INTERNATIONAL PRACTITIONER’S NOTEBOOK

International Law Weekend ’99 presented by:

THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

“INTERNATIONAL LAW IN 2000: A BRIDGE BETWEEN THE 20th AND 21st CENTURIES”

Contributors

Diane Marie Amann
Belinda Cooper
Mark A. Drumbel
Lorna M. Graham
Edward McWhinney
Diane Orentlicher
John Quigley
Michael P. Scharf
Beth Van Schaack
Kelly D. Askin
Charles Curlett
Valerie Epps
Don MacKay
Julie Mertus
Jan Perlin
Alfred P. Rubin
Ronald J. Silverman
Kristen L. Walker

Raj Bhalu
Clarence J. Dias
Craig Etcheson
Catharine A. MacKinnon
Madeline Morris
Ali M. Qazilbash
William A. Schabas
Beth Stephens
Ralph Wilde

Guest Contributor

Chelsea P. Ferette
### TABLE OF CONTENTS

#### INTERNATIONAL LAW WEEKEND PROCEEDINGS

**Advances in Cross-Border Insolvency Cooperation:**
The UNCITRAL Model Law on Cross-Border Insolvency .......................................................... *Ronald J. Silverman* 265

Introductory remarks – Alien Tort Claims Act .................. *Charles Curlett* 273

**Human Rights Accountability: Congress, Federalism and International Law** .................. *Beth Stephens* 277

The Civil Enforcement of Human Rights Norms in Domestic Courts .................................. *Beth Van Schaack* 295

**International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?** .................. *Mark A. Drumbl* 305

Evolving Human Rights Norms Around Sexuality ...... *Kristen L Walker* 343

**Terrorism on Trial: The Lockerbie Criminal Proceedings** .................................. *Michael P. Scharf* 355

The Jurisdiction of the International Criminal Court over Nationals of Non-party States .................. *Madeline Morris* 363

Pinning Guilt On Pinochet ........................................... *Alfred P. Rubin* 371

**Groups Protected by the Genocide Convention:**
Conflicting Interpretations from the International Criminal Tribunal for Rwanda .................. *William A. Schabas* 375
<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Guatemalan Historical Clarification</td>
<td>Jan Perlin</td>
<td>389</td>
</tr>
<tr>
<td>Human Rights, Environment and Development in South Asia:</td>
<td>Clarence J. Dias</td>
<td>415</td>
</tr>
<tr>
<td>The Importance of International Human Rights Law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Human Rights Environment and Development in South Asia</td>
<td>Ali M Qazilbash</td>
<td>423</td>
</tr>
<tr>
<td>International Law Antinomies and Contradictions of an Era of</td>
<td>Edward McWhinney</td>
<td>433</td>
</tr>
<tr>
<td>Historical Transition: Retrospective on the NATO Armed Intervention</td>
<td></td>
<td></td>
</tr>
<tr>
<td>in Kosovo</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Five Theoretical Themes In The World Trade Organization</td>
<td>Raj Bhala</td>
<td>437</td>
</tr>
<tr>
<td>Adjudicatory System</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Self-Determination After Kosovo And East Timor</td>
<td>Valerie Epps</td>
<td>445</td>
</tr>
<tr>
<td>Self-Determination for Indigenous Peoples after Kosovo:</td>
<td>Lorie M. Graham</td>
<td>455</td>
</tr>
<tr>
<td>Translating Self-Determination “Into Practice” and</td>
<td></td>
<td></td>
</tr>
<tr>
<td>“Into Peace”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>From Bosnia To Kosovo And East Timor: The Changing Role Of The</td>
<td>Ralph Wilde</td>
<td>467</td>
</tr>
<tr>
<td>United Nations In The Administration Of Territory</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Proposed Antarctic Treaty On Environmental Damage</td>
<td>Don MacKay</td>
<td>473</td>
</tr>
<tr>
<td>Judgments Rendered in 1999 by the International Criminal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tribunals for the former Yugoslavia and for Rwanda:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tadi (App. Ch.); Aleksovski (ICTY); Jelisi (ICTY); Ruzindana &amp;</td>
<td>Kelly D. Askin</td>
<td>485</td>
</tr>
<tr>
<td>Kayishema (ICTR); Serushago (ICTR); Rutaganda (ICTR)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accountability Beckons During a Year of Worries for the Khmer Rouge</td>
<td>Craig Etcheson</td>
<td>507</td>
</tr>
<tr>
<td>Leadership</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Procedural Limitations On Capital Punishment:</td>
<td>John Quigley</td>
<td>519</td>
</tr>
<tr>
<td>The Case Of Foreign Nationals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Imprint of Kosovo on the Law of Humanitarian Intervention</td>
<td>Julie Mertus</td>
<td>527</td>
</tr>
</tbody>
</table>
The Imprint of Kosovo on International Law ....... *Diane F. Orentlicher* 541

Changing Hearts and Minds: The Domestic Influence of International Tribunals: ............................................................... *Belinda Cooper* 547

The Rights of the Accused in a Global Enforcement Arena........................................... *Diane Marie Amann* 555

Collective Harms Under the ATCA:
A Cautionary Note................................................. *Catharine A. MacKinnon* 567

**ARTICLES & ESSAYS**

The (In)Ability of States to Enter into Agreements with Foreign Nations.......................... *Chelsea P. Ferrette* 575
ADVANCES IN CROSS-BORDER INSOLVENCY COOPERATION: THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Ronald J. Silverman

I. THE PURPOSE AND APPROACH OF THE MODEL LAW ........... 266
   A. Goals of the Model Law .................................................. 266
   B. Scope of the Model Law .................................................. 267
II. ACCESS ............................................................................. 268
III. RECOGNITION OF A FOREIGN PROCEEDING AND FOREIGN
     REPRESENTATIVE ............................................................... 268
   A. Process of Recognition .................................................... 268
   B. Pre-Recognition ............................................................... 269
   C. Effect of Recognition ....................................................... 269
IV. COOPERATION AMONG THE COURTS ................................. 270
V. CONCURRENT AND MULTIPLE PROCEEDINGS ..................... 271
VI. CONCLUSION ................................................................. 272

International insolvencies have proliferated in the past decade, but the law of international insolvency has not kept pace. The United States does not have a single treaty with another country dealing with cross-border insolvencies and many other countries have made relatively little progress in providing for a comprehensive legal framework for dealing with cross-border insolvencies. Recently, however, significant strides have been taken to fill this void. In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Cross-Border Insolvency (Model Law). The Model Law provides a mechanism to coordinate cross-border insolvencies and is designed to be adopted by nations; it is not a treaty. The United States National Bankruptcy Review Commission unanimously recommended the Model Law’s

---

1. Section 304 of the Bankruptcy Code does address the issue of international insolvency. Section 304 permits the United States to act in an ancillary role to insolvency proceedings pending in the debtor’s home country. See 11 U.S.C. Sec. 304 (1999).

2. The Nordic Convention (Scandinavia) and the Bustamante Convention (South America) are systems that have been adopted by segments of the international community, but have been of limited application.

---

Ronald J. Silverman is a partner in the law firm of Bingham Dana LLP, resident in the firm’s New York City office. Mr. Silverman gratefully acknowledges the assistance of Matthew A. Schwartz in preparing this article.
adoption. The Model Law is now pending before Congress, and if accepted, would be enacted as a new Chapter 15 of the Bankruptcy Code.

This article summarizes the Model Law and illuminates its most significant aspects. Section (I) recounts the problems facing international insolvency and discusses the goals and achievements the Model Law is designed to accomplish. This section also defines the scope of the Model Law, an understanding of which is essential to a comfortable grasp of the Model Law's application. Section (II) describes a main component of the Model Law: providing access for a foreign representative or foreign creditor to the courts of an enacting state and providing for equality of treatment for such foreign creditors with their domestic counterparts. Section (III) details another major element of the Model Law, the concept of recognition of a foreign representative and a foreign proceeding, and discusses the types of relief that follow recognition. Section (IV) highlights the backbone of the Model Law, cooperation among all parties to an international insolvency proceeding. Section (V) addresses the issue of concurrent and multiple proceedings and discusses the Model Law's treatment of such situations. Finally, Section (VI) concludes that adoption of the Model Law would provide a useful framework for addressing many of the problems that currently plague international insolvencies.

I. THE PURPOSE AND APPROACH OF THE MODEL LAW

A. Goals of the Model Law

International insolvency has been subject to countless problems which are due, in no small measure, to the absence of a comprehensive cross-border insolvency framework. Conflicts between legal systems exist, resulting in the wasting of valuable resources. Considerable legal obstacles exist which constrain foreign representatives' and creditors' access to domestic courts and result in disparate treatment being accorded foreign and domestic creditors. The Model Law seeks to alleviate these recurrent problems by providing a simple and pragmatic legal framework that guides parties through many of the issues that arise in the international insolvency context.

The Model Law essentially has two main objectives. The first is to implement a more coherent and efficient international insolvency legal system. In pursuing this goal, the Model Law requires cooperation between the courts, provides for fair and efficient proceedings, and protects the interests of all parties including foreign and domestic creditors. The second goal of the Model Law is derivative of the first. Through the creation of a more structured international insolvency legal framework, the Model Law seeks to further the interests of the economic community. For example, a reliable international insolvency legal system will facilitate the maximization of a debtor's estate,
preserve investment and employment through the resuscitation of financially
distressed companies, and improve upon trade through greater legal certainty.

The Model Law's goals are to be accomplished in three basic ways. First,
the Model Law permits and requires courts and administrators to cooperate with
one another to the maximum extent possible. Second, the Model Law enables
a foreign insolvency administrator or representative to have standing in a local
proceeding and to obtain relief in an efficient manner. Third, the Model Law
requires a base level of equal treatment of foreign and local claims.

Despite the desire to create a cohesive international insolvency legal
framework, it was recognized that the Model Law's force is only as good as its
acceptance. In light of this concern, the drafters created the Model Law to be
flexible and user-friendly, and therefore, encourage acceptance by the states.

To begin with, the Model Law is a succinct, ten page, 32 Article text, that
is procedurally focused. This defining characteristic enables accepting coun-
tries to graft the Model Law to meet the substantive needs of their legal regime.
Furthermore, the Model Law is considerably flexible, in that it is not designed
to pre-empt the entire field of international insolvency. For example, it permits
a court to deviate from the specific provisions of the Model Law if such would
otherwise violate domestic public policy. Further, it recognizes that the assis-
tance provided for in the Model Law is not exclusive, so that other existing
legal forms of cooperation, such as the doctrine of comity, are not displaced.

B. Scope of the Model Law

The Model Law has well-defined parameters and covers situations that to
date have generated conflict and confusion. First, the Model Law applies to
insolvency proceedings where a foreign representative or foreign creditor
requests assistance, or otherwise wishes to commence or participate in a
proceeding, in a local court. Second, the Model Law applies when a local court
requests assistance from a foreign representative or foreign court. Third, the
Model Law governs concurrent, domestic, and foreign insolvency proceedings
pending simultaneously.

The Model Law provides clear definitions for key terms used through its
text. The Model Law defines a foreign proceeding as a collective proceeding
conducted pursuant to the insolvency laws of a foreign state in which the
debtor's assets are under the control of a foreign judicial body for the purposes
of reorganization or liquidation. A foreign representative is defined under the
Model Law as a person or body authorized to administer the foreign proceeding
or to act as a representative of the foreign proceeding. This effectively
incorporates the United States concept of a "debtor-in-possession." The Model
Law does not apply to certain types of debtors, such as railroads and certain
regulated financial institutions.
II. ACCESS

The provisions of the Model Law are simple and direct. The drafters wanted to create a model legal framework that was clear and concise so as to prevent interpretive disputes. Chapter II of the Model Law exemplifies this point in the context of providing foreign representatives and foreign creditors access to, and equal treatment under, local insolvency proceedings. The Model Law permits a foreign representative to apply “directly” to a court within the enacting State (Article 9). The Model Law also entitles a foreign representative to initiate a proceeding under the insolvency laws of the State if the conditions for commencing such an action are otherwise present (Article 11). After recognition of a foreign proceeding, the Model Law allows a foreign representative to participate in an insolvency proceeding of the debtor (Article 12). Furthermore, the Model Law mandates that foreign creditors be accorded the same base level of treatment as domestic general unsecured creditors under a local insolvency proceeding (Article 13). In other words, under the Model Law foreign creditors cannot be relegated to worse treatment solely on the basis of their foreign status.

III. RECOGNITION OF A FOREIGN PROCEEDING AND FOREIGN REPRESENTATIVE

A. Process of Recognition

Recognition is a prerequisite to cooperation under the Model Law. A foreign representative or foreign proceeding must first be recognized before relief can be granted. Traditionally, recognition of foreign insolvency representatives has been a cumbersome and costly process. By contrast, the Model Law provides a simple and easy standard for recognition and is designed to eliminate obstacles that can impede the process.

Under the Model Law, a foreign representative and foreign proceeding can be recognized in one of three ways (Article 15). First, recognition can be accomplished by submitting a “certified copy of the decision commencing the foreign proceeding and appointing the foreign representative.” Second, the foreign representative can submit a certificate from a foreign court affirming the validity of the foreign proceeding and that the applicant is a duly approved foreign representative. Finally, there is a third alternative that serves as a “catch-all” method. The court may grant recognition, despite the absence of proof called for in the first two methods, if it finds acceptable evidence that establishes the legitimacy of the foreign representative or foreign proceeding.
Consistent with the Model Law's theme of cooperation and efficiency, the drafters provided simple mechanisms to avoid disputes regarding the validity of documents submitted on behalf of a foreign representative or proceeding during recognition. The Model Law entitles a court to presume the authenticity of any document submitted in conjunction with the recognition of a foreign representative or foreign proceeding regardless of the legalization of those documents (i.e. apostille not required) (Article 16). Furthermore, the Model Law also mandates that a foreign proceeding shall be recognized once a showing under Article 15 has been made. The local court is obliged to determine the recognition application in a prompt fashion (Article 17).

B. Pre-Recognition

Although recognition under the Model Law is designed to be a speedy and efficient process, the Model Law permits temporary relief pending the application. It allows the court, at the applicant's request, to provide relief in order to protect the debtor's assets or the creditor's interests (Article 19). The Model Law provides a non-exclusive list of the types of temporary relief available, including "staying execution against the debtor's assets" and "entrusting the administration or realization of all or a part of the debtor's assets . . . to the foreign representative or another . . ." It should be noted, however, that the relief created pursuant to this section is only temporary. Once recognition is achieved, this relief will typically cease, although frequently it will be superceded by further, post-recognition relief.

C. Effect of Recognition

A foreign proceeding can be recognized as a "foreign main proceeding" (FMP) or a "foreign non-main proceeding" (FNMP). The classification of the foreign proceeding determines what type of relief the court may grant.

A FMP is defined by the Model Law as a foreign proceeding that takes place in the debtor's home country, or the location of the debtor's "centre of its main interest." The Model Law creates a rebuttable presumption that the debtor's registered office is the "centre of its main interests" (Article 16(3)). A FNMP is a foreign proceeding other than a FMP and will only be recognized if it occurs in a State where the debtor maintains an establishment. An establishment is a place of operations where the debtor undertakes "non-transitory economic activity with human means and goods or services." Thus, an establishment means more than simply an asset within the jurisdiction.

