regard to their constitutionality or competence are no longer in point, for the findings in regard thereto have equally been acquiesced in. If, therefore, any such tribunal were established in the future, it may be accepted that no such questions will be raised or given any weight.

\textsuperscript{7} See, e.g., case of an individual indicted by the international war crimes tribunal on charges of gang rape and running a slave/brothel for Bosnia Serb soldiers walked into the office of the U.N. police monitors to protest that he was being harassed by the Bosnian police, he was given the standard complaint form to fill out. When he said he was especially upset because while he routinely passed through NATO military checkpoints with no trouble, the Bosnian police were trying to arrest him, he was told that his difficulty would be investigated. When questioned, "senior officials of the U.N. police monitors said they felt no remorse at having missed the chance to detain Mr. Stankovic, since it 'was up to his colleagues in the Serbian police.'" N.Y. TIMES, Nov. 9, 1996.

\textsuperscript{8} Both Karadzic and Mladic fall into this category.
As regards the precedential value of any judgments delivered by the tribunals, whether in regard to international, non-international, or other low-intensity conflicts, these should be granted as much authoritative consideration as the Judgment of the International Military Tribunal at Nuremberg. Moreover, having been created by the United Nations, rather than by a group of victorious combatants granting jurisdiction only over named individuals, it might even be suggested that the decisions of these tribunals, as coming from a less biased court, should enjoy greater authority than is given to Nuremberg.

Furthermore, the events in Iraq and Bosnia demonstrate that, should humanitarian considerations warrant it, intervention on behalf of an international organization or perhaps even by a leading power, may become acceptable even in a non-international conflict. In this connection, reference might also be made to the possible use of extensive interpretation of chapter XII of the Charter, the concomitant creation of a replacement for the Trusteeship Council which, after all, was considered to have replaced the Permanent Mandates Commission of the League systems, although it is accepted that some other term than trusteeship would have to be found. When the governmental system of a state has disintegrated to an extent that it is no longer possible for the national authorities to protect the inhabitants or itself resorts to measures which in the past would probably have resulted in humanitarian intervention, it should be possible for the United Nations to decide that the state authorities in question have lost the competence to be considered a legitimate authority rendering it necessary for the United Nations itself, or powers authorized by it, to take over the administration of that state and supervise the re-establishment of a system that will once again permit local authorities to perform the proper functions of a government in so far as protection of its citizenry is concerned. To be properly performed, this would require the United Nations, despite its financial difficulties, to establish a core of administrators, much as Protocol I, 1977, envisages regarding the recruitment and training of qualified persons who may be required to act on behalf of a Protecting Power, trained to fulfill such tasks and immediately available should their services be required.

The arguments set out above should be sufficient to indicate that means now exist so that the law may be enforced in respect of offenses committed during non-international and low-intensity conflicts as much as it seeks to do in regard to international conflicts. Arguments based on the

79. International Trusteeship System.
80. See, e.g., the various rulings of the World Court with regard to South West Africa.
traditional view that such non-international conflicts are within the domestic jurisdiction and so outside the purview of international law have lost their validity. This means that the silence of Protocol II regarding both breaches and enforcement becomes irrelevant, and it can no longer be maintained, at least if genocide or crimes against humanity are committed, that these are matters within such jurisdiction and beyond the scope of international legal concern.
As John Crook has pointed out, most of the armed conflicts of recent years have been internal rather than international, and most of the suffering of the civilian population has occurred in these internal conflicts. The United States and other western governments have been trying for a number of years to improve both the legal standards applicable in internal conflicts and the means for their enforcement. This morning, I would like to survey the various contexts in which this question has arisen and to describe what the United States has attempted to do in each case.

John has already referred to the basic texts that apply rules of international humanitarian law to internal conflicts—namely, common article 3 to the 1949 Geneva Conventions and the 1977 Additional Protocol II to those Conventions. During the Geneva Diplomatic Conference which adopted the Additional Protocols, the western group fought a hard and largely unsuccessful battle to bring the substance of provisions applicable in internal conflicts closer to those applicable in international conflicts, particularly with respect to protection of the civilian population.

There were two primary obstacles. First, the nonaligned and Soviet blocs expressed the concern that any strengthening of the obligations applicable in internal conflicts would give enhanced political and legal status to insurgent groups, and would lead to greater international intrusion into their internal affairs. This was a particular concern of the many nonaligned states that did not have a strong history of national unity, and that lived in fear of secessionist ethnic, tribal and religious movements within their societies. It was also a concern of governments that had been the object of international criticism for domestic abuses, and that were not inclined to give new grounds and new opportunities for such criticism or intervention.

Second, there were concerns that the standards and procedures of international humanitarian law, which had been developed to regulate the conduct of states and regular armed forces, could not sensibly be applied to internal conflicts where the insurgent groups often had little internal discipline and fewer incentives to comply with international standards they

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had no hand in negotiating and may never have accepted. A frequent objection was that these governments could not be expected to require their military forces to obey restrictions which their insurgent opponents had not accepted and might not have the ability to comply with if they wanted to do so.

As a result, Additional Protocol II is not as comprehensive as western delegations had wanted, either with respect to its substance or its scope of application. With respect to substance, the Protocol was an important improvement in some areas, but its protections for the civilian population, for detained persons and for those engaged in humanitarian work were in many ways only a pale copy of the rules for international armed conflict.

With respect to its scope of application, the Protocol excludes conflicts with insurgent armed groups which are not under responsible command or which do not exercise such control over a sufficient part of national territory as to enable them to carry out sustained and concerted military operations. Unfortunately, these provisions would exclude many guerrilla wars fought by irregulars. They have also provided a convenient basis for governments that do not wish to apply the Protocol to decline to do so.

The view of the United States is that the rules of Additional Protocol II should apply to all internal armed conflicts, and in submitting the Protocol to the Senate the Executive Branch proposed that United States ratification be subject to a formal Declaration that it would so apply the Protocol and would encourage all other states to do likewise. We hope that the Senate can be persuaded to give its advice and consent to the Protocol with this Declaration at an early date.

Since 1977, the United States has attempted in various contexts to expand the application of international humanitarian protections to internal conflicts. For example, during the drafting of the Statute of the International War Crimes Tribunal for the former Yugoslavia, we took the position that the Tribunal should have jurisdiction over war crimes, crimes against humanity and genocide in internal as well as international armed conflicts.

The Statute that was drafted by the United Nations Secretariat and adopted without change by the Security Council in 1993 included four jurisdictional articles. The article on crimes against humanity expressly stated that the Tribunal had jurisdiction over such crimes when committed in armed conflict, whether international or internal in character. . . . The articles on grave breaches of the 1949 Geneva Conventions, other violations of the law and customs of war, and genocide did not expressly state whether they applied in internal conflicts. In her explanation of vote
in the Security Council in favor of the Statute, Ambassador Albright stated for the record that the United States interpreted the jurisdiction of the Tribunal to apply in all respects to internal as well as international conflicts, including violations of the provisions on internal armed conflicts in common article 3 of the 1949 Conventions and Additional Protocol II.

When these issues came before the Appeals Chamber of the War Crimes Tribunal in the course of ruling on various appeals by the first war crimes defendant (Dusko Tadic), we argued that the conflict in the former Yugoslavia was in fact an international conflict, but that in any event each of the jurisdictional provisions of the Tribunal’s Statute applied in both international and internal conflicts. The Appeals Chamber disagreed with our argument that the entire conflict was international in character, and disagreed with our argument that the grave breaches provisions of the 1949 Geneva Conventions applied in both types of conflicts. However, the Chamber agreed that the other jurisdictional provisions applied in internal as well as international conflicts, relying heavily on the United States statement during the deliberations of the Security Council. Therefore, although we did not agree with the reasoning of the Appeals Chamber on all points, it did sustain our basic argument that the Tribunal’s jurisdiction did apply to violations of genocide, war crimes, and crimes against humanity committed during internal armed conflict.

When the International War Crimes Tribunal for Rwanda was created by the Security Council in 1994, it was agreed by all concerned that the Rwanda situation was an internal armed conflict, and this time the jurisdictional provisions of the Rwanda Statute were drafted so as expressly to apply to the rules of humanitarian law in internal armed conflict, as well as to genocide and crimes against humanity. Therefore, there should be no question that the applicable rules of common article 3 and Additional Protocol II will apply in the Rwanda war crimes trials.

The question of internal armed conflict was also a critical issue during the negotiations of the past few years to improve the international rules governing the use of conventional weapons—particularly land mines and similar devices, which are governed by the Mines Protocol of the 1980 Convention on Conventional Weapons. Unfortunately, the 1980 Convention clearly applied only to international conflicts, while the great majority of civilian casualties from land mine use in recent conflicts have occurred in internal conflicts, such as those in Angola and Cambodia. It was therefore one of the primary United States objectives in the revision of the Mines Protocol to expand its scope to include all internal conflicts. At first, the nonaligned states opposed such an expansion, for all the same reasons that had caused them to oppose the expansion of the scope and content of Additional Protocol II.
In the end, we and other western delegations were able to convince these states that a revised Mines Protocol would be of little practical value if it did not apply to internal conflicts, and that there was no valid reason for denying the civilian population protection from land mines simply because the conflict in which they found themselves happened to be internal rather than international. To meet their concerns about the legal effects of expanding the scope of the Protocol, we added language specifically disclaiming any effect on the legal status of the conflict or the insurgent groups involved, as well as a provision stating that the obligations of the Protocol would apply equally to all parties to the conflict. These additions seemed to provide the necessary cover to allow them to agree to the expansion of scope.

However, I do not know whether this expansion of the Mines Protocol to internal conflicts suggests that it may now be possible to expand other humanitarian law protections to internal conflicts. In agreeing to the expansion of the scope of the Mines Protocol, one key nonaligned state made clear that it viewed this as an exceptional circumstance that should not be repeated elsewhere, and blocked the proposed expansion of the scope of other parts of the Convention, particularly the new Protocol on Blinding Laser Weapons that was adopted at the same time. Furthermore, we were not able to persuade the nonaligned to accept a western proposal for international fact-finding investigations into alleged violations of the Mines Protocol, and one of the reasons often cited for the nonaligned refusal was that it would never be acceptable to have international investigations into the circumstances of internal conflicts.

In surveying the field on the application of law to the conduct of internal armed conflicts, we should not neglect various provisions of arms control agreements that affect the use of weapons in those conflicts. The best early example of this was the 1925 Geneva Protocol which prohibited the use of chemical and bacteriological weapons. This Protocol is often classified as an arms control agreement, but in fact it states a very important rule of the law of armed conflict. By its terms, the Protocol only applies to the use of these weapons in war, which was understood to mean international armed conflict. Over the years, however, more and more states came to accept the position that this prohibition had become a part of customary international law applicable in internal as well as international conflicts. This position was supported by the United States in the aftermath of the use of chemical weapons by Iraqi forces against Kurdish civilians in northern Iraq after the end of the Iran-Iraq War.

Not all states accept this view of customary law. However, two arms control agreements concluded in recent decades would produce much
the same effect. The 1972 Biological Weapons Convention did not expressly deal with the use of such weapons in armed conflict, but did prohibit any acquisition or retention of biological agents of types or in quantities that have no justification for peaceful purposes, or of weapons or means of delivery designed to use such agents for hostile purposes or in armed conflict. The effect of these prohibitions is to make it impossible lawfully to use biological weapons in any form of armed conflict. Likewise, the 1993 Chemical Weapons Convention expressly prohibits the use of chemical weapons, and the use of riot control agents as a method of warfare. This would clearly preclude the lawful use of chemical weapons in either internal or international conflicts.

The United States was a strong supporter of both these conventions, and is of course a party to the Biological Weapons Convention. The Chemical Weapons Convention has been submitted to the Senate, but the Senate has not yet given its consent to ratification. We hope this will occur soon.

Finally, attempts have been made recently by government and non-government experts to identify the rules which may be said to be part of customary international law in international and internal conflicts, or to define sets of principles that should be applied in all circumstances—whether in armed conflict or peacetime. I imagine that Professor Meron, who has been active in these efforts, will describe them in greater detail. The United States is particularly interested in the current project of the International Committee of the Red Cross to conduct a detailed study of the customary rules of international humanitarian law, and hopes to contribute in a concrete way to this useful work.
PROTECTION OF INTERNALLY DISPLACED PERSONS IN INTERNAL CONFLICTS

Luke T. Lee *

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There are some thirty million internally displaced persons (IDPs) today as compared to fifteen million refugees. The root causes generating refugees and IDPs are essentially the same: armed conflicts and human rights abuses. While refugees are protected by a number of international treaties and organizations, and are enjoying comparative safety in countries of asylum or resettlement, IDPs are not — supposedly on the ground that since IDPs are within their own country, their government should be responsible for their protection. This ignores the fact that their own government often is the source of their persecution or is unwilling or unable to provide them with protection. Consequently, IDPs on the whole suffer more than refugees. Little effort, however, has been made to fill the gap in the protection of IDPs by the United Nations and international lawyers. With respect to the United Nations, on the recommendation of the Commission on Human Rights, the Secretary-General in 1992 appointed Dr. Francis Dent of the Sudan as his representative on IDPs, but with very little budgetary or staff support. The United Nations High Commission for Refugees (UNHCR) has extended its protective arms to IDPs on an ad hoc basis at the request of the General Assembly. The International Law Commission or the Sixth Committee (Legal) of the General Assembly has not seen fit to codify or progressively develop the legal status of IDPs.

At the non-governmental level, the International Law Association (ILA) established in November 1992 an International Committee on IDPs, with Professors Rainer Hofmann of Germany and Yukio Shimada of Japan as co-Rapporteurs, and myself as Chairman. The Committee is drafting a Declaration of Principles of International Law on IDPs for adoption by the

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ILA in 1998. At its conference in Helsinki last August, the ILA provisionally adopted a Draft Declaration and is requesting comments from the Special Representative of the Secretary-General on IDPs, as well as from UNHCR, United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA), the United Nations High Commissioner for Human Rights, the International Committee of the Red Cross (ICRC), and relevant regional and non-governmental organizations. The Committee would also welcome your comments and would send you copies of the text of the Draft Declaration upon request. I would like to discuss my topic under three headings: protection of IDPs by governments and de facto authorities, protection of IDPs as refugees, and protection of humanitarian personnel.

I. PROTECTION OF IDPS BY GOVERNMENTS AND DE FACTO AUTHORITIES

The term internally displaced persons may be defined as “persons or groups of persons who have been forced to leave or flee their homes or places of habitual residence as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.”

Recognizing the indispensable role of de facto authorities in the protection of IDPs, the Draft Declaration singles out such authorities for special emphasis and defines them as “any non-State entities in actual control of parts of a State’s territory which are parties to an armed conflict and/or internal strife or have generated or hosted internally displaced persons.”

We proceed from the premise that a foremost responsibility of a government is to provide protection to its nationals. As defined by Vattel, nationality is “the bond which ties a state to each of its members.” In the Panevezys-Saldutiskis Railways case, the Permanent Court of International Justice observed: “[I]n the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.”

If, during an internal armed conflict, a government is unable to provide protection to its citizens in an area from which it is driven away, the de facto authorities must assume the responsibility. Indeed, their ability to succeed to the de jure government hinges on their fulfillment of such responsibility. Thus, under the Draft Declaration, de facto

1. Draft Declaration, art. 1(1).
2. Draft Declaration, art. 1(1).
authorities have the obligation to adopt all necessary measures to ensure that IDPs have free and safe access to assistance and protection by relief organizations (article 9); to take joint and separate action with states and to cooperate with the United Nations and other international organizations, both governmental and non-governmental, to promote respect for and safeguard the rights and interests of IDPs (article 3); to renounce the use of starvation as a weapon against IDPs during armed conflicts (article 16); and to address the root causes of internal displacement with a view to adopting preventive measures and obtaining durable solutions (article 11).

The aspirations of de facto authorities to succeed to the de jure government and be recognized as such, as well as to gain membership in the United Nations, provide a strong incentive for their compliance with the Draft Declaration's provisions, especially if coupled with sanctions in the event of noncompliance.

II. PROTECTION OF IDPS AS REFUGEES

The question may be raised as to whether the legal status of IDPs may be analogized to that of refugees. An affirmative answer would entitle IDPs to international protection as refugees, mutatis mutandis. An analysis of their legal relationship follows.

The 1951 Convention and the 1967 Protocol relating to the Status of Refugees, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and the 1984 Cartagena Declaration, all retain crossing of national borders as sine quo non for the definition of refugee. Thus, if persecuted individuals cross their national borders, an elaborate system of international law and institutions comes into play for their protection. However, if they remain within the national border, they are not considered refugees, hence not entitled to such protection. But the use of border crossing as the most important criterion for distinguishing between refugees and IDPs, hence determining their eligibility to international protection, may be faulted on historical, practical, juridical, and human rights grounds. Each of these grounds will be briefly discussed. Historically, the phenomenon of refugee has existed since time immemorial; some would date it to the proverbial expulsion of Adam and Eve from the Garden of Eden. And yet territorial boundaries assumed importance only after 1648 with the establishment of the Peace of Westphalia that set the stage for the modern nation-state system. Indeed, until the 1951 Convention relating to the Status of Refugees, there had never been any agreement defining refugee as a person who must be outside his country. Under the May 12, 1926 arrangement, for example, a Russian refugee was defined as "[a]ny person of Russian origin who does
not enjoy or who no longer enjoys the protection of the Government of the Union of Soviet Socialist Republic and who has not acquired another nationality."

Similar definitions were adopted in the June 30, 1928 arrangement, the 1933 Convention relating to the Status of Refugees, and others *mutatis mutandis*. The decisive criterion was the presence or lack of protection by the governments concerned.

Even during the early years of the United Nations, the term *refugee* included also the meaning of IDPs. Under the International Refugee Organization of 1946, un-resettled persons of Jewish origin or foreigners or stateless persons who had resided in Germany or Austria, who were victims of Nazi persecution, and who were detained in Germany or Austria, were also defined as *refugees* even if they had never left Germany or Austria.

During the Korean War, the United Nations did not differentiate between *refugees* and *internally displaced persons* in United Nations documents. The United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA) has treated many IDPs as Palestine *refugees*. Even during the early 1980s, the United Nations Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, of which I was a member, did not adhere to any *refugee* definition using border crossing as a criterion.

Why, then, do the 1950 Statute of the UNHCR and the 1951 Convention relating to the Status of Refugees give great emphasis to border crossing as a prerequisite to the refugee status?

It is necessary to place the 1951 Convention in perspective: namely, it was adopted against the backdrop of a deepening Cold War. Originally and essentially a European regional instrument until the adoption of the 1967 Protocol, the 1951 Convention perforce mirrored the political realities then in Europe, where the crossing of the *Iron Curtain* was considered to be of critical importance and where political control within Communist countries was so tight as to leave no room for conflicts that might produce IDPs.

With the disappearance of the Soviet Union as a superpower and communism as a dominant ideology, the political *persecution* of individuals by government has been largely replaced by human rights abuses, ethnic conflicts, and generalized violence. Under these situations, border crossing should no longer be made a prerequisite to the attainment of the refugee status. The impracticality of using boundaries to distinguish refugees from IDPs was highlighted by John Bolton, former Assistant Secretary for International Organization, who accompanied former
Secretary of State James Baker to the Iraqi-Turkish border near Tchivergia in April 1991 as follows:

We saw very dramatic evidence of the plight of the refugees and displaced. The Turkish military very kindly took us up to the border right at the border so we could look out on this hard to describe scene of thousands and thousands of people just sitting on the sides of the hills, and in the valley; no shelter, no sanitation, no food distribution, nothing just people who had come and were sitting there. A very dramatic sight, it had a profound effect on the Secretary and in my view led directly to our decision to launch “Operation Provide Comfort.” But, just as an example, we were to go up to the border and it was in a very hilly area. The Secretary was there and our Defense Attaché from Ankara came up to me and said: ‘I don’t know how quite to say this, but we and the Secretary are about ten yards inside Iraq.’ It was a telling example that they did not have bright yellow line painted in the sand or in the dirt between Iraq and Turkey at that point, and the people on one side of the line were in exactly the same condition as the people on the other side of the line. They both needed protection and they both needed assistance.

Similarly, in my travel to the Ethiopian-Somali border as a member of a Multi Donor Technical Mission in February 1991, I was struck by the irrelevance of boundaries to nomads who fled ethnic conflicts or civil strife crisscrossing the border. Since these nomads shared the same ethnicity or nationality, religion, custom, language, or dialect, were they Somali or Ethiopian refugees? Were they IDPs or returnees? Or a mixture of the above? What difference would it make anyway, so long as they needed the same kind of assistance and protection? Indeed, the Multi-Donor Technical Mission rightly decided to base its recommendations for their assistance not on their legal status, but rather on their needs.

A formidable juridical argument against the use of boundaries as determinant of the refugee status is the fact that the validity of a boundary is inextricably linked to the diplomatic recognition of the state concerned. And yet there is no rule mandating a uniform diplomatic recognition of a particular state. Thus, a country or a party to a civil war may be recognized by some states, but not by others. Cases in point are Biafra during the late 1960s, former North and South Vietnam, former East and West Germany, North and South Korea, and now the fragmentation of the former Soviet Union and Yugoslavia. In each case, a displaced person may be considered a refugee and IDP simultaneously by different states, depending on the recognition factor. Such dual status cannot but blur the boundary between the two.
Indeed, the domestic laws of some countries already recognize that refugees need not be outside their country. The Refugee Act of 1980, for example, defines *refugee* to mean, *inter alia*:

In such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 

This provision has provided the basis for the Orderly Departure Program (ODP) administered by UNHCR, under which *refugees* have been airlifted from Ho Chi Minh City to Bangkok for onward journey to resettlement countries. It has also formed the basis for in-country processing of asylum seekers in Russia, Cuba, and Haiti. In view of the involvement of UNHCR in the ODP, all of its members may arguably be presumed to have accepted the fact that refugees need not by definition be physically outside the countries of origin.

But the strongest argument against the use of border crossing to justify preferential treatment of refugees over IDPs is its incompatibility with equal protection under human rights defined by the late Sir Humphrey Waldock, former President of the International Court of Justice, as “rights which attach to all human beings equally, whatever their nationality,” and, I would add, wherever they may be. To the extent that their basic human rights have been violated, they are entitled to protection and assistance whether as refugees abroad or as IDPs within their own country. Equal rights for all individuals, be they aliens or nationals, refugees or IDPs, is implied in all universal and regional United Nations human rights instruments through the use of such expressions as *all human beings*, *everyone*, *no one*, or *all*. Not a single right in the Universal Declaration of Human Rights, for example, is specified or implied as belonging only to *refugees*, and not IDPs. Thus, in the words of the present United Nations High Commissioner for Refugees: “It made little sense for UNHCR to bring relief and protection to one group of suffering people, i.e. refugees under the 1951 Convention, and to disregard the misery of the other afflicted people.”

She therefore proposed international relief and protection based on needs rather than on the categories into which people are classified.

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But can equal protection of refugees and IDPs be translated from theory into practice? The International Committee of the Red Cross (ICRC) has shown that this can be done. And the Security Council, in Resolution 688 of April 5, 1991, mandates “that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq,” in addition to requesting the Secretary-General “to address urgently the critical needs of the refugees and displaced Iraqi population.”

The foregoing analysis shows that basing international protection of refugees and IDPs on border crossing is untenable on historical, practical, juridical, and human rights grounds. Border crossing should no longer be the criterion for conferring or withholding international protection. Both refugees and IDPs are entitled to international protection.

There are, to be sure, procedural differences between the implementation of international protection of refugees and that of IDPs. However, such differences should not be allowed to obscure the substantive similarities. How to harmonize the two poses a serious challenge to international lawyers.

III. PROTECTION OF HUMANITARIAN PERSONNEL

It is truism to state that humanitarian services and supplies cannot be effectively delivered abroad without the active involvement of humanitarian personnel, both expatriates and local employees, whose safety must be ensured. While, in the event of an armed attack or a threat thereof, expatriates can be withdrawn to safety in their home base or country relatively easily in view of their small numbers, local employees and their families, however, present a more difficult problem. The current debate over the evacuation of local employees of American relief agencies and their families from northern Iraq to Turkey and thence to Guam and the United States for resettlement is a case in point. Might not such evacuation and resettlement have a deterrent effect on future humanitarian effort?

One possible solution lies in linking all humanitarian efforts vis-à-vis IDPs to the United Nations or one of its agencies, as well as in promoting the widest possible adherence to the United Nations Convention on the Safety of United Nations and Associated Personnel, signed December 9, 1994. The Convention defines associated personnel as, inter alia, persons deployed by a government, intergovernmental organization or “a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a
specialized agency . . . to carry out activities in support of the fulfillment of the mandate of a United Nations operation".

4. (Art. 1(b)(iii)).
The text is a table of contents for a book titled "Throw Them to the Wolves: Asylum and Asylum Law" by Enid H. Adler, Esq. It includes sections on preface, introduction, background of United States enforcement, how the author got involved, client one case studies, and client two case studies. The book focuses on the Chinese "boat people" seeking asylum in the United States and the legal defense team's efforts on their behalf. The author is Enid H. Adler, a counselor and attorney at law, and founder of the Global Correspondent Legal Counsel Referral Network. She is also a member of various professional societies and committees.
I. PREFACE

This paper may raise more questions than it answers. The plight and saga of the ship *Golden Venture*, Chinese and specific case studies will be employed to illustrate the issues addressed. Space limits this paper to an overview of the topic. To cover each stage in depth would fill a book. That is how complex this case has become. Areas to be highlighted are selected United States laws regarding asylum, the complex and convoluted process to date of asylum determination and other outgrowths of this case. It is an amazing story that goes far beyond the law. It involves the White House, members of Congress, politics and business, the media, a new art form, and the creation in York, PA of a nationwide grass roots organization, *The People of the Golden Vision*. These elements will be woven into this narrative.

II. INTRODUCTION

"Give me your tired, your poor, your huddled masses yearning to breathe free . . . ," states the beginning of Emma Lazurus' poem inscribed on the pedestal of the Statue of Liberty. The Statue of Liberty itself has been, for over 100 years, the symbol of freedom to the oppressed and persecuted of this world as they sought asylum and refuge in this great country of ours. With the enactment into law of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) in September and the current anti-immigrant fervor, what has happened to the welcoming message of these oft-quoted words written by this nineteenth Century American poet and Jewess.

We as a nation seem so quick to stereotype all immigrants and put them into the same kettle. Myths continue to be fomented by the government, the media, business, and others to inflame anti-immigrant fervor. This to the point where the reality is skewed. If it is politically in the interest of the United States, our government may or may not do business with atrocious human rights violators or, as in the case of China, the current Administration looks the other way. These instrumentalities legitimize and escalate the fears about groups of immigrants, particularly illegal aliens. This instead of looking at the countries and cultural practices from which they fled, and basic human rights violated by the persecutory policies of their homelands as really implemented. In reality,
did those coming to our shores illegally have any other way to flee persecution and relevant policies of their countries?

This raises multiple issues for those of us, on both sides, who will determine their fate. Our immigration laws and most immigration decision makers, including many in the legal profession, when evaluating these cases have little understanding of the cultures and cultural practices, the distrust and fear of government authorities, and potentially persecutive actualities and pressures imposed at all levels of implementation of government policies in the countries from which they fled, specifically of those coming from communist and totalitarian regimes or other countries in turmoil. One needs to be aware of these regimes and what is regarded as and punishable as political or imputed political opinion. Documents from non-governmental organizations (NGOs), other international human rights monitoring groups, and the facts presented by asylee after asylee from certain countries are and should be barometers of truth. On the other hand, asylum seekers from such regimes are expected to respond to our legal system which is alien to them.

The current Immigration and Naturalization Service (INS) system is not one of the United States tradition of basic fairness. At issue is the current Administration's fast track (particularly as designed for those of the Golden Venture) of determining these cases. This raises many problems. Documentation takes time. Evaluating an asylee's claim via an interpreter, overcoming language barriers, gaining the person's trust (a difficult task for those coming from repressive regimes where one trusts no one), and getting to the truth of the matter takes time. Finding pro bono attorneys, yet alone any with immigration experience, in the small towns where the INS places illegal immigrants takes time. The system does not allow even a reasonable time for us in the legal profession to do our job. All of the above play a major role in how illegal aliens will respond to questioning, and how their cases will be presented and adjudicated. This issue becomes clear later when discussing the Immigration and Naturalization Service and judicial process of deciding these cases.

It is unfortunate that history repeats itself. As World War II was igniting, the ship St. Louis was off the United States coast in May 1939. Filled with over 900 Jews fleeing Nazi Germany, the ship's captain waited for permission to land on our shores. Partly due to strong anti-immigrant feelings, immovable immigration quotas, and political reasons, our government refused entry. The ship with its human cargo was sent back to Europe, and most of those on board perished in Nazi concentration camps - part of the final solution. There was documented knowledge in this country that the Nazis had targeted the Jews. Yet, we did not believe or want to
believe the horror stories of Nazi inhumanity, and our country sent them back.

Fast forward to 1993. Enter the ship *Golden Venture*. A repeat again, with Chinese human cargo this time, of a plea for asylum from illegals, or are they in truth refugees, fleeing persecution. This ship landed off the beach of Long Island on June 6, 1993. On board were nearly 300 exhausted Chinese men and women, arriving illegally on our shores, after a harrowing journey of months on the high seas in a seedy, unseaworthy ship. For many this had been a year-long journey. They were frightened, weary, and sick, yet excited that they finally had reached this land. They had dreamed of and survived a death defying voyage to touch and embrace this nation of freedom. This was not to be.

Most came seeking asylum from China's coercive and inhumanely executed family planning policies. The policy of forced abortion and forced sterilization and its physically and emotionally brutal execution had touched them in persecutive ways. Were it our wives, mothers, or sisters, we would never tolerate the forced or coerced implementation of such a policy or even such a policy itself. In 1995 Congressional committee hearings, during testimony of three *Golden Venture* women, this comment was emphatically stated by members of the committee. They were shocked by what they heard.¹ Yet, our government wants to send and has sent some of those from the *Golden Venture* back to the persecutors from which they had fled. In most cases their actions in protecting their families against the cruelty of this system were regarded by the local Chinese officials as an act of political opinion. The current Administration did not see it that way. Therefore, the joy of being safe and free in this new land was short lived. Within hours, the INS herded them in, processed them as a group and sent them to prisons, most in small towns in Pennsylvania, Mississippi, California, Virginia, and Louisiana. These remote locations alone complicated the adjudication of these cases.

Thus began a legal process that has raised numerous issues about asylum and asylum law as actually practiced in this country. Over three years later, a large group from the *Golden Venture* still remains in York County Prison (Pennsylvania) with a few scattered elsewhere. They have waited and waited to be free, while their cases are debated, disputed, and bandied about by contradictory interests and the bureaucracy of our system *i.e.*, the INS, the Administration, judicial system, politics, a group of attorneys determined to see the real justice of our system prevail by having them set free, lay people organized in their support, members of Congress, and others.

¹. See discussion *infra* Part VI(D).
Just as those on the ship St. Louis, the only crime committed by those on the Golden Venture was the need to flee quickly. There only was one way out: to pay the real criminals, the smugglers, for passage. This was not unusual. It certainly was true during World War II, during the Cold War, and currently in countries where it is a matter of one's survival. Historically then, many fleeing persecution paid bribes, and still do so, to corrupt government officials, and others. Corruption breeds on the plight of the persecuted. The smuggled are the pawns; yet, the Office of Immigration Litigation (OIL) regards them as criminals and has incarcerated them as criminals. One reason given by the INS regards the sums of money each paid to smugglers to get them out. Something is radically wrong with our system if the illegal alien is deemed a criminal without regard to the facts of his or her case and the conditions of the country from which he has fled. China's flagrant violations of human rights, particularly their methods of implementation of coercive abortion and sterilization, are well documented.

Times have changed. The Cold War is over. Abusive practices such as forced, coercive, and in practice involuntary abortion, sterilization, and genital mutilation/circumcision no longer can be overlooked. They no longer can be rationalized as internal problems as civilized nations conduct business as usual, which belies the "lip service/a slap on the wrist" to countries like the Peoples' Republic of China (PRC) on human rights abuses. It is continually well documented that PRC has one of the worst human rights records in the world. China is a communist/totalitarian regime. Its population control program is state sponsored terrorism. It is carried out through fear, pressure upon pressure on officials to implement the one child per family policy at all levels, and meeting sterilization quotas in disregard of the health of the woman; doing the same with forced implantation of Intra Uterine Device (IUD) and seasonal forced examinations of women to see if the IUD remains. If found removed, even if necessary for the health of the woman, without the Family Planning cadres approval, the woman will be forcibly sterilized. This goes against all international conventions and the United Nations Declaration on Human Rights. It has opened the eyes of the world community to new abuses of human rights as seen in recent nationalistic uprisings.

Unfortunately, current United States immigration law and the laws of other civilized nations have not kept up-to-date with these intolerable human rights issues. Instead, procedures under the new 1996 immigration law further restrict the admission and evaluation of bona fide asylum seekers. Under the new system, many continue to fall through the cracks.
III. BACKGROUND OF UNITED STATES ENFORCEMENT OF ASYLUM CLAIMS BASED UPON CHINA'S COERCIVE FAMILY PLANNING POLICIES

In the mid-1980s the United States began to deal with some asylum claims based on China's coercive family planning policies. It was only after the June 1989 uprising in Tiananmen Square that led our government and others to recognize the true nature of the inhumane application of these policies and the need for action, particularly in allowing people fleeing this regime asylum. Tiananmen Square resulted in Congressional and Presidential action to change and allow for enhanced consideration for admissibility of these aliens; President Bush's late 1989 Executive Order 12,711 (Executive Order) states that a person seeking asylum could establish eligibility for asylum by showing he or she had been persecuted or had a well founded fear of persecution based on the PRC's coerced population control policies. If so, it would be considered that this person could be granted asylum on account of political or imputed political opinion.

However, with the landing of the Golden Venture in June 1993, the May 1989 Board of Immigration Appeals (BIA) decision, In re Chang, was resurrected by the current Administration and implemented by the INS. Executive Order 12,711 still was in effect; however, it was to be ignored. Now those who came fleeing the PRC's coerced population control policies were summarily denied not just asylum but even parole. Many continue to be incarcerated, as this is written in January 1997.2

The Golden Venture claims have been denied asylum by the Immigration Judges based upon conclusions reached by the BIA in In re Chang.3 The real holding of this case should have been that Chang had not been subjected to forced sterilization or abortion, had not been persecuted for failure to submit to these procedures, nor had he presented any credible evidence of fear of such persecution. In fact, Chang in his testimony "disclaimed any mistreatment by the government and did not refer to any fear stemming from China's population control measures."4

Instead, it is the second part of the Chang decision that has been applied to those of the Golden Venture and others with similar claims. This part of the Chang opinion addressed the position that would have been before the BIA had Chang been persecuted because he had refused to comply with this program. In this portion of the opinion, the Board stated:

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2. See discussion below and later the discussion on the question of political influence by the current Administration into the judicial adjudication of the Golden Venture cases.
4. Id. at 12.
that even if enforcement of China's population control program involved coercive measures and even if it violated fundamental human rights, as long as these measures were "solely tied to controlling population, rather than a guise for acting against people for reasons protected by the IIRAIRA." This application of Chang precludes the immigration judge hearing each case from considering, as part of his or her decision, whether or how the facts of that case differ from those of Chang and, therefore, should be considered as "fear of persecution on account of political opinion."

As stated in the Introduction, the persecutive and inhumane realities of the PRC's policies for controlling population have been documented over and over again. The Chang opinion excludes this reality. It also overlooks the real question which is that the PRC regards resisters to the population control program as political dissenders and applies harsh and cumulative punishment. Chang was decided in May 1989. Times have changed. At the International Women's Conference held in Beijing, at which Hillary Clinton spoke, she and others deplored the very PRC policies under discussion as unacceptable behavior to civilized nations and recognized that this kind of abuse, particularly of women, cannot be tolerated. This writer and colleagues continued to argue that Chang is bad law.

An overview of the process of these administrative and congressional actions is worth reviewing to show how intertwined and convoluted is the implementation, for example, of administrative policy from the President, who signs the Executive Order, to those delegated to enforce it. There are questions of how and when does it get enforced? What do the regulations say? What is the role of the Attorney General to whom this has been delegated and more?

Executive Order 12,711 was issued pursuant to the inherent policy-making authority of the President. When elevated in matters which concern the country's foreign affairs, this authority includes the admissibility of aliens. The Executive Order's directives to the Attorney General rest upon specific statutory authority set forth in section 103(a) of the Immigration and Nationality Act (INA), written in the early 1980s. This charges the Attorney General with the enforcement and administration of the Act. It also

5. Id.
6. Id.
7. Id.
8. Brief of Immigration and Naturalization Service, Int. Dec No. 3107 (BIA 1989). Brief was written by Grover Joseph Rees III, then-General Counsel of the INS. It is clear that Rees opposed the application of Chang in these cases. This was not to be the case. His legal opinion and sense of justice fell on Administration "deaf ears." He resigned that July.
is equally binding upon subordinate executive officials in the Immigration and Naturalization Service and the Executive Office for Immigration Review (EOIR). The terms of the Executive Order, not being incompatible with the expressed will of Congress, were specifically intended to implement protections for Chinese nationals that had been approved by overwhelming majorities in both houses of Congress.¹⁰

The suggestion of the BIA, in a later decision in Matter of Chu, that the Executive Order was not binding because the January 1990 interim regulations on such asylum claims were omitted from a subsequent codification and because no regulations had replaced them,¹¹ Rees noted that the apparent reason for this holding is that the Executive Order is not self-executing and, therefore, not binding upon Department of Justice (DOJ) personnel absent further directives. Rees states that this position was legally and factually untenable. He goes on to note that paragraph four of Executive Order 12,711 was plainly intended to change the policy, reflected in Chang, of denying that persons fleeing forced abortion or sterilization or persecution for resistance to these measures are eligible for protection under United States asylum and refugee laws.

It also was maintained by the DOJ that the term enhanced consideration was too vague to be applied without further direction. Rees indicated that the Executive Order explicitly referred to the January 1990 regulations as the standard for implementing enhanced consideration. He concluded that the Department's failure to include the January 1990 regulations in a July 1990 codification of the asylum regulations cannot be said to negate either the terms of the Executive Order or the obligation of

¹⁰. The provisions of the interim rule, published January 29, 1990; and the Executive Order were adopted from the Emergency Chinese Immigration Relief Act of 1989, H.R. 2712 (1989) (commonly referred to as the Pelosi Bill). The measure included the Armstrong-DeConcini amendment, which its sponsors intended to overrule Chang. The Senate passed this amendment unanimously (July 19-20, 1989). The House instructed its conferees to concur in the amendment (November 2, 1989). The amendment would have required the Attorney General to issue regulations stating that nationals of the PRC who resist the policy of coercive abortion or sterilization shall be viewed as engaging in an act of political defiance sufficient to establish a well-founded fear of persecution. In other words, this kind of action would be viewed as rising to the level of persecution on account of political opinion or, as Mr. Rees argues, imputed political opinion. This is one of the grounds for asylum in the INA. The President pocket vetoed the above Emergency Act. But, at that time, he issued a statement directing the Attorney General and Secretary of State to, inter alia, defer enforced departure of PRC nationals and to provide enhanced consideration under the immigration laws for those fleeing coerced family planning policies. In January 1990, there was an attempted override of the President's veto. The President had promised to issue an Executive Order establishing all of the protections for PRC nationals included in the Bill. This then accomplished everything the Pelosi bill did. Therefore, the House did vote to override the veto, but the Senate fell three votes short of a two-thirds majority to do so. With the President's above promise, Congress agreed to accomplish these same goals through Administrative remedies.

Departmental personnel to adhere to it. Paragraph four of the Executive Order directs that enhanced consideration shall be given to those who express a fear of persecution due to coercive family planning policies, a direction not contingent upon the issuance of regulations or subject to the Attorney General’s discretion. Despite the clarity of the President’s directive, unjustified confusion has persisted regarding the meaning of enhanced consideration and its relation to the Executive Order. This confusion ignores some basic and indisputable points.

At the very least this phrase must mean not adhering to the broad dicta in Chang, which would require the denial of virtually all asylum claims by persons fleeing coercive population control policies. Congress made this clear when it voted overwhelmingly to direct the Attorney General to overturn Chang by regulation. Furthermore, in the President’s veto message on H.R. 2712, he stated in his directions to the Attorney General and Secretary of State, and later incorporated in the Executive Order, “will provide effectively the same protection as would H.R. 2712.”

As noted before, the Executive Order does not give the Attorney General discretion, but rather directs him or her to provide such enhanced consideration and to do so as implemented by the January 1990 regulations. This does not mean that the current Attorney General or the immigration judges acting under her authority have no discretion in how to apply the substance of the enhanced consideration standard. However, they do not have the discretion to ignore the standard or any standard that cannot reasonably be described as “enhanced consideration . . . as implemented by the Attorney General’s regulation” as stated infra. Rees notes that the basic requirement of the Executive Order, as discussed infra, is not contingent upon continued publication of the January 1990 regulations. Therefore, as long as the Executive Order remains in effect, so does this requirement. Rees points out that the silence of current regulations is just that, silence.

It should be clear, Rees noted, that although enhanced consideration means that persecution for failure to comply with coercive population control policies is to be regarded as persecution “on account of political or imputed political opinion,” it does not mandate that everyone from the PRC should be granted asylum. The applicant must present credible and convincing evidence that this really happened to him or her. The person must show that a reasonable person in his or her circumstances would be afraid. However,

12. This is exactly what has happened in the adjudication of the Golden Venture cases. Even credible claims were summarily denied by the Immigration Judges hearing these cases and then affirmed by the BIA.

the enhanced consideration of the Executive Order only removes the irrebuttable presumption against such claims as proclaimed in *Chang*.

**Background Summation**

The interim rule and the Executive Order, an outgrowth of the 1989 Congressional legislation, were also prompted by the narrow construction of the asylum laws adopted by some immigration officials when asylum seekers from the PRC first began making claims based upon forced abortion and sterilization in the early 1980s. It was at this time that the Immigration and Nationality Act was written.¹⁴ When this Act was written "a well-founded fear of forced sterilization or of persecution for refusal to be sterilized, pursuant to a foreign country's coercive population control policies" was not a consideration. In fact, it was not until this time period that China started full scale and coerced enforcement of this policy.¹⁵

It was not until after Tiananmen Square that the true character of the coercive nature of this PRC policy gained worldwide attention. Thus, after this event in June 1989, the President and Congress concluded that those seeking asylum because of their opposition to and, therefore, fear of persecutory retribution might, in fact, warrant asylum because of "persecution on account of political or imputed political opinion." Indeed, in China, this was and is considered a political act, and as we now have documented, severely punished as such.

In mid-January 1993 prior to President Bush leaving the White House, the final rule of the interim rule on the above was signed by then Attorney General Barr. Signed only a few days before the January 20 change of administrations, the final rule did not get published in the Federal Register prior to Clinton being inaugurated. According to Rees' Brief, as of June 1993 such publication still was pending, waiting for a decision by the current Attorney General on whether the rule should be published. Since the final rule was signed by the Attorney General prior to leaving office, publication really was a technicality. Executive Order 12,711 still continued in force and continued to be enforced under the new Administration.

In June 1993 with the landing of the *Golden Venture*, the current Administration elected now to ignore the Bush Executive Order. They did not revoke it. In fact, a colleague noticed it finally was not officially revoked until August, 1994, hidden in the INS Memorandum regarding

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¹⁴. Immigration and Nationality Act 8 U.S.C. § 1101 (a)(42)(A) of the Act states the five statutory grounds on which one can be granted asylum, "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

Humanitarian Parole. By then the *Golden Venture* cases based upon coerced family planning had been denied by the Immigration Judges (IJs) and BIA under *Chang*.

The INS now began enforcing *Chang* which still was on the books. In essence, no matter how strong the evidence in each *Golden Venture* case and no matter how egregious the PRC government's conduct underlying the claim, if the asylum claim related to PRC's population control policy, asylum was denied. In *Chang*, the BIA ruled that the PRC policy of coerced abortion and sterilization did not rise to the level of political opinion, one of the noted five statutory grounds for asylum.

IV. HOW I GOT INVOLVED

In late July, 1993, I received my monthly meeting notice from the International Human Rights Committee of the Philadelphia Bar Association. Attached was a request for pro bono attorneys in Lehigh County (Allentown, Pennsylvania). Needing representation were Chinese men who had entered the country illegally on June 6, 1993. Remembering my World War II history, specifically the tragedy of other illegal boat people on the ship *St. Louis*, I called the local attorney in Allentown to offer my services. Another colleague of mine from my locale, Jerilyn Getson, agreed to join me in this effort. We were given a one day background briefing on these cases in Philadelphia.

Although I was not an immigration attorney (not a prerequisite), I had had hands on experience in human rights missions to the Soviet Union in the 1980s and had spent time with friends and pursued legal studies in countries of communist Eastern Europe. These experiences and, therefore, an understanding of the realities of living under these repressive regimes were essential to the successful adjudication of the first case I was given. Knowing the law only would not have won this man's freedom.

V. CLIENT ONE: A CASE STUDY

A. Case Facts, Preparation and Strategy

In mid-August 1993, we were assigned the case of Deshui Jiang. He was forty-three years old, married, and the father of three teenage children. He already had gone through master calendar and charging document hearings shortly after his arrival at Lehigh County Prison. He was from Fujian Province, as were his co-passengers. He had paid the *snakeheads* (the smugglers) thirty-thousand dollars to escape from China. This was to be paid by his family to the snakeheads in China in three stages of ten thousand dollars each, first before Jiang left, second on his arrival in
Kenya through a telephone call to his family, and the balance on his arrival in the United States. Later, he explained to us that the money came from many sources, including the greater portion a thirty-six percent interest loan from loan sharks. The snakeheads were hounding his family for payment. After all, he had arrived in the United States. I will go into some detail about this case. It supports some of the concerns expressed in the Introduction regarding case evaluation, preparation and presentation.

What would possess someone of Jiang’s age to leave his family and endure a year long journey over land and deadly seas? As his story unfolded, it was clear that his life had been at stake. In initial hearings, Jiang said that he had left due to Chinese coercive sterilization policies. It seems that the smugglers had told all of the Golden Venture passengers to say this if they were caught. Eighty-five percent of other Chinese illegals, who arrived as recently as May 1993, had been granted asylum, under the still in force Executive Order 12,711 on claims of fleeing the persecution of the PRC’s coerced family planning policies.

16. For those of the Golden Venture and others who still owe money, it is well documented that the snakehead organization in the United States lie in wait to kidnap these people when they are released from prison. Until that final debt is paid, they work in America’s Chinatowns, particularly New York, treated like indentured servants under terrible conditions. This has caused a problem for the INS as well as for those of us representing them. For the few who have been released, we are and continue to be very protective of their whereabouts and have asked the INS to release them only to designated people or their attorneys. Initially, there were problems.

17. It was the sense of Congress, in the post-Tiananmen Square legislation, and of President Bush in issuing Exec. Order 12,711 (1989), that Chinese seeking asylum for the above reasons would be granted asylum if they could prove their claim. It was accepted by our government that protests against this coercive policy and threats or actual imposition of this policy against the asylee applicant or spouse rose, under United States law, to "persecution on account of political or imputed political opinion."

Under section 101(a)(42)(A) of the Immigration and Nationality Act [hereinafter INA] there are five grounds in the Act’s refugee definition under which asylum can be granted: persecution on account of race, religion, nationality, membership in a particular social group and political opinion. When the Act was written in the early 1980s, abuse of women, coerced abortion and sterilization as applied today were not issues of world concern. In fact, China was praised for its population control policies. As previously discussed, supra, such acts no longer can be tolerated by civilized nations as internal country affairs. From the Bush to the Clinton Administration and, indeed, until June, 1993, INS trial attorneys so stipulated to the IJ that if the claimant could show that his claim was based on coerced population control policies, a ruling of asylum should be granted. In other words, Exec. Order No. 12,711 (1989) was not challenged nor the 1989 BIA decision, In re Chang, invoked.

After June 6, 1993, this changed with the landing of the Golden Venture. The INS attorneys now challenged these cases, arguing that Chang was ruling law -- that the PRC's coerced family planning policy did not meet one of the five statutory criteria for a grant of asylum. The Chang decision now was included in the legal packets given to the immigration judges brought in to hear these cases. Executive Order 12,711 was not revoked, just ignored. See discussion on historical evolution of these policies, including a court challenge by the Golden Venture attorneys of improper political influence into the judicial arm of the INS (EOIR -
My co-counsel and I had less than two weeks to prepare Jiang's defense before his IJ hearing on the merits. Jiang spoke no English. All of our discussions were through an interpreter. We were fortunate to have two excellent volunteers who were professional men with full time jobs and belonged to the local Chinese church. In over thirty hours of interviewing Jiang and gaining his trust, it became clear that he fled because of religious persecution. Over a period of about six years, Jiang had embraced the philosophy and spirituality of Christianity. This involvement began shortly after the forced sterilization of his wife around 1983. He begged the family planning officials not to sterilize her. The Jiangs already had their family of three children, including a son, all of whom were born in the 1970s. This was prior to the implementation of the family planning policies. Jiang's plea fell on deaf ears. The local officials had a monthly quota to be met for women sterilized. Afterwards, Jiang's wife never was emotionally the same.

Jiang also was a member of a minority group, the Sher. Both his protests regarding his wife's sterilization and his minority status led the local officials to deny him a promotion to captain of the fishing ship, even though his co-workers had elected him. For the same reasons, his older daughter was denied entrance into a preferred school for higher education, even though she qualified and passed all of the examinations.

Despite all of this, Jiang had a good job on a fishing vessel, had a growing family and had no plans to leave China. In December 1991, he was given no choice. He could flee or face harsh and cumulative punishment. Jiang belonged to a household church. These were illegal meetings in people's homes. Bibles and religious books were outlawed in China, except for what was sanctioned by the government for the official churches. However, members of minority groups, such as the Sher, were not allowed to attend or join these churches. In addition, it was dangerous to attend the official church. The ministers, in most cases, were government informers and many of those attending also were informers. Therefore, the household church was Jiang's only choice to meet with Executive Office of Immigration Review - which oversees the BIA and immigration judges) by the White House and others in the Department of Justice (hereinafter DOJ). Although the judicial and enforcement arms of INS are within the DOJ, they are to be kept separate. At this time, these barriers broke down, which the Golden Venture attorneys alleged influenced the IJ and BIA handling of the Golden Venture cases.

18. We were appalled when Jiang was brought into the room in handcuffs. Even though he had yet to prove his case, was this the way our democratic government treated those seeking asylum from persecution?

19. I witnessed this same thing when, in 1983, I attend the one synagogue allowed in Moscow. This was further confirmed in visits to Soviet refuseniks.
other Christians. His knowledge of Christianity was similar to that of the early Christians, *i.e.* a philosophy of Christian thinking. There was a special signal to enter. This way those inside would know it was a friend, not the police.

In December 1991, the police, in a lightning attack, broke down the door of this house and arrested the attendees. Jiang was able to jump out of a window and escape. He later heard that those arrested were severely beaten and sent to labor and re-education camps. Those arrested told the police that Jiang was a Christian and had been in the house at the time of the raid. Jiang was a hunted man. He had to get out of China.

The snakeheads, the smugglers, were known in Fujian Province. They were his only way out. Therefore, it was arranged for Jiang to be smuggled out of China. It was not until later that he knew the United States was his final destination. From Voice of America and other broadcasts, he was aware that the United States was "the land of the free." He longed for such freedom. The saga of his year long journey by land and sea that got him to the United States is a harrowing story by itself. Jiang stated that he was sure those on the *Golden Venture* would die, particularly in the terrible storms encountered as they sailed around the tip of Africa. He said that it was his faith in Jesus and God that sustained him.

It was this story that he told the IJ at his hearing on the merits. However, there were major obstacles to overcome in presenting his case. Jiang in previous hearings and in his application for asylum (Form I-589) stated that he left China because of the PRC's forced family planning policies. Now he was changing his reason for seeking asylum. How would this affect his credibility before the IJ? (This will be addressed later.)

We felt he met two of the grounds for which he could qualify for asylum, a history of ethnic discrimination and persecution on account of religion. Even credible cases based on China's coerced sterilization and abortion policies were being denied, because the IJs automatically applied *In re Chang,* which the INS attorneys now argued was controlling law. In so doing, it negated any assessment of the facts of each case, how these facts differed from those in *Chang,* and the fact that *Chang* did not take account of the evidence that the PRC authorities regard resistance to the population control program as a political offense. Although this was a component of Jiang's case, this was not going to get him asylum.

First we filed a Motion to Terminate, arguing that Jiang had made an entry into the United States and, therefore, should be in deportation proceedings rather than in exclusion. The INS in its response took the opposite view. For the hearing, we found documentation of on the scene
news reports and other interviews which clearly noted that the *Golden Venture* had not been under constant INS and police surveillance when it entered United States territorial waters and landed on the Long Island beach.²⁰

My co-counsel and I contacted human rights organizations and others to obtain as much supporting information on religious persecution in the PRC. We also needed to find an expert on the minority group to which Jiang belonged, the Sher. There were many China experts and university professors in Philadelphia, but none knew much about the Sher. Three days before the hearing, after many phone calls and referrals, we finally found an expert not just in ethnic minorities in China, but someone who knew about the Sher. She had just returned from China, was an anthropologist with a focus on China, was a curator of the Asian section of the University Museum of the University of Pennsylvania in Philadelphia.

²⁰ The following details on the entry issue give the reader an idea of the multiple legal maneuvers taken by Plaintiffs' counsels during these past three and one-half years. If one has entered the United States, then his or her case is heard in deportation hearings. A person in deportation is eligible for immediate parole, can name the country to which he wishes to be deported if not granted asylum, and has greater protection under United States law. On the other hand, if an asylum seeker is deemed not to have entered, he or she is in exclusion and can be deported back to the country from which he or she came at any time (no choice), can not be granted parole and more. Thus the reason why one of the first motions filed is to argue that your client belongs in *deportation* proceedings not in exclusion. Ninety percent of those rounded up that night of June 6 were placed in exclusion. Ten drowned trying to get to the beach. A few wondered off into the local town, before police and INS agents arrived, and later were caught and imprisoned.

There are differing opinions and case law on this issue. Middle District Judge Rambo, as noted below, was asked to decide this question. This was a test case on this issue. Judge Rambo ruled that the petitioner, one of the *Golden Venture* men, had entered when he jumped off the ship into the water. Her decision broadened the scope of entry into United States territory. She ruled that as long as the ship was in United States territorial waters and the tests for entry had been met, they did not, as held by other courts “to be on dry land and venture away from the beach.” Under Rambo’s holding, an entry had been made by all on the *Golden Venture*. Therefore, they should be in deportation not exclusion proceedings. This, in turn, would make them eligible for immediate parole.

More motions were filed by Plaintiffs’ counsels to protect all the detainees. This presented a rash of different issues and the type of motion to be filed. Many individual motions on this issue had not been filed previously based upon the widely held belief that only those who made it to dry land stood a chance of being placed in deportation proceedings. Therefore, it was necessary to determine the location of each of our clients when the ship landed. These different motions and legal maneuvers were made in anticipation of an INS appeal to the Third Circuit.

The INS was determined not to parole these detainees and threw every delay and obstacle in the way. The INS immediately appealed Judge Rambo’s decision to the Third Circuit, asking for a temporary stay of parole to keep the Judge from issuing paroles. The stay was granted a few days later, but not before several were paroled.

In May, 1995, the *Golden Venture* Steering Committee went before the Third Circuit. This court reversed Judge Rambo’s entry ruling.
and taught Chinese cultural anthropology at the University. She also was aware of the household churches and religious practice there. With the approval of the IJ and the INS attorney, we arranged to depose her on a Friday afternoon. Jiang’s hearing was the following Monday. The IJ agreed that we could deliver the deposition to him first thing on Monday morning, so he could review it before Jiang’s hearing that afternoon.

B. The IJ Hearing on the Merits

My co-counsel and I made an opening statement. We apprised the judge that Jiang really fled the PRC because of religious persecution. It was essential that the IJ understood what it meant to be a Christian in China, and he could not judge the sincerity of Jiang’s beliefs based upon the way Christianity was practiced in the United States. If he questioned Jiang on doctrine, he would not know. It was realistic to ask him about why he embraced Christianity and how he felt about it. I then explained the realities of religious practice in a Communist country and the meaning and dangers of attending the official church. It was here that my first hand experiences in this area in the USSR made a significant difference in educating the IJ. Citing my experiences gave me credibility before the court.21

The IJ indeed was furious that Jiang had changed his reason for seeking asylum. He also was confused as to why Jiang initially had not stated religious persecution. We explained about the snakeheads, but suggested that the IJ ask Jiang directly.22

Two days later, we returned for the IJ’s oral decision. He began by noting that he found Jiang credible. This was an essential element for a favorable decision. He denied Jiang asylum on four counts, including actions against him because of belonging to an ethnic minority. To this point, a half hour had passed. That left only the statutory ground, persecution on account of religion, on which asylum could be granted. After discussing his reasoning on this issue, he rendered his decision granting Jiang asylum. When the interpreter told Jiang the decision, he fell on the floor sobbing. For an Asian man, this outward show of emotion was amazing. Two days later, on September 3, 1993, Jiang was a

21. Recently, I was asked to review certain Golden Venture cases for findings of credibility. I found several cases that clearly were religious persecution cases; yet had been denied or not argued as such. It seems that the IJ’s questioned the asylee on religious doctrine. He, of course, could not respond; therefore, he was deemed incredible and was denied asylum. In some cases, the petitioner appeared pro se because he couldn’t find a lawyer. I hope my colleagues and I will prevail in getting these cases re-opened and re-heard.

22. We anticipated that Jiang’s simple response would help establish his credibility. Jiang replied without hesitation, “ because the smugglers told me to."
free man. Jiang was among the first and one of very few *Golden Venture* asylees released.

C. A “Free Man”

Jiang was free and safely under the protection of the Chinese interpreters in Allentown, who had become his mentors. Through our efforts and theirs, Jiang got a position working in the freezer in an area meat processing plant. The myth that illegal aliens granted asylum go on welfare and take jobs from American workers for the most part is not true. Jiang was willing to do any kind of work. The job he got was one that most Americans do not want. I see this over and over again. Today, he knows enough English that we can have a reasonable conversation.

I promised to arrange the necessary documents for his family to join him. This was a very involved process, partly because his older daughter was to turn twenty-one within the year. It is too complex to go into here and not the subject of this paper. Suffice it to say, that his wife and two of his children arrived in Allentown on November 14, 1994. Unfortunately, there was a last minute glitch, and his older daughter was left by herself in China. With the assistance of the United States Consulate in Guangzhou, the older daughter got to the Chinese border crossing to enter Hong Kong. She would just come under the wire before she reached twenty-one. After that, under United States immigration policy, her status would change. Her documents were in order, after months of getting them processed in China and in the United States, airline tickets were arranged for her in Hong Kong, and she would be on her way just before her birthday. She got to the Chinese border by train in time. For whatever reason, the Chinese border officials refused to let her cross. Working to reunify her with her family continues.

Jiang’s wife, son, and younger daughter arrived in Allentown on November 14, 1994. My colleague and I and others instrumental in getting them reunited were there, with Jiang, to greet them. Today, his wife and children, when not in school, work in a knitting factory at minimum pay, but grateful to work. His daughter, who spoke some English when she came, became proficient enough in the language to pass the entrance exams for Pennsylvania State University. She has a difficult curriculum, but is doing well. Jiang’s son, who spoke no English when he came, now is in the honors class in high school.

VI. CLIENT TWO: A CASE STUDY

In the Spring of 1994, Jiang asked me to represent another *Golden Venture* passenger, Fen-Hou Chen, who still remained in Lehigh County
Prison. It had gotten back to this man's family in China that Jiang's attorneys had gotten him asylum. Now Chen's family persuaded Jiang's family (still in China) and, by telephone to Jiang, for him to prevail upon me to represent Chen. At that time, I did not plan to take another case, although I continued to review and consult on other Golden Venture cases, and was on the Golden Venture legal team pursuing discovery into the question of administrative political influence in the adjudication of these cases. As a favor to Jiang, I finally agreed in March to represent Chen. However, I asked Jiang to make it clear to Chen's family that our legal system worked differently and legal procedures must be adhered to; therefore there were no guarantees I could get Chen asylum. This was particularly true since Chen's case clearly was based on China's coerced abortion and sterilization policy, and all such claims were being denied.

A. Chen's Story

Chen's story revolves around the birth of his second child, a son. His first child, a girl, was born five years before. It was only after his second child was born that it became known that his wife had had a baby. She was bleeding severely and had to go the hospital. She had managed to hide her pregnancy. Had she been caught, she would have had a forced abortion and additional punishment for removing her IUD without permission. Initially, she did so because the IUD caused her health problems. It has been documented that second babies are killed at birth or forcibly aborted even at the latest stages of development. They not only wanted a second child but also hoped for a son.

Within days after Chen's wife's return from the hospital, the local police came to take her to be sterilized. Chen asked for a month's delay because she was too weak. If she would not go, then they would force Chen to be sterilized. For Chen, this was not an option. He needed his strength to work (in construction) to support his family. He knew of other men sterilized and how it weakened them, physically and emotionally.

He then got into serious trouble with the officials when he dared to question why they, their friends and others whom they favored, were allowed to have more than one child. Clearly, the officials could be as preferential as they wanted as long as they met their monthly quotas of sterilizations and others. The coerced and selective manner in which they

23. See discussion infra Part VI(E).

24. In Chinese culture a son is essential, especially to those who live in the villages. It is the son who takes care of and is responsible for supporting his parents in old age, whose family becomes part of his parents' family, and more. On the other hand, the daughters become part of their husband's family.
did so was not to be questioned. The officials were furious that Chen should dispute their authority. They would be back and soon.

That night Chen took his wife and children to hide with family in another village. The next day his neighbor warned him at work that a contingent of police came to find him and were so angry that no one was there that they broke down the door to his house. Chen knew he had to escape. He or his wife faced forced sterilization, no matter what their health, imprisonment and stiff fines equal to a year’s salary. To this day, his wife and children remain in hiding. They have no registration or work papers. If they went out, villagers would report them to the police as strangers there.

These actions by Chen were treated, in the PRC, as defiant acts of opposition to an official policy and against those who were to carry out these policies. In the PRC, it has been documented that such actions rise to the level of political opinion, which not only is not tolerated in the PRC, but punishable in the most inhumane and persecutive ways.

B. Initial Legal Procedures

It was mid-March 1994. Timing was crucial. At the end of March, the Third Circuit Court of Appeals hear and render a decision, a class action suit filed on behalf of the Golden Venture detainees in York and Allentown. This was an appeal from the Middle District Court, where Judge Sylvia Rambo had denied the suit. The Third Circuit concurred. The INS had agreed to wait for this ruling before proceeding on deportation processing. At this point anyone not protected by a habeas petition was in jeopardy. The INS again set a mid-April deadline to deport the imprisoned Golden Venture people, specifically those who had exhausted their administrative remedies. Chen fit into this category. In December, 1993, the BIA denied Chen asylum based upon Chang. This even though they affirmed the IJ’s finding of credibility. Chen’s only means for protection against deportation was to file a writ of habeas corpus before the end of March. I met with him over the March 13th weekend to ascertain the facts of his case. On March 24 1994, the habeas was filed in the United States District Court in Philadelphia.

C. INS Transfers Chen from Allentown to York, Pennsylvania

On April 19, 1994, the INS moved the forty-five Golden Venture men in Allentown to join over 100 of their shipmates in York County Prison. The York group was under the jurisdiction of the United States Court of the Middle District of Pennsylvania. Habeas petitions had been filed, and the cases consolidated into one civil action suit. Judge Sylvia
Rambo had notified the INS that none of these men were to be deported without her knowledge and before their individual cases were ruled upon. This gave added protection, which was not a certainty in the Eastern District where Chen's habeas was filed and where his case would be heard. If he were denied asylum, he would be deported back to China.

Only one other District Court, in Virginia, had ruled in favor of a Golden Venture petitioner. This was an excellent opinion, which reflected a common sense judge who had knowledge of the human rights realities in imposition of the PRC's family planning policies. In that case, the INS still did not free him. The INS claimed that the BIA's Chang decision took precedence, and that the decision of one federal district court did not change this. Therefore, in Chen's case, even a favorable ruling in the Eastern District was no guarantee that he would prevail. Other federal court decisions were mixed, most supporting the position of the INS.

This presented this counsel with a dilemma. Chen's life was at stake if he were deported back to China. Looking at all the factors, this counsel determined that the safest route for Chen was to transfer his case to the Middle District. His case would be consolidated into the Civil Case before Judge Rambo. Here he also would not be isolated from his Chinese friends. On May 2, 1994, Chen's case officially was transferred.

D. Joining the Nucleus of Golden Venture Legal Team in York: A Concerted Effort and Resulting Congressional Action

With Chen's transfer to York, I became more deeply involved than I ever anticipated in the plight of the Golden Venture detainees and in the legal team.25 It was only working as a coordinated group that we had any hope of freeing these men. The government was immovable on the implementation of Chang.

So begins a remarkable story of a commitment to ideals, fairness, and dedication by lawyers and lay people in rallying around those of the Golden Venture. It was this combined effort, including hundreds of hours of pro bono time, that resulted in the inclusion in the 1996 Illegal Immigration and Responsibilities Act of section 601, which amended the INA statute's definition of persecution on account of public opinion to include those seeking asylum from China's coerced population control program. This was one of the few positive aspects of the IIRAIRA. The

25. The nucleus of the Golden Venture Steering Committee, set up by Judge Rambo toward the end of 1993, and the legal team was in York. However, attorneys for these men are in Philadelphia, New York, Pittsburgh and so on.
IIRAIRA was passed by Congress and signed by the President on September 30, 1996.26

This did not mean, however, immediate implementation. There were issues to be resolved. The government was in a dilemma on how to proceed and continues to drag its feet in most cases. Do they parole all of the men or just those whose cases were deemed credible by the IJ and BIA, but who were denied by Chang. Not factored into the equation was that many of these cases did not get correct hearings on the facts of each case, or that some had no attorneys because of the fast track expedited nature of the hearings, or that the issue of credibility was not addressed because the case was automatically denied under Chang, and on and on. The maneuvering continues.

With the advent of the new law, the next step, as Chen’s attorney, was to file a request for parole and a grant of asylum to the INS District Director in Philadelphia. Chen qualified. However, in August 1994 he also had qualified, under newly announced INS guidelines, for Humanitarian Parole and, again in June 1996, under enhanced procedures/criteria for Humanitarian Parole. Each time, I filed the required requests and supporting documentation. Each time I received a form letter of denial as had my other colleagues.21 It seemed clear that the Golden Venture people would not be paroled. We kept meeting dead ends.

What would be the reason now under the new legislation for Chen not to be released? This was our best shot yet. After all, Chen’s story had been deemed credible both by the IJ and BIA. So, again, I filed with the District Director a request for Chen, based on the IIRIRA, for a minimum of parole as well as asylum. This was on November 22, 1996. I called daily to inquire on the status of his petition. The response for weeks was, “[w]e’re working on it” or “[w]e are waiting to hear from Washington.” However, by law, it was in the discretion of the District Director to grant parole. This was a familiar pattern and could go on for

26. In brief, section 601 of the Illegal Immigration and Immigrant Responsibilities Act amends the INA’s definition of refugee.” It recognizes that:
    resistance to, failure or refusal of a person to undergo coerced abortion and involuntary sterilization and persecution because of such resistance to a coercive population program and/or a person who has a well founded fear that he/she will be forced to undergo such a procedure shall be deemed to have a well founded fear of persecution on account of political opinion.

The latter is one of the five enumerated grounds for asylum. In some ways this confirms the meaning and application of Exec. Order No. 12,711 (1989).

27. In a discussion with one of my colleagues, he noted that hidden in this 1994 memo on Humanitarian Parole was the first formal policy declaration that Executive Order 12,711 (1989) no longer was in force, but Chang was. Yet, the IJ’s and BIA had been applying Chang for over a year.
months. In the meantime, Chen was facing his fourth Christmas in prison. Emotionally and physically, Chen and the other Golden Venture men in York were ready to break. Previously, some had asked to go back to China. Those who have returned have not been heard from.

Therefore, other action was needed to move this along. I contacted my Congressmen and had them call the INS legislative liaisons in Philadelphia and Washington. I contacted the INS General Counsel's office in Washington. It was his office that issued an internal agency memo on the new law on October 21st and the procedures to be followed in finalizing these cases. The memo concluded that, under the IIRIRA, Chang no longer was valid.

Finally, on January 3, 1997, Chen was one of two granted a sixty day parole from York County Prison. This would be extended to a year once I filed a Motion to Re-Open or Remand. This has been done in a joint motion with the Office of Immigration Litigation to the BIA. It now is up to the BIA to evaluate Chen's request for asylum under the new law and, as I expect, to grant him asylum.

There are others who are credible; yet they still remain in prison. Why remains a mystery. The maneuvering for their release continues as do I as a member of the Golden Venture legal team.

E. The Formation of the "People of the Golden Vision:” An Interfaith Coalition For Immigrants’ Rights

In August 1993 a rash of IJ decisions on the York cases came down. All were denied. One of the York pro bono attorneys for the 100 plus Golden Venture men, Craig Trebilcock, was so incensed that he called a press conference the next day. After reading this news story in the local paper, Joan Maruskin, an area pastor contacted Trebilcock to see how she could help. This also was the beginning of nationwide media coverage of the plight of the men and women of the Golden Venture.

This was the commencement of People of the Golden Vision (Golden Vision), under the dynamic leadership of Pastor Joan Maruskin (Pastor Joan). This grass roots group started out with weekly protests outside York County Prison, which included prayer services entitled Services of Exodus, Freedom, and Justice. At this writing, these gatherings are in their 180th week. This organization, now in its fourth year, will continue until the last person of the Golden Venture is released from detention. The nucleus of the group is in York but it has grown to include people nationwide.

One of the heartwarming results of the formation of the Golden Vision is its diverse composition of lay people and attorneys, conservatives
and liberals, pro-choice and pro-life, people of color, people of different religions, and on and on. It has made activists out of people who do not get involved in issues. The Golden Vision has aroused the interest and support of the entire York community. Under Pastor Joan's leadership, they have made their voices heard in the media, in the halls of Congress, at the White House, and elsewhere. They have raised money to pay for supportive services for the defense of these men, including art sales of their intricate freedom paper sculptures. A significant percentage of these proceeds has been placed in a central account. These funds are used to give each of the men spending money while in detention and resettlement money upon release.  

The bottom line of the People of the Golden Vision and subsequent activities of this group, indicate that most Americans, whatever their views on the moral and political questions surrounding abortion and related human rights issues, regard coerced abortion and sterilization as ghastly violations of fundamental human rights. As a global issue, it should be noted that forced abortion and related acts were considered a crime against humanity at the Nuremberg War Crimes Tribunal, and by other international treaties, and United Nations documents.

An outgrowth of the plight of the Golden Vision has been a Golden Vision sub-group, spearheaded by Pastor Joan, to look into prison conditions for those incarcerated while seeking asylum. It was a revelation of institutional abuse and inhumane treatment. We found this varied from prison to prison. However, in each detention facility, the Golden Venture asylees were in the criminal category.

As part of this sub-group, I attended meetings in New York and with West Coast human rights groups. While in Los Angeles, Pastor Joan and I visited the Golden Venture women incarcerated in the Lerdo Facility in Bakersfield, California, a deportation holding center. I was appalled at the conditions there. This could have been a third world prison. There were slits for windows, covered with what looked like plastic wrap; the water was not drinkable; the women, for example, reported that they could get only one sanitary napkin at a time and not always when needed; breakfast was served at 4 a.m., lunch at 10 a.m. and dinner at 4 p.m. The women reported that they went outside for air maybe twice a week. They were put into isolation or severely reprimanded for infractions as minor as talking too loud, laughing or crying. I had seen other prisons, but Bakersfield was a shock. Even though I was an attorney, I could speak to only one woman at a time, and this by telephone through a glass wall. The English speaking Golden Venture woman was not allowed to stay to

28. See discussion on Golden Venture.
translate for one who spoke only Chinese. Therefore, I was precluded from talking with her. Pastor Joan was with me, only she had to wait until my visit was over before she could go in.

Later, Pastor Joan agreed that the treatment in Bakersfield was horrendous, but that it was absolutely inhumane when these same women were incarcerated in New Orleans (prior to being shipped to California). She tried to visit them at the New Orleans facility, but found that these thirteen Chinese asylees were not allowed visitors. Even their attorneys most times were denied admittance. Somehow she managed to speak with them. Pastor Joan noted that these women were treated with all kinds of abuse and lived under hellish conditions. This was affirmed in letters which these women sent to members of the Golden Vision in York. They pleaded for help. So this is how we treat those fleeing persecution!

In contrast, at York Prison, I could meet with my client in person or join my other colleagues for a group meeting with the men. My client could bring an English speaking Golden Venture person with him to act as translator. The men no longer were handcuffed within the prison. Within the confines of being in prison, these Chinese men were treated as human beings. However, their spirit is broken and some, because of the prison diet which is not digestible by them, have developed serious illnesses. For some, the stress of waiting and confinement were too much, and they asked to go back to China.29

Through our investigations into prison conditions for those requesting asylum, we have learned that our government pays more than twice as much per day to the prisons for illegal aliens than the prisons get for real criminals. This is big business for local prisons with, it seems, very little federal control. In the final analysis, it is our tax dollars that pay for this and that perpetuate this unjust system of justice of the free to the persecuted who come here because we are a nation of freedom.

F. Congressional Hearings

The plight of the detained Golden Venture asylees finally reached the halls of Congress. In May, June, and July, 1995, the House Subcommittee on International Relations and Human Rights of the Committee on International Relations held hearings on coercive population control in China. After several promises and canceled sessions, the INS finally brought several of the Bakersfield women to testify. The chair of this committee was the Honorable Christopher Smith of New Jersey, whose legal counsel was former INS General Counsel, Grover Joseph

29. See discussion infra Part VI(E).
Adler

Rees. After much discussion, the committee denied DOJ’s request for a closed hearing. The public had a right to know what these women had to say.

Representatives Smith, Hyde, Goodling (from York County), and others on the committee were incensed when the women were brought in handcuffed. They were told by the INS security people that these women were considered prisoners; therefore, the rules had to be followed. The handcuffs finally were removed. This, however, set the tone for their dramatic testimony of involuntary sterilization, forced abortion of a late term pregnancy, forced implementation and life threatening infections from IUDs, fines equal to a year’s salary because of non-compliance, and much more. Those on the Subcommittee were shocked. They were incensed not only by the testimony of these women but also by the cruel way in which they were being treated in detention here worse than common criminals in a country that prides itself on being just and free. During their discussions, the overwhelming feeling of the committee was that these women and others on the Golden Venture should be treated as refugees, not as illegal immigrants.

Congresspeople, too, needed this kind of a reality check. It belies the myths perpetrated on illegal immigrants from certain countries. It was a real education on the way we treat those who have fled persecution to come here and are again persecuted.

The outgrowth of these hearings, with continued pressure by the Golden Vision group and Golden Venture lawyers, was section 601 of the IIRAIRA. 30

G. Charges Against the Administration of Political Influence

In November 1993, the first writs of habeas corpus were filed by York attorney, Craig Trebilcock, and others on behalf of those Golden Venture men who already had been denied asylum by the BIA. He felt there was something more behind the Administration’s decision, after the landing of the Golden Venture, to suddenly begin to be apply Chang to this group as a denial of asylum versus Executive Order 12,711, under which they would have and had been grated asylum. The latter had been applied since June 1989 and as recently as May 1993 to those seeking asylum because of recognition that China’s coerced population control programs were the worst kind of human rights violations.

Trebilcock’s interest in what seemed to be the possibility of political influence in the adjudication of the Golden Venture cases peeked

in the Fall of 1993. As he read through some of the IJ merit hearing
transcripts and oral decisions, he noted judge’s comments regarding
“expedited hearings, fast track adjudication for the Golden Venture cases.”
This was substantiated further by a conversation pro bono attorney Ann
Carr had in July 1993 with a clerk in the Baltimore Immigration Court, a
field office of EOIR. Carr called the court office to inquire if she had any
other options to get a continuance for her Golden Venture client’s hearing
on the merits. She just had been given, by the IJ, only four days from an
initial hearing to the merits hearing although she had explained that she
just had been given this client. To prepare even a reasonable defense on
such short notice was hampered further by having to work through a
translator, around cultural barriers, prison regulations, and more. The IJ
made it clear that no further continuances in these cases would be granted.
This was true of others as well.

Ms. Carr asked the Immigration Court Clerk why no extensions
were being granted on hearings on the merits. The clerk replied: “[T]he
Clinton White House had personally called this Immigration Court and
asked that all the Chinese detainee cases be expedited and that no
continuances be granted.” Trebilcock presented Ann Carr’s affidavit and
other evidence discussed, supra, to Middle District Judge Sylvia Rambo.
He requested a court order to allow him, on behalf of all petitioners, to
proceed with discovery of certain INS, DOJ, EOIR, White House, and
other relevant documents. These might shed light on this question of
possible political influence, specifically in the adjudication of the Golden
Venture cases. Judge Rambo saw enough evidence to warrant granting
this order. She set up a Petitioners’ Steering Committee as a liaison to the
Court for all of the Golden Venture attorneys, with Trebilcock as
Chairman.

Government compliance with Judge Rambo’s order was fraught
with all kinds of delays, citing confidentiality and security reasons for non-
release of certain documents, answers of petitioners’ interrogatories and
more. Eventually, Trebilcock and others of us on the designated
Discovery Team conducted depositions with members of the White House
staff, including members of the National Security Council (NSC) and of a
committee organized by the NSC, the Border Control Working Group
(BCWG), those working under the Attorney General, the Counsel to the
Director of EOIR (EOIR Counsel), and others. The EOIR director, to
whom the EOIR Counsel reported and advised on legal issues, also was the
Chairman of the BIA.

31. This conversation was documented in a affidavit by Ann Carr, dated Sept. 16, 1993.
These depositions took us to Washington, Miami, and elsewhere. We discovered information about the Border Security Working Group (BCWG) meetings at the White House. Attending some of these meetings was the EOIR Counsel. It was he who was asked, shortly after the arrival of the Golden Venture, by the Attorney General’s office to prepare an expedited plan to deal with the detained Chinese asylees, specifically those on the Golden Venture. This fast track plan was dated June 15, 1993. Prior to that, he was privy to policy discussions at the White House meetings of the BCWG. This petitioners’ counsel noted was in direct conflict to his role as EOIR Counsel to the BIA. He was well aware from attending these meetings that the Administration wanted a “deterrent to the Chinese smugglers bringing in these people.” It is EOIR that oversees the BIA and immigration judges. Yet here was their counsel being part of the discussion on the need to make an example of the Golden Venture. Deny them asylum and perhaps this will stop the smugglers and send a signal back to others in China. It then was decided to implement Chang for the first time since it was decided in May 1989. Clearly this was a radical departure from immediate past procedure, which, infra, had been discussed in great detail at the BCWG White House meetings.

This discovery process indicated that barriers had broken down between INS litigators and judges, i.e. the enforcement and judicial arms of DOJ. Ann Carr’s affidavit and the discussion, supra, clearly support this breakdown from the newly expedited hearing policy, the Administration’s policy on setting up the adjudication of the Golden Venture cases as a “deterrent effect on smugglers,” the Office of Immigration Litigation’s (OIL) resurrection of Chang as applicable law to accomplish this goal, the conflict of EOIR’s Counsel’s participation in BCWG meetings at the White House, and his position of counselor to the judicial arm responsible for adjudicating these cases. This interference of the White House staff in the judicial process had filtered as far down as the clerical staff at the Office of the Immigration Judge in Baltimore.

It was clear from the testimony heard that the White House was calling the shots and using the adjudication of the Golden Venture cases as an example. This was confirmed in the New York Times statement quoted below by special assistant to then-Associate Attorney General, Webster Hubbell. In this September 5, 1993 Times article, entitled United States Tightens Asylum Rules for Chinese, she states, “[w]e’ve made no secret of

32. Immigration judges who had been brought in to hear these cases were deposed.
34. See supra note 31.
35. Id.
the fact that these cases be expedited. We want the authentic refugees to be found and others deported to China, as a bit of a signal, especially to the criminals organizing the smuggling." The article goes on to note that not only were these cases being decided faster, but tougher standards (namely, Chang) have meant that the vast majority of the Golden Venture passengers automatically would be denied asylum and deported.

In the name of justice, we attorneys and the People of the Golden Vision are just as determined that they shall never be forced to go back to China. Their fate now will be even more persecutive, partly because of all of the media and other attention which has been focused on these cases. From various sources, we know that each person from the Golden Venture is known to the highest level of the PRC's government. Unfortunately, some of the men could not take the stress of our prisons, and the excessive waiting. So they asked to go back. They promised to let us know if they were okay. To date, it is no surprise that we have heard from none of them.

H. Fly to Freedom: The Art of the Golden Venture Prisoners

The men of the Golden Venture detained in York County Prison obviously had time on their hands. Almost all were non-English speaking and, therefore, not interested in watching television. One of the men knew a form of Chinese paper folding. He taught a few of the others around him. The first piece he made went to the prison Chaplain's office. It is the simple figure of a bird reminiscent of Fujianese practice of paper folding folk art called zhizha or huzhi. So, while the men waited they folded.

Prison regulations dictated what tools they could have. They were permitted magazines, legal pads (left by the attorneys during client meetings), and toilet paper. At first no scissors were allowed; but later, they were permitted children's safety scissors, magic markers, and white glue. The first sculptures were of eagles. They called them freedom birds. They symbolized the men's dreams of freedom. An eagle less than a foot high could contain over seven hundred or more of individually folded paper, just in the wings and tail alone. Folding not only became a means of passing the time, but the resulting sculptures a means of gratitude for their pro bono attorneys.

Over the three and one-half years of incarceration, these sculptures have become more intricate, a form of Chinese folk art carried to new heights of artistic and creative expression. New techniques were


37. Id.
developed to show texture. The men were divided into pods, and different pods would develop different specialties. Over the years new styles have been added — pineapples, ginger jars, vases, bonsai trees in pots (using individual threads from towels for tree needles), dragons, statues of liberty, seven story towers, and more. The Chaplain’s office and later the Warden became very supportive. They realized that this an excellent way to keep these 100 plus non-English speaking frustrated and bored Chinese prisoners constructively occupied.

Soon these sculptures were seen in lawyer’s offices and elsewhere. People who saw them were astounded by these unique works, the obvious patience and talent it took to fashion them and wanted to know how they could acquire them. The Golden Vision began having art auctions and shows of these works to raise money for the men. The men now had reason to speed up their production, while continuing to refine each hand-crafted piece.

The news media became fascinated by this unprecedented story, the quality of expression of, and the growing excitement over the prison art of the Golden Venture men. Feature articles with photographs appeared in Life Magazine, the Philadelphia Inquirer Sunday Magazine, Folk Art Magazine, and newspapers nationwide. In fact, several have been granted artist visas and more are pending. This is a testimony of the artistry of their art designs and their execution.

VII. CONCLUSIONS

On January 30, 1997, the United States State Department came out with its annual reports on human rights in 193 countries. Cited right at the top of the list for worsening human rights abuses was China. This reaffirms what we attorneys initially believed and came to substantiate over these past three and one-half years as defenders of the passengers of the Golden Venture.

As exemplified by this article, the INS, DOJ, the federal courts, BIA, INS District Directors, the Administration, and others appeared to have put insurmountable obstacles in our way. They thought that, at some point, we attorneys would become frustrated enough and throw in the towel, particularly, since this was and is mainly a pro bono effort. In essence, this would leave the road open for the INS to deport the incarcerated Golden Venture men and women back to China. As noted, supra, over 100 have been sent back. There is no word from any of them, which says it all.

In doing so, it is not China’s coerced family planning policy that is on the lines. It is the very democratic values that we say we cherish and
preach to other countries to embrace. It is our immigration process, and the manner in which these asylum cases have been adjudicated that is on the line. It is the manner in which we detain and treat such people when in detention that is on the line. It is the fact that our government would change five years of United States policy, i.e. the 1989 Executive Order, that was dictated by Congressional action in granting asylum to such Chinese, by imposing a pre-Tiananmen Square BIA decision, Chang, which automatically denies asylum to those fleeing China's coerced family planning policies. The criminal act a is using this BIA decision as a means of denying asylum and reason to send those on the Golden Venture back to China because the Administration wanted this group to serve as a deterrent to the smugglers who brought them to our shores, and others. It is in these actions and the real meaning of United States human rights policies that are on the line.

This does not mean that the Administration should not set policies which would deter such smuggling of human cargo, whether from China or elsewhere. However, to do so at the expense of those fleeing to our shores, even illegally, because of China's persecutive human rights policies cannot be justified. Good policy does not go after the persecuted, who are the pawns and not the criminals. It finds and prosecutes the smugglers and others who profit from the persecuted.

It was Congress again, as it had in 1989, that acted to grant those of the Golden Venture and others asylum, for reasons already noted, by including section 601 in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (1996 Act). Congress had spoken and the 1996 Act was signed into law by the President on September 30, 1996. However, the actual implementation of this law has been fraught with delays and seemingly bureaucratic indecision. It should be noted that section 601 limits to 1,000 persons per year who can be granted asylum because of coercive family planning. To date, this has non been a problem; but it could become one in the future. In the meantime, for us as a nation, it is important that this issue of coercive family planning has shocked the conscience of our elected officials to the point of such action.

To date, only my client (Fen Hou Chen) and one other have been released on parole under this new law. My client's claim now has been remanded, jointly by this attorney and the government attorneys at OIL, to the BIA for their adjudication. How long this review will take, we do not know. It could be months; but, at least Chen is free on parole. However, until he is granted asylum, he cannot apply for his family to join him. It already has been over four years since he has seen them. In the interim, his wife, to avoid immediate forced sterilization and to protect their children, remains in hiding in China. The rest of the Golden Venture
detainees still remain incarcerated. Each day that they continue to sit in prison has become another nail in their coffins. This is a statement of fact.

How can this or any United States Administration expect the Chinese government ever to change its coercive human rights and other such abusive policies, when the procedures and actions of our government plainly show that we have and may still continue to send back to China those persecuted under the PRC's system? Such United States conduct truly belies the January 30, 1997 State Department Report condemning China's horrendous human rights policies and the outrage expressed publicly by members of this Administration.

There is more. What messages have United Nations agencies and in turn, the United States Administration, in funding and supporting these agencies, continued to send to China about concern for their human rights policies? For example, the United Nations Agency For International Development's (UNFPA) Executive Director, as recently as 1991, told a meeting in Washington that the Chinese program was totally voluntary and that China had every reason to feel proud of and pleased with its remarkable achievement in family planning. One can state that the initial concept may have looked good; however, the media, NGOs, the Golden Venture documentation and our own State Department note that the above quoted comments are not and have not been true for over a decade. Despite this, and media reports of rising coercion levels in these Chinese programs as of May of 1993, the United States Administration went ahead with its funding of UNFPA shortly after the June landing of the Golden Venture.

What signal is President Clinton really sending to the Chinese leadership by his extraordinary gesture to China's president at the November Asia-Pacific Economic Cooperation forum in Manila of an exchange of presidential state visits. This was the first agreed on exchange of presidential visits since 1989? The lack of state visits at this highest level did tell the Chinese that if China wanted such United States recognition, it had to make dramatic changes in its human rights policies. Even the signing by the President of the 1996 Act, which clearly recognizes China's coercive policies, did not stop this invitation. Therefore, China now is getting its wishes without any pre-conditions.

Did our President have to go that far, even for reasons of doing business with China? This lack of such state visits did not stop the growing economic ties between the two countries. My colleagues and I submit, he did not. China needs our business and our markets. To make matters worse, on the January 30th McNeil Lehrer Report, dealing with the just released State Department human rights report, John Shattuck, Assistant Secretary of State, noted that China now has closed down all
dissent. He commented that this and their oppressive human rights policies are of concern; however, in other ways China is making progress. This is even more reason why the presidential visit possibly should be reconsidered. What does such a summit meeting say about the very values for which our nation stands?

In February 1997, the new Secretary of State, Madeleine Albright, will visit China. In a January 31, 1997 *International Herald Tribune* editorial, it stated that Secretary of State Albright's commitment to human rights and democracy faces its severest test in China. Vice President Al Gore, who plans to play a larger role in China, and the Clinton Administration, will be judged on how they handle China on this issue. To quote the above editorial: “Mr. Clinton’s press conference remarks, read closely, were an argument against pushing China hard on human rights and internal political reform.” The editorial continues,

the problem with this analysis is that it indulges Chinese repression and may be taken by Beijing as a sign of American weakness. But Washington does need to be more assertive about its interests, more demanding of an end to China’s human rights abuses, and less willing to sacrifice American principles for American commerce in China. This is not Berlin and the demise of European communism. There is already abundant evidence suggesting that communism in China is not dying, but is instead mutating into a new form that tolerates economic liberties while still suffocating political freedom.

Why then should China correct its human rights policies? It seems that commercially and otherwise, China gets what it wants without doing so. There may be one very important reason. China does want to join the World Trade Organization (hereinafter WTO). To do so, China will have to make some human rights and other changes to meet WTO’s standards unless in some way, other members of the WTO, including the U.S., decide differently.

The comments of Dr. John Aird at the Subcommittee hearings brought in a most important message. For many years he was the United States Census Bureau’s principal expert on population. In the PRC, he stated, “the United States always has played a major role in promoting the idea of universal human rights, not only through the United Nations but also in its relations with other countries.” But our policies and actions have not always matched our words. Human rights considerations at times come into conflict with various domestic interest groups, who are successful in getting the United States government to strike compromises
that serve their own economic and other ends. This is particularly true with a country like China, which is economically and politically important to the United States and others; yet has one of the worst or worst human rights records in the world. Of course China, as did the former Soviet Union, is a closed society and claims that these are internal issues and are not to be meddled in by the United States or others.

This issue of asylum and asylum law and the broader question of immigrations, legal and illegal, has created much interest in the international law and human rights communities. The Cold War is over. Conflicts within and among regional nations have created the most atrocious violations of human rights and the flight of refugees seeking asylum. This has raised many questions of responsibility and resolution on a global scale, particularly in democratic countries. Ad hoc solutions no longer are workable. In the case of the Golden Venture, we have explored the options, including finding third countries that will take them. An indication of this topical significance was its inclusion in the November program of International Law Weekend 1996, an annual event held at the New York City Bar Association. This important conference is presented by the American Branch of the International Law Association in conjunction with other international law organizations. As a member of the planning committee, I suggested this topic and organized the program. The panel was a diverse group, which included this writer, Enid H. Adler; the INS General Counsel, David Martin; Director of Press and Public Affairs, European Commission in New York, Wouter Wilton; the Director of Immigration and Refugee programs at Harvard University Law School, Deborah E, Anker; Counsel, Human Rights Watch/Africa, Binaifer Nowrojee; and the Director of Migration Services, the Open Society Institute, Arthur C. Helton. We each presorted our views to a crowded room. Our intent is to follow-up on this lively discussion and serious issue.

If in this process of the resolution of the Golden Venture case, we attorneys, the People of the Golden Vision, and others have been influential in raising the awareness of Congress with the resulting passage of section 601 of the IIRAIRA, all to the good. If in this process, the media has given the plight of the Golden Venture nationwide coverage and raised the consciousness of the nation, all to the good. If in this process, those fleeing persecution and seeking asylum on our shores now should be treated with dignity and in non-prison decent facilities, all to the good. If in this process, those writing the immigration policies, overseeing and enforcing our immigration laws will be better trained, educated, and sensitized to the realities from which those seeking asylum fled, the political and legal systems, cultures, fear and lack of trust of government
and other authorities, language misinterpretations and more, all to the good. If in this process, we have shown the real spirit of how a diverse group of Americans can come together and make a difference in our immigration system, changes in the law, and more, all to the good.

The fear that continues today, that millions of Chinese will come to our shores if we opened our doors to those fleeing coerced abortion and sterilization, is a myth. It hasn’t happened and will not. It is so difficult to get out of the PRC, legally or illegally. Clearly, from the saga of the *Golden Venture* asylees, people usually do not flee their homeland and risk their lives on such a treacherous journey without good cause. To date we are talking about Chinese refugees in the single digits compared to asylum seekers to the United States from other countries. As already stated, the 1996 Act has placed a cap of 1000 such refugees per year.

My colleagues and I have persisted and will continue to do so, not only for those from the *Golden Venture* but also others from the PRC who have fled to our shores because of China’s persecutive policies, coerced family planning, religious persecution, any political dissent. To allow the INS to send these people back, to face what our own government has documented as the worst kind of human cruelty, would go against our very sense of acceptable human behavior, of justice, and fairness under the law, the right to freedom of expression and the ideals for which we believe our nation stands.
WHAT PRICE PEACE: FROM NUREMBERG TO BOSNIA TO THE NOBEL PEACE PRIZE

Malvina Halberstam *

In the fifty years that have elapsed since the Nuremberg Trials, we have made tremendous progress in the development of human rights. The Genocide Convention,¹ the Convention on Civil and Political Rights,² the Convention on the Elimination of Racial Discrimination,³ the Convention on the Elimination of Discrimination Against Women,⁴ and the Convention Against Torture⁵ have all been adopted by the United Nations and ratified by the vast majority of states in the world.⁶

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University Prepared for presentation at the Panel on International Human Rights and Humanitarian Law After Bosnia, The International Law Weekend, New York, November 1, 1996. The author wishes to thank Allan Blutstein, Cardozo 1997, for his assistance in the preparation of this article.

Treaties prohibiting various aspects of terrorism, such as hostage taking, airplane hijacking, sabotage, seizure of ships on the high seas, and attacks on diplomats, have also been ratified by a large number of states. These Conventions, not only prohibit the conduct, but make it criminal or require states parties to make the conduct criminal under their internal laws, punishable by "severe penalties," and require any state in which an alleged offender is found to either prosecute or extradite him. In one respect, however, we have not progressed, and seem to have regressed: those responsible for war crimes, crimes against humanity and terrorism, still go unpunished. They walk free, with impunity, and in some cases are even courted by heads of state and honored with the most prestigious awards that the international community can bestow.

In the case of the former Yugoslavia, an International Criminal Tribunal has been established to try those responsible for war crimes and establishing themselves as *jus cogens*; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than the States*, 32 AM. U. L. REV. 1, 11-12 (1982) (noting that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, as well as about fifty additional declarations and conventions concerning issues such as discrimination against women and racial discrimination, have become a part of international customary law).


12. As of January 1, 1996, 157 States had ratified the Hijacking Convention, supra note 8; U.S. DEP'T OF STATE, TREATIES IN FORCE 326-27 (1996); 157 States had ratified the Sabotage Convention, supra note 9, at 327-28; 94 States had ratified the Internationally Protected Persons Convention, supra note 11, at 441-42; 76 States had ratified the Hostage Convention, supra note 7, at 442; and 32 States had ratified the Maritime Terrorism Convention, supra note 10, at 398.

13. See Hijacking Convention, supra note 8, art. 2; Sabotage Convention, supra note 9, art. 1; Hostage Convention, supra note 7, art. 1; Maritime Terrorism Convention, supra note 10, art. 3.

14. See Internationally Protected Persons Convention, supra note 11, art 2.

15. See e.g., Hijacking Convention, supra note 8, art. 2, 22 U.S.T. at 1646, 860 U.N.T.S. 110.

16. See Hijacking Convention, supra note 8, art. 7; Sabotage Convention, supra note 9, art. 7; Internationally Protected Persons Convention, supra note 11, art. 7; Hostage Convention, supra note 7, art. 8; Maritime Terrorism Convention, supra note 10, art. 10.
crimes against humanity. A number of persons, including prominent leaders in the conflict, responsible for unspeakable atrocities, have been indicted. But, they have not been apprehended and brought to trial. There appears to be great reluctance to do so. Although they have been barred from running for office, and display of their pictures has been prohibited, those seeking office showed empty frames to convey the message that they identify with and have the support of these leaders whose image was barred.

The question of whether the leaders should be prosecuted has been the subject of scholarly debate, with some commentators taking the position that perhaps we should forego prosecution. For example, Professor Ruth Wedgwood stated,

[i]t may not be possible to bring about a peace settlement in the former Yugoslavia if the Tribunal is going forward with active prosecutions of the state leaders of the belligerent parties . . . . You may need to accept a punto final, and sacrifice the prosecutorial interest in general deterrence for the sake of future peace.

She suggests that “the slow start of the Tribunal reflects a fear that the Tribunal’s work could impede the peace process.”

The picture is even bleaker with respect to those responsible for terrorist acts. No international tribunal has been established to try terrorists who have killed innocent men, women, and children. Although

19. See Robert Marquand, Bosnia War Crimes Judge Talks of Quitting, CHRISTIAN SCIENCE MONITOR, Oct. 22, 1996, at 1 (noting that only seven of 74 people indicted by the tribunal for war crimes are in custody, none of whom are leaders).
20. See Philip Shenon, Mixed Signals on Bosnia War Crime Issue, N.Y. TIMES, June 4, 1996, at A1 (discussing statements by Pentagon officials that NATO commanders are reluctant to step up efforts to capture accused war criminals because arrests might endanger peacekeeping forces).
23. Wedgwood, supra note 22, at 274-75.
24. Id.
an International Criminal Court may finally be established, its jurisdiction
may not include the acts made criminal by the various terrorist
conventions. The draft statute provides for such jurisdiction, but the
United States is apparently opposed, notwithstanding that in the
Antiterrorism Act of 1986 Congress urged the President to work towards
"establishing an international tribunal for prosecuting terrorists."

Not only is there no international tribunal to try those responsible
for major terrorist attacks but, unlike the situation in Bosnia, they continue
in leadership positions. Let me give you two examples.

On the evening of March 1, 1973, Cleo A. Noel, Jr., the United
States Ambassador to the Sudan, and George C. Moore, the United States
Chargé d'Affaires, were taken hostage at a reception at the Saudi Arabian
embassy in Khartoum. Late the following night they were brutally beaten
and machine-gunned to death. A Belgian diplomat, Guy Eid, was also
killed. A Jordanian diplomat who had been taken hostage was released.
The President of the Sudan immediately made public evidence showing
that the operation had been carried out by Fatah (the Palestine Liberation
Organization faction founded and headed by Yasir Arafat), including a
written copy of the plans for the operation, which had been found in the
desk drawer of the top Fatah official in Khartoum.

In 1985, it was reported that the United States had information
from reliable sources that Yasir Arafat played a key role in orchestrating
the operation and gave his personal approval for the execution of Noel and
Moore. According to these sources, Arafat and other Palestine Liberation
Organization officials were directing the assassins from Fatah headquarters
in Beirut, and those holding Noel and Moore did not kill them “until receiving specific code-worded instructions” from Beirut.\textsuperscript{32}

It was further reported that “United States intelligence possessed a taped intercept of Arafat personally ordering the Khartoum murders.”\textsuperscript{33} Walter Vernon, then United States ambassador to the United Nations and deputy director of the Central Intelligence Agency at the time of the Khartoum murders, stated in an interview in 1985, that he had been told of the existence of such a tape. Although he did not know Arabic and had not personally heard the tape, he said the existence of the tape “was common knowledge at the time, among all sorts of people in the government.”\textsuperscript{34}

Charles Lichtenstein, deputy United States representative to the United Nations under Jean Kirkpatrick\textsuperscript{35} and others urged the Attorney General to issue a warrant for Arafat’s arrest. Arafat was, however, not indicted by the United States, nor did the United States seek his extradition.\textsuperscript{36} The Justice Department took the position that because the United States legislation giving United States federal courts jurisdiction to try someone for the murder of United States diplomats abroad was adopted after the Khartoum killings, prosecution of Yasir Arafat in the United States was barred by the \textit{ex post facto} clause of the United States Constitution.\textsuperscript{37}

The validity of that conclusion is open to serious questions. The United States Supreme Court has interpreted the \textit{ex post facto} clause to bar prosecuting a person for an act that was “innocent when [it was] done.”\textsuperscript{38} The killing of Noel and Moore was clearly not “innocent when it was

\begin{footnotes}
\item[33] \textit{See} Muravchik, \textit{supra} note 28.
\item[34] \textit{Id}.
\item[35] \textit{See} Shaw, \textit{supra} note 32.
\item[38] \textit{See e.g.}, Calder v. Bull. 3 U.S. (3 Dall.) 386, 390 (1798).
\end{footnotes}
done.” It was a crime under the municipal law of the Sudan and a violation of one of the oldest and most fundamental principles of international law: that the person of the ambassador is inviolate. The Supreme Court has also stated that the ex post facto clause applies to substantive rules, not to procedural rules. Although the Supreme Court has never decided whether jurisdiction is substantive or procedural, an analysis of the cases and of the policies underlying the ex post facto clause leads to the conclusion that jurisdiction is procedural. The appropriate action, if the United States wanted to prosecute Arafat, would have been to obtain the indictment and to let the Court decide whether the prosecution was or was not barred by the ex post facto clause.

International law clearly does not consider it a violation of ex post facto to try a person before a court that did not have jurisdiction at the time the act was committed. Neither the Nuremberg Tribunal, which tried persons charged with committing war crimes during WWII, nor the recently established Yugoslavia and Rwanda War Crimes Tribunals even existed at the time the acts for which the accused were or will be prosecuted were committed.

Not only did the United States fail to indict Arafat or to request his extradition, but in September 1993 the President of the United States, whose ambassador he ordered murdered, welcomed Arafat to the White

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39. Section 246 of the Sudan Penal Code of 1974 (Act No. 64), Offenses Against the Person, defines culpable homicide as follows:

Whoever causes death by doing an act:
(a) with the intention of causing death or such bodily injury as is likely to cause death,
or (b) with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide . . . . To be deemed murder, the death of the deceased must have been the probable consequence of the act . . . . Murder is punished with death of [sic] imprisonment for life, with the possibility of a fine.


40. This rule is codified in the Vienna Convention on Diplomatic Immunity, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95, which has been ratified by 175 States. U.S. Dept. of State, Treaties in Force 324 (1994). Article 29 provides: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take appropriate steps to prevent any attack on his person, freedom, or dignity.” See also, Republica v. De Longchamps, 1 U.S. (1 DalI.) 114, 119 (Pa. 1784); Legal Mechanisms to Combat Terrorism: Hearings Before the Subcommittee on Security and Terrorism of the Committee on the Judiciary of the United States Senate, 99th Cong., 2d Sess. 10 (1986) (the statement of Harris Weinstein). Weinstein stated that in his view, “substantial authority supports the view that ex post facto clause would not bar prosecution.”

41. See e.g., Miller v. Florida, 482 U.S. 423, 430 (1987) (“No Ex Post Facto violation occurs if the change in the law is merely procedural”).
and on December 10, 1994 he was awarded the Nobel Peace Prize. Mr. Kare Kristiansen resigned from the Nobel Peace Prize Committee in protest. He said, "[H]is past is too filled with violence, terrorism and bloodshed . . . . It will give the wrong signal to other violent organizations . . . ." But, the propriety of the award did not give rise to a great deal of diplomatic or scholarly debate.

The other example involves Abu Abbas, who masterminded the seizure of the Achille Lauro, an Italian flag ship. Several hundred passengers were held hostage and one, a crippled American man in a wheelchair, was killed and thrown overboard. The hijackers eventually surrendered in Egypt. Contrary to its obligations under the Hostage Convention to either extradite or prosecute the offenders, Egypt permitted them to leave and even provided them with an Egyptian military airplane for that purpose.

At President Reagan’s direction, United States military airplanes forced the Egyptian plane carrying the hijackers to land at a United States military base in Italy. The United States wanted to transfer the hijackers
to a United States plane and to take them to the United States for trial, but Italy refused to permit the United States to do so and also refused United States extradition requests. However, all the perpetrators, except Abu Abbas were tried, convicted and imprisoned in Italy. Abu Abbas, who carried a diplomatic passport and, at the time, denied his involvement in the *Achille Lauro* seizure, and claimed to be the one who negotiated the release of the hostages, was permitted to leave Italy despite United States protests.51 He was later tried *in absentia* in Italy, convicted and sentenced to life in prison.52 A 115 page report prepared by the Italian magistrates stated that the evidence against him was "multiple, unequivocal, and overwhelming."53 It found that "Abbas conceived the action, selected its actors, trained them for the specific enterprise, financed them" and "provided them with the arms to conduct the action . . . ."54 He was never apprehended, however.

On April 22 of this year, Reuters reported that Abu Abbas, "emerging from hiding for the first time since the 1985 hijacking,"55 held a press conference in Gaza, surrounded "by some of his old fighters and by armed bodyguards,"56 in which he acknowledged his role in the *Achille Lauro* seizure and referred to the murder of Klinghoffer as a "mistake."57 The following day, Congressman Saxton and several other members of Congress wrote to the Attorney General urging the extradition of Abu Abbas for trial in the United States.58 On April 30, the Senate passed a resolution, ninety-nine to zero, also urging the Attorney General to seek

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54. From letter by Congressmen Saxton, Forbes, Ackerman, and Engel, to U.S. Attorney General Janet Reno (on file with the author).