The classification of a foreign proceeding dictates the type of relief a court shall or may, as the case may be, grant in respect of the foreign proceeding. Upon the court's determination that a proceeding is a FMP, there is a mandatory, automatic stay (subject to local exceptions, such as sections 362(b)
and 363 of the Bankruptcy Code) of all proceedings against the debtor and transfers of the debtor's assets. Such mandatory relief is accorded in the context of a FMP. A FNMP is entitled only to permissive relief. Once a court recognizes a foreign proceeding as a FNMP or FMP, it may grant permissive relief, but the court must first satisfy itself that all creditors will be protected under the relief to be granted (Article 22). Permissive relief includes, but is not limited to, a further stay, an examination of witnesses and taking of evidence, and the entrustment of the debtor's assets to the foreign representative provided expressly that local creditors are protected in the event of such entrustment. In a FNMP, if the court grants permissive relief, the relief must relate to assets that, under local law, should be subject to the FNMP.

The distinction between a FMP and a FNMP is equally applicable to the right to commence avoidance actions (Article 23). The Model Law permits a foreign representative to initiate an avoidance action under the local insolvency laws of the State. A foreign representative in a FNMP, however, can only bring an avoidance action if it relates to assets that, under local law, should be subject to the FNMP.

IV. COOPERATION AMONG THE COURTS

Cooperation among the various parties to an international insolvency proceeding is indispensable to the Model Law's effectiveness. The goals of the Model Law can only be achieved so long as the parties communicate and cooperate with one another to the maximum extent possible. In light of this paramount concern, the Model Law's provisions addressing cooperation employ strict, non-precatory language.

The Model Law mandates that the courts and domestic representatives, "shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through [an official]." (Articles 25 and 26). Additionally, in the interests of efficiency, the court or domestic representative is authorized to communicate directly, or through an official, with the foreign representative or foreign court. Such requirement and authorization is particularly important in the civil law context, where a court may find it difficult to act absent specific statutory direction.

The Model Law provides a non-exclusive list of methods that may be employed to facilitate cooperation (Article 27). The means of cooperation include: the appointment of a mediator or other go-between, coordination of the proceedings, communication of information, or any other measure the court deems appropriate. The courts are given a wide degree of latitude in deciding how to implement these measures and how to achieve the goal of cooperation.
Chapter V of the Model Law addresses the confusing issue of commencing and coordinating simultaneous local and foreign insolvency proceedings. To no surprise, the Model Law provides clear definitive guidelines on how to handle such situations. Chapter V is broken down into five articles, three of which directly address the problems involved in concurrent and multiple proceedings.

The first of these articles focuses on the situation where a domestic insolvency proceeding is sought to be commenced subsequent to a recognized FMP (Article 28). Such a commencement is permitted only if the debtor has assets in the State. Further, the effect of the local proceeding shall be limited to the local assets, and to the extent necessary, to cooperate with the FMP in providing relief that relates to assets that under local law should be administered in the FMP.

The second article addresses two different cases where concurrent domestic and foreign proceedings are pending (Article 29). In both situations the court is required to cooperate with the foreign proceeding to the maximum extent possible pursuant to Articles 25, 26, and 27. The first situation involves an application for recognition of a foreign proceeding while a domestic proceeding is in progress. In such a case, the court can only grant relief to the foreign proceeding that is consistent with the local proceeding. Furthermore, if the foreign proceeding is recognized as a FMP, the mandatory stay provision of Article 20 is inapplicable.

The other situation occurs when a domestic proceeding is commenced after recognition of the foreign proceeding or after an application has been filed for recognition (Article 29). In such a case, the court will review and modify, if necessary, any relief that it had previously granted under Articles 19 or 21. If the foreign proceeding was recognized as a FMP and therefore, accorded a mandatory stay, the court is required to modify or terminate the stay if it is inconsistent with the domestic proceeding. The Model Law also provides that when continuing any relief granted to a foreign representative of a FNMP, the court must find that the relief relates to assets that, under local law, should be administered in the FNMP "or concerns information required in that proceeding."

The final relevant article under Chapter V addresses the circumstances of multiple simultaneously pending foreign proceedings (Article 30). When more than one foreign proceeding regarding the same debtor is pending, the domestic court is required to seek cooperation and coordination among the proceedings to the maximum extent possible. Multiple foreign proceedings will generally fall into one of three categories. In the first, the court will be faced with the task of formulating relief for the representative of a FNMP after the court has
already recognized a FMP. In such a case, any relief the court grants to the FNMP must be consistent with the FMP. The second situation is the direct opposite of the first: when a FMP is recognized subsequent to recognition of a FNMP or the filing of an application for recognition of a FNMP. Under these circumstances, the court must modify or terminate any relief it had previously accorded the FNMP if it is inconsistent with the FMP. Finally, where a FNMP is recognized after recognition of another FNMP, the court shall modify or terminate the relief granted to the earlier FNMP to facilitate coordination between the two proceedings.

VI. CONCLUSION

The benefits to be gained by a uniform, coherent framework for the coordination of international insolvencies cannot be understated. The Model Law presents a pragmatic solution for achieving this goal. The Model Law strives to promote cooperation. The Model Law is fair and equitable in that it generally requires equal treatment of all domestic and foreign creditors. It provides clear, intelligible guidelines for determining what type of relief can be expected and granted. It adopts simple and efficient procedures. Of most significance, the Model Law will help lift the cloud of legal uncertainty that surrounds international insolvency issues. By enhancing predictability, the Model Law will promote economic efficiency and, in the end, the entire international community will benefit.
INTRODUCTORY REMARKS – ALIEN TORT CLAIMS ACT

Charles Curlett*

Good morning ladies and gentlemen, and welcome. We are fortunate to have with us today a distinguished panel of professors and practitioners who will be speaking about various aspects of current Alien Tort Claims Act (ATCA) litigation. Before I introduce them, I thought we might begin with the language of the Statute itself. The ATCA states that “[t]he district court 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.” This language, I think, illustrates the wisdom of our Congress in recognizing that certain universal principles of law transcend national boundaries, overcome issues and defenses of sovereignty, and must be enforced whenever possible by a court competent to hear such claims. Essentially, our courts are competent, because our Congress says that they are. For certain categories of torts, it does not matter that the acts were committed outside the borders of the United States, that the acts were neither committed by a national of the United States, nor were against a national of the United States. These issues are irrelevant because international law, the law of nations, is part of our federal common law. These actions violate international law, and as such violate our laws. Accordingly, our courts should be permitted to do their part in maintaining, wherever possible, international peace and stability through the administration of justice.

These notions of justice and accountability seem right in step with this post cold-war era in which recognition of the universal nature of human rights is of paramount importance. It is of such importance, and recognition is becoming so global, that in just this past year we have seen the arrest of former Chilean dictator Augusto Pinochet, the path for whom is now virtually clear so that he might be extradited to Spain for crimes committed in Chile under his direction when Head of State. In this past year, we have also seen the first international criminal indictment of a sitting Head of State, Slobodan Milosevic, for crimes against humanity committed within the borders of his

* Panel Chair, Special Assistant in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia. Speech Given at the 1999 ILA-American Branch Annual Conference in New York.
1. 29 USCA §1350 (West, 1999).
2. Id.
own country. So, yes, our Congress seems to be for once right in step with the most current thinking regarding international enforcement of human rights norms. However, this is not recent legislation. The language of the ATCA was drafted 210 years ago as part of the Federal Judiciary Act of 1789. Indeed, this legislation illustrates a Congress ahead of its time to such extent that the Act was ignored for 200 years. Enacted originally to address those few norms which at the time violated the law of nations, such as piracy and the slave trade - the Act was laid to rest after only a handful of early cases. Then came Filartiga. In 1976 a man and his daughter came to the Center for Constitutional Rights in search of a means to take action against a Paraguayan police official who had tortured and killed their seventeen year old son and brother. The officer, Americo Norberto Pena-Irala, fled Paraguay after the Filartigas charged him with murder. He was living in New York City at the time the lawsuit was filed. The central holding to emerge from that case was that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. I mention briefly that shortly after Filartiga, Judge Bork in the Tel-Oren disagreed with the Filartiga court and argued just the opposite. Fortunately, his view has been roundly rejected and the fundamental holding of Filartiga remains, and shall remain, intact.

Today, in an era when the international community is taking great strides to recognize, and courts around the world are attempting to enforce fundamental human rights, the ATCA has again become a vital sword for the litigator who champions the rights of victims from around the world. However, I will leave you and our panelists with two questions. First, just how sharp is this sword? In the brief revival of ATCA litigation we have seen fewer than two dozen lawsuits. Although they have generated two billion dollars in damage awards, none has been collected. This area of litigation faces the same practical difficulties of enforcement that plagues much of international law. While we applaud the indictments of Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic, none are in custody. Which brings me to my second question, how can we sharpen this sword? With that, I turn to our panelists. We are privileged to have with us today a remarkable and distinguished group of scholars and litigators. The attorneys who join us this morning are true pioneers and I am pleased to welcome them.

MICHAEL RATNER

Our first speaker is Mr. Michael Ratner. Mr. Ratner is a human rights practitioner who has made his legal and political home at the Center for

3. USCA Const., Art. III § 1 (West, 1999).
Constitutional Rights in New York for over twenty-five years. In the course of his career, he has sued many of the world's worst killers and torturers. Mr. Ratner is a former director of the Center for Constitutional Rights and past president of the National Lawyers Guild. Never content to identify human rights atrocities committed only by foreign individuals and regimes, he has filed a lawsuit challenging the constitutionality of the Gulf War. Mr. Ratner co-authored, with fellow panelist Beth Stephens, the book *International Human Rights Litigation in U.S. Courts*. Of special interest to human rights litigators and activists, it addresses lawsuits in the United States under the Alien Tort Claims Act, the Torture Victim Protection Act, and related statutes for human rights abuses committed in other countries. The authors also discuss jurisdictional issues, immunity, choice of law, and sources of international law.

**BETH STEPHENS**

Beth Stephens is presently an associate professor of law at Rutgers University. A magna cum laude graduate of Harvard University and the law school at UC Berkeley, Professor Stephens clerked for Chief Justice Rose Bird of the California Supreme Court before going on to study the changing legal system of Nicaragua. Before going to Rutgers, Ms. Stephens was in charge of the international human rights docket at the Center for Constitutional Rights in New York. Catharine A. MacKinnon is the Elizabeth A. Long Professor of Law at the University of Michigan School of Law. She holds a B.A. from Smith College, a J.D. from Yale Law School, and a Ph.D. in political science from Yale University. Professor MacKinnon, who practices and consults nationally and internationally, has also taught at Yale, the University of Chicago, UCLA, Minnesota, Harvard, York (Osgoode Hall), and Stanford. Her fields of concentration include constitutional law and political theory. She is the author of numerous articles and books. Professor MacKinnon pioneers the legal claim for sexual harassment as a form of sex discrimination. In 1983, with Andrea Dworkin, she conceived and wrote ordinances recognizing pornography as a violation of civil rights. The United States Supreme Court accepted her theory of sexual harassment in 1986. The Supreme Court of Canada adopted, in part, approaches that she created with the Women's Legal Education and Action Fund with respect to equality, pornography, and hate speech. Professor MacKinnon is the lead counsel in *Kadic v. Karadzic*, filed in 1993 under the Alien Tort Claims Act and Torture Victim Protection Act (TVPA), in which she represents Bosnian Muslim and Croat survivors of Serb atrocities seeking international justice for genocide.

**BETH VAN SCHAAK**

Beth Van Schaak is an associate at the law firm Morrison & Foerster. Ms. Van Schaak recently spent the second year of a Soros Justice Fellowship at the
Center for Justice & Accountability (CJA). CJA is an international human rights legal services organization launched in 1988 with initial support from Amnesty International, USA and the United Nations Voluntary Fund for Victims of Torture. CJA aims to close off the United States as a safe haven for torturers and other violators of human rights. Ms. Van Schaak has filed civil lawsuits in the courts of the United States under the ATCA and the TVPA against human rights violators from abroad who reside, visit, or keep assets in the United States. In May 1999, CJA filed its most recent lawsuit Romagoza et al. v. Garcia and Vides-Cassanovva, involving claims of torture, cruel, inhuman, and degrading treatment or punishment; and crimes against humanity against two former Ministers of Defense from El Salvador who retired in Florida. A graduate of Stanford University and Yale Law School, Ms. Van Schaak served as a law clerk in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia in the Hague. She previously worked for the Schell Center for International Human Rights and as a teaching assistant for the Lowenstein International Human Rights Clinic at Yale Law School.
I. INTRODUCTION

While regularly seeking to apply international human rights norms to judge the behavior of other governments, the United States has vehemently rejected efforts to apply such rules to United States domestic behavior. Variously described as hypocritical and shortsighted, or pragmatic and morally valid, this dichotomy is well-ingrained in our legal system. The tensions produced by United States resistance to domestic application of international law have heightened in recent years, as the United States seeks to cement its position as leader of the post-cold war world community and as human rights and humanitarian law have reached a position of unprecedented importance on the world stage. Over the course of less than twelve months in 1998 and 1999, the United States and its European allies fought a war in Kosovo with the avowed
purpose of forcing a sovereign State to obey international human rights norms within its own territorial borders. The sitting head of the State of Yugoslavia faced indictment by an international criminal tribunal for violations of human rights and humanitarian law. A former head of the State of Chile fought to avoid prosecution in Spain for international law violations committed in his home country. The vast majority of the world's nations endorsed a permanent International Criminal Court over the vehement objections of the United States. Each of these international confrontations turned upon the relationship between international and domestic law. Each demanded examination of the extent to which international law norms govern the internal domestic actions of a sovereign State.

A variety of doctrines, briefly summarized in the following section, limit the application of international norms to events within the United States or to abuses committed by United States officials. Recent litigation under the Alien Tort Claims Act (ATCA), however, has created a small window through which international human rights law can be applied both to United States-based private actors and to United States government officials. As this ATCA window expands, it challenges traditional barriers to domestic enforcement of international law. In this paper, after a brief review of the interpretive structure limiting United States domestic incorporation of international law, I trace the development of the ATCA doctrine and its expansion to a wider range of possible defendants. I then analyze the current cases in light of what is known about the original goals of the statute, concluding that the modern application of the statute is both constitutional and consistent with the apparent intent of its framers. Finally, I explore the challenge these cases pose to the traditional reluctance to enforce international norms within the United States, and the statute's potential for bringing the United States, kicking and screaming, into the modern age of international law.