55. Id.


57. Id.

58. Id.

his extradition to the United States for trial for the murder of Klinghoffer. Three months later, the Attorney General's Office sent a reply to Congressman Saxton. After apologizing (but giving no reason for the three-month delay in responding), the letter from an Assistant Attorney General, stated:

The applicable statute of limitations at the time of the crime was 5 years. Further, we are unable to meet the standard for flight from justice necessary to stay the statute of limitations. The United States, consequently, does not have a basis to seek the extradition of Abu Abbas for trial in this country.

While the Justice Department is correct that the applicable statute of limitations for hostage taking at the time was five years, the law also provides that "[n]o statute of limitations shall extend to any person fleeing from justice." The letter does not indicate the basis for the Justice Department's conclusion that it is "unable to meet the standard for flight from justice to stay the statute of limitations.” However, earlier statements by the Justice Department suggested that the tolling statute did not apply because there was no outstanding arrest warrant or indictment.

There is no requirement that there be an outstanding arrest warrant or indictment for the statute of limitations to be tolled. Numerous cases, spanning over 150 years, have held that a person may be fleeing from justice, even though no process was issued against him. A memorandum prepared by the Congressional Research Service, also disagreed with the Attorney General's conclusion that the tolling provision was inapplicable. After reviewing the applicable law on this point, the memorandum concluded, "[f]rom this, it would appear that section 3290 would operate

60. S. Res. 253, 104th Cong. 2d Sess., Apr. 30, 1996. A similar resolution, introduced in the House of Representatives, was referred to the Committee on International Relations. H. Res. 444, 104th Cong. 2d Sess., May 29, 1996.


64. See e.g., United States v. White, F. Cas. No. 16675 (CC Dist. Col. 1836); United States v. Fonseca-Machado, 53 F.3d 1242 (11th Cir. 1995).
to toll the statute of limitations in Abbas’ case.”

The memorandum further stated:

The hijackers forced the Achille Lauro to sail to Egypt rather than Israel. Abbas’ failure to turn himself over to Italian authorities would probably be sufficient to trigger 3290 by itself. Moreover, he could hardly be ignorant of American efforts to arrest him. The plane on which he was a passenger was forced to land at a NATO base in Sicily by American fighter planes and American authorities only reluctantly allowed Italian authorities to take custody of him there. There is no evidence Abbas has made any effort to make himself available to American or Italian authorities since his departure from Italy, in fact the opposite seems to [be] more readily apparent.

To the best of my knowledge neither Italy nor the United States has requested the Palestinian Authority to hand over Abu Abbas, and he continues as a member of the Palestine National Council.

A number of others responsible for terrorist attacks on innocent civilians, including some who have been convicted, serve in high positions in the Palestinian Authority. Abu Eain, convicted and sentenced to life imprisonment for placing a bomb in a trash can near a bus stop in Tiberias, Israel that killed two sixteen year-old boys and injured thirty-six other children and adults, was released by Israel, pursuant to an undertaking in the Oslo Accords, and is now the Comptroller for the Palestinian Authority.

The mother of Nachshon Wachsman, who was kidnapped and tortured by terrorists before he died, wrote:


66. Id.

67. Following the attack, he fled to the United States and was arrested in Chicago. The extradition proceedings, in which he was represented by Ramsey Clark, a former United States Attorney General, took over two years, including a hearing before a United States magistrate and a United States district court, Eain v. Adams, 529 F. Supp. 685 (N.D. Ill. 1980), and review by the Court of Appeals, Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). For a discussion of the anti-American atmosphere that prevailed at the U.N. at the time and led to a General Assembly Resolution condemning the United States for extraditing Abu Eain, see Allan Gerson, The Kirkpatrick Mission: Diplomacy Without Apology — America at United Nations 1981-1985 (1991), at 77-78, quoted in, Malvina Halberstam, Book Review, 14 CARDOZO L. REV. 407, at 409 (1992).

In October 1994, after being kidnapped and held hostage for six days by Hamas terrorists, our third son Nachshon was murdered. The man who masterminded our son’s kidnapping walks the streets of Gaza freely. Indeed, he was a member of the Palestinian Authority negotiating team who met with the approval of our government. This is an obscenity, a mockery, and a travesty of justice. It is a distortion of the concept of peace.69

Of course there are differences between the prosecution of those responsible for war crimes and crimes against humanity in Bosnia and those responsible for terrorist acts. But, 1) both involve conduct that is criminal under international law and that states are required to prosecute and punish with severe penalties, and 2) both involve offenders in a position to further or impede a precarious peace process.

While the legal obligation to prosecute and the desirability of such prosecution has been the subject of scholarly debate in the context of the conflict in Bosnia,70 and with respect to repressive regimes replaced by more democratic governments,71 there has been almost no discussion of the desirability or legal obligation to prosecute terrorists who can effect the peace negotiations.72 Should we prosecute those responsible for war crimes, crimes against humanity, or terrorism when doing so may impede the peace process?

It is not an easy question. It can be argued, with some force, that it is more important to establish peace than to pursue those responsible for past crimes. We should be aware, however, that a decision not to prosecute those in a position to influence the peace negotiations will not foreclose prosecution in a few isolated cases only. Those responsible for war crimes, crimes against humanity, or major terrorist acts will generally be in leadership positions and, absent complete surrender, as was true for Nazi Germany after World War II, will generally be in a position to further or impede the peace. Thus, a decision to forego prosecution when

it might endanger the peace process would preclude most prosecutions, or at least, the most important prosecutions. Permitting those responsible for war crimes, crimes against humanity and terrorism to go unpunished will undermine the moral force and the deterrent effect of those laws; it will effectively vitiate those laws.

It is a question that should engage the attention of scholars and statesmen, not be decided by default, as is being done in Bosnia by the failure to apprehend those charged, and as is being done with Yasir Arafat and Abu Abbas, by reliance on dubious technical arguments to justify the failure to indict and seek extradition. Supreme Court Justice Breyer recently stated that the importance of Nuremberg was that it established the principle "that persons responsible for inhumanity toward man will be held accountable for their crimes and brought to justice." 73 What we do about bringing to trial Radovan Karadzik, Ratko Mladic, Yasir Arafat and Abu Abbas, will determine our continued commitment to that principle.

INTERNATIONAL HUMANITARIAN LAW AFTER BOSNIA

Jean-Philippe Lavoyer *

To start, I would like to thank Professor Paust for inviting the International Committee of the Red Cross (I.C.R.C.) to participate in this panel. Its subject is indeed closely linked to the I.C.R.C.

In my brief presentation, I would like to comment on the following issues which are related to the theme of this panel: 1) Is present humanitarian law still adapted to the needs of modern wars?; 2) How should war criminals be prosecuted?; and finally 3) How safe can safe areas be?

As most of you know, the I.C.R.C.’s activities are based on the Geneva Conventions of 1949 and the statutes of the International Red Cross and Red Crescent Movement. Its mandate is to protect and assist victims of armed conflicts and internal disturbances.

First, the I.C.R.C. protects and assists the victims in the field. It protects the civilian population, it visits prisoners of war and other detained persons, provides food, medical and other assistance, re-establishes the link between separated family members through Red Cross Messages, tries to find persons who went missing during the conflict, and reunites family members.

Second, the I.C.R.C. is mandated by the international community to act as promoter and guardian of international humanitarian law. Its delegates in the field, which number about one thousand, monitor respect of humanitarian law and, in the case of violations, they intervene with the party concerned. These interventions are made at all levels. The I.C.R.C. seeks to establish a constructive dialogue with all the parties concerned, with governmental authorities as well as with armed opposition groups, which, and this should be underlined, are also bound by humanitarian law.

This dialogue with the parties is the reason why the I.C.R.C. treats its findings and representations in a discreet and confidential way. The principle of confidentiality is thus not an end in itself, but rather a working method. It has its limits: when severe violations of humanitarian law continue even after the I.C.R.C. has intervened, it reserves the right to denounce such violations publicly. The I.C.R.C. has made a more liberal use of this policy in the last few years, in particular, during the war in the former Yugoslavia.

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After these general comments, let me turn to the question of whether present law is still adapted to the needs of modern warfare.

Since the end of the Cold War, the nature of many armed conflicts has changed. Bosnia is a case on point. We have witnessed there, I think in particular of the atrocious policy of ethnic cleansing, types of behaviors which were in complete contradiction with the most fundamental principles of humanitarian law.

In Rwanda and Burundi, ethnic wars have claimed hundreds of thousands of victims, and the present situation in Zaire is extremely preoccupying.

In other parts of the world, such as Liberia, state structures have disintegrated and collapsed to a point where the total lack of discipline and the apparently unlimited availability of light weapons make it impossible for humanitarian organizations to work. Combatants, which often include young children, do not fight for an ideology anymore, but for mere survival.

What lessons should we draw from this grim picture? Is existing law insufficient, and should we therefore advocate new law?

Let me say briefly that the mere fact that a rule is violated does not mean that it is bad. This may sound trivial, but in the ongoing debate, there is a widespread confusion between the quality of the rule and its effective implementation. These are two different things. We are convinced that humanitarian law offers adequate protection. The problem is often a manifest lack of political will to apply the law.

When state structures disintegrate, the problem becomes more specific, as civilian and military command lines, which are essential for the respect of humanitarian law (and law in general), have ceased to exist. There does not seem to be a ready-made solution for this problem. Better law is certainly not a solution, as it would not be enforced. It is then rather the responsibility of states to intervene, as humanitarian actors reach the limits of their work. But this is a political, rather than a legal, issue.

Let me add that these situations of failed, disintegrated states are, at least for the time being, not so frequent. They are certainly much less frequent than people think! Take Bosnia: it was not in the process of disintegration in the sense previously mentioned, even though this argument was often used as an excuse. There was generally no lack of command lines, as the violations of humanitarian law were mainly the result of clear-cut policies. Forcing people to flee had become part of a political strategy. Moreover, the rules of humanitarian law were often well known.

So the problem is often more political than legal. The parties to an armed conflict have to accept more readily the application of humanitarian
law. At the same time, states have to assume their international responsibility and ensure respect for the Geneva Conventions as stipulated in Common Article 1.

At the same time, one should remain pragmatic: the law may need to be developed in certain specific fields. A case in point is the adoption, in May of this year, of a Protocol prohibiting the use of blinding laser weapons. Its Protocol II on land-mines was also revised.

There has also been a debate on whether persons displaced within their own country were sufficiently protected. The representative of the Secretary-General on Internally Displaced Persons, Mr. Francis Deng, has clarified the issue by publishing his Compilation and Analysis of Legal Norms protecting the internally displaced. He came to the conclusion that most of the protection needs of the internally displaced were adequately covered.

Here again, what is lacking is the proper implementation of existing rules: humanitarian and human rights law. Respect of that law would help prevent many population displacements, because it is their violation which forces entire populations to flee their homes.

Let me now turn briefly to the prosecution of war crimes. First, I would like to recall that the Geneva Conventions introduced a system of universal jurisdiction. This means that states have an obligation to prosecute suspected war criminals. It is regrettable that this system has not worked. The ad hoc tribunals for the Former Yugoslavia and Rwanda are an important step. This selective approach is, however, insufficient. There is a need for a permanent international criminal court, as the present impunity cannot last forever.

In the I.C.R.C.'s view, such a court should have the following characteristics:

a) It should be complementary to national courts, the system of universal jurisdiction should remain in place.

b) The court should also deal with internal, armed conflicts, and prosecute those who have committed serious violations of common Article 3 of the Geneva Conventions and of Protocol II of 1977, even though these violations may not constitute grave breaches.

c) The court should be impartial and independent; the prosecutor should be able to open investigations on his own initiative, and the court should not have to obtain permission from concerned states.

d) The court should be independent from the Security Council, which should not be able to block the activities of the court.

In order to have the system of universal jurisdiction work, it is essential that states adopt proper national legislation allowing for the prosecution of war crimes. In order to assist states, the I.C.R.C. has recently set up an *Advisory Service*. Lawyers based at I.C.R.C. headquarters in Geneva, as well as experts based in the field, seek to assist states in adopting such national laws.

To conclude, I would like to say a few words about the concept of *safe areas*. When speaking about Bosnia, one will of course remember the tragic events surrounding the town of Srebrenica. Srebrenica had, though, been declared a *safe area* by the Security Council. The question we have to ask ourselves is: How safe can *safe areas* be?

When discussing this issue, it is important to clarify the terms being used, as there exists quite some confusion.

The Geneva Conventions and their Additional Protocols contain several rules about the establishment of *protected zones*. They are intended to protect the military sick and wounded, or the civilian population, against hostilities. I cannot go into the details of such zones here, and shall limit myself to say that these zones are based on the consent of the parties. In addition, they have to be *demilitarized*, which necessitates a strict control of the concerned zones.

In practice, there have been great difficulties in establishing such *protected zones* because of the lack of trust between the fighting parties. The I.C.R.C., on its part, has managed to create some *neutralized zones*, though limited in space and in time.

The *safe areas* established by the United Nations are very different in nature. They are *imposed* on the parties, as it happened in the former Yugoslavia, on the basis of Chapter VII of the United Nations Charter. The consequence of this is that these zones are very fragile, and need a very strong protection force in order to be implemented. This was not the case in Bosnia, where the United Nations protection forces were clearly insufficient. Moreover, the zones in Bosnia were not even demilitarized, and could, therefore, be seen as legitimate military targets.

We know the sad results. Not only were the people in these zones not adequately protected, but, worse, the civilian population was given a *false* sense of security and protection.

What lessons should we draw from this experience?

1) It is very difficult and risky to establish *safe areas*. That means that one has to think twice before acting.

2) If special protection zones are to be created, the principles and rules of humanitarian law should more readily be taken into account.
3) If they have to be imposed, which may be justified in certain instances, they should be *completely demilitarized and effectively protected*. And, last but not least,

4) Humanitarian law protects the civilian population *as a whole*; zones under special protection should under no circumstances undermine this general immunity.
TRIAL OF THE CENTURY? ASSESSING THE CASE OF DUSKO TADIC BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Mark S. Zaid *

It is more than bitter irony that nearly fifty years to the day after the International Military Tribunal in Nuremberg rendered its judgment, we are here today analyzing the first international war crimes trial held since the end of World War II. The trial of Dusko Tadic, an alleged war criminal from the former Yugoslavia, concludes within the month. After seventy-four trial days and eighty-one witnesses, the International Criminal Tribunal for the Former Yugoslavia (ICTY) is preparing to hear closing arguments now scheduled to begin on November 25, 1996. A decision is expected by early February 1997.

The ultimate fate of Tadic may be as yet unknown, but the events that have transpired over the last six months enable us to offer preliminary analysis. The legacy of the ICTY is finally beginning to form. Unfortunately, the legacy developed thus far offers a very mixed picture; indeed, some might say a bleak one. But before I examine the particular details of the Tadic trial, I believe we first need to understand the backdrop in which this Tribunal was created and why, for to understand the significance of the Tadic case requires a lesson in history.

What was it that awakened the outrage in people after fifty years that the name of Nuremberg once again pursed our lips? After millions of people had died in countless civil wars, insurrections and revolutions, why suddenly did a cry for justice arise? The concept of an international criminal court had been a matter of discussion for decades. One might

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assert that the movement to create an international criminal court gained tremendous strength following Saddam Hussein's 1990 invasion of neighboring Kuwait and the senseless slaughter of Shiite and Kurd minorities. But it was the color pictures — both on television and in magazines — of Serbian concentration camps, grotesquely reminiscent of places like Auschwitz and Dachau, that was just too much for the world to bear. Word of mass deportations, exterminations, and systematic rapes spread throughout the international community. And then the magic words were spoken—ethnic cleansing.

The world was compelled — if not forced — to act. On February 22, 1993, the United Nations Security Council voted to create an international tribunal to prosecute crimes committed in the Former Yugoslavia.1 Three months later the Court was established, at least on paper.2 And with the blessing of the Security Council people across the globe spoke of another Nuremberg. But the ICTY is not another Nuremberg, and much of the frustration expressed throughout the world following the near completion of the Tadic trial is likely traced to this inappropriate comparison.3

Several immediate differences are readily and significantly apparent. First, the Germans on trial at Nuremberg did not deny the accusations, but argued essentially that their individual actions “[w]ere justified or outside of their individual responsibility.” Tadic’s sole defense has been one of alibi — he did not commit the charged offenses.5 This fact alone sets the stage for a very different trial. Second, the Nuremberg defendants were leaders, high-level officials of the Third Reich. For example, one of the smaller figures on trial was Hans Frank who was the Governor-General of Poland. Ninety percent of all Jews were exterminated under his watch. While Tadic is accused of several

3. Public perception, probably more than anything else, has cast the ICTY in the shadow of Nuremberg. Within the prosecution’s office there was little doubt. Minna Schrag, then a senior trial attorney for the Tribunal stated, “[t]here’s no question that this is no Nuremberg.” William W. Horne, The Real Trial of the Century, THE AM. LAW., Sept. 1995, at 5, 65.
4. “For example, when pleas were required from defendants, Goering had planned—but was not permitted—to read a speech declaring, in part, that ‘I accept the political responsibility for all my own acts or for acts carried out on my orders . . . I must . . . reject acceptance by me of responsibility for acts of other persons which were not known to me; of which, had I known them, I would have disapproved and which could not have been prevented by me anyway.’” ANITAUSA AND JOHN TUSA, THE NUREMBERG TRIAL 150 (1986).
counts of murder, persecution, and war crimes, he had no involvement with development of policy or control over those who were to carry out any such policies.°

In many ways Nuremberg can perhaps be considered or characterized as the parent of the ICTY, keeping in mind that while there is a relationship between parents and children, they can have very different traits and personalities. Justice Robert H. Jackson, the Chief Prosecutor for the International Military Tribunal (IMT), invoked Justice Cardozo's statement "[t]he power of the precedent is the power of the beaten path" in referring to the chief obstacle facing the Nuremberg Court. In creating the ICTY, a beaten path, of course, existed that could be traced directly back to the IMT. From there, however, the ICTY must create a path of its own, one very distinct from Nuremberg.

Many of the problems and criticisms faced by the ICTY start with Nuremberg and the unfair expectations that arose from its ashes. Twenty-two major Nazi defendants were tried by the four victorious Allied Powers, including Hermann Goering, Julius Striecher, Hans Frank and Wilhelm Frick. Nearly all of the high-level German officials who survived the war were present at Nuremberg and on trial. But it was not only those who survived that were on trial. Nuremberg placed on trial the ghosts of Adolf Hitler, Heinrich Himmler, and other leading architects of Nazi Germany. Those that were responsible for the deaths of millions were judged at Nuremberg whether they were physically present or not.

Goering stated before the trial began that it was a political court. By that he meant the trial was merely one for show; each of the defendants' fate had already been sealed before the first piece of evidence was even introduced. Goering was right, but wrong in his application. The IMT was political, just as is the ICTY and the forthcoming permanent International Criminal Court (ICC), but they are or were political necessities, not political trials. These courts were, and will be in the case

6. Another significant difference is that the Serbs, unlike the meticulous Germans of World War II, kept no written records of their deeds. Therefore, the evidence against Tadic is almost entirely based on eyewitness testimony.


8. Goering stated that "[a]s far as the trial is concerned, it's just a cut-and-dried political affair and I'm prepared for the consequences. The victors are the judges . . . I know what's in store for me." TUSA & TUSA, supra note 4, at 13.

9. Of course, at first, the simple political solution expressed by the British and Russians in the waning days of World War II was to simply execute the German leaders. ROBERT E. CONOT, JUSTICE AT NUREMBERG 14 (1983). Fortunately, the position of the United States to convene an international court prevailed.
of the ICC, created to judge those who can not or should not be judged in national courts for political reasons.

Why was Tadic then, as the first alleged war criminal, brought to trial before an international criminal court? What is the legacy of Tadic’s trial? On a macro level, the ICTY presents a significant achievement in the development of the law of nations and individual and state criminal responsibility. On the micro level, so long as Tadic remains the Tribunal’s sole voice, it borders on failure.  

This takes me back to my initial observation. From the beginning we expected the ICTY to be another Nuremberg. Before a panel of three judges from three different countries would occur the prosecutions of Nuremberg-like defendants. Mass murderers, killers of defenseless women, helpless children, infirm elderly, and members of minorities — those types of people were Nazis. We expected swastikas and tales of concentration camps. We saw the decimation of Yugoslavia and the horrors of Serb concentration camps on television. Someone must be held accountable. Instead, we got Tadic.

If future war criminals are to learn anything from Tadic, it is not to vacation in a region known for war refugees. Tadic, as you recall, was arrested in February 1994 by German police while he was vacationing in Germany to visit his brother. Refugees from Serbian concentrations camps recognized Tadic as one of their tormentors. Tadic, however, is a small fish. I assert this statement for the first time in a public forum. It is a term that ICTY Chief Prosecutor Justice Richard Goldstone resented hearing during the beginning stages of the proceedings against Tadic, and rightly so. Tadic was accused of horrendous atrocities including war crimes, persecution, and deviant sexual mutilation. The latter charge being a very Nazi-like crime. To his alleged victims, Tadic, of course,

10. At least one commentator has asserted that the Tadic trial may be the “most important criminal trial in this century . . . because it is a chance for the world to redeem the international rule of law and prove it learned something from the horrors of World War Two.” Horne, supra note 3, at 5, 6 (emphasis in original). Of course, this statement was written months before the trial began.

11. Indeed, it was initially believed that “if the prosecutors are even half-right, Dusko Tadic . . . is a perpetrator of the worst sort.” Horne, supra note 3, at 6. The American Bar Association Journal pointed out that “Tadic is charged with what history usually associates with the atrocities of the Nazis: war crimes and crimes against humanity.” James Podgers, The World Cries for Justice, A.B.A. J., Apr. 1996, at 52.

12. Tadic was accused of raping one woman, murdering 13 men, committing repeated acts of torture, and of involvement in a brutal castration incident. In all, 132 counts were originally levied against him. Podgers, supra note 11, at 65.


was no small fish. That is why I believe many of us in the international community avoided the term, perhaps more out of respect for the victims and their families than any other reason. But I believe many of us harbored doubts inside as to what was to emerge from the prosecution of Tadic. We truly hoped that the prosecution of Tadic would once again send a Nuremberg-like message throughout the world — war criminals beware!

To some extent the Tribunal can not be faulted for what has transpired. Tadic was chosen as its first case for several reasons, some of which were realistically out of its control. First, the Prosecution was under intense pressure to begin a trial — any trial. After being created in May 1993 the Tribunal sat for months with a full contingent of judges drawing comfortable salaries and no prosecutor, which was acceptable since there were no defendants. Millions of dollars for the Tribunal's budget were being fought over and eventually allocated for nothing. Therefore, it was time to live up to expectations and begin a trial. In this vein, Tadic's arrest in Germany was a fortuitous event.

Second, in investigating the allegations surrounding Tadic's activities, the German authorities were beginning to interfere with the ICTY's investigation of the Omarska region. German investigators were speaking to the same witnesses, gathering evidence, and interfering with the efforts of the Tribunal's investigators. This was becoming a real problem. As a result the Prosecutor acted, and on November 8, 1994, Justice Goldstone formally requested that Germany defer prosecution of Tadic to the Tribunal.

Having watched the trial closely from the beginning, my conclusion is that Tadic was not worthy of international prosecution. Had
circumstances been different, he should have been left for the Germans to prosecute. Those who should be prosecuted by an international tribunal are those whose prosecution would make a significant difference in the international community. The Tadics of the world will never be affected by this prosecution. Primarily because it is likely that a person such as a pre-conflict Tadic is fairly law-abiding and does not know their nature could permit a transformation into an alleged war criminal until after the event occurred. What is it that suddenly turns one's neighbor and best friend into an alleged murderer? Why is it that one day someone decides to commit a murder based on ideological or ethnic beliefs? That answer is beyond my expertise, but it is my contention that is not necessarily those who seemingly change overnight for no apparent reason that should be brought to trial before an international tribunal, but rather those who caused the igniting spark that set that transformation in motion.

Let me examine briefly the events that transpired during the May-November 1996 trial of Dusko Tadic.

1) Rape Charge: The sole rape charge against Tadic was withdrawn early in the proceedings. This was obviously very disappointing to many. The alleged victim, despite assurances provided by the Prosecutor's Office, refused to testify. Such occurrences, of course, are not uncommon in rape cases and while the fact can not be viewed as the fault of the Prosecution, it nevertheless harmed the case — particularly the case of public perception — against Tadic.

2) Sexual Mutilation Charge: In the indictment, Tadic was alleged to have participated in ordering or overseeing the sexual mutilation of a prisoner by having one male inmate bite off the testicles of another who subsequently died. Of all the charges levied against Tadic, this was the true Nazi-like crime. Yet, as far back as 1994, I recall discussions with colleagues who participated in the United Nations investigation of war crimes in the Former Yugoslavia which preceded the creation of the ICTY. They expressed grave doubts regarding the inclusion of this charge against Tadic. It was not Tadic, I was not told, who was involved in the incident. Unfortunately, it was this charge that so intrigued the international community. As much as we all shuddered at our mental pictures of how the incident was being described, we relished in the charge being proven true. This was the

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19. The president of the Tribunal, Antonio Cassese, has publicly stated that "[m]inor thugs who rape or kill, without command responsibility, should be [handled] by the state courts." Horne, supra note 3, at 61.

20. Tadic was accused of participating in the death of Emir Karabasic who was allegedly one of his best friends.
act of a true war criminal. Again, it was a Nazi act. And when the Prosecution failed to even link Tadic to the crime scene, we were very disappointed, although perhaps not yet dejected. True, the case had now lost a great deal of its glamour, but, after all, Tadic still stood accused of ethnic cleansing and murder. Soon, however, these charges as well would seem to be slowly vanishing.

3) Murder Charges: Tadic was accused of participating or committing over one dozen murders. The Prosecution, however, found it difficult to directly link Tadic to almost all of them. Although several witnesses testified that Tadic beat them severely, a bully — which is the picture of Tadic that has seemingly developed during the course of the trial — justifies an international prosecution even less so than a murderer. Only one witness truly provided strong eyewitness testimony that Tadic had committed murder. Nihad Seferovic stated categorically that Tadic had slit the throats of at least two men. In fact, he had seen it happen. Quite compelling testimony, but one small problem. The indictment against Tadic states that Tadic shot the victims to death. The two types of death seem so glaringly different that one is compelled to seriously question the discrepancy and perhaps discount the eyewitness.

4) Witness L, Draco Opacic: As the Prosecution’s case seemed to be slowly collapsing, a quick burst of strength appeared late in the case in the guise of Witness L, of whom little we were initially told. A young man who had previously pled guilty to war crimes in Croatia and whose identity was withheld from the public, he appeared to tell the Tribunal of horrific accounts that directly implicated Tadic in mass murder. Tadic, Witness L testified, had ordered him to kill ten people and when Witness L refused, Tadic killed several of them himself right in front of witnesses. Rapes were committed in public as well. Tadic, again, was becoming the Nazi we hoped to see prosecuted. But something was glaringly wrong from the start. Witness L set forth some very damaging and specific allegations which alone would likely result in Tadic receiving a life sentence. Yet not one — not one — of these allegations was contained in the indictment. It was too good to be true, and it was. Witness L, or Draco Opacic, as we later discovered his name to be, was completely lying. The entire story was a fabrication made up at the insistence, according to Draco Opacic, of the Bosnian government. Draco
Opacic had never met Tadic and none of the events ever happened. Another devastating blow to the Prosecution.\textsuperscript{21}

In closing his final report on Nuremberg, Justice Jackson wrote President Truman that:

it would be extravagant to claim that agreements or trials of this character can make aggressive war or persecution of minorities impossible, just as it would be extravagant to claim that our federal laws make federal crime impossible. But we cannot doubt that they strengthen the bulwarks of peace and tolerance.\textsuperscript{22}

It is undoubtedly unfair to rest the legacy of the ICTY on the shoulders of Tadic. But for now, unfortunately, the Tadic case conveys the message of the ICTY — its song perhaps. It is a song very much out of tune, but one that has just begun and will hopefully change and evolve. Tadic is but the first to stand before the Tribunal. How many others will follow, however, is unclear. And whether the leaders of the Yugoslavian conflict such as Radovan Karadzic and Ratko Mladic, both of whom have been indicted by the ICTY, or Slobadon Milosovich, will ever be brought before the ICTY for a judgment of their guilt or innocence remains a difficult question to answer. Yet if the leaders who served as the spark to encourage people such as Tadic are not be brought before this international criminal tribunal, then the ICTY will never live up to the expectations, however unfair they may be, of Nuremberg.

\textsuperscript{21} However, it must be said that the Prosecution acted with utmost integrity and forthcomingness by its acts to denounce Witness L and request that the Court disregard any of the testimony introduced therefrom.

22. DEP'T ST. BULL., \textit{supra} note 7, at 775–76.
A FRONTE PRAECIPITIUM A TERGO LUPI:
TOWARDS AN ASSESSMENT OF THE TRIAL OF
DUSKO TADIC BEFORE THE ICTY

Raymond M. Brown

"What man has done to man in the former Yugoslavia strains the most agile capacities of human reason."
Prosecutor Grant Nieman's opening statement in the Tadic case.

"My readers don't care about this stuff!"
Parting comment of American reporter leaving the Tadic trial.

The voyage towards an evaluation of the first international war crimes trial in fifty years is perilous.

# "Between a rock and a hard place."
+ This essay is based on two presentations made to ILA Fall Weekend '96. The author was originally asked to address "The trial of the Century? Assessing the Case of Dusko Tadic Before the International Criminal Tribunal for the Former Yugoslavia." He also spoke about "Global Media: International Images from OJ to Dusko Tadic" as a substitute for Steven Brill, CourtTV's founder and architect of its coverage of the Tadic trial.

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Any legal journalist making this sojourn is buffeted by contradictory theories of the trial's significance. These treacherous currents are best navigated from a seat in the gallery of the International Criminal Tribunal for the former Yugoslavia (ICTY).

I. THROUGH A GLASS DARKLY

For a portion of the trial of Dusko Tadic, I occupied a gallery seat at The Hague, separated from Tadic by a glass wall, 20 feet, a linguistic chasm, and war crimes charges.¹

Tadic is a Bosnian Serb cafe owner from the town of Kozarac in the Prijedor District of northern Bosnia. He was charged with beating and killing Muslims and Croats in Prijedor from May through December of 1992 during the Serb offensive in Bosnia. Prosecutors contend that he subsequently tortured and killed inmates in the Serb-run detention camps at Omarska, Trnopolje, and Keraterm.

In defense, Tadic's lawyers have offered an alibi. They say he was absent when crimes were committed in Kozarac and surrounding areas. They deny that Tadic was a Serb nationalist or affiliated with Serb paramilitary organizations.

Regardless of the trial's outcome,³ it is obvious that Tadic was an insignificant personage in the war. Consequently, the principal dilemma confronting the legal journalist is to put the Tadic trial in context. What larger meaning can be attached to the trial of a minor figure in a war which destroyed a nation, produced 250,000 casualties, and disgorged millions of refugees?

In mute response the gallery seat almost compels its occupant to explore whether the Tadic trial is a harbinger of a system of fair trials for all accused perpetrators of war crimes and genocide. Certainly many in the human rights community have hailed the ICTY and the Rwanda

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¹. The Courtroom Television Network provided a figurative gallery seat through its "gavel to gavel" coverage of most of the prosecution phase of the trial. During the defense phase it created War Crimes on Trial to provide highlights and expert commentary. After the first month of the proceeding the author participated in CourtTV's coverage of the trial from New York.

². Tadic was tried on superseding Indictment IT-94-1-T charging him with 34 counts of Crimes Against Humanity, Grave Breaches of the Geneva Convention of 1949, and Violations of Laws and Customs of War. The indictment alleged that Tadic engaged inter alia in "willful killing, torture or inhumane treatment, inhumane acts, etc.;" counts 2 – 4 charging Tadic with Forcible Sexual Intercourse against witness "F" were withdrawn on the first day of trial because of the unwillingness of the alleged victim to testify.

³. A verdict is expected in late March of 1997.
(ICTR) Tribunals as reincarnations of the spirit of Nuremberg and as catalysts for the creation of a permanent international criminal tribunal.4

Weighed against that optimistic view is a mountain of trenchant criticism hurled at The Hague and at the nations theoretically supporting the ICTY's mission. Most of this criticism reflects the Byzantine nexus between politics and international justice.5 Some challenges are however, more cogent than others.

The most telling criticism of the early proceedings came from an unexpected source, the President of the Tribunal. While the Tadic trial was underway Antonio Cassese journeyed to America to address a gathering commemorating the Nuremberg trials. He told this group, which included representatives of the press that, "[i]f the major powers of the world are not consistent and don't make arrests in the next ten months, we are prepared to pack up and go home. We think our job is to try leaders, not small fry."

Cassese's comment touched upon the one point on which virtually all tribunal critics agree. Dusko Tadic is a small fry!

As the United States presidential election ended and the Tadic trial drew toward its close even spokesmen for the western alliance were hard pressed to justify the specter of a small fry like Tadic facing the consequences of Yugoslavia's bloody demise while more than three score Serbs and Croats indicted on more serious charges found refuge and employment in Croatia, Serbia, and Republika Srpska.8

4. See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, IN THE NATIONAL INTEREST 1 (Quadrennial Report on Human Rights and U.S. Foreign Policy 1996). INT'L CRIM. CT. MONITOR (NGO Coalition for an INT'L CRIM. CT.), July/Aug. 1996, at 12. See also the presentation at ILA/95 of Evan T. Bloom, Comments on the International Criminal Court, 2 ILSA J. INT'L & COMP. L. 649 (1996). Although the proposal for a permanent court has long been moribund, there is now a draft statute for such a court (ICC) and a U.N. sanctioned diplomatic conference on the subject scheduled for the coming year.


7. The Coalition for International Justice released a report indicating that many of the 67 Hague indictees not in custody roam freely and are gainfully employed in areas subject to Serb
The ICTY will not garner history's blessing if its primary legacy is the sacrifice of the Dusko Tadić as propitiation for the sins of those indicted for war crimes but never tried. However, while the international community tries to unravel its geo-political Gordian knot, some defendants will continue to face trial and possible imprisonment before the ICTY. As long as these parallel processes continue, the proceedings of the Ad Hoc Tribunals constitute the most important legal story of the decade.

However, the legal journalist who reports on the tribunal's work or tries to translate the competing analyses offered by the cognoscenti must do so in the face of the blasé reactions of American citizens. The observer faced with this huge abyss between these historic events and the gaping American yawn which has greeted them must confront two questions: 1) Is the trial a huge leap forward or a huge fraud? and 2) Why don't Americans seem to care?

Together these questions reveal a gap in America's public discourse on an issue of critical importance. They raise serious doubts about the sacred mantra of America's criminal justice system, that punishment must be swift and certain to deter violence. The fact that Americans seem uninterested in violations of this sacred tenet in circumstances involving the deaths of hundreds of thousands is discouraging.

In the ordinary citizen's defense, it must be said that little effort has been expended by the American media to present the Tribunal's story. International justice like its domestic cousin is ultimately dependent on and Croatian control. Steven Lee Myers, Rights Group Says Bosnian Suspects flaunt Freedom, N.Y. TIMES, Nov. 26, 1996, at 4. Ironically, it has long been known that many of these men remain part of the police apparatus in their refuges. In light of IFOR's refusal to make arrests, Lawrence Weschler, who occupied the seat next to mine at The Hague for a time, has posed an intriguing question: Are they supposed to arrest themselves? The coming crunch in The Hague, THE NEW YORKER, Dec. 12, 1996.

8. Anthony Lewis, writing for the New York Times in two recent columns (Oct. 28 and Nov. 11, 1996) cites the following: Former United States Ambassador and current head of Mission to the Organization for Security and Cooperation in Europe, Robert Frowick as saying "[t]he whole peace process rests on this issue, . . . going in there and arresting those wanted for war crimes." "There will not be a better moment than right now," Mr. Frowick said. "We have to have some mustering of a greater will." James D. Bevan, First Secretary of the British Embassy in Washington, for the proposition that "Bosnia won't be a normal country until war criminals are brought to justice" and Former US Assistant Secretary of State Richard Holbrooke as admitting, "[w]e face an unusual moment in history." "Not since the years 1945 to 1949 has the United States had such an opportunity to act in the world." Prof. Charles Ingrao of Purdue University, a political and diplomatic historian specializing in Central Europe observing Radovan Karadžić driving through the parking lot of the Pale headquarters of the International Police Task Force and being told by IFOR official that arresting him "is not in our mandate . . . . Our guys are afraid we're going to run into Karadžić."
Brown

political will. Popular perception and media coverage are crucial to the larger issues which surround the Ad Hoc Tribunals and the Tadic trial.

II. VOX POPULI

The commencement of the Tadic trial in May saw the small staff of the ICTY overwhelmed with requests for media coverage. American television networks were joined by electronic colleagues from throughout the world. Print representatives were so numerous that the office of the Registrar resorted to a pass system to control access to the suddenly precious seats in the press gallery. Eventually, the overflow portion of the media was exiled to a tent on the courthouse lawn. An experienced colleague described the gathering as "a genteel media madhouse, O.J. with accents."9

The media frenzy would not last long. Within a week this torrent had dwindled to an intermittent stream leaving CourtTV, among a handful of American radio and print outlets. During the second week of the trial prosecutors called Muslims and Croats who had been tortured and who had witnessed rapes and murder in northern Bosnia. In the midst of their dramatic testimony an American reporter in a nearby gallery seat, one of the few from a major daily, appeared to stir impatiently. Finally he muttered, "my readers don't care about this stuff" and stalked off into the cloudy Dutch afternoon.

The elevation of hype and histrionics over historically sound interpretation is not restricted however, to daily newspapers and the electronic media.

III. THE TRIAL OF THE CENTURY

The phrase Trial of the Century was posed as a general computer research query shortly before the of the Tadic trial. It yielded curious results. Most responses referenced the trial of California v. O.J. Simpson.10 Numerically, the Nuremberg trials rated an honorable mention, as did the Rosenberg, Sacco and Vanzetti, Leopold and Loeb, and Charlie Chaplin's paternity proceedings. The search yielded only one reference to Dusko Tadic's upcoming trial.11

9. Terry Moran, anchor at CourtTV Prime Time Justice, was at the Hague for the opening week of the trial.
10. This included an exciting offer to purchase copies of the SImpson wedding video.
11. William Horne, The Real Trial of the Century, AM. LAW. (Published by American Media Lawyer). There were a number of subcategories unconvered by this query including Trials of the Century that Never Were (Tawana Brawley; the settled Westmoreland v. CBS); Trials of the Century for other countries (e.g. The People's Republic of China's trial of the 'Gang
Undeterred by this result, an Internet search was made at the end of the Tadic trial. (In fairness it should be noted that the closing arguments of the Tadic trial took place while O.J. Simpson was testifying in his civil case.) In a deliberate attempt to fudge the test, the names O.J. Simpson and Tadic were substituted for the phrase Trial of the Century. Despite this change in methodology the results were equally discouraging. Using several search engines the ration of hits overwhelmingly favored Simpson. More discouraging, many of the Tadic hits referred to a scientific treatise by a physicist named B. Tadic.12

It is too simple to dismiss this phenomenon as a uniquely American preference for the pornographic and the sensational. Even the fact that the competing affair Simpson has struck sensitive nerves along America's racial divide and at the synapses of its newfound focus on domestic violence is not sufficient explanation.

Perhaps closer to the mark is a concern that ethnic strife remains a frightening possibility in America and a detailed inquiry into its dynamics a painful exercise. Additionally, there is the fact that witness testimony through interpreters (and by court order, occasionally with their faces obscured) does not create a visually scintillating image for television.

A significant factor also is the apparent disregard shown by the prosecuting team for sustaining the world's interest and attention.

IV. THE PROSECUTION PLODS ON

"What man has done to man in the former Yugoslavia strains the most agile capacities of human reason."

Prosecutors commenced the Tadic trial with stirring rhetoric. However, their choice of a premier witness tossed a wet blanket over the electronic eye anxiously awaiting the fulfillment of their opening promises.

The prosecution summoned James Gow, a professor of War Studies from the University of London who offered an exhaustive history of the Balkans. Gow served important strategic purposes although there were times when he appeared to try the judges' patience.

Of primary importance was his opinion that Serbia, under the leadership of Slobodan Milosevic, formed an alliance with the Bosnian Serbs, to wage an international conflict and execute a policy of ethnic
cleansing against Muslims and Croats. This testimony and the subsequent factual support from other policy witnesses permitted the prosecution to satisfy threshold jurisdictional requirements.

Gow's views did not go unchallenged. Defense co-counsel, Alphonse Orie, made his first attempt at a common law style cross examination with Gow. His strongest attack was aimed at the most dramatic piece of demonstrative evidence offered through Gow, scenes from the BBC film, The Death of Yugoslavia, for which Gow served as a consultant.

Gow emphasized the film's depiction of Radovan Karadžić's infamous speech to the Bosnian Parliament declaring that "[y]ou Muslims, will face extinction." Orie almost forced Gow to concede that certain nuances of timing, context, and linguistic interpretation (which the witness omitted on direct examination) constituted a significant qualification of the prosecution's view that the speech was a clarion call to genocide.

Later in the trial, the defense called its own expert witness who testified that the conflict was a civil war which began with the decision of the Slovenes to withdraw from Yugoslavia. Tactically, the most interesting effect of Gow's testimony was on cross examination of alibi witnesses called five months later by the prosecution.

13. In the Yugoslav context this term has been defined to mean “rendering an area ethnically homogenous by using force or intimidation to remove from a given area persons from another ethnic or religious group.” FINAL REPORT OF THE UNITED NATIONS COMMISSION OF EXPERTS - ANNEX IV - THE POLICY OF ETHNIC CLEANSING.

14. During the trial prosecutors called 81 witnesses. Fifteen of the first 16 were expert or lay witnesses called to establish the dominance of the Yugoslav Army (JNA) and of Serbian paramilitary and police forces in the warfare in Northern Bosnia, as well as detail the existence of the Policy of ethnic cleansing. They came to be known as policy witnesses.

15. The jurisdictional requirements are: 1) To establish that this was an international conflict in order to prove Grave Breaches of the Geneva Convention of 1949 against Tadić and 2) To show that Tadić's alleged crimes were part of a "widespread and systematic" attack on a civilian population, thereby constituting Crimes Against Humanity.

16. After a lengthy contretemps during which Orie tried again to get Gow to concede that all of these variables constituted a significant qualification of Karadžić's extinction statement, Judge Ninian Stephen of Australia pounced as he had before (politely but firmly) saying, "[t]he witness has answered yes to a degree." Orie also confronted Gow about various Security Council resolutions and memoranda attempting to force him to concede that Slobodan Milosevic wanted to withdraw the JNA from Bosnia, but was prevented from doing so by Bosnian troops and by the refusal of General Ratko Mladić to cooperate. On these points Gow adamantly refused to concede ground offering his own interpretation of the U.N. documents.

17. Robert M. Hayden is an associate professor of anthropology at the University of Pittsburgh whose specialties include Yugoslavia and Eastern Europe. He placed less emphasis on Serbian responsibility for the Yugoslav conflict saying that civil war was inevitable after the 1991 Plebiscite and the Slovene decision to secede from Yugoslavia.
defense. Each witness who testified on direct examination that the defendant never attacked Muslims and Croats in northern Bosnia, was hard pressed to explain where all of his former Muslim neighbors had gone. If the judges believe Gow and the other policy witnesses they must entertain serious doubts about the candor of these defense witnesses and perhaps even of Tadic himself.

Despite Gow's strategic importance his appearance as the first witness called by the prosecutors partially explains the flight of the media from the Hague. Gow testified with a dry, academic, almost patrician aloofness. Aficionados of international law and Yugoslav history would undoubtedly overlook his manner. To everyone else in the world he was a crashing bore.

This raises the question of whether prosecutors should have cared that they were driving off one of the largest television audiences in history. It can be argued that the prosecution's exclusive function is to try a case, without concern for public perception and response. However, Richard Goldstone, then Chief Prosecutor for both Ad Hoc Tribunals expressed a contrary view shortly before Tadic's trial began:

I have no doubt that in any country, no less in an international court, the media is a partner in the whole criminal justice system. If people in a country are not told what their criminal courts are doing, then the deterrent aspect of criminal justice is going to fail. Its just not going to be there.19

Any dispute over the prosecution's continued lack of concern for the dramatic structure of its case cannot be resolved until the current prosecutors are free to speak publicly. However, faced with the charge that they cheated history and failed pedagogically, they might cite in their own defense one powerful precedent. The proceedings a half century ago in Nuremberg apparently caused the world and many trial participants to

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18. The defense called 40 witnesses, most of whom supported Tadic's alibi. Those testifying for the defense included the defendant's wife and brother.

19. CourtTV interview with Richard Goldstone, (Feb. 26, 1996) (discussing the role of courtroom cameras). In another interview Cherif Basiouni, Chairman of the U.N. Commission of Experts on Yugoslavia, Oct. 26, 1995, argued that trials like those before the ICTY serve multiple purposes. "When you have so many people who have been killed, who have been tortured, who have been raped, you've got to be able to at least say 'this is what happened.' Victims need to have a recognition of their victimization. That is the first step towards establishing peace." (Interviews by Terry Moran).
doze between Justice Robert H. Jackson's dramatic opening statement and the screening of shocking concentration camp footage.²⁰

Whether justified or not the decision to start with James Gow meant that most cameras and much of the world's attention were absent during some of the most dramatic testimony ever offered in a modern courtroom.

Gow was followed by Bosnian Croats and Muslims who had served either in public office or in the Yugoslav military or security apparatus prior to the fall of 1991. They described the Serb military buildup and subsequent spring offensive in 1992. Their stories included harrowing tales of torture, brutality, friendship, heroism, and incredible ethnic animosities.

Men from Bosansi Samac,²¹ Brcko,²² Vlasenica,²³ Rogaltica,²⁴ and elsewhere described the carefully balanced power sharing arrangements between Serbs, Muslims, and Croats constructed after the election of April 1990. They told of how the SDS,²⁵ the JNA, and undisciplined paramilitary organizations²⁶ destabilizing these structures, disarmed the local militias, and began brutalizing Muslims and Croats.

These witnesses sometimes sought refuge in words like indescribable, unspeakable, or unimaginable. However, they ultimately recounted acts of torture in painful detail. They testified about being beaten until their urine ran red with blood, watching bulldozers dig holes so that meat wagons full of bodies could unload their grizzly cargo, and of helplessly observing the repeated rape of young Muslim women.

²⁰ "During the opening weeks, the pace of the [Nuremberg] trial was slow . . . the documentary evidence - reams of it - at times had judges yawning and the defendants themselves nodding off." Robert Shnayerson, Judgment at Nuremberg, SMITHSONIAN, Oct. 1996, at 132. Also note that "[Nuremberg] got so repetitious," recalls Harold Burson, then radio correspondent for the Armed Forces Network, "[i]t was like the O.J. trial, where you got surfeited with DNA information you didn't really understand." Tom Post, The Trial of the Century, NEWSWEEK, Nov. 6, 1996, at 56.

²¹ Dragan Lukac and Suljman Tihic.
²² Ibro Osmonovic.
²³ Ibro Osmonovic
²⁴ Elvir Pasic.
²⁵ Isak Gasi, a witness from Brcko, told of two appearances of Radovan Karadzic in his hometown where the Bosnian Serb leader made ethnically inflammatory speeches.
²⁶ Witnesses described the activities of Captain Dragan's Red Berets and Arkan's Black Caps and paramilitary forces wearing Tiger Head patches, patches with Serbian slogans, the Cetnik "Eagle, Skull and Cross Bones," and the famous 4 S's, worn in the Brcko area by the Black Panthers. For more detail on this subject see Military Situation Section of the Final Report of the United Nations Commission of Experts - Annex IV - The Policy of Ethnic Cleansing.
Their testimony was permeated with descriptions of efforts made to humiliate prisoners. Sulieman Tihic, a judge, told of being taken to Serbia where he and others were forced to kiss the picture of Draza Mihailovic, a World War II Serbian hero, or risk being beaten. He spoke of being forced to clean toilets with his hands, made to watch other detainees perform oral sex on each other, and of having an Arkan soldier stop torturing him long enough to call his girlfriend in Belgrade on the telephone so that she could listen. Isak Gasi told of watching a detention camp guard carving a cross into the forehead of a Muslim prisoner.

V. THE LOST EYES OF OMARSKA

The American media focused twice on the Yugoslav drama as if it were watching the opening and closing acts of a bizarre tableau noire. These fleeting moments of intense interest occurred during the discovery of the detention camps in August of 1992 and during the slaughter which followed the collapse of the United Nations safe haven at Srebenica in July 1995.

Of the two events, the exposure of Omarska and other camps drew most attention. This was perhaps because unlike Srebrenica, for which the international community bears much responsibility, the outside world did not have to include itself in the cast of camp villains. Additionally, images from the camps caused many to cast eerie glances at Dachau and Auschwitz.

At Tadic’s trial the judges heard days of testimony about the Bosnia camps without ever hearing the defendant’s name. Prosecutors introduced the subject by calling a second expert policy witness a stern Norwegian Judge named Hanna Sophie Greve.

27. The defense spent little time cross-examining policy witnesses except to suggest that Muslims in Prijedor had more weapons than the hunting rifles and World War II pistols described by prosecution witnesses.

28. The first western reporter to alert the world to conditions in the camps was Newsday’s Roy Gutman who earned a Pulitzer Prize in the process. Gutman says that he was inspired by Nazi Hunter Simon Wiesenthal to compile his dispatches in a book, A WITNESS TO GENOCIDE (1993).

29. Greve spent much of her career as an international consultant to the United Nations High Commission for Refugees and other international relief agencies including work in Thailand, Ethiopia, Angola, Romania, Latvia, and Cambodia. In October of 1993, she joined the U.N. commission of Experts (the Bassiouni Commission) and was assigned to investigate Prijedor. Her manner was so sober and uncompromising that CourtTV’s Dutch crew referred to her simply as Judge Norway. The defense objected vigorously to her testimony on the grounds that her references to interviews conducted by others were hearsay and that she lacked any relevant specialized knowledge warranting her designation as an expert. The objections were overruled.
Although Judge Greve did not speak Serbo-Croatian she offered linguistic insights to the Tribunal. In response to Judge McDonald's request for a definition of *ethnic cleansing*, Greve pronounced the term a *euphemism* for rounding up members of an ethnic group and taking them to detention for torture, murder or deportation. She mocked the use by the Serb authorities of the terms *military investigation centers* for detention camps, and *informative talks* for torture.

Other policy witnesses offered numbing tales of torture and abuse in Trnoplje, Keraterm, and Omarska. Typical of these was Muharem Nezirevic, a journalist who spent time as a prisoner in Omarska.

On his first night in the *White House* at Omarska, Nezirevic saw an elderly man throw his body across that of his young son to shield him from blows. Another man gave half of his ration (1/8 loaf of bread each twenty-four hours) to his son through an intermediary who was quartered near the son. One day, the intermediary approached Nezirevic and said he did not know how to tell the man that his son had been taken away and killed. His dilemma was short lived, the father himself was soon dead.

On another night in the *White House*, inmates heard a young woman's screams. When they looked in the corridor they saw an elderly Muslim doctor and a young girl forced to strip. The Serbs ordered the old man to rape the young woman. He refused, saying "she could be my child." The next day Nezirevic saw the doctor's body outside the *White House*.

At one point in his testimony Nezirevic paused and simply said of the inmates at Omarska, "Their eyes! That look! Their eyes were not on the outside, but somewhere deep, deep inside!"

The eyes of the tribunal were able to look directly into Omarska with the aid of the final prosecution *policy witness* Edward Vulliamy. Vulliamy followed Roy Gutman to Omarska and was the first non-Serb film journalist to film the camp.

America's fleeting glimpse of the camps in August of 1992 was a snapshot compared to the detailed mural drawn early in Dusko Tadic's

30. The Presiding Judge for the Tadic trial chamber, Gabrielle Kirk McDonald, is a former Federal District Court Judge from Texas.

31. She placed the number of *missing* persons from Prijedor to include 43,000 Muslims and 3000 Croats. While on the stand, she has also explained the strategic significance of Prijedor to the Serbs in the Spring of 1992. It was a *corridor* which could link the Serb areas in Northeast Bosnia adjacent to Serbia with the Krajina Serbian sector in Northwest Bosnia and Croatia.

32. The indictment and witnesses claim that the White House at Omarska was "a small building where particularly severe beatings took place."

33. He also wrote a book about the experience called *Seasons in Hell*. EDWARD VULLIAMY, *SEASONS IN HELL* (1994).
trial. The lack of interest in this testimony is merely another piece in a curiously apathetic puzzle.

To Dusko Tadic, forced to sit in the dock of an alien tribunal and to listen to the detailing of horrors with which he was not charged, it must have been a tremendous enigma.

VI. WITHER THE PROSECUTION? WHITHER TADIC?

"Dule," brother, how have I wronged you? Why do you beat me?"

The most haunting words of the trial? Perhaps. They were uttered in despair by Mehmed Alic a Muslim from Prijedor, who had known the defendant's father. Alic, who lost one son, Ekrem, was an inmate at Omarska along with his remaining son Enver. He testified that he and Enver were beaten by guards including Tadic. During one beating he lost sight of his son only to hear him wail, "[f]ather, look after my children, take care of my children" followed by his unavailing plea for mercy to Dule. Alic testified that he never saw his son again.35

This dramatic testimony was buried in the middle of the prosecution's case as was that of Nihad Seferovic. Seferovic said that he saw Tadic slit the throats of two Muslim policemen. He was the only eyewitness to testify publicly that he saw the defendant commit murder.36

The prosecution moved rather mechanically through its witnesses with no sign of giving much thought to dramatic timing. Prosecutors may believe that with experienced judges timing is irrelevant, even offensive. This is clearly not true however, of the public at large.

Part of the problem of course is that prosecutors did not have many dramatic witnesses. Of the eighty-one prosecution witnesses more than twenty were called simply to counter the defendant's alibi and prove that Tadic was present at Omarska, Keratern Trnoplje, or near Kozarac between May and December of 1992. While the defense challenged this evidence, the testimony was not gripping.

Approximately half of the prosecution's witnesses testified to beatings (some quite severe) at the hands of Tadic or offered frequently

34. This is Dusko Tadic's nickname.

35. Counts 5 - 11 charge the defendant with Alic's death. Earlier in the trial, the witness' daughter Hasiha Klipic (sister of the deceased Evner Alic) also testified for the prosecution.

36. It appears that Seferovic's testimony was used in support of counts 24 through 28 although there is a variance between one of the victims named in the indictment and one named by the witness. The indictment also charges that the victims were shot.
oblique circumstantial evidence of murders." Only Seferovic publicly claimed to be an eye witness to a Tadic killing.

Prosecutors would like to have avoided much of the drama that did impact on the their case. Redacted transcripts of two in camera witnesses for whom prosecutors appeared to have high hopes were helpful to the defense. One, witness H, seems to have undermined the prosecutions proof on its most dramatic allegation.

From the outset of the trial the most bone chilling charge was that Tadic had forced witness G to bite off one of Fikret Harambasic's testicles with the help of witness H and other prisoners at Omarska.

Several witnesses testified to being at Omarska and hearing Harambasic's screams. Two indicated that they had seen Tadic near the location where the incident occurred. One witness, Halid Mujkanovic, seemed on direct examination to connect Tadic to the incident.

However, near the end of Mujkavovic's testimony the following colloquy took place between the witness and Judge McDonald:

Q: Did you see Tadic himself involved at all in the incident, taking an active part.
A: I did not see those moments.
Q: So you did not see Tadic require G to commit the act you described?
A: No I did not.

When the redacted transcript of witness H's testimony was released the mutilation allegation seemed finally to fade from view.

Q: But one thing is sure, that the man with the beard giving you the orders was not Dusko Tadic?
A: I do not believe so.
Q: You never saw Dusko Tadic in Omarska, would that be right?

37. All of these witnesses if believed would support count 1, a general "persecution count" which encompasses virtually every substantive allegation against Tadic and could be used to embrace acts not specifically charged in the Indictment. The sheer number of persons whose testimony is arrayed against the defendant on this count appears overwhelming.

38. The following witnesses testified in camera: For the Prosecution - 'P,' 'Q,' Sulejman Besic (partially), 'H,' 'L,' 'AA' (rebuttal) and For the Defense - 'V,' 'W,' 'Z,' 'A,' 'B,' Pero Opacic, Janko Opacic. Other witnesses for both sides had their identities hidden or their faces hidden from the cameras.


40. Ferid Mujcic and Muharem Besic said they saw Tadic nearby, but could not connect him to the incident. Armin Jujcic testified similarly on direct examination, but on cross-examination was unsure if he had ever seen Tadic at Omarska.

41. This excerpt is from cross-examination by defense counsel Stephen Kay. Note that there were still other allegations against Tadic in counts 5-11.
I did not see him.

The greatest fear of journalists covering Tadic's trial is that incredibly important testimony will be offered in camera. This fear proved to be well founded when, towards the end of the prosecution case, a redacted transcript of the testimony of witness L was released. It contained shocking eyewitness descriptions of Tadic's personal participation in murders, beatings, and rapes. It even contained the allegation that Tadic was actually the commandant of the Trnopolje camp.

However, on the day that Tadic himself took the stand prosecutors requested that the court disregard the testimony of witness L. Based on information supplied by two in camera defense witnesses prosecutors had interrogated Witness L and extracted from him the confession that he had lied in his testimony to the tribunal.

He claimed that he had been forced to lie to tribunal prosecutors by agents of the Bosnian intelligence services. He admitted that he had never seen Tadic at Trnopolje where he himself had once been a camp guard.

However, defense exultation at the disappointments in the prosecution's case may reflect false hope. As Dusko Tadic mounted his defense he faced significant challenges. As any trial lawyer knows, proving an alibi is a daunting task. Any small hole or imperfection in the elsewhere tapestry can prove fatal. To establish an alibi for a six month period, in a country at war, is especially difficult.

The particulars of Tadic's alibi were also worrisome. At no point does he place himself more than twenty-five kilometers from the camps and areas around Kozarac where he is alleged to have committed crimes.

Furthermore, Tadic is forced to rely heavily on the traditional alibi coterie of witnesses, friends, relatives, and co-workers. Two of the co-workers are part of the security apparatus although one, like Tadic, occupies the lowly status of a checkpoint guard. This means that he has been forced to call as witnesses police officers who had difficulty explaining on cross-examination how they could be totally unaware of the horrors of ethnic cleansing perpetrated on their beats.42

VII. WHO IS DAVID DUKÉ?

The legal journalist assumes that the Fourth Estate will play a positive role in struggling to master the treacherous currents of debate

42. This problem presented special problems for Miroslav Brdar, who allegedly manned the checkpoint with Tadic, and for their superior, Duro Prpos, who came under particularly sharp attack on cross-examination and rebuttal (see the testimony of Fikret Kadiric).
swirling about the trial of Dusko Tadic. However, testimony at Tadic's trial exposed another kind of media activity.

Many witnesses testified about the destabilizing role played by Radio Belgrade and Radio and TV Pale, as well as newspapers, in northern Bosnia. They which spewed forth exhortations to ethnic intolerance and violence for at least a year before the war. These organs served as fountains of hate and intolerance, not as the eyes and consciences of their communities.

Ironically, this testimony about the media's sordid role in the former Yugoslavia led to one of the few light moments of the trial. This occurred during the testimony of Judge Greve.

Greve testified that legitimate historical Serb grievances were used by Serb leaders to frighten Serbs in northern Bosnia. She made particular reference to Noel Malcolm's *Bosnia, A Short History*, which offers the analogy articulated by a Bosnian journalist for this Serb television propaganda blitz.

The journalist compared the Serb broadcasts to David Duke producing a message that would be blasted throughout the United States by virtue of the Klu Klux Klan's seizure of United States television stations.

As the day's session ended Judge Lal Vorah of Maylasia asked prosecutor, Alan Tieger, "[w]ho is David Duke?"

This produced polite laughter among the Americans present. Ironically, David Duke's name is a metaphor for racial intolerance in the United States.

However, there is less reason for Judge Vorah to know of Duke than for Americans to know the details of the struggle to bring justice to

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43. Disturbing parallels can be seen to the circumstances surrounding the 1994 genocide in Rwanda. Hutu controlled Radio Rwanda and its more virulent sister Radio-Television Libres Des Mille Collines (RTLM) continually broadcast incendiary anti-Tutsi speeches before the genocide. "Individuals targeted in the radio broadcasts were among the first killed (along with their families) in April 1994." FINAL REPORT OF THE OF EXPERTS [Rwanda] par. 64. There is a shocking similarity between the 1992 speech of a Leon Mugusera, an accused Hutu genocidaire and that of Karadzic tot he Bosnian Parliament. "They belong in Ethiopia and we are going to find them a short cut to get there by throwing them into the Nyarabongo River. I must insist on this point. We have to act. We have to wipe them all out." Rwanda expert report para. 63. Text is from GERARD PUNIER, *THE RWANDA CRISIS, HISTORY OF A GENOCIDE* 172 (1995). Edward Vulliamy enhanced our comprehension of riparian imagery in this decade's genocides when he testified in the Tadic trial that the Serb engineer operating the damn on the Drina River complained that Muslim bodies were interfering with the operation of his plant.

44. The most recent, and most troublesome claim is that as many as 750,000 Serbs were exterminated by Croatian Ustashe forces in World War II without the redress sought or offered by the international community. FINAL REPORT OF THE UNITED NATIONS COMMISSION OF EXPERTS - ANNEX - THE POLICY OF ETHNIC CLEANSING, III, THE BALKAN WARS AND THE WORLD WARS.
the peoples of the former Yugoslavia. Until Americans become informed it is unlikely that western governments will exercise the political muscle required to bring powerful indictees to trial.

Of course this still leaves the legal journalist struggling with the question of why Americans should care. Perhaps that answer can be found most clearly in the words of an American who is a looming presence in the trial of Dusko Tadic, Judge Gabrielle Kirk McDonald.

We ourselves in the United states I think still have a problem dealing with ethnic differences and what has happened in the former Yugoslavia of course is nothing that we would ever expect to occur in the US but is an example of what can happen when you don't resolve your ethnic divisiveness. When you cannot come to respect people for their difference and accept the differences and yet live together and respect each other that is what happens.

So it seems to me that to the extent that we in America have not come to grips with our kind of aspirational assertions of equality and non-discrimination and with the reality of discrimination that there are some parallels and so perhaps we can learn something.45

Such knowledge will not come without struggle, without braving the dangerous waters between Scylla and Charbidis which can only be traversed seated in the galleries of the Hague or in Arusha. The voyages will be difficult but there are few issues more pressing for our species than finding just solutions to the problems of mass murder and genocide.

45. CourtTV interview with Terry Moran (May 3, 1996).
THE LIKELY LEGACIES OF TADIC

Jose E. Alvarez *

How will historians and others judge the Balkan war crimes tribunal? In my brief time, I would like to indicate how the prosecution of Tadic, the first case before that tribunal, has raised some doubts about that body's legitimacy and likely legacy.

It is clear the creators of this tribunal attempted to correct some of the obvious problems with Nuremberg and Tokyo. The legitimacy of those earlier prosecutions had been attacked on a number of grounds:

1) as revenge trials subject to double standards wrought and conducted by the victors against the vanquished;

2) for violating the rights of defendants through such questionable practices as trials in absentia and unfair evidentiary rules that subjected defendants to trial by document subject to no appeal or review with little attempt to equalize the opportunities between prosecution and defense;

3) for violating the rule against ex post facto imposition of criminal liability, principally through charges invoking crimes against aggression, crimes against humanity, and for membership in criminal organizations;

4) for dishonoring the memory of Holocaust victims by artificially limiting all prosecutions to crimes committed in the course of aggressive war by one state against another thereby denying victims of German atrocities, particularly against the Jews and gypsies, from presenting the world with an accurate picture of the nature of the Holocaust (both during the War and before) and the very real complicity of ordinary German citizens.1

* Professor, University of Michigan Law School. This talk is based on the author's recent article, Nuremberg Revisited: The Tadic Case, in 7 EUR. J. INT’L L. 245 (1996). For additional references, readers should consult that article.

1. For a summary of some of these critiques, see, e.g., DAVID LUBAN, LEGAL MODERNISM 335-78 (1994); Kevin R. Chatey, Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials, 14 DICK. J. INT’L L. 57 (1995); for partial responses combined with additional critiques, see, e.g., TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1993).
The creators of the Balkan tribunal sought valiantly to anticipate and correct these possible problems. Thus, they created an institution that they believed would not be subject to the charge of *victor's justice* since the tribunal was created by the *world community* in the form of the United Nations Security Council and not merely through the action of incidental victors of a war. They sought to ensure that the tribunal’s judges would reflect the world’s diversity and not merely the interests of the five permanent members of the Council. They further attempted to defuse accusations of partiality by giving the tribunal jurisdiction over all crimes committed in the former Yugoslavia by any side. They incorporated the guarantees of modern international human rights to ensure fairness to defendants and gave solace to victims by providing mechanisms in the tribunal’s procedures to protect them from harm should they testify. In response to fears of ex post facto law, they restricted the tribunal’s jurisdiction to crimes based on those “rules of beyond any doubt part of customary law.” With an eye on the ultimate legitimacy of the tribunal, they omitted the death penalty, trials in absentia, or liability for mere membership in a criminal organization.²

Despite all these ostensible improvements vis-à-vis Nuremberg and Tokyo, the legitimacy of the tribunal remains an issue. The most obvious set of constraints for the Tribunal has been ably suggested by others and I need not dwell on them in my remarks. There are grave doubts about the likely efficacy of the tribunal’s efforts given the unstable nature of the former Yugoslavia itself, and most significantly, the fact that many of those responsible for heinous crimes remain at large and some in positions of considerable influence and power. Whatever else might be said about Nuremberg and Tokyo, those proceedings at least succeeded in convicting some of high official and not merely *small fry* like Tadic. Critics charge that by comparison, the enormity of crimes that are likely to remain unaddressed in the former Yugoslavia mocks justice and that the tribunal’s efforts are likely to be as ludicrous as an effort to conduct Nazi war crimes prosecutions would have been in the absence of D-Day.⁴

Less obvious legitimization issues have become clearer as a result of the Tribunal’s responses to pre-trial motions filed in the Tadic case. In an unsuccessful attempt to resist trial, Tadic argued that the tribunal was

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3. For a favorable assessment of the tribunal in light of these changes, *see*, *e.g.*, Chaney, *supra* note 1.

illegal because the United Nations drafters had not envisaged it; because the United Nations General Assembly was not involved in the tribunal’s creation; because the text of the United Nations Charter did not grant the United Nations Security Council authority to create such a judicial organ; because the Council had not consistently created such tribunals in other instances; because the Council could not act on individuals; because there had been no real threat to the peace; and because the Council could not displace national courts and therefore had illegally violated national sovereignty. It surprised no one that both the trial and appellate chambers of the tribunal dismissed all of Tadic’s arguments and upheld the legality of the tribunal X indeed a cynic would say that judges had little choice but to uphold the legality of the enterprise of which they were such an important part. Nonetheless, the judges’ responses demonstrated how difficult it is to legitimize this tribunal given through traditionally legalistic, as opposed to policy-driven, arguments.

The trial and appellate chamber’s diverse responses to Tadic’s contentions show that novel issues of United Nations Charter interpretation, including contestable propositions about the reviewability of Security Council decisions, are posed by the tribunal’s creation and continued operation.

From the perspective of an academic, Tadic’s arguments put the tribunal’s judges between a rock and a hard place. In order to justify the legality of their tribunal, Tadic’s judges found that they either had to modestly defer from Tadic’s questions in deference to an non-reviewable Security Council or boldly proclaim review authority over the Security Council while affirming in substance all that the Council had done. The trial chamber in its response of August 10, 1995, took the first tack while the appellate chamber took the second in its opinion issued on October 2, 1995. Neither response is likely to be entirely acceptable to both permanent and non-permanent members of the United Nations and the chambers’ opinions are provoke further debate about the viability and wisdom of the ad hoc war crimes tribunals.

The weakest set of responses to Tadic’s arguments came from the trial chamber. In an opinion signed by Judge Gabrielle MacDonald of the United States, that chamber attempted to put off these issues by relying on the political question doctrine imported from U.S. constitutional law. Essentially, the trial judges demurred on Tadic’s substantive arguments on the grounds that the Security Council is all-powerful and non-reviewable. Although the heart of a criminal trial such as Tadic is the need to resolve

the rights of individuals X both Tadic’s and the rights of his alleged victims the trial judges opted to privilege state power embodied in the Security Council over the human rights integral to the tribunal’s enterprise. In suggesting the Council had done presented a non-reviewable political question, the trial chamber came very close to suggesting that the judges need to follow the Council’s dictates, even if this were to violate defendants (or victim’s) human rights or even if the Council were to mandate selective enforcement of international humanitarian law. In deference to the likely reaction this conclusion was likely to provoke (and not just among human rights lawyers), the trial chamber straddled a number of inconsistent propositions to the satisfaction of no one. Thus, for example, while the tribunal affirmed that individuals gain human rights under applicable law, including the individual right to be tried by courts established by law, it also simultaneously tried to affirm that individuals have no standing to assert these rights because states generally and the Council in particular have said otherwise.

The most withering critique of the trial chamber’s approach came from the tribunal itself, namely the appellate chamber. As the majority of the appellate judges pointed out, the trial chamber’s answers to Tadic are inconsistent with international law principles granting all international adjudicative bodies competence de la compétence — that is, the power and the duty to determine the legality of its own jurisdiction. The majority of the appellate judges wisely decided that refusing to answer Tadic’s questions by relying a variant of the political questions doctrine would not be a credit to the tribunal. They wisely decided in a case in which the freedom of an individual was at stake, the tribunal’s own judges needed to defend why this tribunal was as legitimate a body to render such a decision as any national court. The appellate chamber decided that it could ill afford to avoid an opportunity to justify their tribunal’s existence.

But while the majority of the appellate judges attempted to give more substantive answers to Tadic’s challenges, the implications of their answers are likely to be contested by many United Nations members as well as the human rights community. Among the contestable conclusions of the majority of the appellate judges were the following:

1) That notwithstanding Chapter VII of the United Nations Charter, sitting judges like themselves were empowered to pronounce on the legality of Security Council action a conclusion that permanent

members of the Council are not likely to find altogether comforting and one that the World Court itself has to date resisted;

2) That (at odds with one above) the validity of Council action can be presumed, even when not supported by either the text of the Charter or its negotiating history, particularly if supported by the Council’s prior practice a conclusion that neither nonpermanent members nor some segments of the human rights community concerned by recent Council actions (as with respect to the conduct of the Gulf War) are likely to altogether favor;

3) That the Security Council can *delegate* its functions to another body (even one that is not subject to the veto), can act prosecutions conclusions that are as likely to prompt discomfort in permanent as well as non-permanent United Nations members and even more so in the human rights community;

4) That “it is only for want of resources that the United Nations has to act through its Members” a recipe for institutional override over any and all sovereign rights that would have surprised the original drafters of the limited security regime which is the United Nations Charter;

5) That *internal armed conflicts* may constitute *threats* to the international peace notwithstanding the language of article 2(4) banning only inter-state force another conclusion that is not likely to win the hearts and minds of any state with unruly internal disputes who naively believes that such matters are within their protected *domestic jurisdiction* and is not subject to forceful Council intervention;

6) That criminal defendant’s rights to be tried before courts *established by law* merely means a right to be tried by any court that respects a defendant’s other procedural rights — a result at odds with the position of human rights advocates before other tribunals. As a result of the Tadic case, defenders of the tribunal may now find it necessary to defend contestable readings of the United Nations Charter and the powers of the Security Council which go to the heart of post-Cold War debates about that body’s newly flexed muscles. Today, the United Nations finds itself in a quandary with respect to legitimacy and future direction of the Security Council.

7. *Id.* at 36.
Increasingly, non-permanent members question the representative nature of that body as well as the scope of many of its post-Cold War precedents. As is clear from recent opinions of the World Court as well as scholarly debates, many United Nations members resist giving that body unchecked authority as much as permanent veto-wielding states such as the United States resist any suggestion that what the Security Council does is ultimately reviewable by any court even one that the Council itself has created.8 The appellate body’s response to Tadic’s pre-trial motions manages to offend all sides in this debate without settling the underlying issues.

Of more immediate concern to litigants in the Balkan tribunal is that the appellate body’s response to Tadic does not answer important questions concerning the future relationship between that tribunal and the Security Council. While the tribunal is, of course, financially dependent on the Council, as well as on the generosity of particular United Nations members, it remains unclear the extent to which the rights of defendants and victims remain legally subservient to the demands of the Council or even to the General Assembly. Could those political bodies interfere with on-going trials or investigations? Does the Security Council retain the authority to, for example, instruct the tribunal not to try prominent Serbs because of the supposed threat to the peace process or to the reconciliation of the country? Could the Council direct a United States national court not to pursue the on-going civil case against Karadzic?9 If Security Council or General Assembly override remains a possibility, what does that possibility never mind its exercise mean for the fulfillment of the tribunal’s grand goals, especially its claim to be non-partial and devoted to the equal application of established law?

These are not the only difficult issues that have been presented by this initial prosecution. In response to Tadic, the tribunal has also determined that charges can be brought against Tadic even for acts committed in the course of an internal conflict. The judges specifically found that the nexus required at Nuremberg between crimes against peace and crimes against humanity is no longer required by modern international law.10 Because of the nature of the Balkan conflict, the tribunal has seen fit

10. Appellate Chamber, Case No. IT-94-I-AR2, paras. 138-42.
to go beyond the Nuremberg precedents, thereby raising some doubts about the application of ex post facto law.11

Finally, the trial court’s answer to at least one pre-trial motion by the prosecutor in the Tadic reveals one likely point of contention with respect to the perceived fairness of the tribunal’s procedures. The trial chamber ruled that the prosecutor is free to present defense witnesses without identifying these to either Tadic or his defense counsel.12 While the prosecutor has decided not to take advantage of this ruling during Tadic’s trial, the possibility that she may resort to unidentified witnesses in other cases involving, for example, charges of mass rape is likely to prompt a barrage of criticism by many common law lawyers to whom cross-examination is sacred. Indeed, one prominent U.S. lawyer, a former legal adviser to the State Department, has argued that if this were to occur, he would support amendment of the United Nations Charter to add a bill of rights.13 On the other hand, should the prosecutor respond to such fears by dropping charges of mass rape against other defendants, she is apt to be criticized for ignoring one crucial aspect of ethnic cleansing as practiced in the former Yugoslavia: its brutally gendered nature. Indeed, if future trials fail to deal with the rape charges because of the difficult evidentiary issues, historians are likely to say that this tribunal sanitized ethnic cleansing as much as Nuremberg did the Holocaust. Those who have been raped in order to cleanse parts of the former Yugoslavia will not forgive this tribunal if it ignores their stories or if it fails to condemn the guilty for this particular crime. For many, a failure to acknowledge this aspect of ethnic cleansing would betray one of the tribunal’s principal goals: an accurate rendering.

Some of the doubts about the legitimacy of this tribunal emerge because its composition is as cosmopolitan as it is. Some of the doubts arise because of the judges’ differing answers to the pre-trial motions made in the Tadic case. Even those most concerned with the tribunal’s legitimacy its judges individually differ on such basic questions as the reviewability of Security Council decisions, the nature of the underlying


conflict in the Balkans, the extent to which internal conflicts can be said to trigger threat to the peace, and the need to resort to unidentified witnesses. Yet, as the dissent of Judge Pal in the Tokyo trials should remind us, some degree of judicial unanimity between east and west, north and south may be necessary if this international tribunal is to retain (or acquire) true international legitimacy. The Tadic case shows that we have not yet reached closure with respect to fundamental jurisprudential issues about this tribunal. Instead, one gets the strong sense that, at least with respect to some basic issues, Tadic's judges simply turned to circular arguments such as their all-purpose answer that the legality of the tribunal needs to be affirmed because "the very purpose of the creation of an international criminal jurisdiction" would otherwise be defeated.

Such arguments, though grounded in political necessity, encourage a search for alternatives to ad hoc war crimes tribunals created on the mere whim of the Security Council. The proceedings in Tadic have not stemmed a growing skepticism that, despite the stenuous efforts of its drafters, the Balkan tribunal has not (yet) overcome the flawed legacy of Nuremberg.

STATE COLLABORATION IN UNITED STATES
RATIFICATION OF HUMAN RIGHTS TREATIES

James A.R. Nafziger *

The process in the United States of negotiating and ratifying human rights treaties seldom engages the states, either individually or collectively. This has been a strange turn in the evolution of our federal system that I believe should be of greater interest to human rights advocates and specialists in foreign relations law. Let me suggest why.

As The Federalist makes clear, the framers of the Constitution were confident that the Senate, and the Senate alone, would be an ideal instrument for the expression of state interests in the treaty-making process.¹ The Senate was going to be small and its members were to be elected by state legislatures. It could, therefore, transmit the will of the states in working closely with the executive branch to make and ratify treaties. Moreover, it was expected that the Senators would be among the most able, virtuous, and therefore trustworthy citizens of the various states.²

How times have changed over the past two centuries! The role of the Senate Foreign Relations Committee, the powers and paternalism of its Chairman, and a routinely clumsy handling of foreign affairs would have been beyond the imagination of even the remarkably imaginative Founding Fathers. Nor was their intent to vest a determination of state interests exclusively within the discretion of a handful of Senators. The states, themselves, through a plenary Senate, were to decide collectively what, within constitutional limits, was in their interest. In effect, it was the states

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See also TREATIES AND OTHER AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE: A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE XXXII, S. Print 103-53, 103rd Cong., 1st Sess. (1993) [hereinafter Treaties Study].
² As the select assemblies for choosing the President, as well as the state legislatures who appoint the Senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object.

THE FEDERALIST No. 63, at 354, supra note 1.
that were to advise the President on international agreements and consent to their ratification.\(^3\)

Surely the states have always had fundamental interests in the codification and progressive development of human rights. In the words of *The Federalist*, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State."\(^4\) A little later, the Tenth Amendment, in effect, confirmed these powers.\(^5\) Today, the states, subject to the United States Constitution and civil rights laws, are where much of the action is.\(^6\) It is to state government, in the words of *The Federalist*, that "the first and most natural attachment of the people will be."\(^7\)

Senator John Bricker knew that. Senator Jesse Helms knows that. Both of those powerful adversaries of human rights treaties have known that to a serious fault. Why don't the states themselves get the message? Why don't they become more involved in the process of ratifying human

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3. U.S. CONST. art. II, § 2. ("[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur.")


5. U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.")

6. Consider that state, not national, laws govern our most important social relationships. Marriage, divorce, and parenthood are matters of state law. State courts applying state law decide deeply human and moral disputes - - whether a hospital may discontinue life support for a hopelessly ill patient or force treatment for a child over the parent's religious objections, for example, or whether a child should live with a father or with a surrogate mother who has changed her mind about her surrogate status - - issues of personal rights more meaningful to many people than freedom of the press or the Fifth Amendment protections against self-incrimination or double jeopardy. Property ownership, inheritance, and the use of land are governed by state law. So are buying and selling, employment, and other contracts. So is compensation for personal injuries. Workers' compensation laws were enacted by state legislatures, and battles over tort liability and insurance coverage are won and lost there as well. The states, not Congress, decide who may practice law or medicine, be a plumber or a hairdresser, drive a car or buy a drink.

The mass of conventional crimes are defined by state laws, and the overwhelming majority of criminal cases are investigated by local police officers and prosecuted by states' attorneys in state courts. Decentralized police power and the limited functions and small number of federal law enforcement officials are crucial protections of liberty in a federal system. Consider also that, second only to law enforcement, our most important and largest social service, education, is provided by state and local schools and colleges or governed by state laws.


7. THE FEDERALIST No. 45, at 258 (James Madison), *supra* note 1.
rights treaties? Of course, many human rights advocates might shudder at the suggestion: The last thing we need is the ghost of the Bricker Amendment\(^8\) come alive. Let's not give the states any more ideas about how they can puncture the Commonweal. What's more, state and local governments claim that they lack resources. They will therefore do anything to avoid new obligations. Worse yet, local police and district attorneys are out to suppress, not expand, human rights. And what about Proposition 187?\(^9\) After all, that was the people of California speaking directly. The less we hear from the states, the better.

Despite the risks, however, I would argue that fuller and more direct collaboration by the states in the treaty making process would strengthen and perhaps accelerate our national commitment to the conventional regime of human rights. Such collaboration would make it more likely that the states would promote ratification and implement human rights treaties, even if they are not self-executing. The political branches of the federal government need to enter into a more direct, educational dialogue with the states. The Meiklejohn Civil Liberties Institute, in a letter to the United Nations Human Rights Committee concerning Proposition 187,\(^10\) questioned United States implementation of the International Covenant on Civil and Political Rights. Three out of seven questions raised by the Institute in their letter highlighted the need to educate state authorities on their responsibilities under the Covenant.\(^11\) Greater collaboration by the State of California in ratifying the Covenant might well have weakened some of the appeal to California political

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leaders of Proposition 187, for example. And when we look at what, really, we have accomplished in more than a symbolic sense by our heavily qualified ratification of a limited number of human rights treaties during the past fifty years, the probable benefits of more direct state involvement in the treaty-making process would seem to outweigh the costs or risks. It is at least worth a try.

We should not forget that state constitutions and laws are often out in front of corresponding federal provisions. Consider just a few examples from three states with which I am most familiar: Oregon, Washington, and California. One judicial decision has gone beyond Title IX of the Federal Civil Rights Act in eliminating gender discrimination in sports. Another simply made gender a suspect classification for judicial scrutiny. Still another rejected polygraph tests as a condition for public employment of persons not involved in public safety. Courts have allowed medical patients to terminate life sustaining equipment or treatment, and voters in one of the three states approved of a ballot measure that provided for physician assisted suicide. Even if California's notorious Proposition 187 spoils this record, we should note that California's next-door neighbor has prohibited state and local law enforcement officials from assisting the Immigration and Naturalization Service (INS) in rounding up undocumented aliens.

These actions are just a few examples of state leadership in promoting and protecting human rights. They are, of course, controversial and far from universal actions among the states. The point is, however, that states can be on the vanguard of championing human rights. Indeed, there has been a trend toward the use of state courts to implement human rights under state laws and constitutions rather than federal constitutional


13. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.")


provisions. Moreover, state courts in the three-state region have had the courage and wisdom to cite international instruments in recent decisions.\textsuperscript{2} That should remind us that customary human rights law is made not "merely by national governmental actors within a federal system."\textsuperscript{23} Whether states are more progressive or retrograde in promoting human rights is not the most important point. What matters most is that, although state and local governments deal with human rights around the clock, they are not playing a direct enough role in advising the federal government on instruments that ultimately rely on implementation by all three levels of government.

I contacted several leading associations of state and local governments to see if this was true. The National Association of Attorneys General reported that they had been involved in the making of only a single treaty, the North American Free Trade Agreement (NAFTA), because of their concern that it might preempt states' rights. They were not, however, involved in drafting NAFTA's side agreement on labor rights.\textsuperscript{24} The National Governors' Association noted they had been a leading force in support of NAFTA, but that they never "get involved," in their words, with any human rights treaties.\textsuperscript{25} Neither the Democratic Governors Association nor the Republican Governors Association assigns staff members to follow treaty developments.\textsuperscript{26} Perhaps the most striking comment was made to me by the United States Conference of Mayors. They reported that they normally deal only with "urban" as opposed to "national" issues. Because they have classified human rights treaties as national rather than urban, they have chosen not to be involved in the treaty-making process.\textsuperscript{27}

The underlying message of this very limited survey may be that human rights treaties are too arcane, too remote, or too trivial for busy state and local governments. Another message may be that state and local authorities rely, quite reasonably in theory, on their United States Senators

\begin{footnotes}
\item[24.] Telephone Interview with Paul Beaulieu, Deputy Director and General Counsel, Nat'l Ass'n of Att'y's Gen. (Oct. 10, 1996).
\item[25.] Telephone Interview with Jim Martin, Director, Office of State and Federal Affairs, Nat'l Governors' Ass'n (Oct. 3, 1996).
\item[26.] Taped telephone messages from Democratic and Republican Governors Ass'n (Oct. 5, 1996).
\item[27.] Telephone Interview with Chip Brown, U.S. Conf. of Mayors (Oct. 5, 1996).
\end{footnotes}
to do the job.\textsuperscript{28} Or, perhaps, governments presume that human rights treaties have only symbolic value by confirming the Federal Bill of Rights. Because human rights treaties, therefore, are thought to pose little or no risk to the nation,\textsuperscript{29} they are not worthy of much attention. To the extent treaty provisions may exceed constitutional protections, the Chairman of the Foreign Relations Committee can be counted on to fend off any unwarranted international intrusion.

The states have therefore been missing in action during the great battles over human rights. On the other hand, a private body, the American Bar Association (ABA), has been able to deploy its forces very effectively. The saga of ABA obstructionism during the first twenty-five or thirty years of the modern human rights era is well known.\textsuperscript{30} Apparently the ABA feared that the President, conniving with the Senate behind the backs of the states, would accomplish by treaty what the Congress for many years had refused to enact, namely, civil rights legislation. What is more, the long-time Chairman of the ABA Section on International Law, Eberhard Deutsch, adamantly opposed human rights treaties not only as a threat to states' rights but as a device, in his words, to destroy local government.\textsuperscript{31} Perhaps his New Orleans background led him to fear a sort of French-style system of prefects serving only the interests of the nation. Deutsch used this premise to launch a broader attack on the treaty clause of the Constitution.\textsuperscript{32} He described it as a "'Trojan Horse,' ready to unload its hidden soldiery into our midst, destroying State laws and constitutions and leaving behind the wreckage of the dream of the Founding Fathers which envisioned maintenance of the established constitutional balance between State and Federal power, and

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  \item \textsuperscript{28} After all, "in an impressive number of instances," both the Senate and the House of Representatives have been involved in the negotiation process leading to conclusion of a treaty. Anne M. Williams, \textit{United States Treaty Law, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW, U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS} 40 (Hurst Hannum & Dana D. Fischer eds., 1993).
  
  \item \textsuperscript{29} \textit{RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT} 13 (1981).
  
  \item \textsuperscript{30} For a chronicle of the ABA's opposition to human rights treaties, see \textit{NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION, passim} (1990). "States' rights were ardently defended and often presented as the only bulwark against an expansive federal government that would use its powers to impose a host of liberal programs on states and local communities, programs such as the elimination of racial restrictions on property ownership, marriage, and education." \textit{Id.} at 12.
  
  \item \textsuperscript{31} \textit{Id.} at 115-16. In Deutsch's words, "[g]ilding of multipartite treaties with such idealistic immediate goals as the prevention of genocide and the promotion of human rights cannot conceal their underlying long-range objective to destroy local government while expanding the sphere of national power." Senate Judiciary Committee Hearings, \textit{supra} note 8, at 145.
  
  \item \textsuperscript{32} \textit{Id.}
\end{itemize}
preservation of the Bill of Rights intact." The ABA has, of course, changed its mind. Since it began to support human rights treaties in the 1970s, the ABA has played a constructive role in the process of ratifying them. But it is not a role that can ever replace the states.

The perceived importance of states' rights in the treaty-making process is clear from a statistical profile of arguments made against human rights treaties. Moreover, the trend is toward greater reliance on the states' rights argument to oppose human rights treaties. It is ironic that precisely because "human rights fall in the domain of states' rights," the Senate, without bothering to consult the states directly or to solicit their testimony, has an excuse for refusing to ratify a treaty that might serve their interests or for nonaction. The question, however, should be about human rights and not states' rights. It should not be a question of what a few Senators perceive states' rights to be, as a technique for blocking human rights treaties. Instead, the question should be how to involve the states in a fuller, more open dialogue about the human rights with which they are concerned on a daily basis.

It is high time, therefore, that we reinvigorate the states' role at the federal level in the ratification process, as the Framers of the Constitution intended. We need to stir up a sluggish process. "[C]urrent opposition to

33. Id. at 119.
34. Kaufman & Whiteman, supra note 8, at 331.
35. For example, between 1953 and 1979 there was a reported increase of nearly fifty percent in the percentage of total arguments against human rights treaties (16.8% to 23.4%).
36. Kaufman & Whiteman, supra note 8, at 313.
37. Of course, the reasons for the poor record of the United States in acceding to human rights treaties extend beyond the issues of states' rights:
Although the United States has been in the vanguard of observance of human rights, the issue of entering into legally binding human rights treaties has been controversial. While sometimes there is a difference on the nature of human rights to be guaranteed, often the controversy has extended to treaties guaranteeing human rights on which there is wide agreement. Various administration officials and Senators have contended that human rights should remain a matter of domestic jurisdiction and have expressed concern that internationally determined human rights could have an impact on rights of American citizens under the U.S. Constitution. They feared that since in the United States treaties are the law of the land, human rights treaties could supersede national and state laws. Other administration officials and Senators emphasized the value of the conventions in promoting human rights in other countries and believed that the United States should become a party to maintain its leadership in the human rights fields. They contended the United States usually had a higher standard of human rights than called for in the treaties, and in any event no international agreement could supersede rights guaranteed by the Constitution.

TREATIES STUDY, supra note 1, at 231.
human rights treaties is a legacy of the 1950's.  

Enlisting greater state collaboration would, of course, impose burdens on the human rights movement. We can expect, for example, that states, individually or collectively, would oppose as well as support ratifications. But that is democracy and the federal system at work. And who knows? Broader collaboration might help convert skeptical state authorities. It might also diminish the significance of federal-state clauses in human rights treaties and the appeal of reservations to them on the basis of so-called states' rights. We might then avoid some of the Swiss cheese effect of this country's treaty commitments to the international protection of human rights.

38. KAUFMAN, supra note 30, at 2.

39. Id. at 171.
WHO'S AFRAID OF THE CRC: OBJECTIONS TO THE CONVENTION ON THE RIGHTS OF THE CHILD

Alison Dundes Renteln

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The painfully slow process of securing the United States ratification of human rights treaties is a well established part of American history.1 Although it is not surprising that one of the newest treaties, the Convention on the Rights of the Child, has not been ratified yet, it is nevertheless remarkable that it has attracted such strong, well organized opposition. According to Mr. Robert Dalton, Assistant Legal Adviser for Treaty Affairs in the Department of State, in the past decade no other treaty has attracted such a virulent reaction.2 In this analysis I will discuss some of the reasons why ratification of this particular convention appears to be fraught with peril.


I. BACKGROUND

One might have expected that the United States would endorse the Convention on the Rights of the Child (CRC), an exciting new treaty that is based in large part on the 1959 Declaration on the Rights of the Child. The drafting of the Convention was undertaken at the behest of the Polish government as part of the celebration of the 1979 International Year of the Child. After years of debate, representatives of states were able to forge a consensus, and the treaty represents an internationally agreed upon minimum standard for the treatment of children everywhere. It has been heralded as a "magna carta for children."3 According to Lawrence LeBlanc: "No other specialized United Nations human rights convention has been accepted so quickly and with such apparent enthusiasm."4

After more than ten years of drafting, the CRC was adopted by the United Nations on November 20, 1989, and came into force on September 2, 1990, with the requisite twenty ratifications. Although the treaty specified that only twenty ratifications were required before it would enter into force, approximately 187 states promptly signed, ratified or implemented the treaty. This left the United States in the company of only a handful of states which had not ratified or indicated an intent to ratify.

One reason to expect United States ratification was the key role played by the United States during the drafting of the treaty.5 Indeed, the inclusion of four articles reflected the strong influence of the United States.6 However, the leadership role might not have been a significant indicator of United States support if the United States participants in the drafting process reflected the views mainly of the Presidential

3. This phrase was used by James Grant when he was the Executive Director of UNICEF. CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, CHILDREN'S RIGHTS IN AMERICA: UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW iii (Cynthia Price Cohen & Howard A. Davidson eds., 1990).


Administration and not of Congress or the public.\textsuperscript{7} Furthermore, many of the nation-states that ratified the treaty quickly were not involved in the drafting process.\textsuperscript{8}

Some condemn the United States' failure to ratify the CRC, calling it an embarrassment.\textsuperscript{9} Others deny this criticism by arguing that the United States is simply being circumspect in its approach. The United States government maintains that the reason for the sluggish pace of ratification reflects the degree to which it takes multilateral human rights treaties seriously.\textsuperscript{10} Whereas other nation-states ratify quickly but fail to implement the policies mandated by the treaty, the United States only agrees to adhere to a convention when it is certain it will be able to follow through by enforcing the treaty provisions.

The Convention on the Rights of the Child has been at the center of many different controversies.\textsuperscript{11} In what follows I will highlight some of the major conflicts associated with efforts to secure ratification in the United States.\textsuperscript{12} In my view most of the disputes, e.g., abortion, juvenile executions, and corporal punishment, reflect ideological divisions within this country that have little to do with the treaty itself. Because so much attention has been focused on these issues, there has been little time to address more serious questions such as the normative coherence of the convention.\textsuperscript{13}

\textsuperscript{7} Interview with Patricia McNerney, Associate Majority Counsel to the Senate Committee on Foreign Relations (Oct. 29, 1996).
\textsuperscript{10} Interview with Robert Dalton, Assistant Legal Advisor for Treaty Affairs in the Dept. of ST. (Oct. 25, 1996).
\textsuperscript{11} In a 1993 Minnesota court of appeals case, Baker v. Chaplin, 497 N.W. 2d 314 (Minn. Ct. App. 1993), Janine Baker, attended a rally outside the Hyatt Regency Hotel in Minneapolis where President George Bush was at a function. She wore a men's business suit, a George Bush mask, and carried a sign which read: "Q?? Why doesn't George sign the United Nations Convention on Rights of Children?" After a barricade fell (or was pushed over), a police officer attacked her with a riot stick. The legal issues were whether the officer used excessive force in violation of Baker's fourth amendment rights and whether he was immune under state and federal law. The trial court rejected both rejected both the qualified and official immunity claims, dismissing the officer's motion for summary judgment. The court of appeals affirmed. \textit{Id}.
\textsuperscript{13} In an extremely astute analysis of the treaty, one scholar contends: " . . . the Convention needs a comprehensive statement as to how the various human rights conventions
II. UNITED STATES RATIFICATION

In September 1990 the Senate and House of Representatives both adopted resolutions urging the President to sign the CRC and to seek the advice and consent of the Senate. The resolutions passed by large majorities. In 1993 the Senate passed Senate Resolution 70 which again urged the President to transmit the treaty to the Senate for advice and consent. In the House there were repeated calls for the President to act. Despite these overtures, President Bush declined to do so. A few years later, however, on February 16, 1995, President Clinton signed the Convention on the Rights of the Child. On April 3, 1995, Madelaine Albright, United States Ambassador to the United Nations, gave a speech in which she announced: "[w]e have decided to seek Senate consent to the ratification of two important human rights agreements — the convention prohibiting all forms of discrimination against women, and the Convention on the Rights of the Child." In response, in June 1995 Senator Helms submitted Senate Resolution 133 to the Committee on Foreign Relations and expressed the opposition of nearly twenty senators to the CRC. In this resolution Helms admonished the President not to act on the treaty: "[i]f the President does attempt to push this unwise proposal through the Senate, I want him to know, and I want the Senate to know, that I intend to do everything interrelate in regard to children's rights." Walter H. Bennett, Jr., A Critique of the Emerging Convention on the Rights of the Child, 20 CORNELL INT'L L.J. 45 (1987).


15. Report to the House of Delegates: United Nations Convention on the Rights of the Child, supra note 5. The Senate passed the resolution despite an abortive attempt by Senator Helms to attach an amendment (2628) to the Bradley amendment (2626) which would have defined a child as any person under the age of 18 including "the unborn offspring of any human being in every state of biological development." 101st Cong., 2d Sess., 136 CONG. REC. 1074 (daily ed. Sept. 11, 1990). The Helms amendment was tabled. 136 CONG. REC. 12803, 12807 (daily ed. 1990).


18. Ambassador Madelaine Albright, Remarks at the State Department Conference on Crises (April 3, 1995). FED. NEWS SER. (available in Lexis). In a speech in the House of Representatives, Congressman George Miller stated in reference to the CRC that: "... the Clinton Administration has all but pledged it would recommend that the United States Senate ratify the convention." 103rd Cong., 1st Sess., 139 CONG REC E2967 (daily ed. 1993).
possible to make sure that he is not successful." According to Senator Helms, more than 5,000 letters in opposition "poured into" his office and only one letter in support. As of September 1996, there were no official plans to transmit the treaty to the Senate.

III. TYPES OF OBJECTIONS TO RATIFYING THE CRC

A large number of right wing organizations have disseminated literature criticizing the CRC. An excellent essay which surveys these arguments is Susan Kilbourne's article *United States Failure to Ratify the United Nations Convention on the Rights of the Child: Playing Politics with Children's Rights.* Among some of the more controversial issues associated with the treaty are abortion, education, and discipline.

The treaty does not, in fact, mention abortion. So, the question of whether it is pro or anti-abortion must be inferred from various provisions. Several organizations focus on articles which they interpret as being pro-abortion, e.g., Article 24(4)(f) concerning family planning and Article 16, the right to privacy.

One might think that the CRC could be invoked to criticize abortion. The lack of a clear definition of the child in the treaty might support this. A child is defined in Article 1 as a person under the age of eighteen, but the treaty provides no lower limit. In the preamble there is language cited from the Declaration of the Rights of the Child to the effect that the well being of the child shall be protected both before as well as after birth. It is unclear what legal status the Preamble has but it probably


20. Id.


22. Id.

23. Id. at 8.

24. Interestingly, Senator Helms tried unsuccessfully to introduce an amendment to Senator Bradley's amendment urging submission of the CRC for advice and consent which would define a child as "all human beings under the age of 18 including the unborn offspring of any human being in every state of biological development."


lacks juridical significance. In addition, Article 6 contains the phrase “every child has the inherent right to life.”

Evidently, some thought the above provisions were coded provisions designed to impose a position on abortion. Despite this suspicion, the history of the drafting process indicates that the treaty was drafted in such a way as to enable each State party to determine its own policy regarding abortion.

Education has also proved to be a controversial issue. According to some of the conservative literature, the concern was that the state could prevent parents from educating their children in accordance with their religious beliefs. Article 29 is the specific provision which sparks debate about the nature of education in the United States.

Another major point of contention is discipline. Some critics contend that ratification of the CRC would outlaw spanking because of language in Article 19. They assert further that Article 28 of the treaty would prohibit school discipline. The treaty itself does not explicitly forbid corporal punishment, but the Committee on the CRC has endorsed this policy.

According to Kilbourne’s study of this subject, organizations opposed to the CRC object particularly to the following articles: Article 13, freedom of expression; Article 14, freedom of thought, conscience, and religion; Article 15, freedom of association and peaceful assembly; Article 16, right to privacy; Article 17, access to information; and Article 18, responsibility of both parents to care for the child. While these types of rights are acceptable for adults, they are objectionable for children.

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Underlying all the objections is an interpretation of the CRC as an "anti-parent" and "anti-family" instrument. This sentiment is expressed in Senator Helms statement in support of Senate Resolution 133: "[t]he United Nations Convention on the Rights of the Child is incompatible with the God-given right and responsibility of parents to raise their children."

On the Internet, there is a discussion group on the CRC, and documents have circulated which exemplify this type of interpretation. These are intriguing pieces of data because they reflect the fears of many of the groups mobilized to challenge any attempt to secure ratification of the CRC.

It is quite odd that the CRC is characterized as anti-family. Consider, for instance, Article 5:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present convention.

This provision clearly shows concern for respecting the autonomy of families and is commendable also for including a broader definition of family than the "nuclear" family. There are other provisions in the CRC which demonstrate a concern for balancing the rights of parents and guardians with those of the child. For example, Article 14(3) concerns parental rights to control the religious upbringing of their children and is phrased in a careful way. Since the drafter of this provision wanted to make sure not to grant parental rights at the expense of children’s rights, they included the caveat that the parental rights had to be exercised “in a manner consistent with the evolving capacities of the child.” Overall, it is

34. See Kilbourne, supra note 6 (discussing the study of these organizations). At the same time that the CRC was being debated, a pro-parents’ rights piece of legislation, the Parental Rights and Responsibilities Act of 1995, was introduced in Congress. Similar legislation was also proposed in Colorado. Kilbourne points out that while this does not directly conflict with the CRC, this legislative development does suggest that the nature of the dispute is parents’ rights versus children’s rights.
36. LEBLANC, supra note 4, at 114.
obvious to anyone who reads the CRC that it is a carefully drafted instrument that tries to balance parents’ rights and children’s rights.

There are other more standard objections to ratification. Some maintain that the United States already has sufficient legislation in place to guarantee child welfare. Consequently, the treaty is unnecessary. The American proclivity to reject economic rights also contributes to the treaty’s lack of appeal. The cost of guaranteeing some of the rights enumerated in the CRC worries some of the critics of the treaty. Another common complaint is the assertion that international tribunals are “biased against the United States.” It would be inadvisable to have other countries judge United States policies. This is part and parcel of an anti-international attitude which seems prevalent in this country in the 1990s. As it happens, the treaty-monitoring Committee has more women than men. It is conceivable that it worries opponents that they will be judged by outsiders, and, moreover, outsiders who are female.

There seems to be greater fear of ratification in light of a general comment issued by the Human Rights Committee concerning ratifications. If reservations are deemed incompatible with the basic object and purpose of a treaty, then they may be treated as invalid. Indeed, this policy statement is cited by opponents of CRC to underscore the claim that United States sovereignty will be undermined by ratification.

If we consider the combination of criticisms of the CRC, it begins to be more clear why there has been such consternation. The treaty seems to implicate family values and world government. Conjuring up American paranoid fears about international scrutiny of American families seems to more than the Senate can bear.

IV. ACTUAL DIFFICULTIES WITH THE CRC

A number of normative issues remain, particularly the question of how to rank order the specific rights enumerated in the instrument. A careful reading of the fifty-four articles in the treaty suggest that there are some internal conflicts. Where the rights clash, there is no guiding principle for determining the relative priority of these rights.

37. See Lucier, supra note 30.
38. See Schafley, supra note 30.
39. Seven women and three men are on the committee.
40. There are not only normative inconsistencies within the treaty but between it and other treaties. See LeBlanc, supra note 4, at 274.
Some of the newer rights relate to identity. For example, several articles seem to support a right to maintain cultural and religious identity: Article 8, right to preserve identity; Article 14, right to religious freedom; Article 16, right to privacy and non-interference in the family; and Article 20, temporary placements and adoptions should take into account cultural background. The key provision is Article 30, which like Article 27 of the International Covenant on Civil and Political Rights, guarantees the cultural rights of ethnic minorities, but Article 30 is broader as it includes indigenous peoples.

Despite clear language in support of these rights, there are also rights which conflict with them. Most directly in conflict is Article 24(3) which provides that, "[s]tates Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." Of course, the dilemma is that these very traditions, prejudicial to the health of children, may be necessary for the maintenance of their cultural or religious identity.

One of the most challenging questions is how to interpret the best interests of the child standard. Most would argue that this is to be construed consistent with Western European individualistic notions. This is not a necessary outcome, however, and is the focus of a book edited by Philip Alston. In the United States this might prove problematic because of a potential conflict between United States treaty obligations under the CRC and domestic obligations to indigenous peoples. The Indian Child Welfare Act is based on a group rights notion that is in tension with the individualistic best interests of the child standard. If this is so, then it would be advisable to have a reservation on reservations, so to speak.


42. This article was weakened and was almost excluded altogether were it not for NGO efforts. Though the article was drafted with female circumcision in mind, it could certainly be applied to other kinds of cultural traditions.

43. The most prominent advocate of the Children's Convention is Cythnia Cohen. She acknowledges the challenge of applying this standard cross-culturally. See Cohen, supra note 5, at 854.


46. George Stewart senses this difficulty. See Stewart, supra note 41, at 231.

Another reason why the Convention on the Rights of the Child has been stalled is the "one at a time" rule. Human rights NGOs seem convinced that it is best to concentrate on one treaty. The preferred one in 1996 is CEDAW which has priority ostensibly because it was sent to the Senate Foreign Relations Committee in 1980. It has languished for over fifteen years, while the CRC has not even been submitted to the Committee yet. Another justification is that the women's convention is more likely to be ratified.

This does not, however, explain why both could not be publicly supported simultaneously. That is, human rights NGOs and the Clinton Administration could lobby for both. Evidently, there is concern that the right wing opposition that is mobilized to challenge the Children's Convention might lead to the demise of CEDAW. It is unclear why CEDAW is regarded as less threatening than the Children's Convention. Both seem to involve some degree of societal change.

The reality is that feminists are, to some degree, ambivalent about children's rights. In a thought-provoking treatment of this subject, Frances Olsen discusses the "complex and ambiguous relationship" feminists have to the idea of legal protection for children.\(^48\) According to Olsen women experience a loss of freedom at the birth of a child rather than at marriage.\(^49\) This implies that as the rights of children are expanded, so, too, the correlative duty to guarantee these rights will require increased responsibilities on the part of women/mothers.