II. UNITED STATES DOMESTIC APPLICATION OF INTERNATIONAL LAW

While actively engaged in international efforts to force governments and officials of other countries to obey international law, the United States government has sharply restricted the domestic application of those same rules. Although scholars continue to debate the interrelationship between international law and the Constitution, statutes and executive decrees, courts generally agree

1. I use State, with a capital letter, to indicate the government of an independent nation, and state to indicate one of the fifty United States.

that both statutes and executive actions override inconsistent customary international law, thus enabling either of the political branches to render unenforceable any international obligation deriving from customary law.\footnote{3} Treaties receive greater respect within the United States domestic law structure, being viewed as of equal stature as statutes - the last in time governs over prior inconsistent provisions - but inferior to the Constitution.\footnote{4} The impact of treaties, however, is sharply restricted by the view that they are enforceable only where they explicitly provide for a private right of action,\footnote{5} a condition that the United States has explicitly attached to several recently ratified human rights treaties.\footnote{6}

Given this restrictive approach to domestic implementation of international law within the United States, virtually all such enforcement depends upon the actions of Congress or the executive branch.\footnote{7} Congress took such action in 1789 with the enactment of the ATCA, and then again over 200 years later with the Torture Victim Protection Act (TVPA). These statutes and the cases applying them provide one of the few judicial arenas in which issues of this nature are decided. After exploring how the statutes have been applied over the past twenty years, I will discuss the implications of this line of cases for the larger issues of domestic application of human rights norms within the United States.

---

\footnote{3}{Although the Supreme Court has never directly decided the place of customary international law in the hierarchy, its decisions imply that both statutes and executive actions override inconsistent customary law, and this has been the holding of all modern court decisions. See The Paquete Habana, The LoLa., 175 U.S. 677, 700 (1899) ("where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations 
\ldots"); id. at 708 (courts must apply a rule of international law "in the absence of any treaty or other public act of their own government in relation to the matter."); See Beth Stephens, The Law of Our Land: Customary International Law as Federal Law After Erie, 66 FORDHAM L. REV. 393, 397-98 (1997).}

\footnote{4}{See The Chinese Exclusion Case, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1888); The Head Money Cases, 112 U.S. 584 (1884).}

\footnote{5}{Id.; See Lobel, supra note 2, at 1108-10 (criticizing the doctrine of "self-executing" treaties).}

\footnote{6}{The United States has attached "reservations, understandings or declarations" to several recently ratified treaties stating that the treaties create no private right of action, do not effect any changes in United States law, and do not "federalize" areas otherwise left to the control of the states. See Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 AM. J. INTL L. 341, 341 (1995) (discussing the recent attachments to human rights conventions); David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DEPAUL L. REV. 1183, 1206 (1993).}

\footnote{7}{One exception is the enforcement of customary international law norms where there has been no overriding action from the political branches. See Stephens, supra note 3.}
III. THE UNIQUE AND EVOLVING ROLE OF THE ALIEN TORT CLAIMS ACT

Given the barriers preventing direct application of most international human rights law within the United States, one of the few arenas in which international norms are regularly applied by United States courts are cases arising under the 200-year-old ATCA and its younger cousin, the TVPA, enacted in 1992. The ATCA grants federal courts jurisdiction over a claim by an alien for "a tort only committed in violation of the law of nations." The statute has been interpreted to allow noncitizens to bring suit for violations of the evolving body of customary international law norms. The TVPA authorizes a civil suit by any individual, citizen and noncitizen alike, for two violations, extrajudicial execution and torture, when committed "under actual or apparent authority, or color of law, of any foreign nation." The TVPA includes detailed definitions of the two torts that reflect, but do not duplicate, accepted international standards.

These two statutes provide the only consistent means by which international law claims are adjudicated within the United States, a result of the explicit authorization of Congress. The constitutionality of the two statutes has been upheld by every court that has considered the issue. But as litigants increasingly seek to apply the statutes to domestic conduct, the statutes are likely to draw increasing scrutiny.

A. Evolving ATCA Claims

The ATCA affords plaintiffs a broad right to file claims for violations of the evolving body of customary international law. The proper interpretation of "the law of nations" was a key issue in the first modern ATCA decision, Filártiga v. Peña-Irala, in which the family of a young man tortured to death in Paraguay sought damages from the police officer who had tortured him. The defendant argued that international law did not apply to a government's treatment of its own citizens, relying on prior Second Circuit decisions. The Filártiga court disagreed, holding that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among

---

10. Id., § 2(a).
11. Id. at §§ (a), & (b). See comparison of TVPA definitions with international law norms in BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 63-68 (1996).
12. See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Trajano v. Marcos, 978 F.2d 493, 501-03 (9th Cir. 1992); Filártiga v. Peña-Irala, 630 F.2d 876, 885-87 (2d Cir. 1980).
the nations of the world today." 14 All courts that have decided the issue have agreed that the statute refers to current norms of international law, 15 and Congress has indicated its agreement as well. 16

This interpretation is consistent with the Supreme Court's understanding of the meaning of the law of nations. In one of the few cases to apply constitutional language authorizing Congress to "define and punish . . . offenses against the law of nations," for example, the Court held that the clause encompassed violations of the law of nations as it had evolved, regardless of whether the particular violation existed at the time the Constitution was drafted. 17 In Arjona, the defendant was charged with violating a federal statute making it a crime to counterfeit notes issued by a government-owned foreign bank. 18 Arjona pointed out that such foreign notes were unknown at the time the Constitution was drafted. The Court nevertheless found the statute to be within Congress' constitutional power to "define and punish . . . offenses against the law of nations" because the law of nations, as used in the Constitution, encompassed this "more recent custom among bankers of dealing in foreign securities . . .," even though the framers would not have contemplated such an act as a violation of the law of nations. 19 Similarly, the Court held in 1900 that the law of nations encompassed a newly developed rule of international law governing the protection of an enemy's fishing vessels, a rule that had evolved into a binding norm over the course of the 19th century. 20

The Courts' conclusion that the ATCA permits suits for violations of currently existing international law norms has enabled the courts to recognize a growing list of violations as triggering ATCA jurisdiction. Filártiga and its progeny require that a norm be "universal, obligatory, and definable." 21 Filártiga itself held that torture by a government official of a citizen of his own state violated international law. Subsequent cases have recognized both

14. Id. at 881.
15. See, e.g., Abebe-Jira v. Negewo, 72 F.3d at 848; Filártiga, 630 F.2d at 881.
18. Id. at 480-82.
19. Id. at 485-86.
20. In The Paquete Habana, 175 U.S. 686,694, the Supreme Court concluded that although the rule had previously been followed as a matter of comity, it had since ripened into "a settled rule of international law."
additional human rights violations and additional actors as falling within the
reach of the statute. Thus, cases alleging summary execution, disappearance,
arbitrary detention, cruel, inhuman or degrading treatment, genocide, war
crimes, and crimes against humanity have all been found to state claims under
the ATCA.\textsuperscript{22} Of particular note, one court initially rejected a claim based on
disappearance, but reversed itself based on plaintiff's showing that international
law had recognized such a violation over the preceding decade.\textsuperscript{23}

Cases over the past twenty years have also expanded the range of
defendants who can be held accountable under the ATCA. Whereas the
defendant in \textit{Filartiga} was the actual torturer, later suits targeted defendants in
a position of command responsibility: those who planned, ordered, or directed
human rights abuses, or who knew or should have known about the abuses and
failed to prevent their occurrence or punish those responsible.\textsuperscript{24}

B. Private Actors: Individuals and Corporations

In Kadic \textit{v.} Karadzic,\textsuperscript{25} the Second Circuit recognized two additional
principles of ATCA jurisprudence as applied to the potential defendants. The
\textit{Kadic} decision arose out of claims filed against Radovan Karadzic, the leader
of the Bosnian Serbs at the time of the Bosnian war and the head of an
unrecognized de facto state: although based on an illegal seizure of power, his
"government" controlled both territory and population, through a legislature,
executive officers, and a powerful military force. The court first noted that

\textsuperscript{22} See, e.g., Kadic \textit{v.} Karadzic, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes and crimes
against humanity); Doe \textit{v.} Unocal Corp., 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (slavery); Xuncax, 886
F. Supp. at 185-89 (certain acts of cruel, inhuman, or degrading treatment); \textit{id.} at 173-75 (gender violence
such as rape as a form of torture); Forti I, 672 F. Supp. at 1541-42 (summary execution, prolonged arbitrary
detention); Forti \textit{v.} Suarez-Mason, 694 F. Supp. 707, 709-11 (N.D. Cal. 1988) [hereinafter \textit{Forti II}] (on
reconsideration) (disappearance). Cases currently pending ask the courts to find gender violence to be an
(suit against Islamic fundamentalist group sued for attacks on women and girls), along with egregious
violations of environmental standards, Jota \textit{v.} Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998) (noting issue
but declining to decide whether claim triggered ATCA jurisdiction); Beanal. 969 F. Supp. at 382-84. In
\textit{Beanal}, the district court held that corporate actions that harm the environment did not violate established
norms of international law. This issue is currently on appeal. \textit{Beanal}, 969 F. Supp. at 382-84.

\textsuperscript{23} Cf. Forti I, 672 F. Supp. at 1542-43 (rejecting claim based on disappearance), with Forti II, 694
F. Supp. at 709-11 (accepting disappearance claim as triggering ATCA jurisdiction).

\textsuperscript{24} See, e.g., \textit{Kadic v. Karadzic}, 70 F.3d 232 (holding de facto head of state responsible for abuses
committed by his military forces); Hilao \textit{v.} Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994) (holding ex-
dictator of the Philippines responsible for abuses committed by his security forces); Xuncax \textit{v.} Gramajo, 886
F. Supp. at 171-73, 174-75 (holding Guatemalan general responsible for violations committed by his forces);
Forti I, 672 F. Supp. at 1537-38 (holding Argentine general responsible for abuses committed by troops under
his command).

\textsuperscript{25} \textit{Kadic}, 70 F.3d 232.
certain international human rights norms prohibit private conduct as well as public acts, and it concluded that the ATCA applies to suits alleging such violations committed by private parties. In particular, violations such as genocide and certain war crimes trigger ATCA jurisdiction when committed by private actors because the international law definitions of those offenses indicate that the prohibition binds private parties as well as public actors.26

Second, the Kadic court recognized that human rights violations such as torture and summary execution, as defined by international law, do require state action,27 but held that the requisite “official capacity” could be supplied by an official of an unrecognized de facto state. The opinion notes that underlying the state action requirement is a regime’s ability to exert official power over those living under its control, not diplomatic recognition:

[I]t is likely that the state action concept, where applicable for some violations like “official” torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.28

The decision reflects the Court’s willingness to examine the underlying purpose of modern international human rights law, applying the ATCA in a manner designed to implement that purpose.

The Kadic court also recognized that the state action requirement may extend accountability to otherwise private actors who act in complicity with


28. Kadic, 70 F.3d at 245. In Islamic Salvation Front (FIS) 993 F. Supp. at 9. The district court recognized that, for the purposes of the state action requirement, the Islamic Salvation Front in Algeria might constitute a de facto state in the areas under its control, but withheld determination of that factual issue until later in the litigation.
public actors. As one district court stated, "it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power." In defining the state action requirement in ATCA cases, United States courts have applied the standards developed in litigation under §1983, the key United States civil rights statute that also requires state action. The Supreme Court has found otherwise private action to satisfy the United States state action requirement in many factual settings, including where a private party performs a public function; where the state commandeers private parties and assigns them public responsibilities; where the state and private actions are so interrelated as to be indistinguishable; and where the private and state parties are engaged in "joint action." As the Doe v. Unocal court noted, a private party's actions will be considered state action where the private party "willfully participate[s] in joint action with the state or its agents;" enters into an agreement with a government actor; "engages in a conspiracy" or "acts in concert" with state agents; or aids and abets state agents. The court summarized, "where there is a substantial degree of cooperative action' between the state and private actors in effecting the deprivation of rights, state action is present.

These concepts permit suits against non-governmental groups such as corporations. Under the same principles applicable to individual private actors, corporations can be held liable for human rights abuses when they are

29. Kadic, 70 F.3d at 245.
34. Id. In a related case against Unocal, the same judge found the allegations of state action to be sufficient where "defendants' challenged actions are allegedly inextricably intertwined with those of the [Burmese military] government." National Coalition of Government of the Union of Burma v. Unocal, Inc., 176 F.R.D. at 349.
35. Similar doctrines permit human rights litigation against unincorporated associations, including paramilitary groups. For example, the plaintiff in Belance v. Front for Advancement and Progress in Haiti, Civ. No. 94-2619 (E.D.N.Y., filed June 1, 1994), seeks to hold the Front for Advancement and Progress in Haiti (FRAPH), a terrorist organization, liable for her torture in Haiti. The complaint charges that the association acted in complicity with the illegal Haitian military regime, and was "present" in New York because it had opened an office with a representative in New York City. In Islamic Salvation Front (FIS), 993 F. Supp. 3 (suit against Islamic fundamentalist group sued for attacks on women and girls), the defendant association may be held liable as an unincorporated association and/or as a de facto government.
responsible for violations of international human rights norms that apply to private actors; or when they act in complicity with government officials to commit other human rights violations. Thus, a corporation can be held liable for using slave labor, as alleged in the Doe v. Unocal case, or when responsible for genocide, as alleged in Beanal v. Freeport, since both of these international law prohibitions apply to private actors as well as government officials. Likewise, corporate actors can be held liable for violations requiring state action, such as torture and summary execution, when they act in complicity with state actors. As the Beanal court concluded, "a corporation found to be a state actor can be held responsible for human rights abuses which violate international customary law." Applying the §1983 civil rights standards, corporations satisfy the state action requirement when they engage in "joint action" with a government or government officials, or conspire with or otherwise act in concert with those officials, or perform a public function, such as taking responsibility for law enforcement. In a suit against a private corporation operating a detention facility, for example, a court held that the defendant corporation and its employees were state actors because they were "acting under contract" with the United States government and were "performing governmental services."

C. Domestic Applications

Most ATCA cases concern violations occurring abroad, committed by foreign government officials or foreign citizens, and much of the commentary on the statute assumes that it is limited to such claims. But the statute in no way bars claims addressing international law violations within the United States or abuses committed by United States citizens or United States government officials, as long as the defendants are not protected by any applicable immunities. In the case on behalf of immigrants detained in the United States, a trial court judge recently upheld the immigrants' right to sue their jailers for cruel, inhuman, or degrading treatment and other human rights violations. The immigration officials had contracted with a private corporation to operate

40. Id.
the facility; the defendants include the corporation, as well as both private individuals and government officials.

Litigation against the United States government is regulated by the restrictive Federal Tort Claims Act, which permits such claims for many torts committed within the United States, but prohibits most claims arising out of abuses in foreign countries, as well as most of those committed as intentional acts or in the implementation of discretionary policy decisions. It is possible, however, to sue United States government officials for abuses committed outside the scope of their authority, or if those acts constitute violations of the Constitution or specific statutory protections. Thus, United States courts have refused to dismiss claims against immigration officials for violations of the rights of detainees and against individual employees of the Central Intelligence Agency accused of responsibility for torture and execution in Guatemala.