A related observation is that the CRC is basically oriented toward male children. According to one version of feminist theory: "[t]o the extent that the Convention deals with children as unspecified, unsituated people, it tends in fact to deal with white, male, relatively privileged children."\(^50\) This concern has led to a campaign to guarantee the rights of the "girl child", a term used by UNICEF. Although the CRC may not explicitly address the problems of female children, it is unclear to what extent this contributes to the delay in securing its ratification in the United States. It is true, however, that the desire to protect CEDAW from the organizations poised to attack the CRC seems to have made it less likely that the human rights community will insist that the CRC be considered in the near future.

The most serious challenge is the undifferentiated set of responsibilities for parents and states under the CRC. There is a general


\(^{49}\) Id. at 193.

\(^{50}\) Id. at 195.
problem with any attempt to secure children's rights because there will always be a tension among parents, governments, and children. In the Anglo–American tradition citizens have not supported much intervention by the state. If the CRC is perceived as mandating unwarranted state intervention in family decision making, that will make it extremely difficult to be accepted. This triangular structural problem is a subtle one, and one which is not sufficiently worked out in the treaty itself. If the scope of the rights were more clear, this would alleviate the fears of American parents that the government would usurp their control of their own families.

In the final analysis, the overreaction to the CRC seems peculiar. Since the United States usually ratifies human rights treaties with a reservation that ensures that it will be non-self-executing, the effect of the treaty would be minimal. The United States government sometimes ratifies with a reservation to the effect that the treaty will only guarantee rights to the same extent as domestic law, in which case, again, there would be nothing to fear from ratification. It strikes one as odd that the treaty cannot even be accepted on a symbolic level. What can account for this?

It is not only the right wing and feminists who are uneasy about empowering children. It is likely that all parents fear this outcome. With all the publicity about Gregory "divorcing" his parents has come a reaction that things have gone too far. In the current climate it will be hard to allay adult fears about children with legal rights that courts would enforce. Despite this anxiety, it is time to champion the CRC to protect children, who are, in virtually all cases, vulnerable.

V. IMPORTANCE OF TRANSMITTING THE CRC

The rhetoric surrounding the CRC is mostly absurd. The treaty would pose no threat to American families, and what is needed is a serious
debate of the meaning of the treaty to clarify the interpretation of the especially controversial provisions. The strategy of using a low profile advocacy of treaty ratification has not proven effective in the case of the Children's Convention. It would be far better to have an open debate on the relative advantages and disadvantages of ratification.

The debate may be a nasty one. Cynthia Price Cohen, perhaps the leading advocate of the CRC, anticipates a major battle between the supporters and opponents of the treaty once the President submits it to the Senate. It is only by taking on one's opponents directly that consensus building becomes possible. Securing ratification quietly may temporarily avoid a clash, but it simply postpones the conflict.

It has been said that the drafting of the CRC was partly a consciousness raising effort. If the United States signing of the CRC was merely a symbolic gesture of support, then attempting to complete the process would, at the very least, show a serious commitment to the notion of children's rights. Even if ratification were 100 percent impossible, the President should show moral courage by transmitting the Convention to the Senate. It may take many years to secure ratification, as with the Genocide Convention, but it is time to begin the process.

53. Stentzel suggests that the quiet lobbying will not be effective. Comparing the unsuccessful effort to win ratification of the International Covenant on Economic, Social, and Cultural Rights with the non-campaign to do the same for the CRC, Stenzel extends Philip Alston's assessment of the IESCR strategy: "[t]here is little reason to believe that the stealth or toothless tiger approach would succeed when it has been unsuccessful for the IESCR." Stentzel, supra note 4, at 1321-1322.

54. Cohen, supra note 8.

55. Kilbourne maintains that the signing was "only at the death-bed behest" of James Grant, former executive director of UNICEF, KILBOURNE, supra note 6, at 1.
THE ROLE OF N.G.O.S IN U.S. RATIFICATION OF HUMAN RIGHTS TREATIES

Jeffery Huffines*

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I. INTRODUCTION

The United States has been ambivalent in its attitude toward the United Nations and toward human rights in particular. On the one hand United States legal experts have been instrumental in helping to craft the United Nations Covenants and Conventions. On the other, the Senate did not give its advice and consent to the Convention on the Prevention and Punishment of the Crime of Genocide until 1986, nearly thirty-seven years after it was first submitted by President Truman.

The role of non-governmental organizations (N.G.O.s) has been essential in the development and implementation of international human rights law. In the United States, the N.G.O. community has provided legal expertise to both the Department of State and Congress, has lobbied Capitol Hill, and has developed a nationwide constituency for ratification of the various human rights treaties.

In 1984, a Washington-based Human Rights Treaty Ratification Working Group (hereinafter “Working Group”) was formed to pursue ratification of the United Nations human rights treaties. The Working Group was composed of representatives of N.G.O.s from the legal, human rights, and religious communities, including the American Bar Association, Amnesty International U.S.A., B’nai Brith International, the

* Bahá’ís of the United States; Organization listed for purposes of identification only. This article is based on a presentation given at a panel discussion entitled U.S. Ratification of Human Rights Treaties at the International Law Weekend ‘96, sponsored by the American Branch of the International Law Association, November 1, 1996, in New York City. The author wishes to thank Ms. Patricia Rengel, Chief Legal Counsel of Amnesty International U.S.A., and Ms. Kit Cosby, Deputy Director for External Affairs of the National Spiritual Assembly of the Bahá’ís of the United States for their assistance in the preparation of this article.
International Human Rights Law Group, United Nations Association of the United States, Lawyers Committee for Human Rights, the Bahá'ís of the United States, the Lutheran Office, and others. Over the years additional working groups that focused on specific treaties were formed. These treaties included the conventions on genocide, torture, race, children, and women, as well as the Covenant on Civil and Political Rights.

This paper will focus on the experience of the Washington, D.C. human rights community. Other human rights coalitions based in New York, the West coast, and the Midwest have also played an essential role in the ratification of human rights treaties. While it is beyond the scope of this paper to provide a comprehensive overview of the N.G.O. efforts to promote ratification during the past decade, the general political strategy of the Working Group will be summarized with examples of decisions and action taken to illustrate each point.

A. Political strategy

The political strategy of the Human Rights Treaty Ratification Working Group may be summarized as follows:

1) Lobby for ratification of at least one treaty during each Congress.

2) Start with those treaties narrowest in scope and establish broad bipartisan support thereby building momentum for each subsequent treaty.

3) Push for ratification with a minimum of limiting reservations, declarations and understandings.

4) Work closely with allies in Congress and the Executive Branch to accomplish ratification and appeal to popular support when necessary.

5) Support passage of implementation legislation when necessary.

1. Lobby for Ratification of at Least One Treaty During Each Congress

The Carter Administration made human rights the center of its foreign policy. In 1978 the Administration submitted four human rights
to the Senate Foreign Relations Committee, and in 1980 it submitted the Convention on the Elimination of All Forms of Discrimination Against Women. Following the 1980 election of President Reagan, the treaties remained in Committee without further consideration. In retrospect, the action taken by the Carter Administration appeared to be a gesture with no strategy behind it.

In 1984, after consultation with the Legal Advisor's Office in the State Department and with key members of Congress, the Working Group agreed upon the goal of seeking ratification of at least one human rights treaty during each Congress. Allies in Congress warned that the Senate would consider only one human rights treaty at a time. Treaty supporters also felt that if more than one treaty at a time were submitted, the opponents of any one treaty could stop the others that were tied to it. The members of the Working Group recognized that it was engaged in a long-term education process in both the Congress and throughout the nation.

2. Start with Those Treaties Narrowest in Scope and Establish Broad Bipartisan Support Thereby Building Momentum for Each Subsequent Treaty

There is a creative tension between the demands and expectations of the Executive Branch, Congress and of N.G.O.s. Depending on the season, electoral politics, domestic politics, and the politics of the international community all come into play.

The Genocide Convention was the first human rights treaty to be considered for ratification. Because it was the first human rights treaty submitted to the Senate in 1948 by President Truman and because the treaty narrowly addressed only the issue of genocide, the subject elicited universal condemnation and generated little domestic opposition. During the presidential election campaign of 1984, President Ronald Reagan announced his support for ratification of the Genocide Convention at the National Convention of B'nai B'rith International. The timing and conception of his statement of support were not coincidental as the American Bar Association, Amnesty International U.S.A., and B'nai B'rith International had recommended that he take such action. Senator William Proxmire submitted statements into the Congressional Record every day for years calling for United States ratification of the Genocide

Convention. In this instance the Working Group worked closely with Senator Proxmire’s office as well as with key members of the Senate Foreign Relations Committee to ensure the Senate’s advice and consent of the Treaty.

Of special significance at the time was the fact that following the Republican takeover of the leadership of the Senate in 1984, Senator Richard Lugar, as Chairman of the Foreign Relations Committee, persuaded a majority of Republicans to support the Convention while ensuring the continued support of Democratic Senators. In addition, the Working Group coordinated constituent visits with key members of the Senate, including Senator Symms in Idaho, Senator Thurmond in South Carolina, and Senator Hecht in Nevada, to urge them to vote for the Convention on its own merits and not against it out of an exaggerated concern for national sovereignty. As a result, in November 1988, almost forty years after the United States had signed the Genocide Convention, President Reagan signed implementing legislation thus completing the process of ratification.

Having opened the door to the ratification process, the Reagan Administration proposed for Senate consideration the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment which the Bush Administration subsequently brought to the Senate for its advice and consent in October 1990. Subsequent treaties brought before the Senate by the Bush and Clinton Administrations included the Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women.

3. Push for Ratification with a Minimum of Limiting Reservations, Declarations or Understandings

Political considerations have had a profound influence not only on the timing and order of treaties to be considered by the Senate but also on the package legal provisions proposed by the State Department for each of the treaties. In principle, the members of the Working Group agreed that the human rights treaties could be ratified by the United States with a minimum of limiting legal provisions. Each organization had to decide for itself what legal issues were amenable to compromise. While the Working Group recognized that compromises would have to be made with the State Department and the Senate on legal issues of concern to get the ratification process started with the Genocide Convention, the overall strategy was to decrease the impact of limiting legal provisions negotiated for each subsequent human rights treaty.
For example, Senator Jesse Helms had insisted that a reservation on national sovereignty be attached to the Genocide Convention. The reservation stated “[n]othing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”

Many members of the Working Group found this reservation objectionable and unnecessary. The Working Group agreed, however, that it was not worth stalling the momentum for ratification by insisting that the reservation be taken out and thus perhaps delaying indefinitely the proceedings. Subsequently, the Working Group cited the negative reaction of other governments against the sovereignty reservation in insisting that the reservation should not be included in the legal package negotiated for the Convention Against Torture.

Although Senator Jesse Helms, ranking Minority Leader of the Foreign Relations Committee, strongly favored the inclusion of the sovereignty reservation in the instrument of ratification for the Convention on Torture, a bipartisan compromise was subsequently reached to reduce the sovereignty reservation to that of a proviso to be sent to all state parties which stated that “no legislation or action is required that is prohibited by the U.S. Constitution.” Significantly, the proviso was not included with the instrument of ratification deposited by the President at the United Nations. Similar provisos were sent upon ratification of the Covenant on Civil and Political Rights in 1992 and the Convention on the Elimination for All Forms of Racial Discrimination in 1994.

Modification in the language of other provisions has occurred over the history of the ratification of human rights treaties. For example, the federal-state reservation under the Convention Against Torture has become an understanding under the Covenant on Civil and Political Rights and the Race Convention. However, the United States continued to take a reservation on the compulsory jurisdiction of the International Court of Justice under the Race Convention as it had under the Genocide Convention. In addition, the Conventions on torture and race, and the Covenant on Civil and Political Rights each had understandings stating the treaties were not self-executing.2

In the package submitted by the Clinton Administration to the Senate Foreign Relations Committee for the Women’s Convention in October 1994, the reservation on the compulsory jurisdiction of the International Court of Justice taken under the conventions on genocide and race has been reduced to a declaration. The freedom of speech reservation

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taken under the Covenant on Civil and Political Rights and the Race Convention has been proposed as an understanding.

There is also a creative tension within the N.G.O. community in the negotiation of political strategy and legal policy. Clearly, the active members of the Working Group were all committed to the overall goal of ratification. Some organizations have wanted to use the treaties to condemn the government's domestic record while others felt it more politic to emphasize the international influence the treaties would have in establishing basic universal human rights standards at home and abroad. Each organization had to decide what it could live with and what it could not when it came to consulting with the State Department on the United States package of provisions for each treaty. Some organizations such as the Bahá'ís of the United States upheld ratification of the treaties in support of the general principle of the rule of law without taking legal positions on the specific provisions of the treaties. In this regard the Bahá'ís could help facilitate a consensus on issues where various organizations differed. Other organizations such as Amnesty International U.S.A., which condemns the use of the death penalty under all circumstances, had to decide when they could accept a compromise and when they had to threaten to oppose ratification of a treaty all together because of a proposed position of the government on a given treaty provision. On many of these difficult issues, the American Bar Association was instrumental in helping to hammer out a compromise solution acceptable to all parties.

For example, in 1988 the Administration had proposed a reservation for the Convention Against Torture that would have changed the definition of torture by introducing specific defenses for torture. Amnesty International U.S.A. decided that it would have to oppose ratification unless this reservation were eliminated. In the fall of 1989, following President Bush's election, Amnesty International's then Legal Director, Nigel Rodley, a world expert on torture, met with the Legal Advisor and staff of the State Department and members of the Criminal Division of the Department of Justice. After the meeting, the Administration created a new package for submittal to the Senate. On the other hand, when the Administration proposed a reservation for the Covenant on Civil and Political Rights that permitted capital punishment, Amnesty International U.S.A. decided, after extensive debate, that they would not oppose ratification on this issue, recognizing that Congress was reluctant to resolve domestic controversies through the adoption of international treaties under the Constitution.

Finally, limiting provisions for treaty ratification are not only a source of controversy domestically, but internationally as well. A number
of State Parties have submitted to the United Nations their objections to United States provisions.

4. Work Closely with Allies in Congress and the Executive Branch to Accomplish Ratification and Appeal to Popular Support When Necessary

Over the years, national organizations with grassroots constituencies have requested their membership to write or call relevant members of Congress and the Administration in support of the ratification of various human rights treaties. Letter writing campaigns have been timed to urge the Administration to actively support ratification, to urge the Senate to hold hearings or vote on a given treaty, or to request sponsorship of congressional resolutions or letters that recommend such action be taken.

The first two treaties on genocide and torture that were ratified by the United States could not have been ratified without the support of key national organizations such as the American Bar Association, Amnesty International U.S.A., B'nai B'rith International, and others who lobbied on Capitol Hill and provided essential legal expertise. Neither treaty had great popular support. The same was true to a great extent for ratification of the Covenant on Civil and Political Rights.

The issues addressed by the remaining treaties, however, particularly those dealing with children and women, and the Covenant on Social, Economic and Cultural Rights, are not so clear cut precisely because of the legacy of the Cold War and the opposition against the social, economic, and cultural provisions in each of them. In addition, many of the provisions of these treaties deal more directly with state law than with just federal law.

In this instance, it has become necessary to build a grassroots constituency for both the Convention on the Rights of the Child and for the Women's Convention.

The role of the United Nations World Summits and Conferences has been crucial in helping to develop such a constituency in the United States, particularly the World Summit for Children in New York in 1990, the Human Rights Conference in Vienna in 1993, and the World Conference on Women in Beijing in 1995.

B. Convention on the Rights of the Child

Following the World Summit for Children in New York in 1990, InterAction, the organization that took the lead in coordinating N.G.O. support for the Convention on the Rights of the Child, developed a very
effective legislative and grassroots campaign which included a National Advisory Council on the Rights of the Child co-chaired by Senators Bradley and Lugar. House and Senate resolutions were passed in the 101st Congress with eighty-five and sixty cosponsors respectively. Nine governors and states issued proclamations or passed resolutions in support of the Convention. Other resolutions were passed at the city and local levels. Sign-on letters addressed to President Bush and the Congress from corporate leaders and N.G.O.s were sent. Periodic letter writing campaigns were initiated by the members of the Working Group on the Rights of the Child. In Washington, the American Bar Association sponsored a working group to do an analysis of the Convention and its impact on United States domestic law.

Of all of the human rights treaties the Convention on the Rights of the Child enjoyed the greatest widespread constituent popularity. It also enjoyed the support of the First Lady, Hillary Rodham Clinton, formerly affiliated with the Children’s Defense Fund. On February 16, 1995, United States United Nations Ambassador, Madelaine K. Albright, signed the Convention on the Rights of the Child on behalf of the United States. However, perhaps because of its relative popularity, the Convention also inspired the most intense organized opposition by such groups as the National Center for Home Education, the Eagle Forum, and the Family Research Council. A second resolution in support of the Convention which was to be introduced in the 104th Congress was stalled because of the withdrawal of support from several senior senators such as Senator Bob Dole. Several Senate offices reported that most constituent phone calls and letters regarding the Rights of the Child treaty were overwhelmingly negative.

C. Convention on Women

The United States signed the Convention on the Elimination of All Forms of Discrimination Against Women on July 17, 1980, and President Carter transmitted it to the Senate Foreign Relations Committee in November 1980. The Committee held hearings on the Convention in the 101st and 103rd Congresses. In the hearing held during the summer of 1990, the State Department, under the Bush administration, testified that it had not yet prepared a legal analysis.

In the Spring of 1993, after intense lobbying by N.G.O.s, sixty-eight senators signed a letter to President Clinton asking him to take the necessary steps to ratify the Women's Convention. In June 1993, Secretary of State Warren Christopher announced at the United Nations World Conference on Human Rights in Vienna that “[g]uaranteeing
women their human rights is a moral imperative.” In the Vienna Declaration and Programme of Action the United States agreed that “[t]he United Nations should encourage the goal of universal ratification by all States of the [Women’s] Convention by the year 2000.” The United States also announced its intention to ratify the Convention on the Rights of the Child and the Covenant on Economic, Social and Cultural Rights. Significantly, the United States and the other nations represented at the Conference agreed that human rights are “universal, indivisible and interdependent and inter-related.”

Administration officials had hoped that ratification of the conventions on race and women would take place by the summer of 1994. Following ratification of the Race Convention in June 1994, the Clinton Administration submitted a package for the Women’s Convention to the Senate Foreign Relations Committee which passed favorably on September 29th by a vote of thirteen-five (with one abstention). At the same time there was an eleventh hour mail and phone campaign against the treaty, fueled in part by radio talk shows. Several senators put a hold on the Convention, thereby blocking it from the Senate floor during the 103rd Congress.

Following the fall 1994 elections, the Republicans took over the leadership of Congress and Senator Jesse Helms became Chairman of the Foreign Relations Committee. When the new Senate convened in January 1995, the Convention on Women reverted to the Senate Foreign Relations Committee, where it remains to this day.

In September 1995, at the Fourth World Conference on Women in Beijing, China, the United States reaffirmed the commitment to seek ratification of the Women’s Convention. With approximately 8,000 Americans attending the Conference, the Beijing Declaration and Platform for Action provided fresh momentum to build popular support for United State ratification. After the Beijing Conference, the Washington D. C. based Working Group on Ratification of the Women’s Convention, currently co-chaired by Amnesty International U.S.A. and the Bahá’ís of the United States, offered as a model an effort initiated in 1995 by the Iowa Division of the United Nations Association. That effort resulted in the Iowa City Council passing on August 1, 1995, a resolution endorsing United State ratification of the Women’s Convention. Since its passage, four other Iowa municipality campaigns have been launched. Five state legislatures, California, Iowa, Massachusetts, New York and South Dakota, have also endorsed resolutions in support of ratification.

On April 30, 1996, over one hundred organizations signed a letter addressed to all Senators urging that “the Senate give its prompt advice and consent to ratify” the Convention.
5. Support Passage of Implementation Legislation When Necessary

The process of ratification of human rights treaties does not end with the advice and consent given by the Senate. States Parties are required to undertake measures to adopt and give effect to treaty provisions, through the implementation legislation if necessary, and to participate in the United Nations system for monitoring compliance.

An issue of concern for nearly all human rights N.G.O.s is that to date each of the human rights treaties has been ratified with the declaration of non-self-execution. This means that provisions of the treaty may not be enforced directly by the judiciary in the absence of implementing legislation passed by both houses of Congress. Many object to this declaration because it prevents United Nations treaties from becoming United States law and United States citizens may not invoke treaty provisions in United States courts unless implementation legislation has been passed by Congress.³

The members of the Working Group recognized that there is great reluctance on the part of Congress to change domestic law through treaty law. The Constitution is the supreme law of land, and even though the Constitution makes treaties the supreme law of the land as well, Congress is reluctant to use the treaty process as a means of changing domestic law because only the Senate is given the responsibility for advice and consent to ratification. In contrast, implementation legislation requires the consent of both houses of Congress.

Implementation legislation was required to make specific provisions of the conventions on genocide and torture a part of the United States legal code. For both treaties, the Working Group assisted the relevant congressional committees in drafting the implementing legislation and in helping to ensure that the legislation went through the ordinary legislative process necessary for final passage by both houses of Congress.

Following the Senate’s advice and consent of the Genocide Convention in 1986, President Reagan signed, in November 1988, the Genocide Convention Implementation Act,⁴ which made genocide a federal crime, established penalties for commission of that crime, and defined the jurisdiction of the United States over acts of genocide as referred to in article V of the Convention. In June 1994, President Clinton signed the State Department Authorization Bill which included legislation implementing articles 10-14 and 16 of the Convention on Torture. In November 1994, the instrument of ratification to the Convention on

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³. *Id.*

Torture was deposited at the United Nations after the proviso on national sovereignty had been sent to all governments party to the convention.

In the fall of 1994, the Lawyer's Committee for Human Rights led an effort to introduce legislation that would make United States law the provisions on which the United States took reservations under the Covenant on Civil and Political Rights. The International Human Rights Law Group began an effort to introduce implementation legislation on the Race Convention. The intent of the proposed legislation was to provide United States citizens a cause of action in United States courts as provided for by the relevant treaty provisions. They failed to find congressional co-sponsors for both measures.

Once a convention is ratified, the United States is obliged to report periodically its progress to responsible United Nations committees that monitor compliance of each treaty. In March 1995, United States representatives appeared before the Human Rights Committee, the treaty monitoring body of the Covenant on Civil and Political Rights, to answer questions about the United States Government's initial report submitted to the Committee in September 1994. Human rights organizations provided information to the State Department for its preparation of that report and in March 1995 made public an N.G.O. report which was also given to the members of the Human Rights Committee. The purpose of the N.G.O. report was to

assess the accuracy and completeness of the United States Report; to identify the subject areas where the most serious compliance problems exist that are not addressed adequately in the U.S. Report; and help the U.S. government and the United Nations agencies responsible for monitoring human rights instruments develop more effective methodology for assessing and reporting on compliance status and needs on a regular basis.

The human rights community has communicated with the State Department officials responsible for preparing the reports required by the conventions on race and torture. However, the United States has not met the deadlines as required by the conventions. The human rights

5. Cosby, supra note 2.

community also expects to prepare its own reports for each of these treaties.

II. CONCLUSION

Support of the ratification of human rights treaties has been a dynamic process which has required the cooperation of the executive and legislative branches of government in collaboration with non-governmental organizations. The role of the N.G.O. community has been essential in generating popular support for human rights and in providing legal expertise and applying political pressure to Congress and the Executive Branch to accomplish ratification. While it appears that the anti-United Nations sentiment in Congress has been tempered somewhat since the 104th Congress adjourned, serious obstacles within the Senate must be overcome before ratification of the remaining United Nations human rights treaties can be achieved. These treaties include the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Children, the American Convention on Human Rights, and the Covenant on Social, Economic and Cultural Rights. The challenge before the N.G.O. community is to significantly increase the popular support that already exists for the ratification of human rights treaties through a nationwide grassroots education program while continuing to press for prompt ratification on Capitol Hill.
A HUMAN RIGHTS AGENDA FOR THE NEXT ADMINISTRATION

Gare A. Smith

I would like to thank the American branch of the International Law Association for inviting me here today. It's a pleasure to join such a distinguished group of business people, scholars, and community leaders. I bring the warmest regards of Assistant Secretary of State John Shattuck, who had very much looked forward to attending today. He was, unfortunately, called to The Hague for an emergency meeting regarding the War Crimes Tribunal—a good example of the Clinton Administration's human rights policy in action.

It is often said that "the past is prologue." The Clinton Administration's human rights agenda in its second term will be certain to capitalize upon the successes of the first term. To this effect, I'd like to discuss what we in the Administration have been doing—and will continue to do—to promote respect for human rights.

There are many reasons why respect for human rights plays an important role in our foreign policy. Three of these reasons stand out.

First, as Vice President Gore recently put it, the United States of America stands for something in this world. People all across the globe look to us as a model of freedom, respect for human dignity, and justice under law. This is one of our proudest legacies, and the American people want us to put these ideals into practice.

Second, our dedication to universal values is a vital source of America's authority and credibility. We cannot lead, and we cannot be a world leader, without it.

Our interests are most secure in a world where accountable government strengthens stability, and where the rule of law protects both political rights and free market economies.

Open borders, transparent legal systems, and respect for freedom of speech are fundamental values to individuals and multinationals alike. A country that respects human rights is far more likely to be a good country in which to transact business than one that does not.

* Deputy Assistant Secretary for Democracy, Human Rights and Labor, U.S. Dept. of State.
Third, the costs to the world of repressive governments are painfully clear. In the twentieth century, the number of people killed by their own authoritarian governments is four times the number killed in all this century's wars combined. Even in 1996, after the end of the Cold War, there are still millions of people who live under repressive regimes and authoritarian governments. It is their suffering, courage, and hope that is the moral basis of our efforts.

Today, people around the globe are engaging each other in ways that transcend national borders. National economies are becoming intertwined. New technologies of communication and transportation, satellite TV, and the Internet are bringing people of different countries and cultures closer together, as are shared concerns about the environment, the population explosion, and international terrorism.

Meanwhile, the political and economic forces that are bringing the world together are also driving it apart, as cynical and self-serving leaders fan the flames of nationalism into deadly ethnic conflict.

In this complex interconnected world, it is becoming increasingly urgent that we create new institutions of justice and new ways of resolving conflicts.

Ever since President Clinton took office, this Administration has steadily worked to move human rights to the center of our foreign policy.

We have worked with other countries to build new human rights institutions, such as International War Crimes Tribunals, National Human Rights Commissions, and the new United Nations High Commissioner for Human Rights.

The Human Rights Bureau, has been given authority to oversee those parts of the foreign aid budget going to help new democracies.

We have made an unprecedented effort to work with the business community to promote respect for human rights and worker rights in the countries where they set up shop.

We have, for the first time, integrated women's rights issues into all aspects of our human rights policy. We saw to it that systematic rape was defined as genocide under the Genocide Convention. We have woven women's issues throughout the State Department's annual Country Human Rights Reports and successfully promoted the initiation of a substantial women's rights agenda throughout the United Nations system. At the Fourth United Nations Conference on Women in Beijing we made our position unambiguously clear, that women's rights are human rights.

This Administration has worked to strengthen the structure of international human rights law, by winning ratification of the Convention on Racial Discrimination, and by releasing the first report published by the United States Government on our own compliance with the International
Law of Human Rights. These efforts reflect our commitment to the universality of human rights principles and greatly enhance our own credibility in pressing for human rights abroad.

We have made a significant difference in specific countries. Haiti has its best chance for democracy in its history, thanks to an intensive international effort led by the United States over the last three years. We led the way in creating an International War Crimes tribunal to try the ringleaders of the genocide that exterminated more than half a million people in Rwanda two years ago. We are working with our NATO ally Turkey to curtail the human rights abuses of its military, and move towards fuller democracy. We are running programs to train police and prosecutors in civil liberties in countries all across Eastern Europe and Latin America. And despite the difficulties we have encountered, we have managed to cast a spotlight on human rights abuses in China as never before.

I would like now to turn to Bosnia. The story of Bosnia, of the war there and the diplomatic settlement that has ended the fighting, is the story of our new world, of the challenges we will face, and of the ways we are learning to respond.

Human rights have been at the heart of this terrible war from the beginning. Leaders spurred ethnic cleansing by playing on people’s fears that their rights would not be protected in the states emerging from the former Yugoslavia. The conflict they set in motion generated some of the worst atrocities Europe has seen since World War II. And now that the conflict has a chance of ending, justice and respect for human rights are imperative.

Only justice can lift the burden of collective guilt from a society and place it on the shoulders of the perpetrators where it belongs. Without a full accounting that holds those who committed the crimes of genocide responsible for their actions, lasting reconciliation will lie beyond reach.

The Clinton Administration has worked to stop the bloodshed, hold accountable those responsible for war crimes, and ensure that the rule of law—not the rule of genocide—prevails. And the lessons we are learning in Bosnia today can be put to good use tomorrow.

To begin with, it was intensive United States diplomacy backed by credible force that led to the Dayton Accords which ended the conflict. This unprecedented peace agreement synthesizes human rights, justice, and conflict resolution in a framework that offers the best chance of securing a lasting peace.

At Dayton, John Shattuck was the first Assistant Secretary for human rights to take an active part in a major diplomatic peace
negotiation. This in itself was a new integration of human rights into the most serious issues of diplomacy, of war and peace.

The Dayton Accords created a set of human rights institutions, including a Constitutional Court, a Human Rights Chamber, and an Ombudsman; provided for international monitoring of elections and human rights performance; and obligated every party to cooperate with the investigations of the United Nations War Crimes Tribunal in The Hague, however the chips may fall.

And we were not starting from scratch in Dayton—we were working with the lessons of Haiti, where U.S. leadership and support for the reconstruction of civil society, democratic institutions, and the rule of law was essential to ending a human rights catastrophe.

This Administration has consistently, steadily, and successfully helped make international justice a reality in the hellholes of Bosnia, Rwanda, and now, if we succeed in our effort to create a permanent International Criminal Court, throughout the world.

Since the Tribunal's inception in 1993, the Clinton Administration has been its steadiest and strongest supporter. We have given the Tribunal more financial, logistical and political support than any other country. This has taken a lot of heavy lifting in a lot of bureaucracies, but we have stuck with it.

At Dayton, we made sure that support for the Tribunal was an essential element of the Agreement, and binding on all parties. And our military forces in Bosnia have taken it upon themselves to provide a safe environment for the Tribunal's investigations and to assist its investigators in their work.

The significance of the Tribunal's work goes far beyond the present-day conflicts in Bosnia and Rwanda.

The Tribunal is precisely the kind of human rights institution we need to be creating in the post-Cold War world. Just as the postwar generation rose to the task of creating new institutions that guided the international community for the next half-century, so too now it is our responsibility to create new transnational institutions of justice for the global community of the twenty-first century. Much of this work is slow going, and well removed from the headlines. But I am convinced that our work on creating institutions of accountability will stand, not only as a significant achievement of this administration, but as one of our country's noblest efforts.

Half a century ago, the need for a global structure protecting human rights was given special urgency by the unprecedented horrors of
the Holocaust of World War II. But the foundation of that structure is embedded in the deepest values of every part of the world.

Throughout modern history, when fundamental human values have been assaulted by governments and their leaders, humankind has turned toward self-destruction. That is what happened in the Nazi concentration camps, in the Soviet Gulag, in the Chinese Cultural Revolution, in the killing fields of Cambodia, and more recently in the acts of genocide carried out in the former Yugoslavia and in Rwanda. These and other massive human horrors live in our historical memory.

Universal human rights are the measure of these horrors and of our commitment to strive not to repeat them.

It is in this arena of human rights institution-building, of creating structures of justice and accountability that will extend into the future and on which others can build, that the Clinton Administration has made its greatest contribution to the unending work of human rights.

In closing, I would like to remember on whose behalf we labor in the field of human rights, and on whose behalf a global structure of protection is being built. In this work we are responding to the pain and need of men, women, and children on all continents, and to our own interest as Americans in peace, security, and the ideal on which our nation was founded.

The challenges human rights advocates face today are greater than we had ever anticipated during the heady early days after the fall of the Berlin Wall and the end of the Cold War. Yet the new international environment offers unprecedented opportunities for the promotion of human rights and human dignity.

One of our greatest American heroes, the Reverend Dr. Martin Luther King, Jr., said that "the moral arc of the universe is long, but it bends towards justice." We all have a long way to go along that arc, but our nation and our Administration are committed to going the distance.
AN INTRODUCTION TO THE DEVELOPING JURISPRUDENCE OF THE RIGHTS OF THE CHILD

Cynthia Price Cohen

The Convention on the Rights of the Child was adopted by the United Nations General Assembly on November 20, 1989. At the time of the International Law Association's 1996 International Law Weekend, 187 countries had ratified the Convention. As of February 1, 1997 the number of States Parties had increased to 189. Because of the Convention's worldwide popularity, it is having a major effect on both national and international law applicable to children. As a consequence, there is a new and growing body of international law on the rights of the child. The purpose of the International Law Weekend panel, The Developing Jurisprudence of the Rights of the Child, was to inform International Law Association members about this new body of international law, the general direction that its development has taken thus far and its effects on United Nations child rights activities, private international law and nongovernmental bodies, such as academic institutions.

Drafting of the Convention on the Rights of the Child was originally undertaken as a part of the celebration of the 1979 International Year of the Child. It was drafted over a ten year period by a Working Group established by the United Nations Commission on Human Rights.

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2. Nations that ratify treaties and are thus legally bound by them are known as "States Parties." The only countries in the world that had not yet become States Parties to the Convention were: the Cook islands, Somalia, Switzerland and the United States.
The final text of the Convention was an elaboration and an extension of a model convention presented to the Commission in 1979 by the Polish government, which was its sponsor. Participants in the Working Group included delegates from nations that were members of the Commission on Human Rights, delegates from nations that participated as observers and representatives from other bodies, such as international governmental organizations and nongovernmental organizations.

During the drafting process, the original Polish model, which had twenty substantive articles, was expanded to such an extent that the substantive portion of the Convention's final text contains forty-two articles. The Convention on the Rights of the Child is the only international human rights treaty that incorporates the full range of human rights envisioned in the Universal Declaration of Human Rights. In fact, it also includes rights that are not covered by the Universal Declaration. Not only does it protect the child's civil-political rights (i.e., freedom of speech, religion and the right to privacy) and economic-social-cultural rights (i.e., the right to education, a standard of living and health care), it also protects the child who has no family, the child in time of war and

3. The difference between nations that were members of the Commission on Human Rights and those that were not had to do with voting powers. However, this distinction was essentially irrelevant because all decisions of the Working Group were made on the basis of consensus and no vote was ever taken.

4. Represented were such bodies as UNICEF, the U.N. High Commissioner for Refugees, the World Health Organization and the International Labour Organisation.


For a full record of the Convention's drafting process, including a list of governmental and nongovernmental participants see THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PREPARATOIRES,” (Sharon Detrick, ed. 1992).

6. For details of this expansion and its effects on the international law of children's rights see infra note 21, Developing Jurisprudence.


8. See supra note 1, Convention at e.g. arts. 2, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 25, 30, 37, and 40.

9. See supra note 1, Convention at e.g. arts. 23, 24, 26, 27, 28, 29, 30, and 32.

10. In particular see supra note 1, Convention at arts. 20 and 21. Article 7 is also relevant because it speaks of the child's right to “know and be cared for by his or her parents.”

11. See supra note 1, Convention at arts. 22 and 38.
provides for physical recovery and social reintegration of children who have been traumatized by a variety of causes.\textsuperscript{12}

The Convention on the Rights of the Child is distinguished by four overriding principles that apply to all of the Convention's articles: 1) protection from discrimination;\textsuperscript{13} 2) the right to survival;\textsuperscript{14} 3) the "best interests of the child;"\textsuperscript{15} and 4) respect for the child's views.\textsuperscript{16} The Convention on the Rights of the Child strongly protects the family-child relationship,\textsuperscript{17} but not to the detriment of the child's well-being. For example, article 5 gives the family a guiding role in the child's exercise of his or her rights, but makes allowances for the maturity of the child. The Convention calls on States Parties to respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.\textsuperscript{18}

Although the Convention on the Rights of the Child supports the child's right to a nurturing family, it does not assume that the family-child relationship is perfect. Article 19 protects the child from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."\textsuperscript{19}

The Convention on the Rights of the Child is also notable for the fact that it is the only international human rights treaty that has been written in language that is equally respectful of both genders. Wherever a

\textsuperscript{12.} See supra note 1, Convention, at art. 39.
\textsuperscript{13.} See supra note 1, Convention at art. 2.
\textsuperscript{14.} See supra note 1, Convention at art. 6.
\textsuperscript{15.} See supra note 1, Convention at art. 3.
\textsuperscript{16.} See supra note 1, Convention at art. 12.
\textsuperscript{17.} The Convention on the Rights of the Child is decidedly pro-family. Recognition of the parent-child relationship can be found in articles 2, 3, 5, 7, 8, 9, 10, 11, 14, 16, 18, 20, 21, 22, 23, 24, 27, 37 and 40.
\textsuperscript{18.} See supra note 1, Convention at art. 5. Emphasis supplied.
\textsuperscript{19.} See supra note 1, Convention at art. 19 (1).
singular possessive pronoun has been used in the Convention, it appears as both masculine and feminine forms. Thus, for example, article 2 speaks of the principle of non-discrimination not only in relation to the child, but also in relation to "his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national ethnic or social origin, property, disability, birth or other status."20

The overall effect of the Convention on the Rights of the Child is that of radically altering the way the world looks at children. Its impact has not been limited to the national legislation of States Parties, it has also been an inspiration to the drafters of the numerous international legal instruments that have been adopted since the Convention on the Rights of the Child went into force.21

Like other United Nations human rights treaties, the Convention on the Rights of the Child calls for States Parties to submit periodic reports to a committee of "experts of high moral standing and competence in the field"22 who are to examine the reports to ascertain the extent to which each State Party has fulfilled its obligations under the treaty.23 Since September 2, 1990, when the Convention on the Rights of the Child went into force, countries that have ratified the Convention have been involved in conforming their national law to meet the Convention's standards and in preparing their initial reports to the Committee on the Rights of the Child, which is the Convention's monitoring body. While in some respects the Convention's monitoring process replicates that of other United Nations human rights treaties, it is unique in that article 45 provides a special role for nongovernmental organizations.24 As a result of article 45, the Committee on the Rights of the Child has access to a broad range of information with which to evaluate the accuracy of States Parties' reports. The reporting process has already enabled many countries to discover and remedy flaws in their national children's policies.

The impact of the Convention on the Rights of the Child has reached far beyond the State Party reporting process. It has brought about

20. See supra note 1, Convention at art. 2 (1). Emphasis supplied.
22. See supra note 1, Convention at art. 43 (2).
23. See supra note 1, Convention at art. 44.
24. See supra note 1, Convention at art. 45. The words "other competent bodies" in paragraphs (a) and (b) were particularly intended to mean "nongovernmental organizations."
the drafting and adoption of two regional children’s rights treaties.25 It has influenced the language used in the text of Hague Conference treaties on private international law.26 It has brought about a restructuring of the work of both the United Nations High Commissioner for Refugees and the United Nations Children’s Fund to reflect internationally recognized rights of the child.27 It has given new impetus to the activities of nongovernmental organizations and has inspired a new basis for research by the academic community.28 Most importantly, it has assured that children’s rights have a regular place on the international human rights agenda.29

Unfortunately, it was not possible at the International Law Weekend panel, The Developing Jurisprudence of the Rights of the Child, to present the full picture of what is happening in the international law of children’s rights. Instead, the panel touched on some of the high points of this development. Anders Rönquist, Counselor for the Swedish Mission to the United Nations, spoke about the place of children’s rights within the Third Committee of the General Assembly and the Commission on Human Rights and the child rights’ resolutions annually adopted by those bodies.30 Professor Gertrud Lenzer, The City University of New York, outlined a future role for academic institutions in: 1) interpreting the rights enumerated by the Convention on the Rights of the Child; 2) supplying reliable information to the Committee on the Rights of the Child, and 3) developing new academic child rights projects’, such as the Children’s


27. Since U.N. adoption of the Convention on the Rights of the Child, the United Nations High Commissioner for Refugees has issued guidelines for field officers to assure that the rights of refugee children are adequately protected. UNICEF, on the other hand, is making child rights the organizational basis for all of its activities.

28. For example, the University of Gent has instituted an annual summer study course on children’s rights and St. Xavier University in Chicago is exploring the possibility of establishing an interdisciplinary research center for children’s rights.

29. The rights of the child is now formally on the agenda of both the Commission on Human Rights and the Third Committee of the General Assembly. Each of these bodies adopts a resolution each year focusing on the most important issues effecting children.

Studies Program which she heads at Brooklyn College. Unfortunately, because of their busy schedules, neither of these speakers were able to provide publishable papers for the proceedings.

The other two speakers, both of whom have submitted essays for the International Law Association International Law Weekend Proceedings, provided distinctly different approaches to the Convention on the Rights of the Child. Peter Pfund, Legal Advisor's Office of United States Department of State, explained the way in which the Convention on the Rights of the Child had been recognized in recent treaty drafting processes of the Hague Conference on Private International Law. William D. Angel, Youth Division of the United Nations, described United Nations youth policies and pointed out the often ironic overlaps between youth policy and the rights of the child and speculated about possible future methods of relating the two areas of international law.

The panel topic was particularly well received. The "standing room" audience stayed to the very end, despite the cramped quarters. Naturally, during the question and answer period, the audience wanted to know why the United States has not ratified the Convention on the Rights of the Child and what can be done about it. The consensus was that biggest problem comes from the fact that those who oppose the Convention are active and in continuously contact with their Senators and Congresspersons. While those who support the Convention's ratification are essentially silent. To overcome the already mobilized anti-Convention campaign, what will be needed is a state by state drive for ratification that will counterbalance the activities of those in opposition. Only by obtaining the support of individual states will it be possible to counter federalism arguments that will undoubtedly be raised against the Convention at future Senate hearings. Unless a grassroots movement begins to build, there is a strong likelihood that the United States will enter the 21st Century as the world's only country that has not taken a stand for children.

32. See infra Peter Pfund, The Developing Jurisprudence of Rights of the Child, this volume.
34. To some extent this may have been influenced by the fact that the 1996-97 Jessup Moot Court problem contains a children's rights issue.
35. Senator Jesse Helms has said that he gets one thousand letters against the Convention for every one in favor.
I. INTRODUCTION

I would like this morning to discuss with you three multilateral treaties produced since 1980 by the international organization known as the Hague Conference on Private International Law. All of them seek to serve the best interests of children on the move with protections to which the United Nations Convention on the Rights of the Child declares that they are entitled. It looks as if the United States will sooner or later be a party to all of these conventions. I also want to mention one other encouraging development in the United States in the area of international child support enforcement.

The Hague Conference was established in 1893. The United States joined the organization in 1964 after its re-constitution with a Permanent Bureau in the 1950s. The organization celebrated its 100th anniversary during its diplomatic session in May 1993 at the conclusion of which it adopted the final text of the Hague Convention on intercountry adoption.

Before the 1960s the Hague Conference’s work was primarily aimed at preparing conventions setting out rules for determining which country’s law would apply to various types of legal transactions and

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relationships and which country's authorities would have jurisdiction. However, the Conference also prepared conventions dealing with civil procedure and providing for international judicial assistance and cooperation, such as the conventions on service of process abroad and the taking of evidence abroad, always only in civil and commercial matters. The conventions on international judicial assistance called on party States to establish Central Authorities with the responsibility to cooperate with each other and to make these conventions work. The Hague Conference has also convened very useful sessions permitting Central Authority officials to discuss the implementation of these Conventions with their counterparts from other countries.

This other type of convention generally attracted more party States than most of the Hague conflicts conventions, suggesting that there was a niche for the Hague Conference to prepare conventions in various legal areas providing for cooperation among national authorities.

Starting with the 1980 Convention on the International Child Abduction, the Hague Conference and its member states focused much of their attention on conventions providing for cooperation among party states for the purpose of protecting children, and children on the move from one country to another. Children are particularly vulnerable and in need of protection when they have been parentally abducted or when they are being adopted by persons residing in another country than their country of origin. The same is true when their divorcing or separating parents living or planning to live in different countries are dealing with the question of which parent will have primary responsibility for protection of the person and property of the child and which parent may be given only visitation rights.

II. INTERNATIONAL CHILD ABDUCTION


The 1980 Hague Convention on the Civil Aspects of International Child Abduction was intended to deter parental abductions and to remedy as much as possible their very bad effects on children. It was also designed to help governments and the left-behind parents involved better

to cope with the previously intractable problem of international parental child abductions. The Convention requires the prompt return of children removed or retained outside the country of the child’s habitual residence, when the removal or retention is in breach of the rights of custody of a parent, whether those rights exist by operation of law or are based on a custody decree. Negotiators were aware that many such abductions take place before any court proceedings for divorce have been initiated. In those days, one still spoke more of custody rights, meaning the rights of the parents to have custody of the object of custody, the child, than of the rights of the child to be the subject of protective measures.

The child abduction convention already speaks in its preamble of the conviction of the signatory States “that the interests of children are of paramount importance in matters relating to their custody” and refers to the desire “to protect children internationally from the harmful effects of their wrongful removal or retention,” language very similar to that found in the later United Nations Convention on the Rights of the Child.

The wrongfully removed or retained child is promptly to be ordered returned, unless one of the narrow exceptions to the return obligation has been established by the parent resisting the return request. The return obligation anticipates article 11 of the United Nations Convention which provides that party states are to take measures to combat illicit transfer and non return of children abroad. Looking at article 12 of the United Nations Convention, one notices its underlying concerns for the child’s opinion to be taken into account as the basis of the earlier provision in article 13, paragraph 2, of the 1980 Hague Convention stating that the requested judicial or other authority “may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”

Anticipating also the provisions of article 9(3) of the United Nations Convention on the rights of the child who is separated from one or both parents “to maintain personal relations and direct contact with both parents on a regular basis,” article 21 of the 1980 Convention, while somewhat sketchily, provides for the possibility of an application “to make arrangements for organizing or securing the effective exercise of rights of access” by non–custodial parents, for the exercise of which governmental Central Authorities are to take steps to remove obstacles.

The United States became a party to this Convention in mid-1988 and the Convention now has forty–five party states. The Department has no way of knowing how many cases of wrongful removals to or retentions of children in the United States occur annually. However, there are about 300 such cases annually covered by the Hague Convention and coming to
the attention of the State Department. Similarly, there are about 700 children from the United States wrongfully removed or retained abroad annually, about 500 covered by the 1980 Convention. Helping with Hague and non-Hague cases is an office in the Consular Affairs bureau of the State Department, the Children's Issues Office, which serves as the United States Central Authority, that also deals with intercountry adoptions to the United States. This office has a staff of eight officers.

On the whole, the Convention has worked quite well, and the cooperation between Central Authorities in party states is helpful. Unique to the Hague Conference as an organization unifying private law, there have been two one-week sessions of a special commission that has brought together Central Authority officials from party states. These officials assemble to discuss systemic and other problems encountered in the implementation of the Convention and to develop solutions for them, to meet each other face-to-face, and to develop a level of confidence in each others’ motivations to make the Convention work as well as possible in their respective countries. The next such meeting is scheduled for mid-March 1997, and the State Department is already examining in what respects United States implementation of the Convention is short of what it should be and how we can improve on it. We are, of course, also examining in what respects implementation of the Convention by other countries seems unsatisfactory and should be improved.

III. INTERCOUNTRY ADOPTION

In 1988 the member states of the Hague Conference decided that the organization should seek to prepare a convention to set internationally agreed norms and procedures to safeguard children involved in intercountry adoptions. Up to that time there were no internationally agreed standards for such adoptions. However, between 15,000 and 20,000 children were thought to be moving annually from one country to another in connection with their adoption by persons resident in a country other than their country of birth or origin.

The member states were clear that the primary objective of work on a convention would be to regulate and improve intercountry adoptions. The legal institution was seen as the vehicle for providing children in need of families permanent families of their own, after consideration of the possibility of their adoption by a suitable family in their country of origin. Intercountry adoption was not seen as a process designed primarily to make children without families available for persons wishing to adopt a child.
If there was any doubt that there were abuses in the intercountry adoption process, such as the marketing of children for adoption, excessive payments to facilitators, or the inadequate protection of birth parents, this was borne out after work on this Convention had already begun by the situation in Romania shortly after the overthrow of Ceaucescu. Hundreds, even thousands, of children were snapped up by persons wishing to adopt them during a period of almost no laws, regulations or procedures in Romania to protect the children and their birth parents and to ensure that the children were really available for intercountry adoption, involving as it does in most cases the severance of the previous legal parent–child relationship.

The United Nations Convention on the Rights of the Child, in article 21(b) as interpreted by many, placed intercountry adoption, internationally unregulated as it then was, at the end of the list of alternative methods of care for children without families. This is thought to follow from the recognition in that sub-section that intercountry adoption may be considered an alternative means of child’s care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin. The order of preferences envisaged in the United Nations Convention places return of the child to its family of origin first, followed by placement of the child by adoption with a family in its country of origin, and then other forms of care in the country of origin not involving a permanent family for the child, foster and institutional care, all before intercountry adoption, which was seen by many to be only an alternative of last resort.

Now let’s look at the preamble of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, the final text of which was adopted in May 1993, about five years after the United Nations Convention.

The preamble begins: “Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding” and continues “[r]ecalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.” It then states “[r]ecognizing that intercountry adoption may offer the advantage of a permanent family to a
child for whom a suitable family, [as opposed to suitable care,] cannot be found in his or her State of origin." You can see that the stress on the need for a child to have a permanent family of its own because of the importance of such a family for the full and harmonious development of the child's personality leads to the new conclusion that intercountry adoption may offer the advantage of a family that foster and institutional care can not. This realization that intercountry may offer the advantage can be understood as "does offer the advantage" when intercountry adoptions result from sound and ethical adoption practices or when they are internationally regulated under the 1993 Hague Convention. In these circumstances, the Hague Convention suggests that intercountry adoption should be preferred over forms of care in the child's country of origin that do not offer the advantage of a permanent family.

The preamble, then, while not a legally binding part of the 1993 Hague Convention but rather its mis-en-scene, the face with which it presents itself, and the entire Convention of which the preamble is a part, represent for the first time a real, rather than a grudging, international endorsement of intercountry adoption.

The preamble continues, noting the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child, with respect for the child's fundamental rights, and to prevent the abduction, the sale of, or the traffic in children. For corresponding language in the United Nations Convention, see its articles 11, 34, and 35. The preamble closes, noting that the signatory states desire to establish common provisions taking into account the principles set forth in international instruments, among them, in particular, the United Nations Convention on the Rights of the Child of November 1989.

Having presented itself in this way, the Convention sets out a framework of minimum norms and procedures, with certain determinations to be made in the country of origin of the child, and certain others in the receiving country, before the adoption may proceed. Among the determinations to be made by competent authorities in the country of origin are that they have ensured, having regard to the age and degree of maturity of the child, that "the child's consent to the adoption, where such consent is required, has been given freely..." This is a direct follow-up to the mandate in article 12 of the United Nations Convention to which reference was made earlier.

The Hague Convention requires the establishment of Central Authorities in every party state with certain mandatory, largely programmatic oversight and cooperation functions and responsibilities, although in some countries they may also have case specific functions. Those Central Authority functions that are specific to individual adoptions
may largely be performed by Convention-accredited agencies, and approved other providers of adoption services. However, it is left up to each country to determine with which agencies accredited, or providers approved, by another state it may choose to work. It is also up to each party state to determine what additional requirements and conditions to those established in the Hague Convention it may set with regard to the intercountry adoptions of children from that country or coming to that country. The Convention also requires that all Convention adoptions be recognized in all party States.

The United Nations Convention, in particular article 7, is behind at least one other provision of the Hague Convention, article 30, which requires the competent authorities of a Contracting State to ensure that information held by them concerning the child’s origin, "in particular information concerning the identity of his or her parents, as well as the medical history, is preserved." Those competent authorities are to ensure that the child or the child’s representative has access to such information, under appropriate guidance, in so far as is permitted by the law of the State where the information is held. In transmitting information on the child to the receiving state, the state of origin is reminded in article 16(2) to take care not to reveal the identity of the mother and the father if, in the state of origin, these identities may not be disclosed. Thus, the requirement to preserve information concerning the identity of the parents is directed primarily at countries from which the children come. However, the Hague Convention leaves it to the law of the country or countries where such information has been preserved to determine whether the child’s access to that information will be permitted. If access is permitted, currently or at some future time, the information will have been preserved and will be available.

As I hope will be evident from this very sketchy and incomplete summary of the provisions of this Convention, the Hague Conference member states had the United Nations Convention in mind in setting out rather detailed norms and procedures.

The Hague Convention has already broken a number of records, more countries involved in its negotiation than for any other Hague Convention (66), including thirty countries of origin that were not member states of the Hague Conference, but whose involvement in the preparation of the Convention as the voting equals of member states was deemed crucial for the Convention's relevance, effectiveness, and broad acceptance. More countries, including the United States, signed the Convention in the first year after it was finalized than any previous Hague Convention, and signing States now number twenty-seven. The Convention entered into force in just under two years with three ratifying
States, another first. In the meantime, eight other States have become parties. Many other countries of origin and receiving countries, including the United States, are working towards becoming parties to this Convention, which promises to become one of the Hague Conference's greatest success stories.

The Convention will require federal legislation to ensure its full and uniform implementation in the United States. Such legislation is also necessary, among other things, to establish and provide for the establishment and funding of the required United States Central Authority, to set up the system for Convention-accreditation of United States adoption agencies, to ensure recognition of Convention adoptions throughout the United States, and to amend the Immigration and Nationality Act to make special allowance for entry for permanent residence of children from abroad under the Convention. In order for the United States to be able to comply with the requirements of the Convention imposed on countries of origin, there will need to be a new form of state court determinations for those few children from the United States that are to be the subject of adoptions, whether in the United States or abroad, that will be covered by the Hague Convention.

On the whole, we expect that if our primary focus is on meeting our obligations under the Hague Convention, current practices in the United States can be modified in relatively minor ways to fit into the framework of requirements set by the Hague Convention. Thus, once the President sends the Convention forward for Senate advice and consent to United States ratification, probably next year (1997), and the State Department achieves the introduction in Congress of legislation that is currently in preparation for clearance by the Administration, and provided there is adequate support for United States ratification from the United States private sector including the adoption and child welfare community, the United States should be able to ratify the Convention by the year before the end of the millennium.

IV. PROTECTION OF CHILDREN (CUSTODY)

At the seventeenth session of the Hague Conference, the suggestion was accepted that the organization seek by its eighteenth session in 1996 to prepare a convention on the protection of the person and property of minors that would revise an earlier 1961 Hague Convention on this topic. The 1961 Convention had placed jurisdiction for the purpose of custody primarily with the authorities of the country of the child's nationality, as well as in other states in certain circumstances and for certain purposes. These competing bases of jurisdiction, the poor
functioning of cooperation between authorities of the countries involved, and absence of a provision on enforcement in one party state of measures of protection taken in another, plus only modest acceptance of the 1961 Convention, led to the belief that a new Convention was needed.

The Hague Conference member states on October 18, 1996 adopted a new Convention, after three two-week preparatory sessions and a three-week diplomatic session of the organization at all of which the United States delegation played a very active role. The Convention provides that the judicial or administrative authorities of the contracting state of the child’s habitual residence have clear, primary jurisdiction to take measures directed to the protection of the child’s person or property.

The Convention’s preamble, after noting conflicts between legal systems, the importance of international cooperation for the protection of children, confirming that the best interests of the child are to be a primary consideration, and noting that the 1961 Convention needs revision, notes that the states signatory desire to establish common provisions taking into account the United Nations Convention on the Rights of the Child.

The Convention provides, by way of exception, for transfer of jurisdiction to the authorities of certain other states to be offered, sought, and effected if they are deemed better placed than the country of the child’s habitual residence to assess the best interests of the child.

The Convention sets out rules for determining the applicable law, requires the recognition in all other contracting states by operation of law of measures taken by authorities of contracting states, and has rather detailed provisions for mandatory and possible cooperation between Central Authorities and competent authorities in contracting states.

The 1996 Convention seeks to bolster the provisions of the 1980 Child Abduction Convention concerning the prompt return of parentally abducted children and the exercise of rights of access.

There was considerable concern, particularly among United States experts, that the jurisdiction provisions of the new Convention could undermine the return requirements of the 1980 Hague Child Abduction Convention. Fortunately, article 7 explicitly now provides that the authorities of the state of the child’s habitual residence before the wrongful removal or retention keep their jurisdiction until the child has acquired habitual residence in another state and either each person or body having rights of custody has acquiesced in the removal or retention, or there was a

long delay amounting, in effect, to laches, \textit{i.e.}, acquiescence, on the part of the person or body with the breached custody rights in bringing the return request and no return request is still pending and the child is settled into its new environment. Thus, if the return request under the 1980 Hague Convention should be refused and so long as jurisdiction with regard to measures of protection has not shifted because the requirements of article 7 have not been met, jurisdiction can only be shifted to the state where the child is located pursuant to the transfer arrangements set out in articles 8 and 9 that require the consent of authorities in the state from which the child was abducted.

V. \textsc{International Child Support Enforcement}

These three most recent Hague Conventions concerned with child protection and, in effect, also children's rights to such protection, have firmly established the Hague Conference as an important international forum for filling in the framework of laudable general aims and goals set out in the United Nations Convention on the Rights of the Child. It does so with conventions focused on substantive obligations and detailed norms, as well as procedures for intergovernmental cooperation among governmental authorities, including periodic intergovernmental consultations.

Looking at the United States we see that it is already a party to the Hague Convention on International Child Abduction. Inter-agency consultations are under way in the United States government aimed at preparing federal implementing legislation for the Hague Intercountry Adoption Convention, the United States being the country that is adopting more children from abroad annually than all other countries put together (11,340 in the year ending September 30, 1996). A United States delegation recently returned from the final negotiations on the Hague Convention on Protection of Children with the belief that in due course the United States should be able to become a party to that Convention as well.

I would like to mention work done since 1980 on her own time and expense by Gloria DeHart, a Deputy California Attorney General, until her retirement a few years ago. Her efforts resulted in agreement on arrangements with twenty foreign countries on behalf of the individual States of the United States that effectively provide for the reciprocal enforcement by each of support obligations, including child support, emanating from the other.

Since Ms. DeHart's shift to part-time work in California, she has also been working part-time in my part of the Office of the Legal Adviser in the State Department. In consultation with the National Child Support
Enforcement Association and with the help of the State Department and the Office of Child Support Enforcement in the Department of Health and Human Services, Gloria DeHart prepared provisions that became part of the just-enacted Welfare Reform Legislation. These provisions for the first time formally give the federal government a role in international support enforcement. Under Title 42, United States Code, new section 659A, the Secretary of State, with the concurrence of the Secretary of Health and Human Services (HHS), is authorized to declare, by international agreement or unilateral declaration or both, that a foreign country is a reciprocating country if it has the means to enforce support owed to obligees resident in the United States and those means substantially conform with the enforcement standards set out in that section. Such a declaration entitles the child and spousal support obligations emanating from such a reciprocating country to enforcement throughout the United States. HHS, in a function likely to be delegated to its Office of Child Support Enforcement, is made responsible to facilitate support enforcement in cases involving United States residents and residents of foreign countries that have been declared to be reciprocating countries.

Once, as the result of this new authority, new arrangements have been made at the federal government level with most of the twenty countries mentioned earlier, we shall seek to make such arrangements also with the dozen or so additional countries with which Ms. DeHart was earlier seeking to conclude arrangements at the state level in the United States, as well as further countries that indicate their interest.

VI. CONCLUSION

I believe that it is possible to conclude from the above that there is very considerable motion within the United States towards improving, through United States implementation of certain conventions and reciprocal arrangements, the protection and welfare of children on the move to or from the United States in various circumstances in which they are particularly vulnerable. Those efforts extend also to children dependent on support which a person located in another country should be paying.

DEVELOPING JURISPRUDENCE ON THE RIGHTS OF YOUTH: REVIEW OF PROBLEMS AND PROSPECTS: NORTH-SOUTH

William D. Angel

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I. HISTORICAL SOURCES OF YOUTH RIGHTS

Whatever civilization one analyses in history, one invariably finds generational conflicts of youth rebelling against the various systems (legal, political, economic, and/or socio-cultural) established by their adult generation. While the majority of youth tend to conform to the rules granted by their elders, the minority of youth (who may be called forerunner youth) often challenge societal laws and standards. If the former are often integrated into the existing orders, the latter act to transform those orders. In terms of what is today called North-South relations, it is interesting to note that the evolution and growth of what I term the international law of youth rights can be traced to actions in both the North and the South.

In 1158, in what is now Italy, the Holy Roman Emperor, Frederick Barbarossa made a formal grant of rights and privileges to what he described a student class. The rights of students to education, freedom of thought, speech, association, assembly, and travel were thus recognized and spread throughout the universities in the Middle Ages. Yet, major demands for youth rights were also made in the South. For example, in 1918, when a group of Argentine students drafted and demanded a

University Reform Programme, they set in motion a far-reaching movement that would subsequently affect the rights of students at universities throughout the world. That reform advocated greater student participation in the administration of the university and a grass roots orientation against the aristocratic traditions of the past.

The university became a legally autonomous republic and the base for student opposition against laws and policies of corrupt political regimes. The Cordoba Student Charter, as it was called, affirmed that students had not only the legal right to participate in the administration of the university, but also to participate in political processes for the democratization of society. The legal principle of university autonomy, student participation in university administration (co-gobierno) and the rights and responsibilities of young people to reform society spread throughout the world and are not unrelated to the current actions of youth to transform the political, economic, and socio-cultural landscapes of the contemporary world (North and South). And on May 4, 1919, student demonstrators adopted a manifesto in China which signaled protests: 1) against foreign intervention; and 2) for modernization. That manifesto and protest also spread throughout the world to encourage students to unite for political action. It is worth noting that these important sources of the international law of youth rights (especially regarding student political participation) actually came in the second decade of the twentieth century from what is now termed the developing world of the South.

The political, economic and social rights of youth were further elaborated after World Wars I and II. The subject of international law consisted of not only States, but individuals (including students, youth, young workers, girls, and young women), and non-governmental organizations (such as student unions, youth organizations, trade union youth associations, young women groups, etc.). After the First World War, international/intergovernmental institutions (such as the ILO and the League of Nations) became subjects of international law, as did, after the Second World War, the United Nations, UNESCO, WHO etc. Indeed, both the League of Nations system (1919-1940) and the United Nations system (1945-1995) have played important roles in codifying major international instruments and standards which have provided the basis of the international law of youth rights.

II. NORTH-SOUTH NEGOTIATIONS ON YOUTH RIGHTS

During the period of the League of Nations system (1919-1940), such negotiations led to the adoption of eleven international conventions by the International Labour Conference on such questions to promote and
protect the rights of young workers regarding minimum age for employment, medical examination, conditions of work, and employment and training. The League's Assembly adopted one major convention to protect the rights of girls and young women: the Slavery Convention of 1926, and appointed a Rapporteur in 1933 to prepare and submit a report on The Traffic of Girls and Young Women in the Far East. The Assembly also adopted several resolutions setting standards on “The Instruction of Children and Youth in the Existence and Aims of the League of Nations” and on “The Protection of Children and Young People.”

With the birth of the United Nations and its system of affiliated agencies and organizations in 1945, the international law of youth rights took on a more far-flung and diverse nature. The General Assembly has adopted ten different categories of resolutions concerned with youth rights and responsibilities, including a Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding between Young People (1965), and two international Guidelines on youth: one on Further Planning and Suitable Follow Up in the Field of Youth (1985) and one on Prevention of Juvenile Delinquency (1990). At its Fiftieth session in 1995, the Assembly adopted a United Nations world Programme of Action for Youth to the Year 2000 and Beyond, containing specific targets for action in ten issue areas: education, employment, hunger and poverty, health, environment, drug abuse, juvenile delinquency, leisure-time, girls, and young women, and full and effective participation. While there was no specific section on the issue of youth and human rights or youth rights and responsibilities, the delegates of Member-States of the European Union proposed and the delegates of the G-77 agreed to the insertion of the latter two sections in the Programme of Action in 1995, as well as a sentence on youth and human rights and fundamental freedoms in the United Nations Declaration of Intent on Youth: Problems and Potentials which serves as a preamble to the Programme of Action.

During the Cold War, and in particular since 1985, the United Nations International Youth Year, the topic of youth rights and responsibilities was often used as an ideological football between West and East blocs in international negotiations. Every time a country of the East (often led by Romania) proposed action on this topic, many Western countries resisted new international instruments on youth rights, preferring operational activities to enhance youth participation in development projects as a concrete expression of such youth rights. Yet, even during that period, it was often countries in the developing regions of the South that proposed international action in this field. In that regard, it should be recalled that representatives of Costa Rica (a nation which became Chairman of the G-77 at United Nations Headquarters, New York in
January, 1996), Guinea, Indonesia, Lebanon, Romania, and Rwanda submitted in 1982 a draft declaration on the rights and responsibilities of youth to the Advisory Committee for International Youth Year. That document was distributed to Member-States of the United Nations for comments. Of the seventeen States that replied, five agreed. The Governments of Rwanda and Pakistan expressed general support of the draft declaration, and the Government of Thailand supported, in particular, the provisions of the draft declaration that did not appear in the Universal Declaration of Human Rights and the Declaration on the Rights of the Child. The Government of France, while noting that the Universal Declaration of Human Rights already covered the substance of the matter, nevertheless recognized the necessity of having an instrument that would adapt the Universal Declaration to the specific case of youth. It expressed the view, however that the draft declaration was not satisfactory as it stood, and indicated that, at an appropriate time, it would propose a revised or a new text.

Unfortunately, most of the other states of the North were not supportive, and the idea of a declaration on the rights and responsibilities of youth was shelved. However, again from the South, the idea was further discussed: the United Nations Economic and Social Commission for Western Asia Preparatory Meeting for International Youth Year in Baghdad, Iraq on October 13, 1983, adopted a regional plan for youth which concluded with a call to the United Nations to take the necessary measure to expedite the issuance of the International Declaration of the Rights of Youth before the advent of the International Youth Year. While there was subsequent action taken by the General Assembly on the topic of youth at the international level on, there has been no specific instrument adopted by the General Assembly on this issue. In retrospect (1985-1995), that draft declaration remains the only comprehensive instrument specifically devoted to the rights and responsibilities of youth, and it is interesting to note that most of the co-sponsors and supporters of the idea ten years ago were states of the South!

However, in 1985, International Youth Year, the issue of youth rights and responsibilities took on added importance. For, in 1985, the Commission on Human Rights requested its Sub-Commission to pay due attention to the role of youth in the field of human rights, and the Sub-Commission, the same year, requested Mr. Dimitru Mazilu, one of its members and a Romanian national, to prepare a report analyzing the efforts and measures for securing the implementation and enjoyment by youth of human rights, particularly, the right to life, education, and work, and requested the Secretary General to provide him with all necessary assistance for the completion of his task. This report was to be submitted
to the Sub-Commission in 1986. Mr. Mazilu had been nominated by Romania to serve as a member of the Sub-Commission for a three-year term, due to expire on December 31, 1986. But, in his new role, as an official of the United Nations (a special rapporteur), he was entitled to continue his task in 1986. However, the Sub-Commission did not meet in 1986, but in 1987. No report was received from Mr. Mazilu, nor was he present. The Government of Romania sent a letter to the United Nations with information that that Mr. Mazilu suffered a heart attack and could not attend that session. In reality, Mr. Mazilu had been under house arrest in Romania because he had insisted to include in his report a section about the violation of youth rights in Eastern Europe. The Government thought it best to place him under house arrest, but to insist that it was a health matter. Yet, the United Nations received two post marked letters from him in 1987 stating that he was able and willing to come to Geneva and deliver his report. The Commission on Human Rights, through the Economic and Social Council, requested an advisory opinion from the International Court of Justice in The Hague on this case of the United Nations vs. the Government of Romania. In brief, the legal issue was whether a special rapporteur of the United Nations enjoyed privileges and immunities under the Convention on the Privileges and Immunities of the United Nations. The Court ruled on December 15, 1989, in favour of the United Nations and against Romania — insisting on the applicability of this Convention in the case of Mr. Mazilu as a special rapporteur of the Sub-Commission. Mr Mazilu returned to Geneva in 1990, and submitted two reports (in 1990 and 1992) to the Sub-Commission.

At the forty-eighth session of the United Nations Commission for Human Rights in 1992, the representative of the Netherlands introduced a draft amendment to draft resolution V, sponsored by Austria, France, the Netherlands, and Portugal, which consisted in replacing, by a new paragraph, operative paragraph four which read: “Invites Mr. Mazilu to consult governmental and non-governmental organizations in order to elaborate further and to complete his work on the draft charter of the rights and freedoms of youth throughout the world, with a view to submitting the final version to the Sub-Commission on Prevention of Discrimination of Minorities, at its forty-fourth session, for its consideration of follow-up to this draft charter.” The Commission adopted that amendment, without a vote, and adopted resolution 1992/49 Human Rights and Youth, as amended on March 3, 1992. Unfortunately, and by some strange coincidence, neither that resolution nor the one subsequently adopted by the ECOSOC made reference that amendment concerning a charter on the rights and freedoms of youth. Yet, Mr. Mazilu submitted his final report to the Sub-Commission in August, 1992, and included a final chapter.
entitled Charter on the Rights and Freedoms of Youth. However, it contained only general remarks on the topic, but no draft international instrument on youth rights as first proposed in 1982 by several states from the South. His report was discussed and eventually shelved. The issue of youth rights was taken off the agenda of the Sub-Commission after nearly twenty-five years being a separate item of debate.

This case revealed several important points: 1) the controversial nature of the matter for Communist countries in Eastern Europe, and in several developing countries in the South, 2) the unwillingness of the majority of other countries (many in the North) to defend the rights of youth on a global basis — at least in such a way (via a special rapporteur). Declarations or resolutions on paper were one matter, but an investigative United Nations rapporteur on human rights and youth was simply too much for many countries in 1992. Indeed, the majority did not even favour a general declaration or charter on the rights and freedoms of youth. Now that the Cold War has ended, perhaps its time to take a fresh look at this question, and propose renewed action.

III. CURRENT PROBLEMS REGARDING NORTH-SOUTH NEGOTIATIONS ON YOUTH RIGHTS

There are several basic problems confronting current negotiations:
1) legal confusion regarding the definitions of children and youth;
2) an anti-youth lobby which often uses the argument of the age of majority as a dividing line between children and adults — thereby subsuming the concept of youth;
3) the proliferation and fragmentation of international instruments and standards on youth and the consequent multiple reporting requirements for Governments;
4) the concept of parental rights vs. youth rights on the issue of reproductive health needs of adolescents; and
5) continued violations of youth rights around the world — in legal, political, economic, and socio-cultural ways in both the North and South.

The General Assembly of the United Nations agreed to the following definition of youth in 1985 for International Youth Year: a chronological definition of who is young, as compared with who is a child or who is an adult, varies with nation and culture. However, for statistical purposes, the United Nations defines those persons between the ages of fifteen to twenty-four years of age as youth, without prejudice to other definitions by Member-States. Yet, when the Convention on the Rights of the Child was adopted by the General Assembly in 1989, it defined the
child in Article I as a child means every human being below the age of eighteen, unless under the law applicable to the child, majority is obtained earlier. The definition of youth age at fifteen to twenty-four and indeed as the concept of that age group seemed to get lost in the process.

Yet, young people gradually assume increasing responsibilities well before the age of majority in many countries (age eighteen). Since youth are obviously more independent than children, they are likely to face legal problems when trying to make their way in life. This problem can be seen in such issues as parental authority, schooling obligations, adolescent health entitlements, employment rights, unemployment benefits, status in law, military service, management of property, etc. However, for political reasons, young people are deprived of such legal protection, including guaranteed freedoms of association and assembly, as well as specific opportunities to participate in national development efforts, particularly in the developing countries. While 141 countries (seventy-seven percent of the total 185) reported to the United Nations in 1995 of having formulated national youth policies, only fifty-four (twenty-eight percent) indicated they had implemented a national youth service or programme of action involving youth in national development. National action is certainly required to implement international standards on youth rights and responsibilities.

Thus, it is no accident that at the international level, there are conventions to protect the rights of women, children, families, migrant workers, and refugees, etc., and a special rapporteur to protect the rights of disabled persons, but no convention or charter of a general nature to promote and protect the rights of youth (legal, political, economic, and socio-cultural). There are, on the other hand, many diverse international standards and instruments on specific rights and responsibilities of youth adopted by the United Nations General Assembly, International Labour Conference, UNESCO General Conference, World Health Assembly, etc., but no international instrument of a cross-sectoral nature on youth rights. This has led to multiple reporting requirements for governments and a fragmentation of international standards on youth rights.

There has also been continued confusion and disagreements in recent North-South negotiations on the question of the reproductive health needs of adolescents. That was perhaps the biggest controversy at the International Conference on Population and Development (ICPD) at Cairo, September 5-13, 1994. Delegates of the Holy See and G-77 argued successfully to maintain the words in paragraph 7.45 "recognizing the rights, duties, and responsibilities of parents and other persons legally responsible for adolescents to provide, in a manner consistent with the evolving capacities of adolescents, appropriate direction and guidance in
sexual and reproductive health." For many of the delegates from the North (where sex education classes are permitted in schools and abortion rights for young girls without parental consent exist) such words on the rights of parents were against national legislation in a number of countries. Further, in both the negotiations between delegates from the North and South on the Beijing Declaration and Platform of Action and on the United Nations Declaration and Programme of Action for Youth to the Year 2000 and Beyond, the same issue resurfaced, but with different results: In Beijing, the term parents' rights was again used in paragraphs 95-118 regarding the rights of young people "to acquire knowledge about their health, especially information on sexual and reproductive health issues, and on sexually transmitted diseases, including HIV/AIDS, taking into account the rights of the child and responsibilities of parents."

However, in the North-South negotiations in 1995, on the Draft United Nations World Programme of Action for Youth to the Year 2000 and Beyond, agreement was reached on the section on youth and promotion of health services, including sexual and reproductive health using language which did not refer to the issues of either the rights or responsibilities of parents in that regard. The agreement was achieved for many reasons, among them was the definition of youth as persons aged fifteen to twenty-four was approved in paragraph nine of the Programme of Action. Thus, while it was believed acceptable to refer to such parental rights and responsibilities in the ICPD Programme of Action regarding legal responsibility for adolescents, and while it was again cited in the Beijing Platform of Action regarding the specific needs of adolescents, it was not mentioned in the corresponding section of the World Programme of Action for Youth because the youth age group extended well beyond the normal age of majority in many countries and beyond the legal responsibility or control of parents. This represented a major advance in both the definition of youth and its rights and responsibilities.

Finally, despite the lip service of governments in both the North and South to youth rights and responsibilities, there has continued to be blatant violations of those rights and responsibilities. For example, in terms of the economic rights of youth, unemployment rates for youth (aged fifteen-twenty-four) in the North are very high. In 1992, Canada (which ranked first in a UNDP human development index list) had a youth unemployment rate of 17.8 percent, Australia 19.5 percent, Finland 23.5 percent, Ireland 19.5 percent, Spain 34.4 percent, and Italy 32.7 percent. While criticism is often aimed at governments in the South for violations of the rights of youth (especially freedom of association, speech, movement, participation, etc.), the topic of youth unemployment is a major problem around the world in both the North and the South. The International
Labour Organization (ILO) has recently reported that comparable unemployment rates in 1994 for Indonesia were: 13.7 percent young women and 11.9 percent young men as compared to 2.2 percent and 1.6 percent for their adult counterparts. And ILO cited similar problems in the countries in transition in Eastern Europe (ie. Poland: 34.5 percent young women and 27.3 percent young men as compared to 14.5 percent and 11.3 percent for their adult counterparts). More than legal standards are needed for such youth in poverty. Obviously, action is needed to better link educational programmes to training, apprenticeships and jobs. National youth service programmes can be an excellent way to mobilize such people, resources, and action. Yet, only fifty-four of 185 Member-States of the United Nations (twenty-nine percent) have indicated that such programmes have been launched.

IV. PROPOSALS FOR THE FUTURE

A number of Governments as well as non-governmental youth organizations have called for a United Nations Charter of Youth Rights and Responsibilities, as well as a special rapporteur and a network of national youth correspondents to monitor such a charter. The idea was proposed by the First United Nations World Youth Assembly in 1970 at United Nations Headquarters, New York, in honour of the twenty-fifth anniversary of the United Nations Charter. It was again recommended by the World Youth Forum of the United Nations System at its first session in 1991 at Vienna, Austria, and by youth delegates to the United Nations General Assembly in 1992 and 1995, and to the United Nations World Conference on Human Rights at Vienna in 1993. Despite the fact that the Special Rapporteur on Human Rights and Youth of the Sub-Commission described such a Charter in his final report in 1992, the only draft text of such an instrument was prepared by the Governments of Costa Rica, Guinea, Indonesia, Romania, and Rwanda in 1982. At the European level, a Youth Rights Charter was drafted by the Youth Forum of the European Union in 1992 to serve as a model for legislation it sought to be adopted by the European Parliament. The 1982 text had only general principles in eight draft articles, while the 1992 text had specific rights set forth in thirty-six draft articles. The former illustrates the concerns of governments, while the latter reflects the needs of youth. There should be a renewed effort to bring such representatives together to update and complete such a draft at the United Nations. However, such work was last discussed at the Commission for Human Rights in 1992 and shelved by the ECOSOC. Perhaps the time has come for an initiative to take the matter off the shelf.
Previous attempts to elaborate such a charter at the United Nations failed primarily because there was:

a) insufficient research undertaken and time spent investigating the needs for and content of such a charter;

b) the evidence of an international law of youth rights was not clearly articulated;

c) the multiple reporting requirements of governments on existing international instruments and standards were not exposed;

d) the political will of most Member-States of the United Nations was not adequate for adopting such an instrument during the Cold War; and

e) the existence of such international instruments as the Convention on the Rights of the Child seem to bury, confuse, and or subordinate the issue of youth rights to those of the child.

The time would seem appropriate for further work and adoption of this charter by the United Nations General Assembly through the commission for Human Rights. The drafts of both 1982 and 1992 should be reviewed and used as models. The outline for such a charter could include sections on: the definition of youth (with references to past definitions of children, adolescents, and juveniles); the specific groups of youth (urban youth, rural youth, students, trade union youth, young women, disabled youth, refugee youth, etc.); cross-sectoral rights of youth (participation, development, and peace); sectoral rights of youth (education, health, employment, etc.); responsibilities of youth (self, family, society, etc.); and monitoring the Charter (national youth correspondents designated by national youth non-governmental organizations, role of United Nations regional commissions, and a Special Rapporteur on Youth Rights appointed by the Secretary-General and assisted by an advisory group of representatives of youth NGOs in consultative status with the United Nations and of youth-serving agencies and organizations of the United Nations system). Such a system was set up by the General Assembly to monitor the implementation of the United Nations Standard Rules for the Equalization of Opportunities for Disabled Persons. The second session of the World Youth Forum of the United Nations System, November 25-29 November 1996 at Vienna, Austria, adopted recommendations for such a United Nations Youth Rights Charter and Special Rapporteur on Youth Rights. There would seem to be a unique opportunity for such an initiative to improve the global promotion and protection of the rights and responsibilities of youth. These are some important measures which could be taken to strengthen the development of the jurisprudence and implementation of the international law of youth rights and to better clarify some problems associated with the international law of the rights of the
child which have tended to confuse the rights and responsibilities of these two age groups.
JUSTICE IN THE WAKE OF GENOCIDE: THE CASE OF RWANDA

Madeline H. Morris

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During three months in 1994, genocide was committed in Rwanda. Two years after those events, and notwithstanding efforts at both national and international levels to bring the perpetrators to justice, the first case has yet to go to trial. Over the past months, I have worked closely with the government of Rwanda on justice issues in the course of a research project that I am doing on the role of national and international tribunals in the former Yugoslavia, Ethiopia, and Rwanda. I would like to share with you some observations arising from that work. I will examine the approaches to justice that have been employed in Rwanda, and consider some of the obstacles that have been confronted despite, or, in some instances, because of, the approaches taken. I will first discuss the recently enacted Rwandan legislation on the handling of genocide-related cases, and then examine the interaction of national and international tribunals as they exercise concurrent jurisdiction in the Rwandan context. I will conclude by briefly considering some of the broader implications of the Rwandan experience.

I. JUSTICE IN THE WAKE OF GENOCIDE

Rwanda was largely destroyed in the spring of 1994. About ten percent of the population was massacred. Another twenty-five percent of the population fled the country. The physical infrastructure of the country was substantially damaged, and the treasury was looted.

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Along with the overall destruction of Rwanda in the spring of 1994 came the devastation of Rwanda's judicial structures. The great majority of judicial and law enforcement personnel were killed or fled the country. Even the basic materials needed to run a legal system — books, vehicles, even paper — were essentially unavailable. And if there was a vehicle available, then there was no gasoline. It was in this context that Rwanda confronted the question of how to pursue justice in the wake of genocide.

II. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In September of 1994, the new government of Rwanda requested that the United Nations establish an International Criminal Tribunal for Rwanda (ICTR). As negotiations over the terms for establishment of an ICTR proceeded, however, Rwanda objected to a number of provisions. The objections related to the absence of a death penalty in the ICTR Statute, that the seat of the ICTR would be outside of Rwanda, and a number of other issues. By strange coincidence, Rwanda held a seat on the United Nations Security Council [hereinafter Security Council] at that time. Ironically, because of its objections to the ICTR Statute, Rwanda cast the sole vote opposing adoption of the Security Council resolution establishing the ICTR.

Nevertheless, the ICTR was established; and Rwanda ultimately expressed its intention to cooperate with its work. Now, two years after its establishment, the ICTR, barring further delays, will begin its first trial in several weeks.¹

But the ICTR is not expected by any means to address the bulk of Rwanda's staggering volume of genocide-related cases. Rwanda's prison population has grown to over 80,000 virtually all awaiting prosecution for genocide-related crimes. The equivalent proportion of the American population would amount to 3,000,000 prisoners. The caseload of the ICTR is expected to be in the hundreds at most.

III. NATIONAL JUSTICE

So Rwanda is faced with the enormous problem of how to handle the other 80,000 plus criminal cases arising from the genocide. Specialized legislation to facilitate handling of those cases was drafted over the course of the past several months and was enacted this past September 1st.

Drafting that legislation required finding a path through an array of profoundly problematic options. The Rwandan criminal justice system had

¹. The text of this speech was delivered on Nov. 1, 1996.
never been equipped to handle a large volume of cases, and it had been entirely disabled during the violence. It tried zero cases in 1995. That was the justice system that had to manage, in some way, to handle 80,000 serious criminal cases (mostly murders). The defendants in those cases were already in prison, having been arrested by soldiers of the rebel army that halted the genocide. So even just doing nothing was not an option. This criminal justice crisis had to be met with almost no resources, barely any trained personnel and, even worse, in a highly volatile political environment.

The specialized criminal justice program laid out in the law that was passed to respond to this situation is quite simple. Suspects will be classified into four categories according to their degrees of culpability. The most culpable category will include leaders and organizers of the genocide and perpetrators of particularly heinous murders or sexual torture. All others who committed homicides will come within category Two. Category Three will include perpetrators of grave assaults against the person not resulting in death. And those who committed property crimes in connection with the genocide will fall into category Four.

This specialized criminal justice program will rely heavily on a system of plea agreements. All perpetrators other than those in category One will be entitled to receive a reduced sentence as part of a guilty-plea agreement. Specifically, a pre-set, fixed reduction in the penalty that would otherwise be imposed is available to all non-category One perpetrators in return for an accurate and complete confession, a plea of guilty to the crimes committed, and an apology to the victims. A greater penalty reduction is made available to perpetrators who confess and plead guilty prior to prosecution than to perpetrators who come forward only after prosecution has begun.

The requirement of a detailed confession was thought to be important for purposes of establishing a truthful historical record of the Rwandan genocide; for purposes of allowing for meaningful verification of the accuracy of the confession; and for purposes of assisting in prosecutors' continuing investigations and prosecutions of other cases. The additional requirement that a perpetrator make an apology to the victims is intended to contribute to the process of national healing. While it is true that defendants will have an ulterior motive for making these apologies to obtain reduced sentences, the apologies nevertheless are thought to represent at least some acknowledgment of wrongdoing, which in the aggregate, may contribute to reconciliation.

This specialized criminal justice program represents a complex compromise. While regular criminal prosecution of every suspected perpetrator might in many respects have been most desirable, the resources
demanded by such an approach would quickly overwhelm national capacities. Therefore, a decision has been made in Rwanda to establish a program which, it is hoped, will accomplish the crucial purposes of criminal justice while also respecting resource limitations.

An approach such as that adopted in Rwanda offers the benefit of expediency in the handling of an enormous volume of cases and may make some contribution to national reconciliation. At the same time, there is reason for concern about the potential for miscarriage of justice under such a system. Factually innocent suspects may choose to plead guilty for fear of a worse outcome at trial or to avoid extensive delays before trial. These concerns are exacerbated by the fact that no provision has been made for any form of defense counsel for the many indigent defendants in Rwanda (though a program for training lay defense counsel as counterparts to the lay prosecutors in Rwanda is currently under consideration). Moreover, and on the other side of the equation, survivors and others rightly ask why perpetrators of these horrific crimes should receive leniency, especially when an "ordinary criminal" who committed a murder in Rwanda tomorrow would not receive the same benefit.

The question to ask in evaluating legal responses in the complex situations surrounding crimes of mass violence is: What action will do the most good and the least harm under the circumstances? Full trial of 80,000 defendants, more than one percent of the national population, would be infeasible in even the wealthiest nation and is emphatically not an option in Rwanda. The alternative at the other extreme, releasing prisoners en masse under an explicit or implicit grant of amnesty, would perpetuate a culture of impunity in a country with a long history of inter-ethnic violence, would be unacceptable to the survivor population, and would constitute a heightened risk to security, both of the regime and of the individuals released. The value of the system adopted in Rwanda will depend in the end both on the soundness of the design itself and on the quality of its implementation which will unfold in the coming months.

IV. THE TRIAL OF CONCURRENT JURISDICTION

The administration of justice in post-genocide Rwanda is rendered uniquely complex by the fact that concurrent jurisdiction for the genocide-related crimes is actively exercised by two different entities: the government of Rwanda and the ICTR. This concurrent jurisdiction has exposed difficult issues which are likely to recur in future contexts.

Concurrent jurisdiction raises complex questions regarding cooperation in investigations and the sharing of evidence. Obvious advantages are to be gained by close national and international cooperation
in investigations and evidence-gathering. But difficulties concerning confidentiality of evidence, witness protection, due process standards, and the need to avoid any appearance of partiality of the international tribunal raise delicate questions which have yet to be systematically addressed. Discussion of these matters has been ongoing between the ICTR and the government of Rwanda. But the issues, for the most part, remain largely open.

An area which has been of particular concern in the exercise of concurrent jurisdiction is the distribution of defendants between the national and international fora. This issue has been the cause of uncertainty, and, at times, of tension between national governments and the ICTR. On more than one occasion, the ICTR and the government of Rwanda have sought to obtain custody of the same suspect. In one case, not only the ICTR and the Rwandan government, but also the Belgian government were attempting to gain custody of the same suspects who were being held in Cameroon. As an aside, I should also note that, while many speculated that these conflicts over custody were really illusory because no country would be willing to transfer a suspect to Rwanda, that speculation has proven false. At least one defendant has already been transferred to Rwanda by Ethiopia, and other countries have expressed a willingness in principle to do the same.

The tensions between the government of Rwanda and the ICTR over distribution of defendants have resulted, in part, from a lack of communication over time and perhaps in part from a more fundamental conflict of interests or, at least, of agendas. When the ICTR was established, the Rwandan government had not yet decided upon an approach to national prosecutions. The approach ultimately adopted was one that relies heavily on plea agreements, as I have discussed. That plea-agreement program turned out to be somewhat incompatible with the operation of an international tribunal that views its mandate as prosecuting the top-level leaders of the genocide.

The reasons for this incompatibility are easy to understand. The leniency in sentencing that goes with plea agreements can easily create a perception that impunity has prevailed — unless at least the leaders are fully prosecuted and punished. If, however, the leaders are taken to an international tribunal, and there receive more favorable treatment than they would in the national courts, then this leaves a gap in the national justice picture. This more favorable treatment enjoyed by defendants at the international tribunal includes escaping the death penalty (which may be imposed by Rwandan courts, but not by the ICTR); likely being imprisoned in more favorable conditions than those in Rwandan prisons; and being guaranteed various due process safeguards including appointed
defense counsel, among other factors. So, then, if the leaders are away receiving international justice which is perceived as lenient, and the followers are at home getting bargains in the national justice system, then no one is punished fully and severely, relative to national standards, for the horrors that were committed. A perception may thus be created, especially among the survivor population, that the plea-agreement program is really a program of impunity. So you can see why trying at least some category One defendants is so important to Rwanda.

This problem became apparent over time. After the ICTR had been in place for many months, and when ICTR personnel thought that the Tribunal was finally showing results and deserved to be congratulated, the Tribunal, instead, was reaping the wrath of the Rwandans each time it pursued a leader to be prosecuted. ICTR personnel and supporters found this wrath especially difficult to accept since Rwanda had not managed actually to begin any trials, of leaders or otherwise. The Rwandans, in reply, noted that the ICTR had been no swifter, and had so far also tried no one. This friction was caused at least in part by the fact that the parties had not communicated regarding policies to govern the distribution of defendants in light of the national justice program as it evolved.

On the authority of the Security Council Resolution that brought the ICTR into being, the ICTR enjoys primacy of jurisdiction. This means that, where the ICTR and a national body each have a legal basis for jurisdiction over a given case, the ICTR is entitled, but not obliged, to exercise jurisdiction to the exclusion of the national body (a defendant cannot be tried by both). But the criteria to be employed in deciding whether to exercise jurisdiction in any particular case have yet to be articulated by the ICTR. Conflicts over exercise of jurisdiction that have arisen have been resolved on an ad hoc basis.

A more satisfactory basis for consistent decision making regarding the distribution of defendants will have to rest upon a careful analysis of the purposes of the ICTR and of its concurrent jurisdiction with national courts. This analytic process still remains to be completed.

Identifying the appropriate criteria for distribution of defendants between national and international fora is tricky within any one context. The issues are further complicated when one recognizes the need to articulate underlying principles and guidelines that will serve across contexts — in Bosnia or in Croatia as well as in Rwanda, and very likely, in future instances as well.

In anticipation of such future instances, a statute for a permanent International Criminal Court is currently under consideration by the United Nations. That draft statute to some extent averts potential conflicts over defendants by giving deference to national-level prosecutions under most
circumstances. But those provisions giving deference to national jurisdictions would not apply where the international criminal court's jurisdiction had been invoked by the Security Council, as can occur under the draft statute. In such instances, the same difficulties regarding distribution of defendants as have arisen in Rwanda would be likely to recur.

Further, the draft statute for a permanent International Criminal Court does not directly address whether an international court's role is especially tied to trying leadership-level defendants. Article 35(c) of that draft statute provides that the International Criminal Court may decide "that a case before it is inadmissible on the ground that the crime in question . . . is not of such gravity to justify further action by the Court." One might imagine that such a provision, if adopted, would form the basis for an admissibility challenge by a defendant, such as Dusko Tadic, the defendant currently being tried at the Hague, who was not in a leadership position in the overall criminal enterprise. Such a challenge would be based on the proposition that gravity includes within its meaning the notion of leadership or other special responsibility. The claim, in other words, would be that it is not the role of an international court to try small fry, as President Cassesse of the ad hoc International Criminal Tribunals recently implied.

Not only those issues concerning distribution of defendants, but also the dilemmas that arise more generally from concurrent jurisdiction are starkly posed in the context of Rwanda. But Rwanda is unlikely to remain unique in this respect. The same problems predictably will arise in future contexts where concurrent jurisdiction is actively exercised. Many of these issues are currently under debate by the United Nations Preparatory Committee on the Establishment of an International Criminal Court. The broad range of issues concerning the interaction of national and international jurisdictions forms the basis for ongoing debates on complementarity between national criminal jurisdictions and a permanent international criminal court.

A threshold requirement for greater coherence in the interaction of national and international jurisdictions is a clear articulation, in each case in which an international tribunal is to be convened, of the needs which that particular tribunal is intended to meet. The needs that are likely to be present in greater or lesser degree, singly or in combination include: responding to an overwhelmed national justice system; substituting for a national system in which the fact or appearance of bias would substantially undermine justice processes; substituting for a national justice system where the national system would be unable to obtain custody of suspects, and expressing, through the exercise of international jurisdiction, a
universal condemnation of some special feature of the crimes in question such as the special international responsibility of certain perpetrators. So, the purposes for an international tribunal will not be identical across contexts.

Two important benefits can be gained by articulating in each context the particular needs to be met by convening that international tribunal. First, such an articulation will permit confirmation of whether an international tribunal will best serve the goals sought in that particular context. For instance, if the purpose is to respond to a situation where the national justice system is overwhelmed, then we can analyze whether it is best to provide an international tribunal or to provide assistance to the national system, or some combination of the two. Second, having reference to clearly articulated purposes for convening an international tribunal will allow the operation of that particular tribunal, and especially its interaction with national jurisdictions, to be appropriately tailored to those goals. For example, if the purpose is to substitute for national courts where they cannot obtain custody, then arguably, that international tribunal should defer to the national justice system if that national system can gain custody in a particular case. By contrast, if the purpose is to express universal condemnation of certain crimes, then that international tribunal may wish to exercise jurisdiction even where the national court could gain custody. In that sort of instance, a very careful analysis would be required of how the international interest in universal condemnation should be weighed against the national (and international) interest in successful operation of the national justice system if the two should conflict. In sum, it will be essential to the fruitful operation of an international court that its purposes are clearly articulated in each instance and that its operations are appropriately tailored to those purposes in each case.

V. THE FUTURE IN RWANDA AND BEYOND

In Rwanda, the performance of the national justice system and that of the ICTR remain to be seen. Two years after the massacres and yet before the first trial in either jurisdiction, it is clear that the best form of justice that the ICTR or the national courts will be able to render will be justice delayed. The slow progress of justice in Rwanda points to needs for protocols for prompt international assistance to national justice systems; for permanent bodies, such as an International Criminal Court, that can be put readily into service when warranted; and for clear articulation of the purposes of each international tribunal in order that both national and international jurisdictions may be as effective as possible in responding to crimes of mass violence.
PANEL DISCUSSION ON INTERNATIONAL ENVIRONMENTAL CRIMES: PROBLEMS OF ENFORCEABLE NORMS AND ACCOUNTABILITY

Myron H. Nordquist *

This panel’s scope of discussion covers norms as well as compliance regarding international environmental crimes during both times of peace and armed conflict. This is a huge subject, as indicated by the comments of my colleagues, which was largely directed to the past and current state of international law for environmental crimes. The task assigned to me on this panel is to focus more on the future. The views that follow are presented in a personal capacity. I am not an official spokesman for the United States government, although I work for it.

Bearing in mind that seventy percent of the earth’s surface is covered by salt water, it is appropriate to begin by noting that many principles and rules to protect the international marine environment in peacetime are found in the Third United Nations Convention on the Law of the Sea. Articles 213 through 222 deal specifically with enforcement related to marine pollution violations from land-based sources, the seabed, the atmosphere, dumping and the like. Criminal violations of rules based on the Convention’s norms may trigger criminal responsibility and enforcement is carried out under domestic law based on nationality, flag state, or territorial jurisdiction. Detailed regulations for commercial vessel operators are developed through the International Maritime Organization where work is underway on many complex marine environment issues. Environmental crimes committed by commercial vessel operators in the world’s oceans are typically enforced through the flag state. There are instances, however, where the coastal-state enforcement jurisdiction is based on its control over fisheries, petroleum, or by conditioning the entry of vessels into its ports. This latter nexus is particularly effective for enforcing vessel standards intended to protect the marine environment. A recent regional agreement on straddling stocks and tunas, nudging enforcement against third-state vessels for overfishing on the high seas beyond the 200 mile exclusive economic zone, is a modest step beyond traditional law. The underlying jurisdictional innovation follows from the customary law obligation, which is embodied in the 1982 Law of the Sea.

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Convention, and by which the flag states ensure that their vessels fishing on the high seas do not undermine the effectiveness of regionally agreed rules, whether or not the flag state is a party to the relevant regional agreement. If overfishing on the high seas proper is an international environmental crime, and it certainly can be, we may conclude that criminal enforcement to ensure better accountability is improved in this limited, but important area of international law. The principle reflected in this jurisdictional innovation may even contain the seeds for discovering more effective enforcement of environmental rules in non-high seas areas. Unfortunately, the bad news is that the United States is only one of three parties to the new agreement on straddling stocks and highly migratory species. The good news is that the world’s largest high-seas fishing nation, the Peoples Republic of China, plans to sign the Convention in the near future.

Turning from the sea to the air in peacetime, we can expect any pertinent law with respect to civil aircraft involved with international environmental law and with respect to civil aircraft involved with international environmental crimes to be developed in the International Civil Aviation Organization (ICAO). The conventional rules governing this area are largely found in the Tokyo, the Hague, and Montreal Conventions. These Conventions, along with customary international law, provide what can only be fairly described as a *rudimentary system of sanctions* for civil aviation crimes during peacetime. The imperfect enforcement regime for civil aviation crimes in general, has been dramatically demonstrated in terrorism cases. Compliance on safety matters, on the other hand, is excellent, being based on well-defined and widely recognized international law rules.

At this juncture it is worth recalling that both warships and military aircraft enjoy sovereign immunity. This fundamental precept of international law is reflected both in the 1982 Law of the Sea Convention and in the various ICAO conventions.

Conventional and customary international law norms governing environment crimes during peacetime on land territory occur within the jurisdiction of sovereign states. Accordingly, they are only effectively enforced when these international norms are incorporated into the domestic authorities who base their actions on the classic jurisdiction exercised by a sovereign state over its territory or nationals. This is by far the most significant and pervasive interface between international environmental norms and their enforcement. To the extent that deficiencies exist in states’ agreeing on legal norms that are equivalent to international environmental crimes, and in taking effective criminal enforcement in their sovereign territory during peacetime, suggestions for corrections are
properly addressed to generating greater political will by sovereign states. And to misuse a line from Mark Twain to make a point, the reports announcing the death of state sovereignty are greatly exaggerated.

In reviewing the international normative rules pertaining to environmental crimes, a curious pattern emerged. It became evident that there seemed to be greater agreement among states and experts about the general principles that apply during hostilities than during peacetime. At the same time, the contrary appears with respect to the enforcement regime for environmental criminal violations: enforcement seems to be more effective in peacetime than during armed conflict. This state of affairs may explain why the text of a statute for an International Criminal Court due to be finalized in 1998 by a United Nations preparatory Committee is expected to be limited to \textit{core} crimes. Genocide will then be whether the international environmental crime at issue is a \textit{war crime}. In addition, expectations are that enforcement of the Court's judgments will depend upon \textit{cooperation} from national courts.\footnote{See \textit{AM. SOC'Y INT'L L. NEWSL.}, Sept.-Oct. 1996, 16.}

With the foregoing observations in mind, let us focus on possible improvements in the legal regime governing international environmental crimes during armed conflict. The comments which follow concentrate on both normative standards and on enforcement mechanisms.

A sensible beginning point is to ask whether there is sufficient law concerning international environmental crimes during hostilities and follow on with a discussion about enforcement. My fellow panelists have addressed that question by citing an impressive array of conventional and customary law rules and principles that proscribe international criminal conduct against the environment during armed conflict. A similar detailing of existing international law on this subject is contained in joint memorandum prepared by Jordan and the United States for the United Nations' General Assembly in 1993.\footnote{Joint Memorandum prepared by Jordan and the United States, \textit{U.N.G.A. Doc. A/C.6/47/3/ Annex} (1992).} It appears that the prevailing expert opinion is to answer the question about the adequacy of substantive law in the affirmative. Support for this view was borne out when the General Assembly urged compliance with the international rules spelled out in the memorandum and endorsed their incorporation into the military manuals of members.

To facilitate common understanding of the norms and their practical implementation, the International Committee of the Red Cross
even drafted guidelines for military manuals and instructions on the protection of the environment during armed conflict.\(^3\)

The United States position, that is supported by other responsible governments and many leading experts, is that the substantive law on international environmental crimes is adequate for now. A leading expert from the Office of Legal Adviser in the United States Department of State, J. Ashley Roach, identifies nine specific customary law provisions pertaining to the protection of the environment during armed conflict.\(^4\) He cites articles 22, 23, and 55 of the 1907 Hague Regulations, articles 53, 55, and 147 of the 1949 Fourth Geneva Convention, and among other customary law principles, military necessity, proportionality and humanity. Note is made of articles 35 and 55 of Additional Protocol I to the 1949 Convention adopted in 1977 and a number of other possibly applicable rules.

The idea is that international law rules are adequate and that the international community ought to place its emphasis on the education of military personnel and on the dissemination of existing legal obligations under international law. From this policy perspective, the real problem is seen not as a lack of norms, but rather as a lack of enforcement for environment crimes committed during armed hostilities.

Pertinent questions raised by this approach are how much effort states ought to expend on promoting international enforcement to protect the environment, and more importantly, how much effort they will exert? The painful comparison that immediately comes to mind is that international enforcement to prosecute individuals indicted for murdering groups of humans in mass killings is woefully lacking. Protracted philosophical debates about the relative weight to be accorded anthropocentric or inherent values regarding the environment have their place. But the outcome on that issue does not resolve the practical question of how much limited political capital a nation should use on trying to improve enforcement for international environmental crimes, whatever the underlying value. Only die-hard inherent value fans would quibble with the observation that crimes against the environment per se involve less direct and immediate human suffering and loss of life than do the crimes of genocide or democide. Abstract arguments, even when true, that humanity will perish if it neglects the environment fade in value intensity when compared with the evil slaughter of innocent people now. Governments must prioritize their foreign policy goals and make choices


that husband their limited political capital. A political leader who pushes for enforcement against murderers harder than for enforcement against polluters is unlikely to be faulted. Stated plainly, if Saddam Hussein is not brought to justice for murdering Kurdish bodies, how much effort should governments expend attempting to try him for crimes against the environment? Is the international community likely to pursue indicting him for killing plants when it does not indict him for killing thousands of innocent humans? The attitude in the real world toward enforcement priorities is illustrated in the current Bosnia conflict. So far, the leadership in the North Atlantic Council lacks the political will to carry out a clear legal obligation by its Member States to search for individuals known to be in IFOR’s area of operations and who are indicted by the international criminal tribunal for grave war crimes. Even if international environmental war criminals ought to be tried, is there any evidence that they will be in the near future?

Despite the weight of the opinion cited above, I do not see the problem as being limited to just enforcement. My judgment is that the substantive law governing international environmental crimes is inadequate for the post Cold War era. As one of the eminent authorities on war crimes recently observed: “Governments have been exceedingly slow in drafting law-of-war agreements, or even provisions, for protecting the environment.”

One basis for my skepticism stems from a lack of confidence in the substantive norms themselves being adequate for successful prosecution in an international criminal court where the operative procedural presumption is that guilt must be established beyond a reasonable doubt. As is well known, this is a high standard of proof. On their face, the norms suffer from too often appearing as mere afterthoughts scattered helter-skelter throughout conventions that were concluded before modern outlooks arose that place an independent value on the environment. In truth, many of the customary international law norms that are cited by the experts as protections for the environment are, in reality, protections against wanton destruction of non-combatant property. There is quite a different legal concept that is motivated by markedly different human values. In part due to these inadequacies, the meaning of key definitions and textual terms regarding environmental crimes is often too vague to meet the standards for criminal misconduct under either substantive or procedural due process, as those concepts are generally understood. Admittedly, the notion of due process itself is at an early stage of development insofar as its use in an international criminal court

trial is concerned. But this fact simply makes it all the more important that vague and ambiguous standards not be advanced prematurely. Critics will be looking for openings, especially when the victim is the environment, rather than dead groups of human beings. Fundamental fairness also dictates genuine concern for the rights of the accused. Minimum due process in criminal trials of any nature requires establishing that the accused understood the rules he allegedly breached. Promoting respect for the rule of law in the world is not enhanced if vague rules are treated as if they were clear cut and are only enforced by the victors after winning the conflict.

Assuming, for the sake of reasoned debate, that progressive codification of the law, that is, that a consolidation and more precise reformulation of international criminal norms to protect the environment were desired, how might it be done?

It is recognized that an attempt to clarify norms runs the risk of opening a Pandora's Box. Respect for the rule of law in this area is not advanced if a good faith effort to create a forum for discussion on this issue is seized upon as a pretext for opponents of weapons of mass destruction to concentrate their efforts to foist unacceptable rules on non-consenting states. The mischief potential for overreaching by well meaning, but sometimes over-zealous supporters of the environment is well understood by experienced international negotiators. Suffice it to say, it's bad enough for this area of international law that meaningful international enforcement is lacking for acknowledged war crimes against large groups of humans. Respect for law on a global scale will not be enhanced and environmental protection goals not advanced by developing a new set of criminal norms to protect the environment that will be notable only for being universally ignored.