IV. THE CONSTITUTIONAL FOUNDATION OF THE ATCA

The Filártiga approach to the ATCA has been remarkably successful on several fronts. United States courts have followed the precedent in dozens of cases, producing not a single contradictory holding. Congress has indicated its agreement with the case and its interpretation of the ATCA, praising the decision in the legislative reports accompanying the passage of the TVPA. Until very recently, however, almost all of the United States cases have addressed abuses committed by foreigners in foreign countries. As the targets of this litigation expand to include United States based corporations as well as United States government officials, the cases may begin to provoke a more serious backlash. Thus, it is important to review the constitutional basis for the statute, and to evaluate whether it will survive increasingly hostile scrutiny, as

41. The Foreign Tort Claims Act and the exceptions to United States government liability are codified at 28 U.S.C. §§ 1346, 2680.
42. Jama, 22 F. Supp. 2d at 365.
43. Harbury v. Deutch, Civ. No. 96-00438 (D.D.C. March 9, 2000) (Order granting in part/denying in part defendants' Motion to Dismiss) (unpublished opinion). In a suit against the City of Los Angeles, the Ninth Circuit recognized that the ATCA would support a claim against a municipal government for arbitrary arrest and detention, but found the claim was not supported under the facts. Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998).
44. Only one judge has written an opinion rejecting Filártiga, Judge Bork's concurring opinion in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798-823 (D.C. Cir. 1984); neither of the other judges on the panel joined his opinion (the case produced three separate opinions, agreeing only in the result), and no judge since has adopted Judge Bork's reasoning.
45. The House TVPA Report states that the ATCA has important uses and should not be replaced, and notes that the Filártiga decision "has met with general approval." H.R. Rep. No. 367, supra note 16, at notes 3, 4.
the inevitable evolution of the law of nations triggers ATCA litigation under increasingly controversial circumstances.

A. Federal Foreign Affairs Powers

As with many congressional enactments, the ATCA rests on several alternative constitutional provisions. All derive to some extent from the framers’ expressed intent to centralize foreign affairs powers in the federal government.

The roots of the ATCA have been traced to a series of crises during the period between independence and the ratification of the Constitution, a time when the Continental Congress struggled ineffectively to govern the loose federation of independent states.\(^4^6\) One of the prime areas of concern was the Confederation’s inability to prevent the states from violating international obligations. After two incidents in which foreign diplomats were assaulted but the states failed to act to protect their diplomatic status, Congress twice called on the states to both prosecute crimes in violation of international law and to permit civil suits for damages by those injured by such violations. Only one state, Connecticut, is known to have responded.\(^4^7\) The states’ refusal to force repayment of private debts to the British and their allies - as promised in the treaty ending the war - threatened to precipitate new hostilities.\(^4^8\)

Leading participants at the Constitutional Convention described federal control over foreign affairs as a central objective of the new Constitution. In particular, they emphasized the need for federal supervision of domestic actions that might have an impact on foreign relations.\(^4^9\) The violent crimes committed against diplomats, for example, were of concern not because the underlying crime - assault and battery - had international implications, but because the target of the assault brought the crime into the realm of foreign affairs. Similarly, debt repayment, normally a domestic affair, became a national and international crisis when such payments were governed by international commitments.

The Constitutional Convention responded by centralizing foreign affairs powers in the federal government through a series of clauses granting particular

\(^{46}\) See Stephens, supra note 3, at 402-03.


\(^{48}\) See Dodge, supra note 47, at 236, 254; Dunlop v. Ball, 6 U.S. 180 (1804) (“Until the act of 1793, from the obstacles interposed by juries, and the proceedings of some courts of Virginia, a general opinion prevailed among the inhabitants of the state of Virginia, and among juries, that a British debt could not be recovered.”).

\(^{49}\) Stephens, supra note 3, at 402-07.
powers to the federal government and prohibiting the states from exercising others.\textsuperscript{50} In addition, as the Supreme Court has stated repeatedly, certain foreign affairs powers arise out of the very structure of our government. As summarized in a case addressing federal authority over immigration, "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."\textsuperscript{51} In a later case, the Court relied upon the supremacy of federal authority over "the general field of foreign affairs," a supremacy to which the Court has "given continuous recognition."\textsuperscript{52} "The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."\textsuperscript{53}

This federal authority over foreign relations provides support for congressional power to regulate foreign affairs. In upholding the constitutionality of the Foreign Sovereign Immunities Act, for example, the Supreme Court found that Congress has the power to define the circumstances under which foreign governments can be sued in United States courts.

By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter

\begin{itemize}
\item \textsuperscript{50} The Constitution grants Congress the authority to "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," and "repel Invasions," and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," U.S. Const. Art. I, § 8, while the President is to serve as "Commander in Chief of the Army and Navy of the United States," "make Treaties," with the "Advice and Consent of the Senate," U.S. Const. Art. II, § 2, appoint ambassadors subject to Senate approval, and "receive Ambassadors and other public Ministers." Id. at § 3. The states are prohibited from entering into "any Treaty, Alliance, or Confederation;" or granting "Letters of Marque and Reprisal;" or, without the consent of Congress, "lay[ing] any Duty of Tonnage, keep[ing] Troops, or Ships of War in time of Peace, enter[ing] into any Agreement or Compact with another State, or with a foreign Power, or engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. Art. I, § 10.
\item \textsuperscript{51} The Chinese Exclusion Case, 130 U.S. 581, 606 (1889). See also MacKenzie v. Hare, 239 U.S. 299, 311 (1915), where the court stated, "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries."
\item \textsuperscript{52} Hines v. Davidowitz, 312 U.S. 52, 62 (1941).
\item \textsuperscript{53} Id. at 63-64 (citations omitted). This has been the consistent holding of the Supreme Court, stated most strongly in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), where Justice Sutherland reasoned, "[T]he powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution," but rather are "vested in the federal government as necessary concomitants of nationality." Id. at 318, 325-26. The Constitution, Sutherland concluded, was based upon the "irrefutable postulate that though the states were several their people in respect of foreign affairs were one." Id. at 317.
\end{itemize}
of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident. To promote these federal interests, Congress exercised its Article I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States.  

Similarly, Congress has the power to decide "whether and under what circumstances" claims alleging violations of international law trigger liability in United States courts. In the TVPA, a modern Congress defined specific examples of such liability. In the ATCA, the 18th century Congress delegated to the courts the task of defining the exact contours of such claims.

Such delegation was unexceptionable to the framers, who assumed that customary international law was a part of the common law of both the states and of the new federal government. In our modern, post-<i>Erie</i> world, this unwritten international law is part of the federal common law, a source of both supreme federal law, binding on the states, and of federal court jurisdiction. Indeed, the <i>Filártiga</i> court rested its analysis of the ATCA in part upon the fact that customary international law is part of the federal common law, and, as such, cases alleging violations of such international norms "arise under" federal law for the purposes of Article III of the Constitution.

---

54. Id. at 493 (footnote and citations omitted). The Court explained that the application of federal law thus triggered federal court jurisdiction:

The statute must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity. At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies - and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction.

Id. at 493-94 (footnote and citation omitted).

55. "[W]e conclude that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996).


58. <i>Filártiga</i> v. Peña-Irala, 630 F.2d 876, 887 (2d. Cir. 1980).
B. The Offenses Clause

The Constitutional Convention also included an apparently noncontroversial clause empowering Congress to "define and punish ... offenses against the law of nations." 59 The first Congress codified several crimes committed against diplomats as offenses against the law of nations.60 Further criminal codification was unnecessary, given that federal courts prosecuted common law crimes without codification for the first thirty years of the new nation.61 The civil side, however, was also codified by the first Congress, by including the ATCA as a section of the First Judiciary Act.62 The language of the ATCA tracts that of the Constitution, granting federal courts jurisdiction over torts "in violation of the law of nations," and it is likely that the offenses clause served as an important piece of constitutional support in the minds of its framers.63

C. The ATCA and the Evolving Law of Nations

Given this constitutional history, the current interpretation of the ATCA seems both plausible and consistent with the general intentions of the framers. This is not to say, of course, that any participant in the drafting and ratification of the statutes foresaw its application, for example, to a claim of genocide against the leader of a de facto regime in Europe. Such an action was no more foreseeable in 1791 than was the federal government's power to regulate interstate commerce conducted by means of the Internet. An attack on the


60. Diplomatic Relations Act of Apr. 30, 1790, ch. 9, 1 Stat. 117-18 (declaring certain acts against diplomats to be crimes against the law of nations).


62. The civil side of the offenses clause has been frequently overlooked. The only commentators to address the clause have assumed without discussion that it applies only to criminal prosecutions. See Howard S. Fredman, Comment, The Offenses Clause: Congress' International Penal Power, 8 COLUM. J. TRANSNAT'L L. 279 (1969) (reflecting the criminal limitation in its title, without further discussion); Charles D. Siegal, Deference and Its Dangers: Congress' Power to "Define ... Offenses Against the Law of Nations," 21 VAND. J. TRANSNAT'L L. 865, 866 (1988) (describing the clause as "permitting Congress to define violations of customary international law as domestic crimes," also without further discussion (emphasis added)). Congress, however, cited the clause in support of congressional power to impose civil liability in enacting both the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602-11 (1994), and the TVPA. As explained in Stephens, Congress is clearly correct in relying on the offenses clause for civil as well as criminal powers, supra note 59.

63. See Stephens, supra note 59.
Filártiga approach based on supposed unforeseeability is meaningless; most of the core institutions of our current society were unforeseeable at the time the Constitution - and the foundational statutes passed by the first Congress - were enacted.

One recent argument posits that the First Congress intended to create a cause of action only for claims for which the United States would be held accountable if it failed to provide redress. Thus, the international law crises during the Confederation were triggered by attacks on foreign diplomats and by treaty violations. In such situations, the injured parties looked to the United States government for satisfaction; when it was not forthcoming, the national government risked reprisals from the victim’s government.

But the language of the ATCA was not restricted to violations of diplomatic privileges. Instead, Congress chose much more expansive language, creating remedies for all torts in violation of the law of nations. The plain meaning of this language is exactly that applied by Filártiga: torts that violate currently existing norms of international law. And the background understandings of the framers, to the extent that we can uncover them, support this meaning. Indeed, when the offenses clause was adopted at the Constitutional Convention, authorizing Congress to “define and punish . . . offenses against the law of nations,” the only recorded opposition addressed the incongruence of a claim that the United States could “define” the law of nations. “To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make us ridiculous.” The framers understood that the world community would take international law along paths that they could not predict; rather than fixing its content, they chose a standard that would enable the statute to evolve along with the law of nations.

Moreover, to the extent that the goal of the statute was to avoid international disputes, the drafters chose language that accommodated the reality that they could not predict what issues would be considered to be of international concern in the future. In their day, diplomatic protection and treaty violations were of central concern. Today, issues of trade and human rights are just as likely to provoke international uproars. Well aware both of the changing nature of the law of nations and the reality that no one nation could control its evolution, the framers crafted the ATCA broadly enough to encompass

64. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 614-15 (Max Farrand ed., rev. ed. 1937). The language was accepted only with the explanation that “define” was intended to suggest the need to provide detail, not to create offenses where none had previously existed: “The word define is proper when applied to offenses in this case; the law of nations being often too vague and deficient to be a rule.” Id. at 615.
changing notions of international obligations. Interpretation of the ATCA is in this sense quite simple: it means what it says, as several courts have held.  

V. FEDERALISM AND CONGRESS’ POWER TO ENFORCE INTERNATIONAL LAW

Congress’ power to implement international law rests upon several constitutional provisions, including the federal structural foreign affairs power, the federal common law status of customary international law, the power to “define and punish... offenses against the law of nations,” and the interactions between each of these and the wide-ranging “necessary and proper” clause. How far does the power to implement international obligations extend? Can Congress enact statutes pursuant to this power that would not otherwise fall within the federal legislative powers? In particular, what constitutional result if Congress enacts a statute regulating foreign affairs that infringes into an area otherwise reserved to the states?

Both the logic of the foreign affairs power and Supreme Court decisions in analogous areas indicate that Congress can take such actions. Each of the congressional powers constitutes a specific grant to the federal government of the authority to regulate activities that fall within its reach; only those powers that are not assigned to the federal government are reserved to the states. In an analogous area, the Supreme Court held long ago that congressional power to implement treaties extends into areas over which Congress could not otherwise legislate. Despite recent criticism, this doctrine remains good law.

Similarly, the congressional foreign affairs powers - the structural power and the enumerated powers, including that contained in the offenses clause - afford Congress the authority to take any and all actions to implement international law and regulate foreign relations, as long as such actions do not violate specific constitutional mandates.

Thus, in Boos v. Barry, one of the few cases relying on the offenses clause, the Supreme Court analyzed congressional statutes barring certain peaceful protests in the vicinity of foreign embassies. The Court found one

65. See, e.g., Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995), holding that the ATCA “confers federal subject matter jurisdiction when the following three conditions are satisfied: (1) an alien sues; (2) for a tort; (3) committed in violation of the law of nations (i.e., international law).”

66. Particular congressional actions, of course, might also rest upon anyone of the specific congressional powers, see supra note 50.


68. See Martin Flaherty, Are We to be A Nation? Federal Power vs. States’ Right in Foreign Affairs, 70 UNIV. COL. L. REV. 1277, 1297-1316 (1999).


70. The case addressed the constitutionality of a statute governing protests within the District of Columbia, but compared the District of Columbia statute to a similar, but less restrictive statute governing
Stephens statute to violate the First Amendment, noting that “it is well established that ‘no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.’”71 However, the Court accepted without question Congress’ power to legislate in this area, despite the fact that the federal government would otherwise have had no power to regulate peaceful political protests. Noting that “[t]he need to protect diplomats is grounded in our Nation’s important interest in international relations,” the Court reviewed efforts to protect foreign diplomats dating back to the pre-constitutional era of the Confederation. Indeed, the Court noted that, if anything, the pressing national interest in diplomatic protection is “even more true today given the global nature of the economy and the extent to which actions in other parts of the world affect our own national security.”72

_Boos v. Barry_ addressed a statute aimed at protecting diplomats, a centuries-old topic of international law. But the constitutional analysis would be no different applied to a modern application of international law. As with the ATCA, nothing in the Constitution freezes foreign affairs to the areas of concern they occupied at the time the document was drafted and ratified. In particular, the available evidence as to the intentions and understandings of the framers, confirmed by early Supreme Court opinions, indicates that the Constitution incorporates the assumption that the issues governed international law necessarily evolve over time.

Consider, for example, the international law provisions governing imposition of the death penalty on juveniles. Much of the world considers such executions to be barred by international law; the United States, however, through reservations to treaties and other objections has attempted to bar the international norm from applying to United States conduct.73 In the absence of such objections, the norm would be binding on the United States, either through treaty obligations or as a norm of customary international law.74 In such a situation, failure to obey the prohibition would place the United States in such protests around the country. The Court noted that Congress had enacted the District of Columbia statute pursuant to its authority under Article I, § 8, cl. 10, of the Constitution to “define and punish ... offenses against the Law of Nations.” _Id._ at 321. The Court also referred to the United States treaty obligation to protect diplomats, contained in the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502. _Id._ at 322.

71. _Id._ at 324, cited in _Reid v. Covert_, 354 U.S. 1, 16 (1957).
72. _Id._ at 322.
74. Some commentators have argued that United States objections have been ineffective, and that the norm is already binding within this country. See Hartman, _supra_ note 73.
violation of its international law obligations, although repercussions from other members of the world community would likely be limited to criticism, rather than concrete reprisals. In the absence of domestic incorporation of the international rule, United States courts would refuse to enforce it, on behalf, for example, of a person sentenced to death for a crime committed as a juvenile.