With the above caveats about the possibility of counterproductive results in mind, I still believe that it is worthwhile to consider a consolidation and clarification of the norms applicable to international environmental crimes during armed conflict. Perhaps the day will come when there will also be realistic grounds to expect better enforcement. If it does arrive, this modest step would at least have the substantive law in a better state of organization and international consensus than it is now. Along these lines, one approach that may merit consideration is to ask the International Law Commission to prepare a draft Protocol V to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Step one should be to condense the wordy title of this Convention.
The Preamble to the Conventional Weapons Convention provides, "it is prohibited to employ methods of warfare which are intended, or may be expected, to cause wide spread, long term and severe damage to the natural environment, reaffirming the need to continue the codification and progressive development of the rules of international law applicable in armed conflict." 6

The Conventional Weapons Convention is thus seen as an umbrella document that could provide the legal structure for a progressive codification of the rules pertaining to international war crimes. This proposition assumes that the terms of reference are strictly confined to a good faith effort only to clarify existing international law. This must be the limited mandate given to the International Law Convention. Use of the Conventional Weapons Convention would provide no means for enforcement beyond what states are already obligated to do as parties to an international agreement. To the extent that codified norms reflecting customary international law are embodied in the new Protocol V, then all states are already obligated to abide by them. And for the customary law rules to be true law, sovereign states must have manifested their acceptance of the rules through state practice. The suggestion to consider normative clarification and consolidation is therefore a modest one. It ought not to be taken as a signal that enforcement will be improved by creating a permanent, or even of an ad hoc, international judicial organ specifically chartered to try environmental war crimes. The sole objective of the new Protocol V would be to codify existing international law that many government experts say is already clear enough.

Responsible governments and environmentalist activists ought to share the objective of ensuring that there is little doubt about the existence in international law of a common understanding of the applicable substantive norms. Without that, convictions cannot be obtained beyond a reasonable doubt. After all, it will be members of the armed forces of the responsible governments who will actually try to obey the law. They deserve better than to be left with any doubt about what is and is not an international environmental crime. After there is no room for meaningful disagreement between experts on what constitutes crimes against the international environment in the normative sense, world leaders will be better positioned to turn to the task of making enforcement take place in good faith and in accordance with due process and respect for the rule of law.

I have been asked to discuss various models that might be available to address crimes committed by the Khmer Rouge during its murderous reign in the 1970s. Before turning to these, I would first like to identify several overarching considerations pertinent to the question, which model is most appropriate for Cambodia?

Let me begin by noting a paradox that lies at the heart of the issues addressed by this panel. On the one hand, since Nuremberg there has been a general acknowledgment, in principle if not always honored in practice, that some crimes are of genuinely universal concern and responsibility. That responsibility is captured by the very name of such offenses—"crimes against humanity." This conference, and this panel, affirm the degree to which crimes against the human condition engage international regard and responsibility.

Yet on the other hand, responses to such crimes must, in a meaningful way, reflect the peculiar social and historical culture of the country in which they occurred if the process of accountability is to achieve its central aims. There cannot be a one-size-fits-all response to crimes against human dignity.

Let me elaborate on both points, beginning with the first.

International legal responsibility for some offenses is reflected in the fact that genocide, certain war crimes, and crimes against humanity are subject to universal jurisdiction. Significantly, too, in a decision rendered on July 11, 1996, the International Court of Justice held that the obligation under the Genocide Convention to prevent and to punish genocide is not territorially limited.¹

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¹ The case, brought by Bosnia—Herzegovina against Yugoslavia, alleges that the respondent state committed genocide. In response to Yugoslavia's claim that the Court lacked jurisdiction under the Genocide Convention because the acts allegedly giving rise to responsibility by Yugoslav authorities occurred in Bosnia, the court wrote: "[T]he rights and obligations enshrined by the Convention are rights and obligations erga omnes. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention." Decision on Preliminary Objections, Application of the Convention
This dimension of international law is deeply rooted in moral obligation. The nature of that responsibility was suggested in a recent article in the Washington Post about a lawsuit by a Holocaust survivor against Swiss banks. Those banks, the plaintiff alleged, withheld money deposited by her father before he fell victim to the Nazi machinery of death. The Post article quotes the plaintiff's husband reading a passage from the Talmud, which describes a debate among ancient rabbis: "If a mouse steals a piece of cheese and runs into a hole, then who's responsible? It's the hole who's responsible. If he didn't have the place to hide it, then he wouldn't steal it." This passage evokes the basic principle underlying international law's recognition of universal responsibility for assuring that those who commit crimes against humanity are brought to the bar of justice. If a state provides sanctuary to Nazis, it has breached the vow of universal conscience, "Never Again." If the world fails to demand justice for the sweeping crimes of the Khmer Rouge, it is complicit in those crimes.

Further, by the very nature of crimes against humanity, accountability will come, if at all, only when international society demands it. The decision of a United States Military Tribunal in Nuremberg is instructive. "Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty," the Tribunal wrote in the Ohlendorf case. The Tribunal continued:

It is to be observed that insofar as international jurisdiction is concerned, the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered state makes adequate provision. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.

But if crimes against humanity engage the responsibility of international society, an effective response must include measures that meaningfully reflect the culture and circumstances of the nation that endured those crimes. In particular, to the extent that the aim of a process of accountability is to inoculate a country like Cambodia against the revival of brutal governance, the most effective approach will reflect the social, historical, and legal culture in which the crimes occurred.

Press accounts of the recent amnesty accorded Ieng Sary suggest the importance of this issue in respect of Cambodia. Much of the press coverage surrounding Ieng Sary’s demand for an amnesty suggested that criminal prosecution might sound a dissonant chord in Cambodian Buddhist culture. For example, in an article on September 8 entitled *Why Cambodia May Overlook Its Past*, a reporter for the *New York Times* wrote:

Many Cambodians seem to prefer not to reopen old wounds, and on the streets of Phnom Penh today people seem more eager for peace than for retribution. Though human rights groups and foreign governments, along with a number of Cambodian public figures, voice dismay at the respectful treatment of Mr. Ieng Sary, most people here seem prepared to accept his proposal to forget the past. ‘It does not feel good to have people who killed our parents coming to live with us, but as Buddhists, we are taught not to seek revenge,’ said a restaurant owner in Phnom Penh.

I cannot say whether, or to what extent, this reporter’s account fairly represents Cambodian views. I have seen and heard other accounts that give cause to doubt sweeping claims that prosecution of Khmer Rouge atrocities would offend Cambodian values. Notably, when he granted Ieng Sary a royal amnesty at the behest of Cambodia’s two Prime Ministers but against his own conscience, Prince Sihanouk made plain that such a pardon should not prevent an international tribunal from prosecuting Ieng Sary. While Prince Sihanouk of course does not speak for all Cambodians, I suspect that he speaks for many. Again, I cannot speak with any authority about whether prosecutions would, as the *Times* suggests, comport with Cambodian values. My point is simply that, to be effective in inoculating a society against a recurrence of state violence, a process of accountability must be rooted in that society’s culture.

Up to a point. We surely would not want to defer to cultural—relativist arguments counseling against accountability when the culture in question is one of wholesale impunity. A key aim of trials following sweeping violations of personal integrity is to help dispel the culture of impunity that enabled the crimes to occur. In some respects, then, the demands of universal justice may in fact require some measure of meddling with patterns of national culture.

The complex concerns on which I have focused are, as I have suggested, especially pertinent to the extent that a process of accountability seeks to prevent a country from returning to abuses of the past and to advance reconciliation within a deeply riven nation. But these are not the
only aims. Consider, for example, the work of the International Criminal
Tribunal for the former Yugoslavia in The Hague. This Tribunal,
established by the United Nations Security Council, seeks not only to
establish a foundation for peace and security in Bosnia, but also to
broadcast a global message: Those anywhere who might in the future
contemplate crimes against the human condition should think again. They
will not get away with it.

That processes aimed at establishing accountability may have
multiple audiences surely complicates the question, what is the best model
for a country like Cambodia? Criminal prosecution might, for example,
send the strongest message to a global audience, while a more broad-
ranging process, like that currently underway in South Africa, might best
promote the sort of deliberative reflection that enables a brutalized society
to heal.

How to reconcile these competing claims presents questions to
which no easy answers are available. I would suggest, however, that we
must take this challenge far more seriously than has heretofore been
common. Too often, transnational efforts to establish accountability for
gross abuses have evinced a tendency to disregard the voices of those most
directly concerned.

With these general considerations in mind, let me turn now to the
principal question which I have been asked to address—what models of
accountability are available in respect of the Cambodian killing fields? A
range of measures are potentially available to address the crimes of the
Khmer Rouge, though it remains doubtful whether any will garner the
political support essential to their success.

One option is the institution of a contentious case before the
International Court of Justice. Such a case must be brought against
Cambodia, which is a party to the Genocide Convention, by another state
party. The case would, in essence, allege that the Cambodian government
breached its treaty obligation to prevent and punish genocide.

The excellent report prepared by Jason Abrams and Steven Ratner
for the United States Department of State on accountability for Khmer
Rouge atrocities concluded, however, that this option is improbable for
several reasons. First, despite diligent efforts, nongovernmental
organizations have been unable to convince any government to institute
proceedings against Cambodia before the International Court of Justice.
Second, with the Khmer Rouge no longer in control of Cambodia’s
government, it might not be possible to establish that there is a genuine
dispute between a petitioner state and the government of Cambodia.

The recent decision of the Cambodian government to grant an
amnesty to Ieng Sary might change this legal calculation, establishing a
genuine dispute under the Genocide Convention. In particular, a petitioner state could allege that Cambodia breached its explicit duty under the Convention to punish genocide by granting Ieng Sary an amnesty. Still, it scarcely seems likely that a state will institute such a case now, when none could be found to do so throughout the years when the Khmer Rouge constituted, or was part of, the internationally recognized government of Cambodia. Further, as the State Department report concludes, even if such a case were instituted and led to a finding that Cambodia had breached its obligations under the Genocide Convention, it is by no means clear that such a judgment would stimulate national prosecutions in Cambodia.

National prosecutions would, of course, be the response to those crimes of the Khmer Rouge constituting genocide that is most consistent with Cambodia’s obligations under the Genocide Convention. But national prosecutions against Ieng Sary are presumably precluded by the recent amnesty, and in any event that amnesty may signal the Cambodian government’s general disinclination to institute genocide prosecutions against the Khmer Rouge.

Even if these obstacles could be surmounted, Cambodia’s national legal system is by all accounts in a state of shambles—in no small measure a result of Khmer Rouge policies. International support for national prosecutions would therefore be necessary, and also problematic. The specter of a clash of legal cultures would loom large over such a venture. Foreign legal advisors assisting Cambodians would surely insist on benchmarks to measure the success of their efforts and to justify their continuing support. But such a process often entails the sort of paternalism that has been problematic in other contexts, like Ethiopia. National prosecutions underway in Addis Ababa for crimes against humanity have been the object of well meaning, but at times counterproductive, international advice. These risks should not deter us from pursuing more effective approaches in Cambodia, but should sound a cautionary note about how to proceed.

As Prince Sihanouk observed, any amnesty conferred by Cambodian authorities would not prevent an international tribunal from prosecuting Ieng Sary (or others) for the murderous policies of the 1970s. What, then, are the prospects for such a tribunal?

It is unlikely that the Security Council would establish an ad hoc tribunal for Cambodia’s crimes similar to the tribunals it created for the former Yugoslavia and Rwanda. Both of those tribunals were created as enforcement measures under Chapter VII of the United Nations Charter. As such, they were predicated on Security Council determinations that the situations in the former Yugoslavia and Rwanda constituted threats to
international peace and security. Such a finding in respect of Cambodia seems unlikely, to put it mildly. Further, even if a permanent international criminal court is established, it is unlikely that such a tribunal would have retroactive jurisdiction.

One option that might be available is the establishment of an "international penal tribunal" by states parties to the Genocide Convention pursuant to article VI of that treaty. Presumably such a tribunal could be established by a small number of states. But Cambodia almost surely would have to agree to cooperate with such a tribunal. In light of the recent amnesty for Ieng Sary, the present government does not seem disposed to support such an effort.

Another model for establishing accountability for crimes of the past is through a "truth commission"—a body that attempts to establish a comprehensive and authoritative record of serious abuses committed during a specific period. In fact, such commissions represent "models" rather than "a model" for accountability, as their mandates, powers, and modes of operation have varied considerably from one country to another.

One of the principal virtues of truth commissions is the extent to which they can, potentially, engage society in a broadly gauged and broad—ranging deliberative process about its past. This process is, I believe, essential in securing one of the principal aims of accountability in nations recently scourged by crimes against human dignity. Such collective deliberation may help strengthen the sinews of civic culture, fostering a deep commitment to personal rights and a demand that they be respected. At the same time, a national truth—telling process provides a framework for healing the wounds of those who endured atrocious crimes. In these and other respects, the process of accountability engendered by truth commissions tends to be more inclusive than that of criminal trials.

One noteworthy process is now underway in South Africa. To reckon with apartheid-era crimes, the Mandela government has established an architecture of accountability that ingeniously facilitates both truth and justice. To qualify for amnesty for politically-motivated human rights abuses, potential and actual defendants must fully confess to their role in such crimes. Even then, amnesty may be denied if the confessor's crime is deemed disproportionate to its political aim.

This approach creates an incentive for human rights violators to come forward which has been missing in other countries that have recently emerged from periods of sweeping abuses, several of which have established truth commissions. Typically, such commissions have failed to breach the wall of silence surrounding participants in the prior regime's system of abuse. Instead, in Latin America, where the institution of truth commissions was inaugurated, such initiatives typically have encountered,
and perhaps helped inspire, a closing of ranks among those who were complicit in state-sponsored violence.

In South Africa, in contrast, the information obtained from those who seek amnesty through confession can lead to prosecution of those whom they implicate, while the threat of prosecution may prompt a broader reckoning with the past through an ever-widening circle of disclosures. Finally, the amnesty committee’s residual power to deny an amnesty may prevent the South African approach from ultimately ratifying wholesale impunity.

The South Africa experience is a model in other respects as well. When South Africans grappled with the question of how to deal with abuses of their past, they received considerable international support in this deliberative process, and explored the experiences of other countries, such as Chile, that had tried to come to terms with their legacy of dictatorship. Ultimately, however, South Africa found its own solution— informsed by the experiences of other nations, but uniquely South African.

In conclusion, then, I have tried to suggest that, as we seek to meet our responsibility for enforcing universal conscience, we must recognize that our charge begins at precisely the place where universal and local values converge. To make meaningful the vow “Never Again”, there must be a genuinely global demand for justice in respect of crimes against human conscience. But if this project demands universal engagement, its basic themes must be composed, above all, by those who have endured offenses against their humanity.
SWAPPING AMNESTY FOR PEACE AND THE DUTY TO PROSECUTE HUMAN RIGHTS CRIMES

Diane F. Orentlicher *

I am fortunate to have as a foundation for my remarks Professor Roht-Arriaza's lucid presentation of the principal sources of international law bearing on amnesties for gross violations of human rights. My own remarks will address the policy dimension of such amnesties, focusing on their implications for peace in countries that are tenuously emerging from brutal conflict.

First, however, I would like to note that, in respect of Bosnia-Herzegovina, there is an additional source of legal obligation bearing on the question of punishment beyond those found in general international law. The Security Council resolution establishing the International Criminal Tribunal for the former Yugoslavia requires all states that are members of the United Nations to cooperate fully with the Tribunal, including its orders of arrest and requests for assistance. That obligation was reiterated in the Dayton peace agreement with respect to the parties to that accord.

Turning to the subject of my remarks: "Do amnesties represent sound policy?" The answer can only be, "It depends." Those who claim to have a universally relevant answer to this question surely overreach the limits of human knowledge. Still, I would offer several general observations respecting the wisdom of amnesties for gross violations of human rights.

First, one ought to be skeptical of claims that a wholesale amnesty is the approach most likely to facilitate national reconciliation, even while being open to persuasion on this point. All too often, the term "reconciliation" has been used as a code-word for impunity when invoked as a justification for amnesties. In fact, however, punishment may be an essential foundation for reconciliation, as Hannah Arendt suggested when she wrote: Men cannot forgive what they cannot punish.

More generally, when the decision is too easily made in the direction of overlooking crimes of the past in the service of national reconciliation, the costs, both morally and socially, are high.

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Finally, I believe that we would do well to resist the tendency to address the wisdom of amnesties in terms of stark dichotomies, such as “punish or pardon” and “amnesty or accountability”. These dichotomies present unduly narrow options, detracting from more constructive efforts to balance the demands of justice against those of reconciliation and, ultimately, to promote reconciliation within a framework of accountability.

A model of such an approach is that which has been undertaken by the government of South Africa. Under that country’s law, individuals must confess fully to their crimes in order to receive an amnesty. Even then, an amnesty committee may deny the petitioner’s request if the committee deems his crime disproportionate to its political objective. Although it remains to be seen how this approach will play out, it may well have the effect of fostering a fuller accounting of the truth behind apartheid’s grim litany of crimes, as well as a more robust record of prosecution, than has been possible in other countries that have endured crimes against the human condition.

The possibility of receiving an amnesty provides an inducement for those who participated in apartheid-era depredations to disclose information about those crimes, thereby facilitating full disclosure of the truth. These disclosures may, in turn, facilitate successful prosecutions of persons implicated by the confessors. In this respect, the South African approach establishes a dynamic relationship between the truth — and justice — seeking dimensions of accountability, while breaking out of the sterile dichotomy (“punish or pardon”) that has too long framed international debate about how nations should address their legacies of brutal governance.

I will devote the rest of my remarks to another country — Bosnia and Herzegovina — because decisions made in the months ahead will have truly critical implications there. Further, policy determinations respecting the crimes that raged across Bosnia during its recent conflict have been, and will continue to be, almost peculiarly the province of the international community.

That policy is one of professed commitment to accountability but, for the most part, has emerged in the past year as a policy of de facto impunity.

The official policy is embodied in the Security Council’s establishment of the first international criminal tribunal since Nuremberg and Tokyo. The Hague Tribunal was created to prosecute those responsible for serious violations of humanitarian law committed during the conflict in the former Yugoslavia. As I noted earlier, the Security Council resolution establishing the Tribunal imposes an obligation on all states that are members of the United Nations to cooperate with the
Tribunal. Further, the governments of Yugoslavia, Bosnia, and Croatia reiterated their commitment to cooperate fully with the Tribunal when they ratified the Dayton peace agreement. The Dayton accords also authorize, but do not require, the NATO Implementation Force (IFOR) to arrest suspects indicted by the Tribunal.

The very establishment of the Tribunal speaks volumes about the subject of this panel. Above all, this measure was a powerful tribute to the role of justice in securing peace. Notably, the Tribunal was established as a peace enforcement measure under Chapter VII of the United Nations Charter. The Council determined that the work of the Tribunal would help ensure an end to the crimes known as "ethnic cleansing", and would "contribute to the restoration and maintenance of peace" in the war-ravaged territory of the former Yugoslavia.

Notably, too, the provisions in the Dayton accords requiring parties to cooperate with the Tribunal upended the conventional wisdom about the need and desirability of "swapping amnesty for peace." It had been widely predicted that such a deal would be inevitable if the parties to the Balkan conflict were to reach a peace agreement. Instead, the accords affirmed the important role that the Tribunal would play in assuring lasting peace in Bosnia.

Further, it is widely acknowledged that the Dayton peace accords would not even have been possible had the Tribunal not already indicted two men who bear principal responsibility for "ethnic cleansing": General Ratko Mladic and Radovan Karadzic. Before his indictment, when Karadzic headed the Bosnian Serb delegation to United Nations-sponsored peace conferences, no success was possible. Far from hindering peace prospects, then, the Tribunal played a central part in clearing the way to Dayton.

But if Dayton avows that legal process is a keystone of lasting peace in Bosnia, implementation efforts have thus far defied Dayton's clarion call for justice. Among the authorities in the former Yugoslavia in a position to arrest war criminals, only the Bosnian government has complied fully with this obligation (though it too may have breached its duty to cooperate fully with the Tribunal by allegedly putting forth false testimony, thereby forcing prosecutors in The Hague to retract the testimony of one witness in the trial of Dusko Tadic). Of seventy-four suspects indicted by the Tribunal, only seven are in its custody.

Dario Kordic, the most senior Croat official indicted by the Tribunal, reportedly lives in a government-owned apartment in Zagreb. Since his indictment, he has been seen sitting in the row behind Croatian President Franjo Tudjman at a public concert. Another Croat indicted by
the Tribunal, Ivica Rajic, reportedly lived for almost a year in a hotel owned by the Croatian Defense Ministry.

This week, it was reported that four Bosnian Serbs indicted by the Tribunal have been working openly as police officers in Prijedor and Omarska, cities indelibly linked with images of “ethnic cleansing”. Yesterday, the *Boston Globe* reported that two other Bosnian Serbs indicted by the Tribunal were working as public officials in Bosanski Samac, one as the highest-ranking municipal official, and the other in the local office of Bosnian Serb state security.

For its part IFOR has made a shameful mockery of its professed policy to arrest suspects indicted by the Hague Tribunal if they are “encountered”. One United States commander asserted that his troops would arrest suspects like Radovan Karadzic only if they literally stumble into an IFOR checkpoint. In fact, the record suggests that IFOR would not even arrest indicted suspects under these circumstances. In August, when IFOR inspectors learned that General Ratko Mladic was inside a bunker they had planned to inspect, they rescheduled their visit rather than confront the indicted war criminal within.

Two days before the September elections in Bosnia, the United States Commander of IFOR, Admiral Joseph Lopez, met with Serb officials in the headquarters of Radovan Karadzic, who, according to Serb sources, was almost certainly inside the building. And in a virtuoso display of IFOR’s talent for not “stumbling into” Mladic or Karadzic, none of the 53,000 IFOR troops deployed to provide security on election day in mid-September had an arrest-worthy encounter with these men, although both reportedly turned out to vote.

The costs of this policy have been evident in each grim dateline from Bosnia, and the principal casualty has been the Dayton peace process. Emboldened by IFOR’s repeatedly avowed resolve not to arrest him, Bosnian Serb leader Radovan Karadzic has undermined virtually every major non-military provision of the Dayton accords. The first significant test came last February, when Serb-held neighborhoods in Sarajevo were transferred to the authority of the Bosnian Government. Coming in the early months of the peace, this transfer could have been a harbinger of reconciliation in the best spirit of Dayton. Instead, heeding the calls of Karadzic, Serbs abandoned these neighborhoods rather than live with returning Muslims—and torched their homes as they left.

More recently, negotiated out of public office but not political influence, Karadzic derailed the possibility of a credible voter registration process, a fact that led to the postponement of municipal elections that had been slated to be held in mid-September, but not to the postponement of national elections. Humanitarian aid programs administered in Serb-held
areas of Bosnia by Karadzic's wife, for example, were flagrantly manipulated to secure a Serb victory that would ratify the results of ethnic cleansing. To qualify for aid packages, displaced Serbs reportedly had to agree to register in certain key locations. In this setting, the elections effectively ratified ethnic cleansing, bringing into office hard-line nationalists who openly oppose inter-ethnic cooperation.

Above all, Srebrenica, where thousands of Muslims were slaughtered by Serb forces last summer, stands as a tragic monument to the folly of letting Mladic and Karadzic remain at large. The largest massacre in Europe since World War II, this happened under the supervision of men who had already been indicted by the Tribunal. That it occurred before the Dayton accords were signed does not affect the grim reality that if any semblance of the rule of law had been enforceable only last year, an odious crime could have been avoided.

Finally, the costs of this de facto impunity include an intangible, but potentially serious, erosion of the Hague Tribunal's authority. Just as the craven acquiescence in "ethnic cleansing" by the United Nations Protection Force (UNPROFOR) in Bosnia deeply compromised the credibility of the United Nations, a continuing failure to secure the arrest of suspects indicted by the Hague Tribunal will surely diminish its hard-earned credibility and its ability to advance national healing in Bosnia.

Yesterday, Carl Bildt, the civilian High Representative for implementation of the Dayton peace plan, said through a spokesman that he would like NATO to reconsider its current policy respecting the arrest of war criminals. Significantly, Mr. Bildt suggested that a reversal of IFOR's policy of de facto impunity would "stimulate the peace process in Bosnia-Herzegovina to go in a normal direction." It is time, past time, to change course.
INDIRECT INCORPORATION OF HUMAN RIGHTS TREATY PROVISIONS IN CRIMINAL CASES IN UNITED STATES COURTS

Mark Andrew Sherman *

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I. INTRODUCTION

A. The Treaties

The recent ratification by the United States of the International Covenant on Civil and Political Rights (ICCPR)¹ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)² raise important possibilities for the rights of criminal defendants in United States courts. Although the treaties are both non-self executing and encumbered with reservations, declarations and understandings that blunt their force in domestic tribunals, they can still be useful to criminal defendants in strengthening constitutional and statutory claims³ through “indirect incorporation.” Essentially, indirect incorporation uses international human rights law to infuse interpretation of domestic law, both constitutional and statutory.⁴

1. ICCPR

The ICCPR contains a number of provisions that can be indirectly incorporated into constitutional and statutory defenses and claims. Article 6 recognizes that every human being has an inherent right to life and a right not to be arbitrarily deprived of life. Where it exists, the death penalty may be imposed only for the most serious crimes, and not for crimes committed by persons under the age of eighteen, nor carried out on pregnant women. Article 7 provides that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. Article 9 guarantees the right to liberty and personal security, and prohibits arbitrary arrest and detention. Article 10 provides that detainees and prisoners be treated humanely, and for


the segregation of accused from convicted persons, and juveniles from adults. Finally, article 14 provides for the equality of all persons before the courts and for due process guarantees in criminal proceedings, including the right to the presumption of innocence, to have adequate time to prepare a defense, and to be tried in one's presence.

Importantly, under article 28, the ICCPR has an active supervisory organ, the United Nations Human Rights Committee. Under article 40, all states parties must submit periodic reports to the Committee evaluating their own compliance with the ICCPR. The Committee then meets with representatives of the states parties to ask questions about their reports. Following these meetings, the Committee issues comments on the reports and the subsequent question-and-answer sessions. The United States submitted its first report to the Committee in 1994, and representatives of the United States Government — including Assistant Attorney General for Civil Rights Deval Patrick, Assistant Secretary of State for Democracy and Human Rights John Shattuck, and State Department Legal Adviser Conrad Harper - met with the Committee in early 1995. The Committee issued its comments on the United States report in the spring of 1995.5

In addition, the Committee also issues general comments, similar to advisory opinions, regarding the interpretation of the treaty. These comments may address a specific treaty provision, such as a comment addressing the meaning of "cruel, inhuman or degrading treatment or punishment," or a general treaty practice, such as a comment addressing the attachment of reservations, declarations, and understandings by states parties.6

Finally, a number of states parties have also ratified the Optional Protocol to the ICCPR which permits individuals to pursue claims against states parties before the Committee.7 As a result, the Committee has begun to compile a substantial human rights jurisprudence.

2. Torture Convention

The Torture Convention also contains provisions that can be incorporated indirectly into constitutional and statutory defenses and claims. Article 1 defines "torture" as the intentional infliction of severe physical or mental pain and suffering, carried out by a public official or

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6. See Gen. Comm. No. 24 (52) 1/, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (commenting on issues relating to reservations made upon ratification or accession to the Covenant or Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant).

person acting in an official capacity, for purposes of obtaining a confession, meting out punishment, intimidation, or for any reason based on discrimination. Article 3 prohibits the expulsion, return ("refouler") or extradition of a person to another state if that person would be in danger of being subjected to torture. Article 16 requires each state party to prevent acts by public officials or persons acting in an official capacity that, while not amounting to torture, amount to cruel, inhuman or degrading treatment or punishment.

The supervisory organ to the Torture Convention, the Committee Against Torture, provided for by article 17, operates in similar fashion to the Human Rights Committee. States Parties are required to submit regular reports on compliance and must meet with the Committee to discuss their reports. At this point, the Committee Against Torture is just beginning to develop its jurisprudence, so the breadth of interpretation of treaty provisions is somewhat limited. However, because there is some overlap among provisions of the ICCPR and the Torture Convention, interpretations of the Human Rights Committee on similar provisions of the ICCPR can help in explaining and understanding the provisions of the Torture Convention.

B. Declarations, Reservations and Understandings: The Challenge Posed by Non-Self-Execution and Indirect Incorporation as a Solution for Criminal Defendants

Both the ICCPR and Torture Conventions were ratified by the United States pursuant to specific reservations, declarations, and understandings. In terms of the legal effect of the treaties in domestic tribunals, perhaps the most important declarations in both treaties are the ones indicating that the treaties are non-self-executing. In other words, the provisions of the treaties that establish certain rights, as ratified by the United States, cannot stand alone as the legal basis of a defense or cause of action in a domestic court.

To make matters even more difficult, the aggregate substantive effect of the United States' reservations, declarations, and understandings to the ICCPR and Torture Convention is to limit the scope of the treaties' provisions to that of similar provisions contained in the United States Constitution. In other words, the United States reserves the right to consider itself bound by certain treaty provisions only to the extent of their meaning in United States domestic law.

The issues of non-self-execution and the aggregate, substantive effect of the reservations, declarations, and understandings to the ICCPR and the Torture Convention pose at least two significant challenges for criminal defendants intending to raise treaty-based international human
rights defenses or claims. First, non-self-execution requires that human
rights treaty provisions and international jurisprudence interpreting treaty
provisions be raised in conjunction with domestic constitutional and
statutory defenses and claims. In this regard, ICCPR and Torture
Convention provisions and interpretations via the respective United
Nations supervisory organs can only be used to bolster constitutional and
statutory defenses and claims.

Second, the substantive effect of the reservations, declarations, and
understandings requires criminal defendants to fully and persuasively
integrate domestic constitutional and statutory (e.g., civil rights) law with
international human rights law. In this connection, the ultimate purpose of
indirect incorporation is to persuade domestic tribunals, first, that the
United States, by ratifying the ICCPR and Torture Convention, has again
recognized that protection of the individual from the arbitrary
encroachments of the state is of the highest priority; and, second, that
because the state is prone to violate its international human rights
obligations in the pursuit of justice, just as it is with its domestic
constitutional obligations, domestic constitutional and statutory
interpretation must now also conform with international human rights
standards.

II. ANALYSIS OF INDIRECT INCORPORATION

A. International Human Rights Law in United States Courts

1. Dealing With Non-Self-Execution by Not Dealing With It

This analysis assumes that federal and state courts will give legal
effect to the non-self-execution declarations contained in the ICCPR and
Torture Conventions. While, from a human rights perspective, the non-
self-executing nature of the ICCPR and Torture Convention is unfortunate,
the futility of challenging the relevant declarations in United States courts
must be appreciated. However, acquiring such an appreciation is not the
same as admitting defeat. Rather, it allows a lawyer’s creative energies to
be employed elsewhere. In this regard, human rights lawyers must
recognize that, simply because human rights treaty provisions cannot alone
provide the legal basis for a defense or claim, they can inform a court’s
interpretation of domestic law.

8. See Carlos Manuel Vasquez, The Four Doctrines of Self-Executing Treaties, 89 AM. J.
2. Indirect Incorporation

Basically, the provisions of the ICCPR and Torture Convention must be invoked as persuasive authority, bolstering constitutional and statutory defenses or claims, and must be connected to customary international law. Unlike treaty law, customary law, "at least where the United States has not persistently objected to a particular norm during its formation, ipso facto becomes supreme federal law and hence may regulate activities, relations, or interests within the United States."9

Perhaps the most successful infusions of customary international human rights law and, more recently, international human rights treaty law into United States domestic law have been in cases involving the Alien Tort Claims Act (ATCA).10 The seminal case in this area is the 1980 case of *Filartiga v. Pena-Irala.*11 In that case, two Paraguayan plaintiffs brought an action against another citizen of Paraguay for the torture and death of their son and brother, basing their claim on the Alien Tort Claims Act. The statute, part of the Judiciary Act of 1789, provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Notably, *Filartiga* took place prior to United States ratification of the Torture Convention. Thus, jurisdiction under the statute turned upon whether torture violated customary international law. Ultimately, the United States Court of Appeals for the Second Circuit held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."12

More recently, in *Kadic v. Karadzic,*13 a 1996 case that followed United States ratification of the ICCPR and Torture Convention, the United States Court of Appeals for the Second Circuit reversed a district court order dismissing an action under the ATCA initiated by Bosnian Muslims who claim they were tortured by Bosnian Serbs under the leadership of Radovan Karadzic. The court of appeals held, *inter alia,* that certain forms of conduct, such as torture, violate the law of nations whether undertaken by persons acting under the auspices of a state or only as private individuals. For instant purposes, however, the actual holding

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9. Lillich, *supra* note 4 at 235 (citing The Paquete Habana, 175 U.S. 677 (1900) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1)-(3) cmts. c, d, reporters' notes 2,3 (1987)).
12. Id. at 884.
of the court is less important than the method by which it arrived there. In addition to discussing *Filartiga*, the Second Circuit examined customary international human rights law on genocide, war crimes and torture, and treaty law covering these subject areas, including the Torture Convention.

In addition to *Filartiga* and *Kadic*, United States courts have held that torture, prolonged arbitrary detention and causing the disappearance of individuals are prohibited by customary international law. Further, Section 702 of the Restatement contains a list of the international human rights that have achieved customary international law status. In addition to those already listed, these include genocide; slavery or slave trade; cruel, inhuman or degrading treatment or punishment; and systematic racial discrimination.\(^\text{14}\)

Although the ATCA cases involve civil actions by aliens against alien tortfeasors, the ATCA cases bear striking resemblance to successful cases initiated pursuant to both civil actions and criminal prosecutions brought under federal civil rights statutes. Thus, plaintiffs and prosecutors in federal civil rights cases might be able to bolster their domestic statutory claims by using international human rights law, both customary and treaty-based. Further, because federal civil rights laws are based on the protection of rights embodied in the Bill of Rights, criminal defense counsel should bolster constitutional arguments by using international human rights law, both customary and treaty-based.

As evidenced by the ATCA cases, despite certain judicial trends which seem to militate against making international human rights law arguments in domestic courts, there is another, more subtle trend that favors such arguments. However, in order to further this trend, international human rights law arguments must be especially artfully crafted, connecting domestic law, with customary international law and, then, treaty law. If they are not, they could very well set back the advancement of international human rights in United States courts.

**B. Relevant ICCPR and Torture Convention Provisions Lending Themselves to Indirect Incorporation in the Criminal Context**

1. Arrest, Initial Detention and Detention on Remand

   a) Police Conduct Prior to and During Arrest

   The United States faces continuing difficulties regarding ill treatment of persons in police custody. According to Amnesty

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International, instances of police brutality are particularly prevalent in 
metropolitan police departments such as the New York City Police 
Department and the Los Angeles Police Department.\textsuperscript{15} Citing cases such as 
that of Rodney King in Los Angeles and those uncovered by the Mollen 
Commission in New York City, Amnesty's allegations included use of 
excessive physical force, and inappropriate use of police weapons such as 
batons, pepper spray and firearms.\textsuperscript{16} The Washington, D.C. Metropolitan 
Police Department also has had serious problems of excessive force used 
by police against civilians.\textsuperscript{17} At the federal level, the misuse of force by 
the federal government against alleged white separatists, and members of 
religious cults has been well documented.\textsuperscript{18}

Article 7 of the ICCPR and article 16 of the Torture Convention 
each require states parties to prevent acts by public officials or persons 
acting in an official capacity that, while not amounting to torture, amount 
to cruel, inhuman or degrading treatment or punishment. These 
provisions, when combined with ATCA jurisprudence, the customary 
international human rights law analyzed in ATCA jurisprudence, and 
Human Rights Committee commentary defining "cruel, inhuman or 
degrading treatment or punishment," might lend themselves to use by both 
civil plaintiffs and prosecutors to bolster claims and prosecutions brought 
under the Civil Rights Act of 1871. The Human Rights Committee, in 
General Comment 20, addressing article 7, specifically refused to "draw 
up a list of prohibited acts or establish sharp distinctions between the 
different kinds of punishment or treatment."\textsuperscript{19} According to the Human 
Rights Committee "the distinctions depend on the nature, purpose and 
severity of the treatment applied."\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{15} AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA–HUMAN RIGHTS VIOLATIONS: 
REPORT I).
\item \textsuperscript{16} Id.
\item \textsuperscript{17} See D. Tillotson, . . . And A Little Fear of Punishment, WASH. POST, Jan. 9, 1994, at 
C8. See generally U.S. COMMISSION ON CIVIL RIGHTS, 1 RACIAL AND ETHNIC TENSIONS IN 
AMERICAN COMMUNITIES: POVERTY, INEQUALITY AND DISCRIMINATION–THE MOUNT 
PLEASANT REPORT (1993) (analyzing racial and ethnic tensions in the District of Columbia).
\item \textsuperscript{18} AMNESTY REPORT I, supra note 15, at 11–12; George Gardner, Ex-FBI Aide Charged in 
A1.
\item \textsuperscript{19} Human Rights Committee, General Cmt. 20, art. 7 (44th Sess., 1992), in Compilation of 
General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. 
Doc. HRI\GEN\11\Rev.1, at 30 (1994).
\item \textsuperscript{20} Id.
\end{itemize}
Similar to ATCA, under which an alien can initiate a civil damages action for acts of torture committed by an alien who is either a state actor or acting under color of state law, the Civil Rights Act of 1871 provides both civil and criminal remedies where a person is deprived of his or her civil rights under color of state law. While police misconduct prior to and during arrest, such as that at issue in the Rodney King case, may not amount tortue, it can be credibly argued that where such acts deprive a person of his or her civil rights, they also amount to "cruel, unusual or degrading treatment" under customary international law as reinforced by the ICCPR, Torture Convention and relevant commentary. Thus, relevant international norms can inform a court's articulation of the proper legal standards under domestic civil rights law. That way, courts will be reconciling United States statutory law with the law of nations.

International human rights legal norms can similarly inform state court interpretations of state statutory and constitutional law — for example, laws that create an administrative process for complaints of police misconduct. Since international law applies to both the federal government and the states, international legal norms can be used as independent state grounds for a court decision. As such, the decision would remain insulated from United States Supreme Court review.

b) Police Conduct Following Arrest

The Fifth Amendment to the United States Constitution guarantees an individual's right not to self-incriminate and the right to be free from deprivations of life, liberty or property without due process of law. It is not unheard of for law enforcement officers in the United States to attempt to physically coerce persons under arrest and interrogation into confessing to a crime.

United States courts have indicated that post-arrest law enforcement conduct that shocks the conscience can result in a violation of the Fourth Amendment's guarantee against unreasonable searches and seizures, and the Fifth Amendment's due process requirement. In this regard, articles 7, 10 (right of detainees to be treated humanely), and 14 (right to due process) of the ICCPR, and article 16 of the Torture Convention might be taken into account in determining constitutional standards in post-arrest misconduct cases.

21. United States v. Toscanino, 500 F.2d 267 (1974); See also United States v. Birdsell, 346 F.2d 775 (5th Cir. 1965); United States v. Nagelberg, 434 F.2d 585 (2d Cir. 1970). But see United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975) (holding that where facts similar to those in Toscanino but without claim of torture or United States involvement in the interrogation, Toscanino relegated to cases involving "torture, brutality and similar outrageous conduct.").
Notably, in General Comment 7, the precursor to General Comment 20 to article 7 of the ICCPR, the Human Rights Committee indicated that "the scope of protection required goes far beyond torture as normally understood." Further, among the particular forms of punishments and practices the application of which have attracted the attention and sometimes the criticism of [Human Rights Committee] members have been certain interrogation methods, the evidential use of illegally obtained information...stoning and flogging, whipping, 30 - 40 years rigorous imprisonment..., and deprivation of civil and political rights for extended periods.

2. Sentencing, Capital Punishment and Prison Conditions

a) Discrimination in Sentencing and Capital Punishment

Recently, certain aspects of the United States Sentencing Guidelines and state capital punishment statutes have been the subject of criticism alleging disparate impact on African Americans. The Fifth Amendment's due process clause contains an equal protection component, and the Fourteenth Amendment explicitly states that no state shall deprive any person of the equal protection of the laws. United States Supreme Court equal protection jurisprudence has increasingly required evidence of individualized discrimination in order for a claimant to succeed, rather than evidence indicating a pattern of discrimination giving rise to a disparate impact. However, article 14 of the ICCPR contains an equal protection clause. This clause, combined with international legal norm recognizing that systematic racial discrimination violates the law of nations, may assist federal courts, including the United States Supreme Court, in understanding that there need not be a conscious, discriminatory motivation in order for a law to violate the concept of equal protection if the law disparately impacts adversely a particular racial or ethnic group.

With regard to capital punishment and racial discrimination specifically, article 6(1) of the ICCPR prohibits the arbitrary deprivation of life. In the United States, such arbitrariness is evidenced by the history of 1) racial discrimination in death penalty cases; 2) ineffective assistance of general counsel.


defense counsel where a capital defendant is indigent; and 3) by recent federal legislation and jurisprudence restricting the habeas corpus rights of capital defendants. Further, article 6(5) of the ICCPR prohibits application of the death penalty to "persons below eighteen years of age."

Studies show that race continues to play an important role in the process of who will be sentenced to death. Further, the disparity in resources available to the prosecution and defense for capital cases in the United States ensures that capital trials are unfair. Finally, the United States Supreme Court and the United States Congress have both acted to limit the right to appeal a capital conviction at the federal level after a trial and post-conviction appeal at the state level, thereby eroding a fundamental safeguard in ensuring a fair outcome. In this regard, article 6(1) and article 14 might be combined with constitutional due process and equal protection arguments to persuade courts reviewing capital cases that the imposition of the death penalty is arbitrary in the particular case.

Notably, in the 1988 case of Thompson v. Oklahoma, the United States Supreme Court consulted extensively the law of nations in concluding that execution of a person who is sixteen years of age or younger at the time of the offense violates the Eighth Amendment's guarantee against cruel and unusual punishments. Thus in cases involving the execution of juveniles and mentally retarded persons whose mental age is below eighteen, Eighth Amendment arguments can be combined with articles 6(5) and 7 of the ICCPR and article 16 of the Torture Convention in an attempt to persuade courts that, if capital punishment must be carried out, only adults, signified by the age of eighteen, should be subject to it.

b) Prison Conditions

Certain prison conditions in the United States arguably violate the ICCPR article 7 and Torture Convention article 16 requirements that each state party prevent acts by public officials or persons acting in an official capacity that, while not amounting to torture, amount to cruel, inhuman or degrading treatment or punishment. Particularly disturbing are current trends in federal and state criminal justice policies that may encourage violations of articles 7 and 16 by law enforcement and corrections officials.


With regard to conditions of detention specifically, alleged conditions that can violate article 7 have included

incommunicado detention in a small cell (1 m. by 2 m.) in solitary confinement for eighteen months; solitary confinement for several months in a cell almost without natural light; detention in a garage with open doors, sleeping uncovered on the floor, with no change of clothing, blindfolded, hands bound, having only two cups of soup per day; detention in overcrowded cells with 5 cm. to 10 cm. of water on the floor, being kept indoors all day, insufficient sanitary conditions, hard labour, poor food, periods of incommunicado detention, chained to a bed spring on the floor with minimal clothing, and severe rationing of food. The [Human Rights Committee] described these as inhuman conditions.26

i. Overcrowding

As of June 1996, the United States prison population stood at 1.1 million.27 Because of increasingly strict federal and state laws regarding mandatory prison time,28 incarceration rates are high, making it difficult for federal and state governments to keep up with demand for bed space. This has led to double-and triple-bunking in facilities originally intended to single – cell inmates; deteriorating physical conditions and sanitation; reduced levels of basic necessities, such as staff supervision, health care and counseling services, and recreational facilities. Moreover, overcrowding is directly linked to the spread of airborne diseases, such as


26. MCGOLDRICK, supra note 23, at 372.


tuberculosis. In addition, HIV infected individuals are more at risk in contracting TB and the MDR-TB strain of the disease.\(^{29}\)

Both the Violent Crime Control and Law Enforcement Act of 1994 and the 1996 Prison Litigation Reform Act restrict the ability of prisoners to challenge confinement conditions, the latter by directing that prospective relief extend no further than necessary to correct the violation of the federal right of a particular prisoner or prisoners.\(^{30}\) Constitutional challenges to prison conditions brought pursuant to the Fifth, Eighth and Fourteenth Amendments, and statutory challenges to prison conditions based on deprivations of civil rights might be combined with customary international law recognizing the right to be free from cruel, unusual or degrading treatment or punishment, article 7 of the ICCPR and article 16 of the Torture Convention.

\(\textit{ii. Control Units}\)

Criminal justice policy in the United States has increasingly encouraged the use of so-called “control units,” “security housing units,” and “super-max” units in state and federal prisons.

The term ‘control unit’ was first coined at United States Penitentiary (USP) at Marion, Illinois in 1972 and has come to designate a prison or part of a prison that operates under a ‘super-maximum security regime. Control unit prisons may differ from each other in some details but all share certain defining features:

1. Prisoners in a control unit are kept in solitary confinement in tiny cells (six by eight feet is usual) for between twenty-two and twenty-three hours a day. There is no congregate dining, no congregate exercise, no work opportunities and no congregate religious services.

2. These conditions exist permanently (temporary lockdowns occur at almost every prison) and as official policy.

3. The conditions are officially justified not as punishment for prisoners but as an \textit{administrative} measure.

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Prisoners are placed in control units in *administrative* moves and since there are no rules governing such moves (in contrast to *punitive* moves), prisoners are denied any due process and prison officials can incarcerate any prisoner in a control unit for as long as they choose, without having to give any reason.\(^{31}\)

As of 1994, at least thirty-six states were reported to have constructed super-max units.\(^{32}\) There is one federal super-max prison, located at Florence, Colorado\(^{33}\) which assumed the operations of the former federal super-max at Marion, Illinois.

In January 1995, in *Madrid v. Gomez*,\(^{34}\) a federal court in California found that conditions of the Security Housing Unit (SHU) at Pelican Bay State Prison, operated by the California Department of Corrections, violated the constitutional rights of a class of defendants. The 344 page opinion condemned

what [the court] described as a pattern of brutality and neglect at Pelican Bay State Prison, California, a high security prison complex which opened in 1989. The ruling called upon the state to discontinue practices which included repeated assaults on prisoners; a pattern of punitive violence toward prisoners during 'cell extractions' (the forcible removal of prisoners from cells); the punitive shackling of inmates to toilets or other cell fixtures; and grossly inadequate medical and mental health care. The ruling also found that guards resorted to firearms too quickly and in circumstances that did not warrant the use of lethal force. The ruling referred to a number of individual cases including the case of Vaughn Dortch, a mentally disturbed prisoner who suffered third-degree burns over a third of his body after guards forced him, handcuffed behind his back, into a bath of scalding water. Another prisoner, Arturo Castillo, who refused to hand over his food tray, had a gas gun fired into his cell, was knocked unconscious and beaten so severely that a piece of

\(^{31}\) *Committee to End the Marion Lockdown, From Alcatraz to Marion to Florence — Control Unit Prisons in the United States* 1 (1992) <http://www.unix.olt.umass.edu/~kastor/ceml.html>.


his scalp became detached. The judge also found that the guards were rarely disciplined for excessive force and that their accounts of incidents were routinely accepted at face value, ignoring any other evidence. The judge also ordered the state to cease holding mentally ill prisoners in the prison’s Security Housing Unit . . . on the ground that the conditions could exacerbate their condition.  

Amnesty International has documented conditions at other supermax prison units. The H-Unit at the Oklahoma State Penitentiary at McAlester opened in 1991 to house prisoners in administrative or disciplinary segregation as well as the state’s death row population. Inmates are housed two to a small, windowless cell for all but five hours per week. Guards are isolated, from inmates and serious health problems go untreated and inmate conflicts undetected. Opportunities for exercise and programs were lacking. Some prisoners were reported to have become seriously mentally ill while on H-Unit but to receive little or no psychiatric care. Amnesty concluded that such conditions “amounted to cruel, inhuman or degrading treatment” and that certain conditions also violated the United Nations Standard Minimum Rules for the Treatment of Prisoners and the standards of the American Correctional Association. Oklahoma authorities have not acted on any of Amnesty’s recommendations to bring the facility into compliance.

Amnesty also reported on conditions at the Maximum Control Complex (MCC) at Westville, Indiana, a control unit which opened in 1991. The practices at MCC mirrored those at Pelican Bay, the McAlester H-Unit and other control unit prisons despite an agreement by authorities to change conditions following a lawsuit filed by prisoners.

37. AMNESTY REPORT I, supra note 15, at 17.
38. Id.
40. AMNESTY REPORT I, supra note 15, at 17.
41. Id.
42. Id.
Problems persist at other control unit prisons. Trenton State Prison in New Jersey utilizes a Management Control Unit in which inmates must use an activity module, measuring fifteen inches by fifteen inches and made of tubular steel and chain-link fencing, for group meals, indoor recreation, haircuts, meetings with counselors and classes.43

In Maryland, control units exist at the Maryland Correctional Adjustment Center (MCAC) and the Maryland House of Corrections Annex (MHC Annex). The MCAC’s first warden was forced to leave because of an alleged pattern of sexual harassment of female employees. More disturbingly,

[t]here were stories of a ‘pink room,’ where prisoners were taken for ‘disciplinary segregation.’ Many reported being stripped naked there and chained in a three-piece shackles, where they were often beaten by guards and left to shiver in forty-five degree air, blown in by the powerful fans of an air conditioner.44

In 1995, the United States Department of Justice initiated an investigation of the MCAC. The investigation found, among other things, that inmates are subjected to extreme social isolation by being confined to single person cells twenty-four hours a day; food is served lukewarm or cold; access to meaningful sick call is inadequate; inadequate staffing; mental health care that is inadequate to satisfy minimum constitutional standards; less than an hour of indoor out-of-cell time every second or third day; total lack of outdoor exercise or exposure to fresh air and natural light; and indefinite segregation. The investigation confirmed use of a “pink room,” which was

an unheated strip cell inappropriately located in the medical unit where an inmate was held in isolation for punishment. The cell was made of concrete and contained no furniture or mattresses. Inmates remained in the pink room sometimes as long as four days, wearing only underwear and a three piece restraint (leg irons, handcuffs, and a waist chain connected to the handcuffs and holding the hands very close to the body). Inmates used a hole in the floor as a toilet. The cell was filthy, covered with old feces and urine. Because hands were chained to waists,


44. BALTIMORE ANARCHIST BLACK CROSS, CONTROL UNIT PRISONS IN MARYLAND 2 (1995) <http://www.charm.net/g"barren/abc/cu.html>.
inmates were usually forced to urinate or defecate on themselves. Inmates in the pink room could not feed themselves with their hands due to the restraints. There was no running water in the pink room.45

The pink room was closed just prior to the Justice Department investigation. Since then, the pink room has been replaced by "cadre cells," which are normal cells, located in an isolated area, which are used for disciplinary purposes. "The doors to the cadre rooms have large metal closers on the inside of the doors which present a suicide risk."46 Although the Justice Department was unable to uncover evidence of a pattern of physical abuse by MCAC staff against inmates, the report noted that the Department has "received and continue to receive a substantial number of inmate allegations that staff at Supermax are using excessive force against the inmates out of the range of Supermax cameras."47 In response to the Department of Justice's letter informing the state of its findings, the State of Maryland stated: "[T]he conclusions contained in your May 1 letter are supported by neither law nor fact. Instead, the letter reflects your Division's philosophical opposition to "super maximum" facilities without regard to constitutional criteria."48 The state's response also generally challenged the Justice Department's jurisdiction to investigate the facility, stating that "absent any . . . wholesale constitutional misconduct, the DOJ simply has no right to proceed against a state in the management of its prisons."49 Ultimately, the state rejected the Justice Department's findings.

Again, cases brought by either individual plaintiffs or governmental entities, as in Madrid and the Maryland MCAC, challenging prison conditions pursuant to the United States Constitution and federal civil rights statutes, should be combined with customary international human rights laws and relevant treaty provisions in order to strengthen the constitutional and statutory legal standards.

iii. Prison Rape and Sexual Abuse

Rape and sexual abuse of prison inmates—both women and men—by guards and other inmates remains a problem in the United States. In

45. Letter from Deval L. Patrick, Assistant Attorney General for Civil Rights to Parris N. Glendening, Governor of Maryland 9-10 (May 1, 1996).
46. Id. at 10.
47. Id.
49. Id. at 2.
1993 the Justice Department began investigating allegations of widespread sexual abuse by guards of inmates at the Georgia Women's Correctional Institution. The abuses included coercion of inmates into having sex with guards and forcing inmates into guardrun prostitution rings.50 Criminal charges were brought against at least twelve prison employees and others were either dismissed or transferred.51

From 1993-95 Human Rights Watch found that women incarcerated in state prisons in California, Georgia, Illinois, Michigan, New York and the District of Columbia face a serious and potentially pervasive problem of sexual misconduct by prison officials. Male officers have engaged in rape, sexual assault, inappropriate sexual contact, verbal degradation, and unwarranted visual surveillance of female prisoners.

In virtually every prison ..., state prison authorities were allowing male officers to hold contact positions over female prisoners with no clear definition of sexual misconduct, no clear rules and procedures with respect to it, and no meaningful training on how to avoid it. Prison officials were also failing to equip female prisoners to deal with the potential abuse in the cross-gender guarding situation. They rarely, if ever, informed female prisoners of the risk of sexual misconduct in custody. Nor did they advise them of the mechanisms available — to the extent that any existed — to report and remedy such practices.

Two prison systems ... in Georgia and the District of Columbia, had taken initial steps to address this problem. But most states were failing to address adequately custodial sexual misconduct and had yet to train officers to avoid such misconduct or to put in place administrative measures and, where appropriate, to apply criminal sanctions to prohibit and punish this abuse. Moreover, the federal government was failing to meet its international obligations to ensure that custodial sexual violence was not only prohibited but also remedied by the states. In fact, the United States government had allowed custodial sexual

50. AMNESTY REPORT I, supra note 15, at 15.
51. Id.
misconduct at the state level to fall into a kind of legal and political vacuum where in large measure neither international, nor federal, nor state law was seen to apply.\footnote{52}

With regard to the situation of rape and sexual assault against male inmates, in \textit{Mathie v. Fries},\footnote{Mathie v. Fries, 939 F.Supp. 1284, 1285 (E.D.N.Y. 1996).} an inmate alleged that the Chief of Security at the Suffolk Jail on Long Island handcuffed him and raped him repeatedly between January and April 1990. The inmate was diagnosed in April 1990 with post traumatic stress disorder, specifically, rape trauma syndrome. An investigation undertaken in 1980 by the Federal Bureau of Investigation uncovered a pattern of sexual misconduct with prisoners by the Chief of Security going back to 1972 with a number of corroborating witnesses. However, the Department of Justice declined to prosecute.

In \textit{Bell v. Phenster},\footnote{Bell v. Phenster IP95–0205C (S.D. Ind. 1995).} an inmate at the Indiana Youth Center complained to several officials that he was in danger of sexual abuse from a fellow inmate. Following his complaint, he was moved to a cell with his pursuer, and was anally raped by him on August 23, 1994. After reporting the rape, the inmate was treated at a hospital and diagnosed as a rape victim. He was then placed in solitary confinement. He was shackled hand and foot to a steel bunk, face down, with arms and legs crossed, wearing only underwear, with the window open and rain coming through. He was kept without hot food until he agreed to withdraw his demand for an investigation. In April 1995, the inmate was denied asthma medication for one week and was near death when brought to the hospital. He was charged thirty times with violating prison rules which led to a rescheduling of his release date. He was again placed in solitary confinement.

Rape of inmates by other inmates in particular, a frequent occurrence that is often exacerbated by the actions and policies of corrections officials, is accompanied by the pervasive transmission of HIV and AIDS. One of eight New York state prisoners is HIV positive, and half of HIV/AIDS prisoners are in New York, Florida and Texas.\footnote{Mergenhagen, \textit{supra} note 25.} In this regard, the United States Supreme Court’s interpretation of the Eighth Amendment’s proscription against cruel and unusual punishment which requires inmates to demonstrate prison officials’ deliberate indifference to
cruel and unusual conditions may offer little protection in such circumstances. Under such a standard, it might be helpful to those seeking relief to combine their claims with customary international human rights law, relevant provisions of the ICCPR and Torture Convention, and Human Rights Committee and Committee Against Torture jurisprudence, if any, that provides examples of similar treatment held to violate the ICCPR.

iv. Treatment of Women Prisoners Involving Problems Other than Rape and Sexual Abuse

The number of women in prison in the United States is increasing. Between 1980 and 1990, the number of women in state and federal prison increased from 12,331 to 43,845. However, women still only comprise approximately 6.1 percent of all prisoners in the United States. Problems other than rape and sexual abuse experienced by women inmates include being housed far from home, and fewer recreational and vocational opportunities than are available to male inmates. Some federal courts have held such conditions to violate the United States Constitution's Fourteenth Amendment guarantee of equal protection of the laws; but other courts have disagreed with employing equal protection analysis. Possibly combining article 14 of the ICCPR with equal protection claims may strengthen the constitutional standard.

On April 4, 1996 women prisoners housed at two large California prisons, the Central California Women's Facility (CCWF) at Chowchilla and the California Institution for Women (CIW) in at Frontera, filed a federal class action charging "that the prisons' dramatically deficient medical care for chronically and terminally ill women has caused needless pain and suffering and threatened their health and lives." According to the lawsuit:

60. Id. at 29.
61. Id.
Lead plaintiff Charisse Shumate is incarcerated at CCWF and suffers from sickle cell anemia, serious heart problems, pulmonary hypertension and asthma. In spite of her life-threatening condition, Ms. Shumate frequently has been denied necessary medication and appropriate medical care and treatment. She does not receive a diet necessary to maintain her health. . . .

The lawsuit describes case after case of shockingly deficient treatment:

—a seizure patient at CCWF who is paralyzed on her left side has never been given occupational or physical therapy;

—a sixty-eight year old woman at CIW with asthma and cardiac problems who was placed in a locked room for approximately twelve hours without oxygen, necessary medication or treatment;

—a woman at CCWF who suffered burns over 54 percent of her body has gradually lost mobility because she was denied the special bandages which would prevent her burned skin from tightening;

—a prisoner at CCWF was confined naked in a filthy cell where she ingested her own bodily waste. She died of untreated pancreatitis that went undiagnosed until she was terminally ill;

—a women at CCWF unsuccessfully begged staff for months to allow her to see a doctor. She was finally diagnosed with cancer. Though in enormous pain, she received almost no pain medication. Because of swelling in her legs, she could barely walk, yet she was required to walk to the dining hall if she wanted to eat. She died approximately nine months after the diagnosis.  

63. ACLU PRESS RELEASE, supra note 62, at 2-3.
Notably, only twenty-nine percent of the guards at CCWF are women. Once again, in cases such as this, international human rights norms, customary international law and relevant treaty provisions and supervisory organ jurisprudence should be used to strengthen domestic claims.

v. Treatment of Juveniles

Current trends in juvenile justice policy and practice in the United States also pose problems under article 10(3) of the ICCPR, which mandates that juvenile offenders "be accorded treatment appropriate to their age and legal status" and article 16 of the Torture Convention. Increasingly, states are passing legislation which subjects, in certain cases, juvenile offenders as young as fourteen years of age to prosecution as an adult. The 1994 Violent Crime Control and Law Enforcement Act "permits the federal government to prosecute juveniles as young as 13 as adults in federal court."65

Children are increasingly involved in the criminal justice system. Between 1989 and 1993, the number of juveniles arrested for violent crimes increased 36 percent.66 During the same period, due to the major increase in weapons use among young people, arrests for homicide have increased nearly 40 percent.67 Further, "a growing proportion of convicted criminals are children. Nearly 600,000 juveniles were under some type of correctional supervision in 1991, according to the [Bureau of Justice Statistics]" 100,000 of whom were in prisons, juvenile detention facilities or jails.68

The problems associated with the conditions of juvenile confinement are serious. According to a 1994 OJJDP report, "substantial" and "widespread" problems exist with regard to living space, health care, security, and control of suicidal behavior.69 The research team that compiled the report visited ninety-five randomly selected public and private juvenile facilities. Notably, the team found that "deficiencies were distributed widely across facilities. Most had several deficiencies, and the

64. Adrian Nicole LeBlanc, A Woman Behind Bars Is Not a Dangerous Man, N.Y. TIMES MAG. June 2, 1996, at 35.
67. Id.
68. Mergenhagen, supra note 25.
types of deficiencies at these facilities varied considerably.” The report noted specific problems related to “crowding,” insufficient staffing, insufficient screening for suicidal behavior, and untimely health screenings.

In 1995 Human Rights Watch reported pervasive physical brutality and lack of a formal complaint system in the juvenile detention system of the state of Louisiana.

Moreover, children are confined unnecessarily in restraints such as handcuffs and shackles, and are kept in isolation for as long as five days, contrary to international standards. In addition, many children told [Human Rights Watch] that they were hungry. The overall environment of the institutions failed to meet the primary goal required by international standards for any form of juvenile incarceration: to create an environment that will ensure children’s successful integration into society.

The juvenile justice system of the District of Columbia, like its adult prison system, has become notorious as an institution unable to protect its population. The District of Columbia’s juvenile justice system has been the subject of serious litigation since 1970. Despite the presence of a court-appointed monitor to oversee implementation of a 1986 consent decree entered into by the city and juveniles comprising a class that initiated legal action, the District of Columbia has failed to implement the terms. Conditions at Oak Hill, the District’s remaining juvenile detention facility, have improved over the past ten years. However, there are still instances of failure to comply with the consent decree. Problems continue
in such areas as extended stays between detention and trial, delay in community placement, allegations of sexual abuse by staff against female residents, occasional overcrowding in the girls' unit, unfair treatment of residents by staff, understaffing of professional social services personnel, and a "crumbling, poorly maintained, and dirty" physical plant.  

One of the more popular trends in juvenile justice has been the creation of military-style "boot camps" as alternatives to institutionalization. A research report sponsored by the Justice Department's National Institute of Justice found that although the camps were successful in some areas, such as program completion rates; improvement in educational performance, physical fitness and behavior; and cost-effectiveness, problems persisted in achieving a healthy balance between programming emphasizing military discipline and programming focusing on remedial education and counseling; and high levels of absenteeism and non completion in aftercare (including re-arrest).  

Like the situation in Thompson v. Oklahoma, this situation raises potential Eighth amendment and international human rights concerns, albeit in a non-capital punishment context.

vi. Prison Labor and Chain Gangs

Current trends in prison construction, management and labor in the United States also pose problems under article 7 of the ICCPR and article 16 of the Torture Convention. With regard to the public policy effects of the prison construction industry:

[w]hat is new in criminal justice policy in the last decade is the growth of . . . private prison companies . . . . The American prison-industrial complex involves some of the largest investment houses on Wall Street. Goldman Sachs and Co. and Smith Barney Shearson Inc. compete to underwrite jail and prison construction with private, tax-exempt bonds that do not require voter approval. Titans of the defense industry such as Westinghouse Electric and Alliant Technisystems, Inc. have created special divisions to retool their products for law enforcement. Publicly traded prison companies such as the Corrections Corp. of America and Wackenhut Corp., as well as correctional


78. NATIONAL INSTITUTE OF JUSTICE, BOOT CAMPS FOR JUVENILE OFFENDERS (1996).
officers unions, also exercise a growing influence over criminal justice policy.\textsuperscript{79}

One of the primary problems caused by the privatization of prisons is that, since the companies are for-profit entities, "there is inherent pressure to provide a minimum of services in order to maximize profits."\textsuperscript{80} Indeed, Esmor Correctional Services, the corporation responsible for operating an private detention facility in Elizabeth, New Jersey "hired correctional staff with little or no experience, served a substandard diet to the inmates and shackled detainees in leg irons when they met their lawyers."\textsuperscript{81} Certainly, there are some prison companies, such as Corrections Corporation of America, that are providing a positive atmosphere in their facilities. However, as the industry continues to grow, so might abuses.\textsuperscript{82}

Also troubling is the extent of influence of corrections officers' unions. The California Correctional Peace Officers Association is that state's second-largest campaign donor.\textsuperscript{83}

Trends in prison labor in the United States are also disturbing. At the Lockhart Work Program Facility, a Texas prison facility operated by Wackenhut, private employers locate production operations there and employ prison labor.\textsuperscript{84} Current employers include a circuit board assembler, an eyeglass manufacturer, and a maker of valves and fittings. Prisoners built the factory assembly room. Those working on the assembly line are paid minimum wage, of which the prison deducts eighty percent for room and board, victim restitution and other fees. The state pays for workers' compensation and medical care. The company pays one dollar per year in rent and receives a tax abatement from the city of Lockhart. The Local AFL-CIO has charged that Wackenhut and Texas have violated federal law by not consulting with the AFL-CIO regarding


\textsuperscript{80.} Donziger, \textit{supra} note 79.

\textsuperscript{81.} \textit{Id.}

\textsuperscript{82.} \textit{Privatizing America's Prisons, Slowly}, \textit{N.Y. TIMES}, Aug. 14, 1994, §3, at 1 ("Not everybody is Corrections Corporation," said John J. Dilulio Jr., a professor at Princeton University, "I'm worried about the fly-by-night companies.")

\textsuperscript{83.} \textit{Id.} See also \textit{Crime in America: Violent and Irrational — and That's Just the Policy}, \textit{supra} note 25, at 25.

the effect of the prisoner-manned assembly line on the local civilian workforce. Notably, in 1992, the United Auto Workers successfully challenged an auto parts manufacturer in Ohio that had hired prisoners at two dollars and five cents per hour, of which the prisoners received thirty-five cents. The UAW stated that prison labor undercut the civilian workforce and pressured the auto parts manufacturer to eliminate its prison labor contract.85

Yet another disturbing trend at the state level is the reinstitution of chain gangs. Currently, Alabama, Florida and Arizona have reintroduced the punishment. Wisconsin and California are considering it.86 However, the new chain gangs are much different from the old system, which was dismantled in the 1960s. Unlike the prior system which provided cheap labor for both private and public projects, today’s chain gangs do not engage in large scale private or public works and are not bound together by heavy-gauge chains. Rather, the primary purpose of today’s chain gangs is humiliation.87

Chain gangs at Limestone Correctional Facility in Alabama began by cutting weeds and picking up trash along the highways. Now they break rock. Prisoners are shackled together with lightweight leg irons, walk into a barbed wire pen, and work on the rock pile with sledge hammers.88 Interestingly, chain gangs are cost efficient, an important factor in light of increasing prison populations. “One officer can guard 40 chained prisoners but only 20 without chains.”89 Facility officials take pride in showing the chain gangs to the media and tourists.90

In Arizona, members of chain gangs are shackled at the ankles but not to each other. Prisoners are used for road clean-up.91

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85. Id.
88. Id.
89. Id.
90. Id. See also Christy Parsons, Tourists, Other States Curious About Alabama Chain Gangs; But Some Critics Say Humiliation Won’t Help Rehabilitate Inmates, CHI. TRIB., May 10, 1996, at 10.
Challenges to prison labor and chain gang policies brought pursuant to constitutional and statutory law should be combined with customary international law and relevant treaty provisions.

3. Right to Counsel and Equality of Arms

The United States has been aggressively using civil in rem forfeiture against the property of criminal defendants. Asset forfeiture and seizure can result in the indigence of a criminal defendant and, therefore, reduce significantly the defendant's ability to mount an effective defense. Thus, asset forfeiture may lead to a deprivation of due process, ineffective assistance of counsel, and inequality of arms.92

Although the United States Supreme Court recently ruled, in Bennis v. Michigan,93 that civil in rem forfeiture does not violate the Fourteenth Amendment's due process clause, the opinions in the case indicate that there may be some room for movement, especially in cases of egregious conduct by the state, including conduct that may leave the defendant a pauper. In such cases, constitutional claims should be combined with customary international human rights law recognizing the right against cruel, inhuman or degrading treatment or punishment, and relevant treaty provisions regarding such treatment or punishment, and due process.

4. Expulsion, Return and Extradition

Article 3, paragraph 1 of the Torture Convention states a general prohibition against expulsion, return and extradition of persons where substantial grounds exist for believing that they would be in danger of being subject to torture.94

Traditionally, the United States government has not considered its obligations under multilateral human rights treaties and conventions as affecting its role in expelling, returning or extraditing from the United

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94. See Khan v. Canada, Communication No. 15/1994, U.N. Doc. A/50/44, at 46 (Thirtieth Session 1995) (Committee against Torture held that Canada may not deport Kashmiri author to Pakistan because substantial grounds exist to believe he would be subject to torture in Pakistan); Mutombo v. Switzerland, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994) (Committee against Torture held that Switzerland may not deport Zairian of Luba ethnicity active in democracy movement because substantial grounds exist to believe that he would be subject to torture in Zaire).
States persons accused or convicted of crimes elsewhere. However, the United States routinely considers its international non-return (i.e., non-refoulment) obligation in refugee cases governed under the Convention and Protocol Related to the Status of Refugees. This opens the door for United States courts to consider its non-refoulment obligations under the Torture Convention in expulsion and return cases in the criminal context, as well as extradition cases.

Expulsion from the United States in the criminal context occurs when a non-citizen in the United States is convicted of a crime and, subsequently, faces deportation. Traditionally, such persons are required to serve their full sentence in the United States, at the conclusion of which they are subject to the deportation process. Within the deportation process, and depending on the type of crime for which the person was convicted, the person may attempt to raise issues relating to the possible deprivation of his or her human rights in the receiving country. Recently, however, the United States has embarked on a policy of expelling such persons prior to completion of their sentences and, simultaneously, narrowing the avenues for recourse.

In a 1994 agreement between the United States Immigration and Naturalization Service (INS) and the State of Florida, undocumented prisoners serving time for non-violent offenses such as drug possession and burglary, were to be granted early release. Each case was to be reviewed by the Florida state clemency board, and the board would recommend commutation of the sentences of only those prisoners who give their consent to deportation. Because of the consent requirement, there is no inquiry into the possibility that the person would be subject to torture once returned to his or her home country. This could place an inmate subject to the agreement in the interesting position of having to either remain in prison in the United States, or be granted clemency and take the chance that they will not be tortured once they arrive back home.

Notably, a statute similar to the INS-Florida agreement has been enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996.\textsuperscript{98} Importantly, the statute does not provide for prisoner consent to deportation and does not provide for inquiry regarding the possibility of torture upon return to the receiving country. The 1996 Act also narrows the ability for persons subject to deportation as criminal aliens to challenge the validity of a deportation order via collateral attack,\textsuperscript{99} makes "certain criminal aliens who are not permanent residents" presumptively deportable, denies such persons discretionary relief from the government, and judicial review of any issue other than whether the person "is in fact an alien."\textsuperscript{100}

Return from the United States in the criminal law context may arise in the context of cases involving international cooperation in criminal matters — for example, when the United States requires testimony from a witness who is a foreign national in foreign custody and who must be brought to the United States to testify. Such cases are rare, but it appears as though the United States government does not inquire into the human rights implications of returning the person to the country cooperating with the United States. As a result, it has been left up to the individuals subject to return to raise human rights claims before a United States court. It is then up to the court to determine whether it should inquire and, if so, to what extent.

In \textit{Wang Zong Xiao v. Reno}\textsuperscript{101} a Chinese witness in the custody of the People's Republic of China (PRC) was brought to the United States to testify in a heroin smuggling case in federal district court. The witness had been arrested on drug charges and subjected by PRC authorities to detention without trial, forced confession, physical and mental torture, and was scheduled to be executed. Although the United States government had knowledge of the witness's torture and the potential for further torture upon his return to the PRC, the government failed to inform the court. The United States government also interfered in the witness's attempt to obtain political asylum once he was in the United States. Although the district court held that the United States government's conduct was shocking to the conscience and deprived the witness of his substantive due

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\textsuperscript{99} \textit{Id.} § 441.
\textsuperscript{100} \textit{Id.} § 442.
\textsuperscript{101} Wang Zong Xiao v. Reno, 837 F.Supp. 1506 (Cal. Dist. 1993), \textit{aff'd} slip op. 93-17262 (9th Cir. 1994).
\end{flushleft}
process rights under the United States Constitution, the court dismissed the witness's international human rights claims for technical reasons.

Extradition refers to the return of a fugitive to a requesting state via either bilateral or multilateral treaty, or irregular rendition. The United States government possesses virtually sole discretion to inquire whether a person requested for extradition will be subject to torture upon delivery to the requesting state. Federal courts, following the "rule of non-inquiry," traditionally have deferred to the government in making the extradition determination. However, in some cases, federal courts have examined human rights claims raised by persons subject to extradition. Still, even in such cases, United States courts do not typically refer to international human rights treaties or conventions that have been ratified by the United States. Ultimately:

[i]n view of the Department of State's superior position to inquire into the alleged extra-legal dangers faced by . . . a person, to set conditions on his surrender to satisfy any concern raised by its inquiry, and to monitor compliance with those conditions after surrender, courts have uniformly ceded to the Executive the sole responsibility to pass upon such a claim by a requested person.

Some United States courts have explicitly rejected any responsibility to inquire regarding the potential treatment of the requested person by the requesting country. However, at least one district court has inquired about such treatment, citing, inter alia, the Torture Convention. That court, examining Israel's extradition request of a suspected terrorist, stated that the court "must be satisfied that it is more probable than not that the requesting country will treat the accused unfairly, denying him or her the fundamental protection of due process, and will take inadequate measures to prevent cruel and inhuman

102. Id. at 1551-59.
103. Id. at 1563.
104. Piragoff & Kran, supra note 95, at 239 (citing Note, Executive Discretion in Extradition, 62 COLUM. L. REV. 1313, 1315 (1962)).
105. Id. at 238-39.
106. Id. (citing Leslie Anderson, Protecting the Rights of the Requested Person in Extradition Proceedings, MICH. Y.B. INT'L LEGAL STUD. 153 (1983)).
108. Piragoff & Kran, supra note 95, at 258-59 (citing In re Singh, 123 F.R.D. 127 (D.N.J. 1987)).
Although the district court permitted the extradition to forward, the Court of Appeals rejected the district court’s inquiry into Israel’s justice system. Based on the recent ratification of the Torture Convention, combined with existing non-refoulment jurisprudence under the Refugee Convention and Protocol as well as constitutional and statutory issues that arise in expulsion, return and extradition cases, this area appears to be fertile ground for raising international human rights law as persuasive authority informing the interpretation of domestic law.

**III. CONCLUSION**

Hopefully, it has become clear from the admittedly incomplete laundry list included herein, that it is not necessary to engage in a frontal attack on the state, through challenges to the ICCPR and Torture Convention’s reservations, declarations and understandings, in order to engage United States courts, both federal and state, on issues of international human rights. Of course, there is no doubt that indirect incorporation is far more difficult than direct incorporation. It requires artful advocacy and a solid understanding of both domestic “human rights” and international human rights laws, for the advocate must weave them together in a persuasive way. However, as highlighted by the ATCA jurisprudence and cases such as Thompson v. Oklahoma, domestic courts are not averse to arguments using international human rights norms, customary international law and relevant treaty provisions to inform the interpretation of domestic law.

The recent United States ratifications of the ICCPR and the Torture Convention provide further incentive for civil rights plaintiffs, prosecutors bringing criminal civil rights claims, and criminal defense counsel to attempt indirect incorporation. The ratifications have legitimized the use of relevant treaty provisions combined with customary international law and international human rights norms. Now, the primary question is: How best to do it? The answer can only come, literally, through trial and error. However, some error has already occurred, as has some success. The time has come to examine these mistakes and victories more closely and to learn from them.

109. Id. at 259-60 (quoting Ahmad v. Wigen, 726 F. Supp. 389, 416 (E.D.N.Y. 1989), aff’d, 910 F.2d 1063 (2d Cir. 1990)).

110. Id. at 260-61 (citing Ahmad, 910 F.2d at, 1067.)
TOWARD THE ENFORCEMENT OF UNIVERSAL HUMAN RIGHTS THROUGH ABROGATION OF THE RULE OF NON-INQUIRY IN EXTRADITION

Richard J. Wilson *

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I. INTRODUCTION

In June of 1995, the Mexican government requested the extradition of former Deputy Attorney General Mario Ruiz Massieu, who was accused of engaging in a cover-up in the investigation of the assassination of his own brother, a top official in Mexico’s ruling party. A federal magistrate who reviewed the extradition request, sitting in Newark, New Jersey, denied the government’s request, ruling that witness statements taken in Mexico were “incredible and unreliable” because they were taken in a country which was infected with “massive corruption growing out of the cocaine-smuggling trade,” and that Mexico “has admittedly practiced torture in the questioning of suspects.” The magistrate also suggested that statements were further tainted because the witnesses did not have counsel...
present when they were given.\(^1\) This magistrate thus joined a number of other federal judicial officials who conduct full judicial inquiry into the protection of human rights in the criminal justice system of the receiving state, here Mexico. His and other judicial decisions are part of a growing international trend to abandon or radically narrow the rule of non-inquiry.

The rule of non-inquiry is part of extradition law in the United States and other countries. It asserts that the sending country will not look behind the receiving country's request for extradition to the quality or severity of criminal justice in that country because such inquiry is an invasion of the requesting country's sovereignty and a violation of international principles of comity. The rule of non-inquiry tacitly assumes that the quality of justice in the receiving country is addressed in the initial decision to execute an extradition treaty with the country in question, as well as in the content of the treaty itself. Thus, under the rule, neither the criminal processes to which the defendant will be subjected, nor the potential conditions of confinement or severity of punishment in the receiving country are relevant factors for consideration by the reviewing authority in the sending state. New critical scholarship has asserted that the rule of non-inquiry, devised at the turn of the century in the United States, should be abandoned.\(^2\) I will not replicate those arguments in depth

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1. Robert L. Jackson & Juanita Darling, *U.S. Judge Won't Extradite Former Mexico Official*, L.A. TIMES, June 23, 1995, at A1. The most adventurous of the court decisions in this protracted litigation arose when the government changed tactics after repeated failure to obtain an extradition order for Ruiz Massieu, and instead shifted to deportation proceedings. A federal district court in New Jersey reviewed the authority of the Secretary of State to order deportation and found the unreviewable nature of that authority to be, *inter alia*, an unconstitutional delegation of judicial powers to the executive branch. The decision finds unconstitutional 8 U.S.C. § 1251(a)(4)(C)(i), which, according to the court, had not been construed previously. Ruiz Massieu v. Reno, 915 F. Supp. 681 (N.J. 1996). The government successfully appealed the grant of a permanent injunction against the deportation proceeding of Ruiz Massieu. Without reaching the broader constitutional claims addressed by the lower court, the Court of Appeals recently held that Ruiz Massieu must exhaust available administrative remedies before pursuing federal court review. Ruiz Massieu v. Reno, 91 F.3d 460, (3d Cir. 1996).

here. The critics, however, struggle to articulate a standard by which such review should take place, or a remedy when the reviewing authority anticipates serious violations of human rights in the receiving country.

I propose here that judicial inquiry should be permitted so long as both the sending and receiving states are parties to international human rights instruments which define each country's common acceptance of binding principles of international human rights in the criminal process. Whenever the reviewing authority finds it more likely than not that a human right commonly subscribed to by the two countries would be violated, the extradition request should be denied unless assurances can be obtained that the receiving government will not violate the rights in question and a means of review for compliance with those assurances is provided. Failure to adhere to these principles itself amounts to a violation of human rights, in that most such instruments provide for "effective remedies" in the domestic courts for their enforcement. In short, shared human rights commitments must take precedence over mere notions of comity or political considerations.  

II. THE NOW-OBsolete ORIGINS OF THE RULE OF NON-INQUIRY

In the United States, the rule of non-inquiry was developed judicially in 1901 in the United States Supreme Court's decision of Neely v. Henkel. The Court rejected a contention by the extraditee that, if surrendered to Cuba, he would not be tried under procedures which conformed to guarantees found in the United States Constitution. The Court held that the safeguards of the United States legal system, and in particular its criminal procedures, are inapplicable to crimes committed in foreign jurisdictions. Other rationales have developed, in the United States and abroad, to justify the use of the rule of non-inquiry. In general, these include assertions that court review of decisions on the operation of overseas legal systems would involve the courts in foreign affairs. This

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4. An argument might also be made that in the case of reluctance by the receiving country to accept basic human rights norms through treaty ratification, the sending country should apply customary international human rights norms to the receiving country to ascertain its legal obligations.


6. Id. at 123.
argument is expressed through the political question doctrine or its international analog, the act of state doctrine, under which the courts may decline consideration of issues that are more appropriately undertaken by the political branches of government. Another argument is that courts lack the investigative machinery to verify claims of alleged abuses of human rights in foreign legal systems. Still another is that review of the legal systems of states with differing ideologies allows notorious criminals to escape punishment. None of these reasons, including those originally offered in Neely, can withstand scrutiny in the face of the developing law of international human rights.

The premises underlying the Neely decision have been undermined with the passage of time. There, the person being extradited argued that the Cuban legal system failed to conform with the requirements of the United States Constitution. No argument was offered that the country's legal system could not measure up against a universally accepted international human rights standard because no such standards existed at that time; they did not formally come into being as a body of law until after World War II. Understandably, the Court was reluctant to extend United States constitutional guarantees to another country. Moreover, the person to be extradited had no real case or controversy alleging an actual violation of his rights by the Cuban legal system; nor did he offer proof that the Cuban legal system was likely to treat him badly in fact. He offered only general allegations that Cuba did not provide habeas corpus or jury trial protection, nor did it prohibit ex post facto laws. He did not offer proof as to how he had been or might be affected by such failures in Cuban law. Today, such proof is easily available through extensive human rights reporting by both domestic and international monitors or through expert testimony. In the context of political asylum claims, for example, the Cuban legal system routinely comes under close scrutiny and has been held to violate human rights norms inherent in the law of political asylum.

Asylum judges make findings of fact and law about the quality of justice, often basing their findings on submissions from the applicant for asylum as to that issue as found in human rights reports from credible governmental and non-governmental offices. In fact, the extensive and detailed annual reports on human rights country conditions prepared by the

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7. These arguments are collected and analyzed in Shea, supra note 2, at 93.
9. See, e.g., Matter of Toboso-Alfonso, Int. Dec. 3222, (BIA 1990), (granting withholding of deportation to a gay Cuban because he could not expect to find adequate protection in the Cuban legal system if he were returned there).
United States Department of State are now generally considered a model of accuracy and fairness, and have been a great help to judges in their assessment of the risks of return of putative asylees.\(^{10}\)

There is also little evidence that the executive branch is any more capable of exercising the fact-finding function than the judicial branch, and some evidence to demonstrate the contrary. For example, in the United States, the executive branch has negotiated extradition treaties with many countries whose governments have since changed to repressive regimes. While the State Department reserves the right to terminate an extradition treaty where fundamental fairness cannot be preserved, the United States has never done so in its history.\(^{11}\) Finally, the executive branch, acting through the Justice Department in extradition proceedings, may have ethical conflicts in distancing itself from the interests of foreign governments. In an affidavit describing the role of the executive branch in the extradition process, submitted by the State Department in an extradition proceeding in New York, the Department asserted that “the Department of Justice, through the office of the United States Attorney, will represent the legal interests of the requesting State at the hearing . . . .”\(^{12}\) It is hard to imagine how the government of the United States can represent the interests of the receiving state in extradition, and then neutrally assess the potential human rights consequences of extradition prior to the extraditee’s surrender in the same proceeding.

III. EROSION OF THE RULE OF NON-INQUIRY IN INTERNATIONAL AND DOMESTIC COURTS

Courts in the United States have shown increasing interest in abandonment of the rule of non-inquiry. A series of decisions in the United States uses the standard set out in the decision of Gallina v. Fraser. Where the Second Circuit United States Court of Appeals observed that judicial inquiry is appropriate when “the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court’s sense of decency as to require reexamination” of the rule of non-inquiry.\(^{13}\)

\(^{10}\) This has not always been true. In the years of the Reagan and Bush administrations, during which the State Department’s country reports became extremely politicized, human rights organizations published an annual critique of the reports, arguing their factual inaccuracy and errors, and adding information relevant to human rights concerns. The need for such correction, in itself, argues for removal of the fact-finding function of the judicial branch.

\(^{11}\) WOLFE, supra note 2, at 1029.

\(^{12}\) State Department affidavit in Gill and Sandhu v. Imundi, quoted in Paust, supra note 3, at 387.

\(^{13}\) Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960), cert. denied, 364 U.S. 851 (1960). The Gallina court’s reasoning has been questioned more recently in the appeal from a well-
Despite this narrow and strict standard for abandonment of the rule, courts in the United States have begun to question the application of the rule of non-inquiry. Similar trends are discernible in Canada and the United Kingdom.\footnote{4}

An interesting and very recent case, for example, is the January 1996 decision of a New Jersey federal district court judge in \textit{Sidali v. INS}.\footnote{15} There, the court refused extradition and granted habeas corpus relief, finding that the government had not established probable cause to believe that the petitioner had committed a crime in Turkey, although the highest reviewing court of that country had upheld his conviction for rape and murder. The judge provides an excellent analysis of arcane criminal procedure in Turkey, noting that the petitioner was acquitted by two separate trial courts before his conviction was upheld on appeal when the prosecution petitioned a reviewing tribunal to reexamine both the factual and legal sufficiency of the lower courts’ decisions to acquit.

The strictness with which the \textit{Gallina} standard for waiver of the rule of non-inquiry is applied, however, has created great difficulty for those who seek to inquire into potential human rights violations by the receiving country. Typical is the protracted litigation arising from a request by the Indian government to extradite two gentlemen named Sandhu and Gill, begun in the late 1980’s and still in progress today. In an attempt to challenge their extradition, the two men offered extensive evidence that the Indian government systematically engaged in terrorism against Sikhs. They were twice rejected by a federal magistrate who held that such evidence was outside judicial purview, as such review is reserved for the State Department.\footnote{16} The federal district court, on review of the application for extradition by writ of habeas corpus, granted the writ, in large measure because of a finding that a confession of a third party implicating Gill and Sandhu in the crimes for their extradition was tainted. Indian courts themselves had found the confession to be involuntary and

\footnote{14. Cases from Canada and the United Kingdom are collected in Shea, supra note 2, at 113-119.}

\footnote{15. Sidali v. INS, 914 F. Supp. 1104 (N.J. 1996). No appeal was reported in the case at the time of this writing.}

\footnote{16. WOLFE, supra note 2, at 1016.}
untrue; the Indian decisions had not been revealed to the United States courts in a timely fashion. The judge specifically declined, however, the broader invitation to review the anticipated mistreatment of the men on their own return to India. The grant of habeas corpus relief included an option for the government to file new extradition complaints. When the government availed itself of this option, another United States Magistrate Judge, in the most recent of this long line of decisions, again declined to permit the introduction of evidence that the men would be subjected to torture and extrajudicial execution if extradited, agreeing *reluctantly* that he must follow the law of the circuit on application of the rule of non-inquiry.

Aside from judicial reluctance to intervene in this area, perhaps the most difficult issue to resolve is that of an appropriate remedy. It is often asserted that a decision not to grant a petition for extradition because close judicial inquiry will make the sending country a “haven for international criminals” given that the only effective remedy in such situations is the release of the defendant from custody. While this is often offered as a theoretical problem, it rarely occurs in actuality. Perhaps the best example is the case involving Jens Soering, a German national who sought review of Britain’s decision to extradite him to the United States in the European human rights system. Soering’s extradition was sought in connection with charges of capital murder in Virginia. When he prevailed at the European Court of Human Rights, prosecutors in Virginia eventually relented on their pursuit of the death penalty and assured British authorities that capital punishment would not be sought. Soering was extradited, convicted of murder, and sentenced to life without parole.

18. Id. at 13.
19. See, e.g., WOLFE, supra note 2, at 1037.
20. Soering prevailed in the European Court on the claim that conditions on death row in Virginia were so egregious that his return to face the “death row phenomenon” would constitute cruel, inhuman or degrading treatment under international human rights law. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser.A)(1989), reprinted in 11 Eur. H.R. Rep. 439 (1989). The United States was so concerned about its potential liability for violations of Soering that it included an express reservation to Article 7 of both the Torture Convention and the International Covenant on Civil and Political Rights, limiting the meaning of “cruel, inhuman or degrading treatment or punishment” in the latter to the meaning of cruel and unusual punishment under the Fifth, Eighth and/or Fourteenth Amendments to the United States Constitution. David P. Stewart, U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations, 14 Hum. RTS. L.J. 77 (1993).
requirement that assurances be given before the sending state surrenders the individual to be extradited goes a long way toward addressing the "haven for international criminals" argument. Moreover, the Soering decision contains two implicit premises which should operate in all extradition cases: first, the sending state is responsible for the consequences of its actions in surrendering a person to potential abuse of human rights; and second, human rights principles must prevail over the law of extradition.

A more difficult problem, in my view, is that of the consequences of the receiving government's failure to fulfill its assurances. A recent example from my own practice is relevant here. In 1994, the International Human Rights Law Clinic at American University was contacted by United States lawyers representing Joseph Kindler, an American who escaped to Canada following his conviction for murder and death sentence in Pennsylvania in 1983. These lawyers represented Kindler after his return from Canada by extradition.

Kindler was extradited from Canada in a case which drew international attention. The Canadian Supreme Court ordered his extradition and that of another prisoner, Charles Ng, in opinions which sharply divided on the question of whether extradition to face the death penalty in the United States would violate the Canadian Charter of Rights and Freedoms. The Human Rights Committee of the International Covenant on Civil and Political Rights also reviewed the decision under its powers to hear individual complaints against states parties. In a divided decision, the Committee found that Kindler's extradition from Canada to face the death penalty would not violate Article 7 of the International Covenant on Civil and Political Rights, in that Kindler's facts were distinguishable from Soering's. Counsel for Kindler had not alleged poor conditions or the effects of delay in the Pennsylvania death penalty regime, and there had been no simultaneous request for extradition to a non-death penalty jurisdiction, as had been the case with Germany in the Soering litigation.

The United States had apparently assured the Canadians that review of Kindler's murder conviction would comply in all respects with Virginia?, 30 VA. J. INT'L L. 241 (1989). The decision has been criticized as an overreaching by the Court. Colin Warbrick, Coherence and the European Court of Human Rights: The Adjudicative Background of the Soering Case, 11 MICH. J. INT'L L. 1073, 1078-1080, 1090-1095 (1990).


due process. After his extradition, Kindler's United States defense counsel asserted to me that his appeals in the United States legal system were being given short shrift by the courts, generally on grounds of procedural bar, waiver, and collateral estoppel. His lawyers inquired whether there was any recourse for this failure to provide fundamental due process, which they felt had been part of the basis for the Canadian executive branch and the courts' willingness to return Kindler to the United States. The Canadian government had purportedly expressed some interest in intervention in the appellate process but had no means, other than by diplomatic note, to intervene in the jurisdiction of the United States courts. On consultation with colleagues, our conclusion was that there is no legal basis, and no legal precedent, for intervention in the proceedings based on "breach of promise" by the receiving state. Our conclusion was that Kindler had only diplomatic, not judicial, recourse. This lack of ability to monitor the assurances, or to take action in the event of non-compliance by the receiving state, also needs a judicial solution.

The International Human Rights Law Clinic handled a case involving the application of the rule of non-inquiry. *Calum Ian Innes v. United States* was an appeal from denial of a petition for habeas corpus seeking a bar on extradition of Mr. Innes from the United States to France, where he had been convicted in absentia in 1982 of various offenses having to do with importation of illegal drugs, smuggling, and fraudulent profits. French authorities commenced the extradition process by filing a complaint in the Western District of Louisiana, where Mr. Innes was serving time on a federal conviction, in December 1992. A federal magistrate certified Mr. Innes as extraditable after an extensive hearing on the issue, and Mr. Innes filed a timely petition for writ of habeas corpus in the United States District Court for the Western District of Louisiana. The writ was denied in June 1993, and Mr. Innes filed a pro se notice of appeal when the district court denied his request for appointment of appellate counsel. The Clinic was approached to undertake his appeal on a pro bono basis on August 23, 1993. The same day, unknown to us, the Secretary of State signed a warrant for the transfer of Mr. Innes to France. On August 27, 1993, Mr. Innes was surrendered to authorities in France. Not knowing the exact whereabouts of our client, the Clinic entered an appearance on August 31 and sought an emergency stay of removal, or in the alternative, for Mr. Innes' return to the United States. The motion was

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24. The assertion by Kindler's lawyers to this effect were part of their conversations with me, and are not apparent from a review of the Canadian litigation surrounding his surrender.

25. *Calum Ian Innes v. United States*, No. 93-5112 (5th Cir. Ct. App.).
denied as moot, but the appeal was not dismissed. Briefing of the case went ahead as scheduled.

The *Innes* appeal raised two principal questions: first, whether the executive branch violated court rules and separation of powers by intentionally removing Innes from the jurisdiction, knowing of his pending appeal; and second, whether the French government's guarantee of "trials de novo" as a curative for the 1982 in absentia trials could meet minimal standards of international human rights norms accepted as binding by both the United States and France by virtue of their common ratification of the International Covenant on Civil and Political Rights (ICCPR). Among other fair trial guarantees, the ICCPR requires in article 14(3)(d) that the defendant be tried *in his presence*. The second issue is the concern of this paper.26 Our brief asserted that the mutual ratification by France and the United States of the ICCPR establishes a *minimum floor* for due process and fair trial considerations in both countries. Under these criteria, there is little doubt that the French procedures for trial de novo after trial in absentia violate the norms of the ICCPR and other international human rights instruments. Such has been the position of both the Human Rights Committee27 and the European Court of Human Rights28 when reviewing cases involving denial of the right to trial in one's presence.

Unfortunately, the court never reached the issue. Following full briefing and oral argument of the case, a short memorandum decision dismissed the appeal as moot in August 1994.

26. The first issue also raises fascinating issues of international law beyond the scope of this article. The practice of removal of the extraditee during the pendency of his appeal is apparently on the rise. We were aware of a number of such cases in addition to our own. In no case, to our knowledge, did the court intervene to return the extraditee; all courts which have reached the issue have dismissed the appeal as moot. While a stay order barring removal may protect the appellant, many are unrepresented by counsel and unaware of the risk of not seeking a stay. We did make the argument that another United States Court of Appeal had used the All Writs Act to order the return of John Demjanjuk, alleged to be Ivan the Terrible, a notorious guard at Treblinka, from Israel when he had been deported improperly from the United States. That case is an unreported bench ruling, Demjanjuk v. Petrovsky, No. 85-3435, 1993 U.S. App. LEXIS 20596 (1993).


28. Cases in the European human rights system seem to uniformly read the right to presence at one's trial (or appeals) in the strictest sense. In Poitrimol v. France, 18 E.H.R.R. 130 (1994), for example, the Court found a right to "presence" on appeal, through counsel, even where the defendant himself intentionally absconded. A helpful discussion of this issue is found in P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 319-322 (2d ed. 1990).
IV. THE STRENGTHENING OF UNIVERSAL HUMAN RIGHTS
OBLIGATIONS AND THE BROADENING OF EXTRADITION TREATIES TO
CONFORM TO THOSE OBLIGATIONS

A total of 135 nations now have ratified the International Covenant
on Civil and Political Rights, including the United States.\textsuperscript{29} It is hard to
imagine a treaty that can be characterized more accurately as \textit{universal} in
its application. The treaty carefully delineates rights to fair trial and
appropriate punishment in a fashion that could permit judicial
interpretation in the context of an extradition request. Moreover, article 2
of the Covenant requires, as noted above, that effective remedies for
vindication of the treaty rights be adopted by the parties to the treaty. This
requirement alone militates toward abrogation of the rule of non-inquiry
and recognition of the \textit{Gallina} exception articulated above. However, the
United States has taken on a number of other treaty obligations that speak
directly to the extradition process.

Most specifically, the Torture Convention, to which the United
States has been a party since 1994, explicitly prohibits extradition from a
State Party "to another State where there are substantial grounds for
believing that [the extraditee] would be in danger of being subjected to
torture."\textsuperscript{30} Application of this provision in the Sandhu and Gill litigation,
discussed above, seems appropriate, in that both the United States and
India have ratified the treaty, but it is never mentioned by the courts in any
of their deliberations. A similar provision is contained in Article 9 of the
International Convention Against the Taking of Hostages, which requires
that extradition:

\begin{quote}
shall not be granted if the requested State Party has
substantial grounds for believing: (a) That the request . . .
has been made for the purpose of prosecuting or punishing
a person on account of his race, religion, nationality,
ethnic origin or political opinion; or (b) That the person's
position may be prejudiced (i) for any of the reasons
mentioned in subparagraph (a) . . . , or (ii) for the reason
that communication with him by the appropriate authorities
of the State entitled to exercise rights of protection cannot
be effected.
\end{quote}

\textsuperscript{29} International Covenant on Civil and Political Rights, 1968, 6 I.L.M. 368. Information
on the current number of ratifying countries is taken from the United Nations Treaty Database on
the World Wide Web.

\textsuperscript{30} Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or
Punishment, 1984, 23 I.L.M. 1027 at art. 3.1.
This treaty was also ratified by the United States in 1984.\footnote{Covenant Against the Taking of Hostages, 1979, 18 I.L.M. 1456.}

The Convention Relating to the Status of Refugees and its accompanying Protocol, to which the United States is also a party, use the language of \textit{persecution} or \textit{threats to life and freedom} on account of race, religion, nationality, membership in a particular social group, or political opinion as grounds for non-return or expulsion of refugees.\footnote{Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (entered into force, April 22, 1954), at arts. 1(A)(2) and 33(1); Protocol Relating to the Status of Refugees, 6 I.L.M. 78 (1967). The United States has ratified the Protocol, which incorporates the Convention by reference, and incorporated the refugee definition into domestic legislation as part of the Immigration and Nationality Act, 8 U.S.C. §§1101(42), 1253(h).} Finally, the Third Restatement of the Law of Foreign Relations, in its commentary, notes that:

\[\text{[e]xtradition is generally refused if the requested state has reason to believe that extradition is requested for purposes of persecution, or because the person sought belongs to a particular political movement or organization, or if there is substantial ground for believing that the person will not receive a fair trial in the requesting state.}\footnote{RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS, at 476, Cm. h., g., at 711.}

A substitute for the \textit{Gallina} exception to the rule of non-inquiry might be gleaned from the foregoing treaty provisions, as well as the language of the Supplemental Extradition Treaty between the United States and the United Kingdom (Supplemental Treaty).\footnote{Reprinted in Senate Committee on Foreign Relations Report, Supplementary Extradition Treaty With the United Kingdom, S. EXEC. REP. NO. 17, 99th Cong., 2d Sess. E, 15-17 (1986).} In article 3(a), the Supplementary Treaty prohibits extradition "if the person sought establishes . . . by a preponderance of the evidence that . . . he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions." This language, taken in part from the international standard for the establishment of a claim of political asylum, abrogates the rule of non-inquiry. It then couples the evidence to be permitted with a reasonable standard of proof — preponderance of the evidence — for establishment of the claim. Moreover, unlike the traditional, unappealable extradition inquiry before a federal magistrate, the Supplementary Treaty stipulates, in article 3(b), that decisions by the magistrate are immediately appealable by
either party to the federal district court or court of appeal, as appropriate.\textsuperscript{35} This congressionally established standard for abrogation of the rule of non-inquiry makes the judiciary the appropriate locus for review of compliance by the receiving state with basic norms of international human rights.

The standard finds its roots not only in the language of human rights treaties binding on the United States, but also in the European Convention on Extradition, under which eighty-five percent of all extraditions in the world take place each year.\textsuperscript{36} Convention article 3(2) provides that extradition shall not be granted:

> if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offense has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons.\textsuperscript{37}

One treatise on international judicial assistance notes that the United States "strenuously resisted" such language but ultimately agreed to some version of it in treaties with three countries: Ireland in 1984, Jamaica in 1983, and the United Kingdom.\textsuperscript{38} This pattern of action by the State Department, coupled with congressional action on the subject, show a clear willingness by the other branches to permit judicial review of the question of potential inequities in the criminal justice system of the receiving country.

Unfortunately, the limited judicial interpretations of the Supplemental Treaty to date indicate a continued reluctance by courts to intervene in extradition proceedings. In United States v. Howard, the First

\textsuperscript{35} Cases and commentary on this legislatively-established exception to the rule of non-inquiry note that it was adopted as a concession to those in the United States Congress who opposed a broader effort to sharply narrow crimes designated as political under the United States-UK extradition treaty. The scholarly output on the advisability of this course of action was heated. See, e.g., Scharf, supra note 2 (arguing for strict application of the rule of non-inquiry); Note, Just Say No! United States Options to Extradition to the North of Ireland's Diplock Court System, 12 LOY. L.A. INT'L & COMP. L.J. 249 (1989) (arguing for broad application of the treaty exception because of the serious breaches of the right to fair trial posed by the Diplock courts).


\textsuperscript{38} ABBELL & RISTOW, supra note 37, at 108, 211.
Circuit United States Court of Appeals found that the petitioner, an African-American citizen accused of a particularly brutal murder of a white female in the United Kingdom, had not established sufficient proof of systematic racial prejudice in England to carry his burden of proof of prejudice directed toward him. The Court of Appeals, however, notes that the new treaty language "openly alters [the] traditional practice" of non-inquiry.

A more troubling decision is that of the Ninth Circuit United States Court of Appeals in *United States v. Smyth*. There, the District Court refused to extradite based on an analysis of the potential harm to which James Smyth would be exposed on return to Northern Ireland. The Court of Appeals found that Mr. Smyth, convicted of attempted murder of a prison officer in Belfast, had not established by a preponderance of the evidence that his potential punishment or restrictions in Maze Prison in Northern Ireland would be due to his affiliation with the Irish Republican Army and not merely to his escape from prison. The extensive evidence offered by the petitioner, as well as the refusal of United Kingdom officials to cooperate with the fact-finding efforts of the trial judge, militate against extradition if the reviewing court were to have applied the extensive jurisprudence of asylum law on the issue of well-founded fear of persecution based on political opinion. Note should be made here of the fact that both the United States and the United Kingdom are parties to the Torture Convention's specific prohibition on extradition where there is a strong probability of torture, a standard which no court examined. While there is a question as to whether the potential retaliation against Smyth would amount to torture, this explicit prohibition in international human rights law should not have been ignored.

39. United States v. Howard, 996 F.2d 1320 (1st Cir. 1993). The decision seems correct on the record before the court, in that the petitioner offered little specific evidence as to prejudice directed toward him. The petitioner argued for a per se rule, once evidence of prejudice was established. *Id.* at 1331. The reviewing court, justifiably in this author's view, rejected that standard and the sufficiency of the proof to establish specific prejudice directed at the petitioner. The case is discussed in Mary B. McDonald, *Extradition Law–Supplementary Extradition Treaty Between United States and United Kingdom–Interpreted as Partial Abrogation of the Rule of Non-Inquiry*, 18 SUFFOLK TRANSNAT'L L. REV. 391 (1995).

40. *Howard*, 996 F.2d at 1330.


42. United States v. Smyth, 61 F.3d 711 (9th Cir. 1995). Some of my concerns with the reasoning of *Smyth* at the Court of Appeals were shared by Valerie Epps in her Note on the case, Epps, *supra* note 2. She concludes that the court "reveals very little legal analysis and an almost willful urge to reverse findings of fact." Epps, *supra* note 2, at 299.

V. CONCLUSION

The rule of non-inquiry, like many rules of international law generally, is based on now obsolete views of sovereignty and the appropriate role for an independent and fully informed judiciary. For almost twenty years courts in the United States have applied a standard for the grant or denial of political asylum in this country which requires the court to weigh and balance the information about the extent to which a refugee might be exposed to potential dangers of persecution, torture, denial of a fair trial, or many other human rights violations in their country of origin. No one, the State Department included, has argued that the courts lack sufficient expertise to make these judgments, or that such matters are better left to the discretion of the Executive branch. In fact, the traditional practice of heavy reliance by courts or asylum hearing officers on the opinion of the State Department as to the viability of the asylum claim, either specifically or more generally, has yielded to the expertise of the courts, due to both the high volume of cases and the relative lack of information provided by the State Department.44

Abandonment of the rule of non-inquiry is not a change in policy nor a major leap in fact-finding for the courts, despite their apparent reluctance to fulfill what is not only a need but an established international obligation. The language of three now well-established extradition treaties with the United Kingdom, Ireland, and Jamaica provides a framework for abrogation of the rule of non-inquiry that was agreed to by the Executive branch and adopted by Congress. Some European countries have gone further. It is now statutorily provided in Switzerland and Austria that no extradition can proceed if the requesting state’s procedures are not in compliance with human rights standards.45 There is no reason not to apply the more modest framework proposed here more generally to all extradition cases. To do so would bring the United States into closer conformance with the practice of the European extradition regime, a regime which is applied in the vast majority of the world’s cases.

44. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, REPRESENTING ASYLUM APPLICANTS: AN ATTORNEY’S GUIDE TO LAW AND PRACTICE 84 (1995), “An Asylum Officer . . . is not required to wait for comments from the State Department before deciding whether to grant asylum.” But see SARAH IGNATIUS, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 133 (1993), “[t]he [State Department] opinion letters continued to play a role in asylum adjudication, although less than the almost total reliance on them under the previous INS examiners.” Ignatius notes that, for her study, a response of “no additional information” or no response at all constituted as many as eighty percent of all State Department responses to INS asylum cases.