But if Congress chose to adopt the norm as binding on the United States, it would obtain the force of federal law. Congress could constitutionally enact legislation implementing the prohibition on the juvenile death penalty relying on the federal foreign affairs power. Such a statute would no more infringe upon states' rights than the 1790 classification of assaults upon diplomats as federal crimes, or the more recent federal prohibition of certain acts in the vicinity of foreign embassies, upheld in *Boos v. Barry*. In each of these examples, Congress has the authority to regulate activities that would otherwise fall within the control of the states because Congress has determined that such regulation implicates foreign policy concerns. Although the issues of international importance have changed, congressional power to determine the content of such issues remains the same.

VI. CONCLUSION

The modern expansion of human rights law to cover private actors is firmly founded both in 18th century concepts of the evolving law of nations and in developments in international law over the past fifty years, developments that the United States has both guided and accepted during that time period. Indeed, in a world in which private corporations wield more power than most governments and are increasingly active in areas formerly reserved for diplomats, it is inevitable that international law must increasingly address the behavior of both private individuals and private corporations. The acceptance of norms governing private actors into international law reflects a new international consensus that such issues are of international concern, that they affect international relations.

Similarly, international law recognizes no exceptions either for United States government officials acting abroad, or for the actions of the United States government within our borders. It is time for the United States to accept this reality and to bring the nation into compliance with international obligations. ATCA litigation has opened a window for litigating such issues in United States courts; the opening must be strengthened and enlarged if the United States wishes to be recognized as a law-abiding member of the world community.
THE CIVIL ENFORCEMENT OF HUMAN RIGHTS NORMS IN DOMESTIC COURTS

Beth Van Schaack*

This Article will attempt to make the case for the domestic civil action in defense of international human rights in the face of a potential threat to such litigation. It starts with a discussion of the importance of civil redress for human rights victims and then recounts developments in the area of private international law that threatens these domestic civil enforcement measures.

Until very recently, impunity for human rights violations and international crimes has been the general rule in the international community, with few exceptions. It is clear that only a small proportion of those who commit human rights offenses are ever brought to justice in a court of law. Some perpetrators are insulated by blanket amnesties erected in the wake of a transition to democracy, while others benefit from general government complicity and inaction. It is axiomatic that this pervasive impunity is probably the most important factor in the recurrence of such abuses.

Recently, a great deal of attention has focused on efforts at the international level to establish institutions to end this culture of impunity and ensure some measure of accountability for human rights violations. These efforts include the establishment of the two *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, the future establishment of the permanent International Criminal Court (ICC), and renewed interest in the establishment of a hybrid institution to try members of the Khmer Rouge for the international crimes committed in Cambodia in the 1970s. However, even when these institutions are fully operational at the international level, domestic enforcement mechanisms will continue to play a vital role in the promotion of international human rights norms. International institutions, by necessity and by design, are capable of addressing only a limited number of perpetrators and conflicts. The jurisdiction of *ad hoc* tribunals, such as those established to respond to the crises in the former Yugoslavia and Rwanda, is limited substantively, temporally, and geographically. Likewise, a fundamental pillar of the ICC statute is the principle of complementarity, which provides that the future Court will operate only when the domestic court with jurisdiction is unable or unwilling to go forward with prosecutions. In all fora, prosecutions at the international level will probably be limited to those individuals

* Attorney, Morrison & Foerster; Consulting Attorney, The Center for Justice and Accountability.
B.A. Stanford University; J.D. Yale Law School.
commanding and controlling large-scale abuses and to individuals committing the most serious violations of international humanitarian law. Thus, in order to address comprehensively this problem of impunity, national systems must be prepared to take action against human rights abusers within their jurisdictional reach. National legal systems may respond in a variety of ways to the presence of human rights abusers within their territories or subject to their jurisdictional reach. These include criminal prosecutions, often according to the principle of universal jurisdiction, administrative remedies, and civil redress. No one mechanism is sufficient, and human rights advocates must strive for the creation of a coordinated and multifaceted national response to the problem of impunity.

Europe has witnessed a resurgence in domestic criminal proceedings initiated against human rights abusers not seen since the close of World War II. Many of these cases have been brought on the basis of the principle of universal jurisdiction, as the events in question usually occurred extraterritorially and involved non-nationals. A leading example is found in the Pinochet proceedings, but prosecutions of individuals accused of committing international crimes during the conflicts in Latin America, Bosnia, Rwanda, and elsewhere have been commenced in almost every European state, including Austria, Denmark, Germany, Italy, the Netherlands, France, and Switzerland. Additionally, many countries have enacted domestic statutes specifically authorizing the exercise of universal jurisdiction over individuals accused of perpetrating grave international crimes. The typical remedy of a criminal proceeding is the incarceration of other punishment of the perpetrator. At the same time, civil reparations for the victim in the form of a money judgment may be available through the criminal law system in civil law countries that have adopted the partie civile system.

In contrast to these exciting developments in Europe, criminal proceedings enforcing international human rights norms in the United States are almost non-existent despite the legal authorization, and indeed the obligation to criminally punish human rights abusers within this country. In 1994, the United States enacted federal legislation providing for the prosecution of torturers found within its borders pursuant to the principle of universal jurisdiction espoused in the Torture Convention. To date, however, the United States has declined to initiate criminal proceedings under this statute, despite credible and corroborated evidence of the presence of torturers here.

In addition to criminal prosecutions, states may respond to human rights abusers with administrative measures. These remedies usually relate to an accused's right to enter or remain in a particular country and include exclusion, deportation, denaturalization, or revocation of visa rights. For example, after staging a few largely unsuccessful prosecutions of World War II defendants, Canada reevaluated its strategy in 1995, and thereafter adopted a practice of
deporting non-Nazi perpetrators from the country, rather than criminally prosecuting them.

Individuals seeking admission into the United States either as refugees, asylees, or in other capacities must disclose their military service and answer a series of questions relating to past criminal behavior. Unfortunately, these filters are not as fine as one would hope. For example, one United States forum asks candidates if they ever committed a crime of “moral turpitude.” The form fails, however, to proffer specific questions about the candidate’s involvement in the torture or persecution of others. If individuals misrepresent their past on an immigration form, they may be subject to administrative remedies, such as deportation, or they may face criminal prosecution for fraud. Earlier this year, Senator Leahy of Vermont sponsored legislation approved by the Senate and designed to strengthen administrative remedies by empowering the Office of Special Investigations of the Department of Justice to investigate and prosecute modern day war criminals and human rights violators present in the United States.

Such administrative responses have the benefit of providing victims of human rights abuses with a genuine safe haven in their country of refuge. However, these measures may ultimately prove unsatisfactory to victims because they provide only a limited degree of punishment or accountability. Further, such proceedings take place in closed hearings that do not afford victims an opportunity to present their claims in a court of law or see justice in action. And they do not assign individual liability or provide victims with reparations.

This brings us to civil suits within domestic courts. This may seem strange to some observers, but every international crime - such as the crime of genocide or torture - is also a tort. Human rights abuses manifest this dual character as both crimes and torts because they harm both human society generally and individual victims. The commission of a tort can give rise to a civil proceeding by the victim against the tortfeasor, and the principle remedy is a money judgment for the victim against the perpetrator.

In the United States, civil cases against human rights abusers have been pursued with consistency over the last two decades by organizations such as: the Center for Constitutional Rights in New York and The Center for Justice & Accountability in San Francisco. Many of these cases manifest a form of civil universal jurisdiction, in that, personal jurisdiction over the defendant is obtained wherever he may be found. These civil cases have the benefit of involving the victim directly in the legal process. The victim chooses to initiate the proceeding and then plays a central role throughout. This is in contrast to a criminal trial, at least in the United States and other common law countries, in which the victim plays a secondary role as witness for the prosecution against the defendant.
Those of us who represent victims of human rights violations have found that this active and direct participation within the legal system is empowering and often restores a sense of justice for victims of grave human rights abuses for whom the courts of their countries provided no recourse. Civil cases can also be commenced where the government is unwilling to act against abusers within a particular country, as is currently the situation in the United States. The remedy provided by a civil suit is money damages. The theory behind tort damages is that they return the plaintiff to the place he or she was prior to the commission of the tort. In the context of a case seeking to enforce human rights norms, a money judgment is clearly no equivalent to the harm suffered by the victims of human rights violations; something fundamental has been taken from them. However, money damages may begin to compensate the victim for the pain, emotional distress, and bodily harm suffered, as well as, for medical expenses, and lost wages, and earning potential. In some common law systems, punitive or exemplary damages can also be awarded to reflect the willful or wanton nature of the defendant's conduct and to contribute to the deterrence of future tortfeasors.

There are some limitations to such suits. First, during the pendency of the suit, the defendant is not detained in any fashion, which may raise security concerns for the plaintiffs. Further, in most countries, the defendant can leave the country despite the filing of a suit against him. Thus, there is no guarantee that the proceedings will be adversarial in nature, and the plaintiff may end up with a default judgment in her favor without a detailed articulation of the full scope of her rights under international law. The most vexing limitation of civil suits relates to the difficulty of enforcing any resultant judgment. Cases brought in the United States have been plagued by a lack of enforcement, because defendants may not hold assets here or they may secrete their assets abroad during the pendency of the suit. Further, a money judgment may be difficult to enforce overseas. There is no worldwide enforcement regime in place. As a result, the enforcement of foreign judgments is largely a matter of comity and reciprocity.

Several years ago, the United States initiated an effort on the international level to create a worldwide system aimed at the universal enforcement of foreign judgments in exchange for the rigid regulation of the exercise of jurisdiction. As will be explained, this system raises large stakes for civil human rights litigation in domestic courts. Delegates from the international community are in the process of drafting a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters under the auspices of the Hague Conference on Private International Law. The proposed Convention will govern all "civil and commercial matters" within the national courts of signatory countries brought against defendants domiciled in another signatory
country. As such, the Convention would apply to civil suits by human rights victims and civil judgments for reparations obtained through criminal trials.

The Convention seeks to regulate two areas of private international law: the exercise of jurisdiction and the enforcement of foreign judgments. The latter aspect of the Convention, dealing with the enforcement of foreign judgments, holds the potential to greatly benefit civil human rights suits by providing a mechanism for the automatic enforcement of judgments in the jurisdictions in which defendants have assets. However, the former aspect of the Convention - dealing with the exercise of jurisdiction - may actually hinder, and under some circumstances eliminate, civil suits seeking to enforce human rights norms. As the Convention was originally drafted, the default jurisdictional rule was found in draft Article 3, which provided that suits could be brought in the jurisdiction in which the defendant resides. Draft Article 10 was a claim specific rule governing cases in tort. According to this rule, a suit sounding in tort could also be brought in the forum in which the tortious activity occurred. Article 20 outlined a series of prohibited bases of jurisdiction and included two important bases of jurisdiction for plaintiffs seeking to enforce international human rights norms: doing business jurisdiction and transient jurisdiction. The former allows for plaintiffs to bring suit in a jurisdiction in which the defendant engages in "systematic and continuous" activities, even if the defendant is not a resident in the jurisdiction. The latter allows for plaintiffs to bring suit in any forum in which the defendant is present, so long as the process is properly served while the defendant is in the forum.

Under the original jurisdictional system, victims of human rights abuses seeking civil redress would have had two options available to them: suing in the state in which the defendant resides or suing in the state in which the harm occurred. Thus, these provisions would have entirely foreclosed the application of universal jurisdiction in the civil context. These original provisions failed to reflect the fact that many human rights cases before national courts are brought outside of the state in which the harm occurred or in which the defendant resides. The vast majority of grave international law violations occur in states that are experiencing political upheaval or are governed by authorities who themselves are responsible for the commission of, are complicit in, or are otherwise indifferent to such violations. Further, perpetrators of human rights violations may benefit from a blanket amnesty that precludes criminal and civil trials. As such, domestic courts in these states may be unable or unwilling to proceed effectively against perpetrators or to provide victims with redress.

In order to ensure their safety, many victims of human rights abuses have had to flee the state in which the harm occurred, such that it may be impossible for them to return to that state in order to pursue their rightful claims. They may even be refugees as defined by the 1951 Refugee Convention. Requiring the victim to return to their country of persecution in order to seek redress
clearly convenes the object and purpose of the Refugee Convention and the international law principle of non-refoulement.

Given these unfortunate realities, in order to seek civil redress, such victims must be able to access the courts of other nations when a human rights violator travels abroad. Articles 3, 10, and 20 as originally drafted would have barred this. Further, the proposed Convention could have prevented the enforcement of civil judgments arising out of criminal trials if jurisdiction were premised on the principle of universal jurisdiction, which was effectively prohibited by the proposed Convention.

In this way, the original draft of the proposed Convention could have extinguished efforts by certain states to enforce international human rights norms through civil litigation in their national courts and foreclosed efforts to develop similar avenues for redress elsewhere. This would have significantly stymied efforts by states to fulfill specific conventional and customary international law obligations to prevent, punish, or remedy international law violations. Many international human rights conventions, such as the Torture Convention and the two International Covenants, oblige states parties to provide victims of abuses with a meaningful remedy, access to the judiciary, and monetary reparations. If the Convention were ratified as it was then drafted, signatories would arguably have been in breach of these conventional provisions. This is especially alarming given the lack of available international and regional fora for individual victims of human rights abuses.

Fortunately, attorneys and advocates representing victims of human rights abuses became aware of the implications of this Convention to cases seeking to enforce human rights norms in domestic courts and sounded the alarm among other members of the human rights community. These concerned individuals formed a “Human Rights Coalition” to participate in the drafting process of the Convention and lobby delegates to include language excluding human rights provisions from the more restrictive aspects of the Convention’s jurisdictional regime. Negotiations of the Hague Conference on Private International Law on the draft Convention were held most recently in October 1999 in preparation for a final Diplomatic Conference in 2000. Going into the negotiations, members of the Coalition had secured a bracketed “placeholder” that suggested an exception for civil suits seeking to enforce human rights norms. However, this placeholder did not provide any details regarding the scope of the exception. Fortunately, the negotiation session resulted in considerable progress, although additional work is necessary.

The debate began with the submission from the Human Rights Coalition that proposed that the following language be inserted in Article 20:

Nothing in this Article shall prevent a party from bringing an action in a national court seeking relief for a violation of international
human rights or international humanitarian law that amounts to
criminal conduct under either international or national law, or for
which a right to reparation is established under either international
law or national law. International law shall be interpreted with
reference to the sources of international law identified in Article 38
of the Statute of the International Court of Justice.

In drafting this language, members of the Coalition were mindful of two
considerations. On the one hand, we wanted to keep the language as broad as
possible in order to allow for the evolution of norms under international law.
At the same time, however, we were cognizant of the fact that delegates would
balk if the exception swallowed the rule. Thus, we drafted the text so that the
exception would apply only to conduct that rose to the level of a crime under
international law. We also suggested that courts look to international and
domestic law to determine which norms have attained this status.

In the ensuing debate, some delegates were concerned that this proposal
remained overly vague and broad. In response, another proposal was put
forward that enumerated a few crimes that would activate the exception and
required future plaintiffs to demonstrate exposure to a risk of a denial of justice,
because proceedings in other states are not possible or could not reasonably be
required. Other delegates insisted that this short list of crimes would prove to
be too limiting over time and disallow normative evolution. A third proposal
was advanced that enumerated three general categories of crime - genocide, war
crimes, and crimes against humanity - in keeping with the subject matter
jurisdiction of the ICC Statute.

China introduced a fourth proposal that would trigger the exception only
if the state exercising jurisdiction was acting in accordance with an interna-
tional treaty to which it is a party. Other delegates countered that the Conven-
tion’s exception should be triggered by a violation of customary international
law norms, as well as by treaty violations, in order to address the patent
inequalities created by the fact that not every state has enacted the necessary
implementing legislation for the treaties they have signed.

By the end of the session, the Drafting Committee had consolidated these
proposals into the following draft text to be located in Article 20:

4. Nothing in this article shall prevent a court in a Contracting State
from exercising jurisdiction under national law in an action [seeking
relief] [claiming damages] in respect of conduct which constitutes:
[Variant One:

genocide, a crime against humanity, or a war crime [as defined in the statute of the International Criminal Court]; or a serious crime against a natural person under international law; or a grave violation against a natural person of non-derogable fundamental rights under international law, such as torture, slavery, forced labor and disappeared persons. Sub paragraphs [(b) and (c)] above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another state are not possible or cannot reasonably be required.

[Variant Two:
A serious crime under international law, provided that that state has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.]²

The fact that the entire provision is not in brackets is a welcome development in that it indicates that a human rights exception will be included within the final text, although this could theoretically be re-opened at the final Diplomatic Conference in 2000.

However, this language does include some limitations. First, Variant 2 is unacceptable for the reasons discussed above, and some version of Variant 1 must be adopted. However, the Convention should not require proof that proceedings in another state are not possible. This has never been a prerequisite to the exercise of universal jurisdiction. Further, plaintiffs should not bear the burden of trying to bring suit in various other jurisdictions when the forum in which the defendant is found can exercise jurisdiction under the universality principle. Second, the crimes that trigger the exception should not be defined with reference to the Statute of the ICC. The subject matter jurisdiction of the future ICC is limited to the most serious international crimes. As such, these definitions include high thresholds of applicability in order to exclude smaller-scale and isolated crimes from the ICC’s jurisdiction. It is crucial that some exceptional language along the lines of a modified Variant 1 be included within the Convention text to protect cases seeking to enforce international human rights norms from these restrictive jurisdictional provisions. This will ensure that victims of human rights violations who lack access to the courts of the state in which the harm occurred are not denied legal redress, and that perpetrators who are immune from suit in their home countries can be held accountable for their violations of international law wherever they can be found. These minor modifications will ensure that the Convention on Jurisdiction and Judgments reflects the fact that human rights litigation is qualitatively different from

² Drafting Committees consolidation of Section 4 for Article 20 (1999-2000).
commercial or tort litigation, and that it is inappropriate to subject these vastly disparate types of cases to a uniform set of jurisdictional rules. Further, the Convention will actually advance the cause of human rights by providing a uniform enforcement mechanism that will ensure the enforcement of judgments arising out of civil suits seeking to enforce human rights norms.

International human rights law is composed of a litany of rights that are fundamental to our sense of fairness and justice. However, if these rights are to be meaningful, the law must enforce them and provide a meaningful redress to victims. Civil suits in domestic courts play an important role in this process. A court judgment denouncing a human rights violation, identifying a responsible individual, and providing reparations can go a long way toward restoring a victim's sense of justice. Further, an enforceable damage award can assist the rehabilitation of victims of human rights abuses who must restart their lives in their countries of refuge. Unless wrongful conduct is addressed in some official and public capacity, violations will be repeated with impunity. For these reasons, it is imperative that the proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters enables, rather than disables, civil suits seeking redress for grave human rights violations.
INTERNATIONAL HUMAN RIGHTS, INTERNATIONAL HUMANITARIAN LAW, AND ENVIRONMENTAL SECURITY: CAN THE INTERNATIONAL CRIMINAL COURT BRIDGE THE GAPS?

Mark A. Drumbl*

I. INTRODUCTION ........................................ 305
II. OVERVIEW OF THE ENVIRONMENTAL CONSEQUENCES OF ARMED CONFLICT ........................................ 307
III. THE ICC AND ENVIRONMENTAL PROTECTION: THE LANGUAGE OF THE ROME STATUTE ........................................ 310
A. The Physical Act: Widespread, Long-term and Severe Damage ........................................ 315
B. Exculpatory Effects of Military Advantage ........................................ 319
C. The Mental Element: Strict Intentionality ........................................ 321
IV. IS IT WORTH GREENING THE ICC? .................... 323
A. Environmental Concerns Lost in the Shuffle ........................................ 326
B. Low Environmental Expertise of the Judges and Prosecutors ........................................ 327
C. Inappropriate Sanctions ........................................ 327
D. Limited Scope of Judicial Interpretation ........................................ 329
E. No Room for Negligence or Recklessness ........................................ 330
V. PUNITIVE SANCTION, PROACTIVE PROTECTION, OR ENVIRONMENTAL JUSTICE? ........................................ 331
VI. CONCLUSION ........................................ 341

I. INTRODUCTION

Human rights law has evolved considerably over the past half-century. Much of this evolution has occurred at the international level. Evolution can, of course, consist of growth and expansion, or decline and regression. For the

* Assistant Professor, School of Law, University of Arkansas at Little Rock. E-mail address: madrumbl@ualr.edu. This Article was presented at the International Law Association International Law Weekend (November 4-6, 1999), for a panel entitled “Evolving Law: International Human Rights in Flux.” Parts (III) and (IV) of this Article expand upon concerns raised in my essay Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes, 22 FORDHAM INT’L L.J. 122 (1998).
most part, the recent international evolution of human rights law has tended towards growth and expansion.

Growth can involve the creation of new mechanisms to enforce basic civil rights by holding accountable those who violate these rights. In recent years, the creation of mechanisms to promote accountability has become a focal point of activity for international lawyers. This activity has most immediately culminated in the adoption of the Rome Statute of the International Criminal Court (Rome Statute) in July, 1998. The Rome Statute innovates on both the procedural and substantive fronts. Along with creating an enforcement mechanism in the form of the International Criminal Court (ICC), the Rome Statute also refines prior customary and conventional rules by providing a detailed list of what can prospectively be sanctioned as the “most serious crimes of concern to the international community as a whole.” In this regard, the Rome Statute creates important linkages between human rights, international humanitarian law, and international criminal law. This gives rise to what one scholar has labeled the “humanization” of international humanitarian law.

Although there has been considerable parallelism between international human rights and international humanitarian law, this has, for the most part, occurred within the nexus of classic human rights such as the right to life, the right to freedom from persecution, and the right to bodily integrity. The evolution and growth of social and political rights, and their penetration into the world of international humanitarian law, has been much slower. A traditionally socio-political right whose exploration shall constitute the focus of this Article is the right to live in a healthy and productive environment, which some have called “environmental security.” For the most part, the linkage between international humanitarian law and environmental security is weak and may in fact reflect a somewhat troubling disjunction between international environmental law and humanitarian concerns. Although international humanitarian law may well be “humanized,” it is not showing signs of being “environmentalized.”

The gap between international humanitarian law and environmental security should trouble international lawyers. Just as armed conflict often creates a context in which the most serious human rights abuses occur, so too,
does it create a similar context for the infliction of wanton and extensive destruction to the environment. This destruction creates profound environmental insecurity. Part (II) of this Article explores the insecurities caused by the environmental consequences of armed conflict. Although the international community has shown considerable concern for the humanitarian consequences of war,\(^5\) it has been significantly more hesitant in accounting for war’s environmental consequences. It is for this reason that a very fruitful exploration of the progress that has been made and that still needs to be made in terms of harmonizing international humanitarian law with environmental protection can emerge from a study of how the international community monitors the environmental consequences of war. Part (III) examines the successes and failures of the international legal order in controlling these consequences and directs its focus on the ICC’s jurisdiction to prosecute environmental war crimes. Part (IV) argues that the ICC may not be particularly well-suited to sanction environmentally destructive behavior. This raises the more penetrating question whether punitive criminal approaches pursued in isolation of other policy devices can ever promote environmental security. Part (V) is prescriptive, sketching ways in which the promotion of environmental security can be made more effective. Part (V) posits that the effective promotion of environmental security requires a multifaceted approach, which combines criminal prosecution, preventative measures, and specially tailored remedies. An additional element of this multifaceted approach, inspired by environmental justice litigation in the United States, involves more proactive use of international anti-discrimination conventions to guard against the infliction of environmental insecurity on already disempowered groups. In the end, this encourages environmental security to become more closely integrated with both the protection of human rights and international humanitarian law.

II. OVERVIEW OF THE ENVIRONMENTAL CONSEQUENCES OF ARMED CONFLICT

Modification or desecration of the natural environment has often been used as a strategic mechanism to safeguard state sovereignty. Over two mil-

---

lennia ago, Roman soldiers salted the soil of Carthage. Much more recently, Agent Orange was used to defoliate the Vietnamese jungle. In fact, it is estimated that, from 1962 to 1971, the United States sprayed twelve million gallons of defoliant over more than ten percent of what was then South Vietnam. United States estimates reveal that fourteen percent of the area's forests were destroyed. Other estimates place the figure at nearly one-third. Regardless of the exact numbers, "broad stretches of the landscape are still bare of trees." Civilians and soldiers who had been exposed to defoliants claim to have passed the ill-effects through their family lines. In fact, there are tens of thousands of physically or mentally disabled children in Vietnam whose disabilities can be linked to the spraying of Agent Orange which occurred before they were born or even conceived.

During the 1990-1991 Gulf War, vast quantities of oil were dumped into the Persian Gulf to contaminate Kuwait's water supply. Kuwaiti oil wells were also deliberately ignited by Iraqi troops. Remedy the losses and damages suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait has prompted the creation of the United Nations Compensation Commission (UNCC) as a subsidiary organ of the United Nations. The UNCC is a unique initiative (part court of law, part arbitral tribunal) which adopts mass tort litigation approaches to settle claims and pay compensation, including for damage to the Kuwaiti environment and public health. Iraq, whose liability is presumed, is to pay reparations out of its frozen international

7. Id.
10. There is evidence that dioxin, the poisonous residue of Agent Orange, contributes to the types of birth defects found in Vietnam. However, much of this evidence is "anecdotal" and is disputed by the United States, which persists in refusing to take responsibility. Id.
12. See Public Authority for Assessment of Compensation of Damages Resulting from Iraqi Aggression, OIL AND ENVIRONMENTAL CLAIMS BULLETIN (Aug. 1997). Independent of the damage to Kuwait and to the Persian Gulf waters, it is estimated that the oil well fires set by Iraqi soldiers expelled one to two million tons of carbon dioxide, which in 1991 represented one percent of total global carbon dioxide emissions. Id. at 8. One commentator has estimated that over 700 oil wells were ignited. See Weintraub, supra note 4, at 536.
assets as well as from a portion of its future oil export earnings. Thus far, 2.6 million claims have been filed. The asserted value of claims is still to be resolved $320 billion. Of those claims which have been resolved, nearly 15 million has been awarded in compensation to aggrieved partners.

Reports of significant ecological destruction are also emerging from the Federal Republic of Yugoslavia (FRY). NATO aerial bombardment of the FRY under Operation Allied Force has resulted in the destruction of oil refining installations as well as storage facilities for other industrial products. Much of this destruction arose from the indiscriminate effects of bombing from very high altitude levels. In particular, the destruction of a petrochemical, fertilizer and refinery complex in Pancevo resulted in the discharge of oil, gasoline, and dichloride (a powerful carcinogen) into the Danube river. The bombardment of the Pancevo facility also caused the emission of toxic gases. The result, according to one Western observer, is an “ecological disaster,” with the pollution “spread[ing] downstream to Romania and Bulgaria and then into the Black Sea.” Scientists are also very concerned that extensive flooding may result from ice which may form on the Danube and then become lodged behind three bridges in Novi Sad which were bombed during Operation Allied Force. The areas most at risk include low-lying portions of Serbia, as well as Croatia and parts of Hungary.

In short, “[f]rom antiquity to the present, examples of environmental destruction in war abound.” But it is not only actual war which creates environmental insecurity. The environment also faces severe threats as nations prepare to go to war (mobilization) and as nations turn back from the threat of

15. Id.
16. One scholar has in fact argued that the patterns of the NATO bombings trigger important international humanitarian law concerns. See comments of Professor Julie Mertus, “The Imprint of Kosovo on International Law” Panel, International Law Weekend (November 4-6, 1999) (notes on file with the author).
18. Id.
19. Id.
20. Marlise Simons, Hungary Says Danube's Bombed-Out Bridges May Cause Floods, N.Y. TIMES (October 24, 1999). One hurdle which will have to be overcome in the repair of the bridges is that the FRY government maintains there are still unexploded missiles and other ordnance in the Danube. Id.
21. Id.
war (decommissioning and disarmament). On this latter point, Russian attempts to decommission its nuclear submarines in the Arctic Ocean are being carried out with insufficient financial and human resources and seriously threaten that particularly fragile marine environment. Testing of weapons - specifically nuclear, biological and chemical weapons - also has particularly noxious effects on the environment. These activities collateral to actual armed conflict therefore require regulation. Nonetheless, for the most part, multilateral legal structures only provide limited supervision and monitoring for the environmental consequences of such activities.

III. THE ICC AND ENVIRONMENTAL PROTECTION: THE LANGUAGE OF THE ROME STATUTE

It is only very recently that the international community has made inroads into contemplating the prosecution of those who engage in unacceptable use of the environment during wartime. In this regard, the language of the Rome Statute is important. For the first time, environmental war crimes are independently sanctioned and an apparatus is provided for the punishment of those who commit such crimes. Although there was some scattered mention of environmental war crimes at the Nuremberg Trials, over the past five decades humanitarian abuses have been treated separately from environmental desecration. This disconnect is revealed in the Statute of the International

---
23. Mobilization should also include the day-to-day maintenance of military bases. It is reported that it would take "enormous diversions of money and effort to remediate the numerous hazardous waste sites that the United States military has created at its many military bases." See Weintraub, supra note 4, at 582. Should military bases not be run in an environmentally sensitive manner, the threat of environmental degradation and contamination increases.

24. SYMPOSIUM RATIONALE, ARMS AND THE ENVIRONMENT: PREVENTING THE PERILS OF DISARMAMENT, University of Tulsa (Dec. 9B10, 1999) ("Many of the past and potentially adverse future global environmental impacts on the Arctic caused by Russian nuclear dumping have obstructed and delayed the implementation and multiplied the costs of implementing START I [n.b. the Strategic Arms Reduction Treaties]. The United States, Norway, and the international community are trying, ex post, to address and prevent these unforeseen problems, but might have done so more effectively and efficiently ex ante."). See also, Elizabeth Kirk, The Environmental Implications of Arms Control Agreement (Paper on file with author).

25. See, e.g., German General Rendulic was acquitted of charges that he perpetrated a scorched earth policy as his forces evacuated Norway. See The Hostage Case (U.S. v. List), 11 T.W.C. 759 (1950). Rendulic alleged he believed his forces were being chased by Soviet forces. As a result, he maintained that the environmental destruction was militarily necessary. As it turned out, Rendulic's forces were not being chased by Soviet forces. However, it was held that Rendulic's belief, although mistaken, was reasonably held. Id. The Rendulic case is a classic example of the operation of military necessity as a defense to environmental crimes. See Ensign Florencio J. Yuzon, Deliberate Environmental Modification through the Use of Chemical and Biological Weapons: 'Greening' the International Laws of Armed Conflict to Establish an Environmentally Protective Regime, 11 Am. U. J. INT'L L. & POL'Y 793, 815 (1996).
Criminal Tribunal for the Former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda. Neither Tribunal is directly empowered to prosecute those who propagate environmental insecurity through the commission of environmental war crimes. The International Criminal Tribunal for the Former Yugoslavia has some jurisdiction over war crimes which bear an incidental relationship to the security of the natural environment. The International Criminal Tribunal for Rwanda essentially lacks jurisdiction over even incidental violations of environmental security.

---


28. The ICTY has jurisdiction over a series of war crimes. See Statute of the ICTY, supra note 27, art. at 3. Environmental desecration does not figure among the listed crimes. There is, however, jurisdiction over a series of war crimes which bear an incidental relationship with environmental insecurity. See id. These include: employment of poisonous weapons (art. 3(a)); wanton destruction of cities, towns or villages, or devastation not justified by military necessity (art. 3(b)); attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings (art. 3(c)); and plunder of public property (art. 3(e)). The ICTY can also prosecute as a war crime the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (art. 2(d)). However, these crimes do not involve environmental destruction as a crime per se. Instead they focus on damage to human environments and property. Without the immediate causal link to human harm there can be no liability. This provides no jurisdiction to hold individuals accountable for wanton environmental destruction, regardless of the long-term effects of that destruction on human life or environmental security. The ICTY's jurisdiction over war crimes is not limited to those enumerated in the Statute of the ICTY. Id. at art. 3. However, so far no one has been prosecuted for environmental war crimes. See Preparatory Commission Request, infra note 39, at 29. As a result, the ICTY has not been called upon to decide whether it has the discretionary jurisdiction to address such crimes. Id.

29. Statute of the ICTR, supra note 28, at art. 4. One crime over which the ICTR has jurisdiction that bears a remote relationship to the environment is "pillage." Id. at art. 4(f). Jurisdiction can also be exercised over "violence to health of persons" and "acts of terrorism." Id. at arts. 4(a) and 4(d). Both of these crimes have an even more remote relationship with the protection of the natural environment. However, there have been no charges involving these war crimes. Given the profound environmental insecurity arising out of the Rwandan conflict, the lack of jurisdiction over environmental war crimes is disappointing. The Rwandan conflict has seen two national parks (Parc national des volcans and Parc national de l'Akagéra) landmined, endangered species (the mountain gorillas) poached, agricultural lands rendered barren in order to coerce the migration of persecuted peoples, and systemic resettlement exhausting moderate lands specifically in eastern Congo of their agricultural capacities. See Mark Drumbl, Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials, 29 COLUM. HUM. RTS. L. REV. 545 (1998). The domestic war crimes prosecutions which are occurring in Rwanda have also been completely reticent in the area of environmental crimes.
Under the language of the Rome Statute, however, intentional infliction of harm to the environment may constitute a war crime.\(^{30}\) More specifically, Article 8(2)(b)(iv) prohibits [emphasis added]:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.\(^{31}\)

The negotiation history of Article 8(2)(b)(iv) merits a brief review. The draft of the Rome Statute which served as the basis for the final negotiations listed three other options along with the language which was eventually adopted in Article 8(2)(b)(iv).\(^{32}\) The three rejected options are:

1. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity; (Or)
2. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment;
   (Or)
3. No paragraph [in other words, no prohibition on intentionally inflicting widespread, long-term and severe damage to the natural environment].

In the end, the provision which was adopted was a compromise and, from an environmental perspective, occupies a middle ground. However, it shares with the first option the important limitation that environmental integrity is secondary to the military advancement of national security interests. There are other important limitations. The jurisdiction of the ICC is restricted to "war

\(^{30}\) Rome Statute, *supra* note 1, at art. 5(1)(c) (vesting the ICC with jurisdiction over war crimes). Articles 5(1)(d) and 5(2) create jurisdiction over "crimes of aggression." However, the definition of this term is not provided; in fact, the Rome Statute leaves it to the parties to define this term in the future. *Id.* Those concerned with environmental issues may view the open-ended nature of crimes of aggression as a potential device to expand the ICC’s jurisdiction over environmental matters.

\(^{31}\) *Id.* at art. 8(2)(b)(iv)(emphasis added).

crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes."\textsuperscript{33} The question consequently arises whether the "in particular" language will allow isolated incidents to fall within the purview of the Rome Statute. A more important limitation, however, is the fact that prohibiting harm to the natural environment is explicitly mentioned only once in the entire Rome Statute.\textsuperscript{34} This provision may therefore become peripheral given the broad array of other crimes to which the ICC's energies will be directed. As a result, the effect of this provision may well be more apparent than real. Also, the environmental war crimes provision of the Rome Statute only applies to \textit{inter-state} armed conflicts. Environmental desecration during internecine conflicts is consequently left unaddressed.\textsuperscript{35} This is a

\textsuperscript{33} Rome Statute, \textit{supra} note 1, at art. 8(1). Another limitation to the effectiveness of the ICC in the area of war crimes is the fact that any signatory state can opt out of the ICC's jurisdiction over war crimes alleged to have been committed by that state's nationals or on that state's territory. \textit{See id.} at art. 124.

\textsuperscript{34} In other places, the Rome Statute prohibits as a "war crime" conduct which may be collaterally related to the well-being of the natural environment, or have some other ancillary connection. \textit{See, e.g., id.} at art. 8(2)(a)(iv) (sanctions extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly). Article 8(2)(b) prohibits other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely: (ii) Intentionally directing attacks against civilian objects; (iii) Intentionally directing attacks against ... installations, material ... involved in a humanitarian assistance or a peacekeeping mission; (v) Attacking or bombing ... dwellings or buildings which are undefended and which are not military objectives; (ix) Intentionally directing attacks against ... \textit{[inter alia]} historic monuments; (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (xvi) Pillaging a town or place; (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival. The Rome Statute also criminalizes the use of certain weapons with destructive effects on both humanity as well as the natural environment. \textit{See id.} at art. 8(2)(b). Prohibited practices include: (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices. Many of these weapons are already prohibited by other international agreements. \textit{See, e.g., 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, 35 U.N. GAOR, 35th Sess., U.N. Doc. A/CONF 95/15, Oct. 27, 1980, 19 I.L.M. 1523; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800.

\textsuperscript{35} \textit{See Rome Statute, \textit{supra} note 1, at arts. 8(2)(c) & (e). These articles list the types of war crimes punishable within internal armed conflicts. Intentionally inflicting widespread, long-term and severe harm to the environment is omitted from this list. Basic principles of treaty interpretation provide that this omission is deliberate and evinces a desire not to punish environmental desecration when committed in an internal conflict. Further limitations on the application of the entire Rome Statute to internal conflicts are found in Article 8(2)(f), which provides. Paragraph 2(e) applies to armed conflicts not of an international character and thus \textit{does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is
troubling gap. Also troubling is the fact that the ICC can only capture environmental crimes committed by military forces actively engaged in hostilities. There is therefore no jurisdiction to sanction the environmental insecurity created by armed forces in the testing of weapons or in the mobilization of forces. Nor is there jurisdiction to supervise any disarmament process, notably the modalities of decommissioning and their environmental effects.

Article 8(2)(b)(iv) also triggers more specific interpretive concerns. By way of overview, there are three principal components to the language of Article 8(2)(b)(iv): (1) the actual physical act - or actus reus - which consists of launching an attack which causes “widespread, long-term and severe damage” to the natural environment; (2) a second material element, namely that the damage must be “clearly excessive” in relation to the “concrete and direct overall military advantage anticipated”; and (3) even if both material elements are found, the mental element - or mens rea - must be demonstrated, thereby entailing proof that the attack was launched intentionally and in the knowledge it will cause “widespread, long-term, and severe damage” to the natural environment.
A. The Physical Act: Widespread, Long-term and Severe Damage

A successful prosecution under the Rome Statute will, first and foremost, have to show that the accused launched an attack\textsuperscript{38} which caused "widespread, long-term, and severe damage to the natural environment." Of great importance is that all three elements must conjunctively be proven. The language of "widespread, long-term and severe" has woven its way into the handful of other international humanitarian conventions which address the use of the environment in times of war, for example the 1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention),\textsuperscript{39} and the 1977 Additional Protocol I to the 1949 Geneva Convention (Protocol I).\textsuperscript{40} However, by providing that all three elements must be conjunctively shown to exist, the

\textsuperscript{38} "Attack" has been defined as an act of violence against the adversary, whether in offence or defense." See Protocol I on the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. See also PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT, PROPOSAL SUBMITTED BY JAPAN, U.N. Doc. PCNICC/1999/WGEC/DP.12 (July 22, 1999). The attack cannot be isolated or sporadic, but must involve the use of armed force to carry out a military operation during the course of an armed conflict." See REQUEST FROM THE GOVERNMENTS OF BELGIUM, COSTA RICA, FINLAND, HUNGARY, THE REPUBLIC OF KOREA, SOUTH AFRICA AND THE PERMANENT OBSERVER MISSION OF SWITZERLAND TO THE UNITED NATIONS REGARDING THE TEXT PREPARED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ARTICLE 8, ¶ 2(b), (i), (ii), (iii), (iv), (v), (vi), (vii), (ix), (x) AND (xii) OF THE STATUTE, UN Doc. PCNICC/1999/WGEC/INF.2/Add.1 (July 30, 1999) 29 [hereinafter Preparatory Commission Request].

\textsuperscript{39} United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333 (entered into force Oct. 5, 1978) [ENMOD Convention], which prohibits engagement "in military ... environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage, or injury to any other State Party." The ENMOD Convention focuses on the use of the environment as a weapon - as a result, wanton destruction of the environment occurring as a byproduct of a military campaign might not fall within its parameters. See Richards and Schmitt, supra note 7, at 1063 ("The 1977 ENMOD Convention ... merely limits the use of modification of the environment as a tool or weapon of warfare."). Environmental damage \textit{per se} is for the most part not a concern of the ENMOD Convention. See Richards and Schmitt, supra note 7, at 1063. Some of the activities prohibited by the ENMOD Convention amount to outrageous behavior not within the military capability of most nations for example: inducing earthquakes and tidal waves, or activating quiescent volcanoes.

\textsuperscript{40} Protocol I, supra note 39, at art. 35(3) (prohibits "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"). \textit{Id.} at art. 55 states that:

Carc shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition on the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. Attacks against the natural environment by way of reprisals are prohibited. \textit{See also id.} at arts. 54, 56 (which provide for the protection of property, which has ancillary benefits for the environment.) The United States has not yet ratified Protocol I, in part owing to objections over its environmental provisions. See Richards and Schmitt, supra note 7, at 1054.
language of the Rome Statute regresses from the wording of the ENMOD Convention which bases fault disjunctively on proof of only one of these three characteristics.

What exactly do "widespread," "long-term," and "severe" mean? The Rome Statute is silent on this point. The International Law Commission (ILC) has concluded that "widespread, long-term and severe" describes the "extent or intensity of the damage, its persistence in time, and the size of the geographical area affected by the damage." However, the International Committee of the Red Cross (ICRC) recognizes that the more specific question "as to what constitutes 'widespread, long-term, and severe' damage... to the environment is open to interpretation." In this regard, some interpretive guidance can be provided by the work of the Geneva Conference of the Committee on Disarmament Understanding (CCD Understanding) regarding the application of these terms under the ENMOD Convention. This additional work was necessary since the ENMOD Convention does not itself define these terms. The CCD Understanding provides as follows:

1. "Widespread" encompassing an area on the scale of several hundred square kilometers;
2. "Long-term" lasting for a period of months, or approximately a season;
3. "Severe" involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

Regrettably, the interpretive value of the CCD Understanding is curtailed by the fact that it stipulates that its use is limited to the ENMOD Convention and is not intended to prejudice the interpretation of similar terms if used in another international agreement. As the ENMOD Convention deals with "extraordinary manipulations of the natural environment for military purposes, such as creating floods, it is unclear what weight, if any, it would be given by the [ICC]." As it turns out, greater interpretive guidance may be obtained from commentaries on Protocol I, especially since its language is, like the Rome

44. Id. (It is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms of used in connection with any other international agreement.). See also Richards and Schmitt, supra note 7, at 1065.
45. Austin and Bruch, supra note 15, at 38.
Statute's, conjunctive in nature. From an environmental perspective, the prohibitions in Protocol I are more circumscribed than those of ENMOD. For example, "long-term" has been interpreted by the ICRC as meaning lasting for "decades rather than months." The "widespread" and "long-term" principles attempt to ascribe temporal and geographic limitations to environmental harm which, for the most part, does not know such boundaries. As the planet constitutes one single ecosystem, environmental degradation of one part of the earth ultimately affects the entire planet. The "severe" requirement could mean that damage to an isolated section of the global commons whose natural resources have not yet been valued by global financial markets could escape punishment; and this notwithstanding its biodiversity or species-importance. The anthropocentric limitation of "severe" damage to that which affects human life and human consumption of natural resources underscores a more general shortcoming with much of the existing framework of environmental protection during wartime - namely that this protection is not geared to protecting the environment per se, but, rather, humanity's need to make use of it. More troubling is that state practice in some of the signatories to the Rome Statute ascribes the anthropocentric limitation to the totality of the material element of Article 8(2)(b)(iv). For example, the German Military Manual states that: "'Widespread,' 'long-term,' and 'severe' damage to the natural environment is a major interference with human life or natural resources."

An additional phrase that requires definition is "natural environment." In its report detailing the work of its 43rd Session, the ILC offered a broad definition of "natural environment." This definition focused both on the

46. UN Doc. A/48/269, p. 9. See also Jozef Goldblat, The Mitigation of Environmental Disruption by War: Legal Approaches, in ENVIRONMENTAL HAZARDS OF WAR: RELEASING DANGEROUS FORCES IN AN INDUSTRIALIZED WORLD 52 (Arthur Westing ed. 1990). The ILC has concluded that "Along-term" should be taken to "mean the long-lasting nature of the effects and not the possibility that the damage would occur a long time afterwards." See UN Doc. A/CN.4/SR.2241, 22 August 1991, pp. 15, 18, cited in Preparatory Commission Request, supra note 39, at 33.


48. HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL (GERMANY), No. 403, 37 (1992), cited in Preparatory Commission Request, supra note 39, at 34. More broadly, the fact that the environmental war crimes is clustered by the Working Group on the Elements of Crimes with provisions entirely focused on damage to the human environment gives further credence to the concern that the delegates to the Preparatory Commission may not see Article 8(2)(b)(iv) operating beyond these anthropocentric limitations. See Preparatory Commission for the International Criminal Court, Second Session, 26 July to 13 August 1999, <http://www.un.org/law/icc/prepccpmm/prepjul.htm> (visited October 18, 1999) [Preparatory Commission for the International Criminal Court, Second Session].

human environment as well as on the natural environment *per se*.\(^{50}\) Having such a broad definition is necessary for Article 8(2)(b)(iv) to fully encompass environmental security as opposed to only covering the protection of human environments (*e.g.* cities, dwellings, private property) from destruction. The ILC definition of the "natural environment" is as follows:

The words "natural environment" should be taken broadly to cover the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment. These words therefore cover the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements.\(^{51}\)

It will be important to develop a memorandum of understanding under the Rome Statute in which the scope of "natural environment," "widespread," "long-term," and "severe" is spelled out. The ongoing Preparatory Commission sessions provide an appropriate forum for such discussions. In fact, the Preparatory Commission intends to "ensure the formulation of generally acceptable elements of crimes on Article 8, as part of a complete set of elements of crimes for all crimes, laid down in the [Rome] Statute."\(^{52}\) Unfortunately, thus far specific discussion of the environmental war crime provision has been very limited.\(^{53}\) Nonetheless, it is essential to the viability of

\(^{50}\) *Id.*

\(^{51}\) *Id.*

\(^{52}\) *See* Preparatory Commission for the International Criminal Court, Second Session, *supra* note 49.

\(^{53}\) The Working Group on the Elements of Crimes regularly meets during the Preparatory Commission sessions. *See id.* So far, it has considered the elements of some of the war crimes enumerated in the Rome Statute. It has divided the war crimes provisions into nine clusters based on "the possible commonality of their elements." *Id.* Art. 8(2)(b)(iv) is clustered with arts. 8(2)(b)(v) (attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives), (ix) (intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives), and (xxiv) (intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law). *Id.* So far, several discussion papers have been proposed by the Working Group on the Elements of Crimes. No discussion paper has been prepared for Article 8(2)(b)(iv). *Id.* The official website for the Preparatory Commission addresses this gap in the following manner: "there was not sufficient time for the Coordinator to prepare discussion papers on the elements of all the provisions of war crimes." *Id.* Of the 23 national government proposals submitted to the Working Group on Elements of Crimes, only a handful made mention of Article 8(2)(b)(iv). *See* Rome Statute of the International Criminal Court, List of documents issued at the second session of the Preparatory Commission, [http://www.un.org/law/icc/prepcomm/g/docs2nd.htm](http://www.un.org/law/icc/prepcomm/g/docs2nd.htm) (visited October 19, 1999). Only one of these proposals gave thorough treatment to Article 8(2)(b)(iv). *See* Preparatory Commission Request, *supra* note 39. There is no indication this trend will change in upcoming Preparatory Commission sessions.
Article 8(2)(b)(iv) that the definition of the elements it contains is not pitched at such a high level so as to strip the provision of any practical effect. This may well require the threshold of responsibility to be relaxed from the international community’s current understanding of the meaning of “widespread,” “long-term,” and “severe” harm.

B. Exculpatory Effects of Military Advantage

Even if there is proof of widespread, long-term and severe damage to the natural environment, liability is only found if this damage is “clearly excessive” in relation to the “concrete and direct overall military advantage anticipated.” This second material element permits “military objectives [to be] offered as a defense against charges of environmental damage, even intentional damage, as long as that damage is outweighed by the expected military gain.” The exculpating force of “proof of military advantage” traces its roots to the doctrine of “military necessity.” This doctrine has historically been used to mitigate or eliminate responsibility often for grievous breaches of humanitarian standards. In short, “military necessity” is a principle of customary international law “which ‘authorizes’ military action when such action is necessary for the overall resolution of a conflict, particularly when the continued existence of the acting state would otherwise be in jeopardy.” At the Nuremberg trials, the doctrine of military necessity was applied to the destruction of property (the closest the international community has yet come to an environmental war crimes proceeding) in the following manner:

The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.

“Military advantage” may bear an even lower threshold of proof than “military necessity.” As a result, the prohibition in Article 8(2)(b)(iv) may be narrower than its antecedents at customary international law. In the case of

---

The fact that little individualized attention is given to the environmental war crimes provision notwithstanding its fundamentally different nature than the other war crimes may foreshadow the possibility that the environmental war crime is simply not taken particularly seriously within the spectrum of offenses contained within the Rome Statute.

55. See Preparatory Commission Request, supra note 39, at 28, nn. 32-33.
57. The Hostage Case, supra note 26, 11 T.W.C. at 1254.
Article 8(2)(b)(iv), the ambit of "military advantage" is limited by the fact that only "concrete and direct overall military advantage anticipated" can justify the environmental damage. Nonetheless, "concrete and direct overall military advantage anticipated" still seems easier to prove than "military necessity." In addition, although the "military necessity" defense may in fact form part of customary international law, it is noteworthy that Protocol I, in its prohibition of "widespread, long-term and severe" harm, did not permit proof of any military advantage or necessity to eliminate wrongdoing.\(^5\) As a result, Article 8(2)(b)(iv)'s prohibition is but a diluted version of that in Protocol I.

There are other concerns with "military advantage" in Article 8(2)(b)(iv). First, although a "proportionality test" (i.e. the environmental damage must be clearly excessive in relation to the concrete and direct overall military advantage) is established, no guidelines, definitions or examples of "clearly excessive" are provided. In fact, "the addition of the word[ ] 'clearly' . . . in the definition of collateral damage is not reflected in any existing legal source."\(^5\) To this end, memoranda of understanding of the Parties to the Rome Statute or initial decisions by the ICC will be important in setting the scope for "clearly" excessive.

Second, the factual element of the proportionality test is also unclear: since proof of "clearly excessive" is required in order to find someone guilty, and since the burden of proof rests with the Prosecutor, what type of research and data will have to be marshaled? In addition, adjectival terms such as "concrete" and "direct" and "overall" military advantage are somewhat vague and have not yet been comprehensively defined by international law. Nor does the Rome Statute provide more particularized definitions of the meaning of these terms. As for "overall," the ICRC has suggested that it indicates "that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself."\(^6\) In the end, the extent to which these adjectives qualify or extend the exculpating effect of military advantage will bear heavily on the ability of Article 8(2)(b)(iv) to punish environmental crimes.

\(^5\) See Protocol I, supra note 39, at arts. 35, 55. See also Richards and Schmitt, supra note 6, at 1062 ("No other considerations, such as the military advantage offered by the prohibited act, the possibility that alternative operations will result in greater incidental injury to civilians or collateral damage to civilian property, or the overall impact of the action in context, can trump the principle of environmental protection"). Protocol I did use the military advantage limitation for other violations (e.g., the safety of civilians). See Protocol I, supra note 39, at arts. 51, 52, 57. As a result, interpretive assistance of the meaning of "military advantage" in the Rome Statute can flow from the use of the term "military advantage" in Protocol I. Any such assistance is, of course, limited by the fact that "military advantage" in Protocol I does not figure into its treatment of the environmental war crime.

\(^6\) See Preparatory Commission Request, supra note 39, at 29.

Finally, the military advantage needs simply to be "anticipated." What does this term signify? Some clarification as to the meaning of "anticipated" can emerge from a consideration of state declarations made to the use of "military advantage" in prior international conventions. It is reported that:

A number of [s]tates expressed their understanding that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.61

On a related note, it is unclear by whom and according to what standards the "anticipation" is to be judged. Does there have to be an objective element to the anticipation, or can the belief be subjectively held yet unrealistic? If the notion of military advantage remains subjective in the mind of the military or political leader under the circumstances in which the tactical decision was made, then the defense could be too widely available. In order to curtail misuse of the defense, it will be important to establish some objective standards as to when the military advantage of an attack may justify widespread, long-term, and severe damage to the environment.

The difficulties which inhere in giving appropriate meaning to the defense of military advantage raise more penetrating questions. These questions militate in favor of reconsidering the interaction between international environmental law and international humanitarian law. Certain practices - such as genocide and torture - have been sanctioned as illegal by the international community to the extent that they can never be undertaken even if essential to defend national sovereignty. Why should intentional environmental desecration not be similarly proscribed?

C. The Mental Element: Strict Intentionality

In the case of Article 8(2)(b)(iv), criminal sanction will only fall upon an individual who knows his or her behavior will cause widespread, long-term, and severe damage to the environment which is clearly excessive in relation to the overall military advantage anticipated and, notwithstanding proof of this knowledge, still commits the act with the full intention of causing the environmental damage. More concisely, the perpetrator must be found to have

61. Preparatory Commission Request, supra note 39, at 30. This is the position taken by the governments of Belgium, Canada, Germany, Italy, the Netherlands, Spain, and the United Kingdom in regard to Protocol I. Australia and New Zealand have declared that military advantage anticipated refers to the Abona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved." Id. Commentators have also linked the military advantage of the specific attack in question to the purposes of the military operation taken as a whole. Id. at 31.
acted willfully and in the knowledge that the attack will cause the prohibited environmental damage. The Rome Statute therefore "presupposes that the attack was launched in the knowledge that [the] consequences listed occur." The ICRC has interpreted the phrase "in the knowledge" as requiring "the person committing the act [to know] with certainty that the described results would ensue, and this would not cover recklessness." The fact that there is no liability for negligently or carelessly inflicting widespread, long-term, and severe damage to the environment means that persons who are found to act negligently will not face any sanction at all. The provision therefore covers only the most invidious offender. It goes without saying that proving this very onerous intentionality requirement will not be easy.

As a result, a more proactive approach may be required. Military and political officials in both developing and developed nations should be educated on the environmentally harmful effects of certain types of warfare, and be informed of the technologies to avoid reliance on such strategies in the first place. In this regard, the work of the ICRC can play a pivotal role. The ICRC has published a document entitled Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (Guidelines), which are:

Intended as a tool to facilitate the instruction and training of armed forces in an often neglected area of international humanitarian law: the protection of the natural environment. The Guidelines[... ] sole aim is to contribute in a practical and effective way to raising awareness ... [T]hey are an instrument for dissemination purposes.

The Guidelines state that they are drawn from existing international legal obligations and, as such, constitute a baseline of jus commune among nations.
Many detailed rules are provided in Article III(9) of the Guidelines, which cover numerous issues ranging from barring incendiary weapons in forested regions to precluding the use of naval mines. Ultimately, it is hoped that the Guidelines could constitute the specific level of objective knowledge imputed to all military and civilian leaders and agents for purposes of culpability under Article 8(2)(b)(iv) of the Rome Statute. It is also hoped that they will be taken into account as new weaponry is developed. In this latter regard, Article IV(18) of the Guidelines is particularly important:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, states are under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by applicable rules of international law, including those providing protection of the environment in times of armed conflict.67

In conclusion, unless some level of objective knowledge is read into the intentionality requirement, individuals who choose not to inform themselves that what they are doing is destructive of the environment might be able to use their ignorance as a full defense. A failure to incorporate an objective element into the Rome Statute's environmental war crimes also represents a step backwards insofar as Protocol I had, as early as 1977, grounded responsibility not in intentional environmental harm, but simply when there was a reasonable expectation that environmental damage would occur.68

IV. IS IT WORTH GREENING THE ICC?

International lawyers need to consider whether the interests of the global environment are in fact well-served by collapsing environmental crimes within an overarching multilateral mechanism. If so, then an important subsidiary question emerges: is the ICC the appropriate mechanism or should a new environmentally specific entity be created? The most immediate countervailing option to proceeding multilaterally would be to address environmental crimes within the rubric of independently negotiated regional agreements. In such cases, domestic courts, regional tribunals, or either domestic or regional regulatory agencies could serve as enforcement mechanisms.

Efforts at the regional level may prove effective in combating environmental crimes within and outside the context of armed conflict. By way

67. Id. at art. IV(18).
68. Background Paper, in Proceedings of the First International Conference on Addressing Environmental Consequences of War: Legal, Economic and Scientific Perspectives (June 10-12, 1998) 5; See also Preparatory Commission Request, supra note 39, at 34.
of example, in March, 1999, six African countries established an “African Interpol” to fight wildlife crime. 69 More sweeping is the Council of Europe’s Convention on the Protection of the Environment Through Criminal Law. 70 The motivation behind the Convention is that signatories should take effective measures to ensure that the perpetrators of environmental hazards having serious consequences escape neither prosecution nor punishment. 71 This Convention obliges signatories to criminalize certain intentional or negligent forms of environmental offenses (although the negligence may be limited by declaration to acts of gross negligence only). 72 Specific examples are provided. For instance, the intentional discharge of ionizing radiation into the air, soil, or water which causes a “significant risk” of death or serious injury is to be prohibited. 73 So, too, is the unlawful disposal or transport of hazardous waste which causes or is likely to cause death, serious injury, or “substantial damage to the quality of air, soil, water, animals, or plants.” 74 This latter provision is important for it goes beyond the anthropocentric approach to assessing environmental harm which often characterizes current conventions and laws.

However, these successful regional initiatives should not obscure the importance of multilateral efforts. The two levels can in fact operate contemporaneously. As for the ICC, in order for it to capture environmental crimes outside of the context of war, its jurisdiction would have to be broadened. In this vein, some commentators have suggested making it a crime recklessly or intentionally to harm the environment. 75 This could permit the behavior of armed forces not engaged in hostilities to be regulated, together with corporations and governments who may implement policies which promote insecurity through environmental modification. This crime has been named “geocide” or “ecocide.” Literally, this constitutes the environmental counterpart of genocide - a killing of the earth. The logic of ecocide is as

69. IRIN News Update (March 18, 1999). The countries are: Democratic Republic of Congo, Kenya, Lesotho, Tanzania, Uganda and Zambia. The headquarters of the African Interpol will be in Nairobi, Kenya. Negotiators indicated that the arrangement was required owing to the need for international cooperation to fight wildlife crimes successfully.” Id.


71. Id. at pmbl.

72. Id. at arts. 2, 3.

73. Id. at art. 2.

74. Id.

follows: significantly harming the natural environment constitutes a breach of a duty of care, and this breach consists, in the least, in tortuous or delictual conduct and, when undertaken with willfulness, recklessness or negligence, ought to constitute a crime.\textsuperscript{76}

Although some international environmental lawyers may find the criminalization of ecocide to be intellectually attractive, it seems fair to say that its chances of being negotiated into the jurisdiction of the ICC are slim at best. And yet environmental crimes outside armed conflict do occur and, when they do, certainly inflict "widespread, long-term, and severe" damage to the natural environment. Examples of such crimes could include reckless misconduct at nuclear power facilities,\textsuperscript{77} testing of biological weapons, or intentional dumping of oil and chemical wastes from ships (often cruise ships) at sea.\textsuperscript{78} Trade in endangered species, hazardous wastes and ozone-depleting substances constitutes an underground market estimated at $U.S. 20 billion annually.\textsuperscript{79} Another particularly troubling example of what is arguably an environmental crime which is essentially unregulated at the international level notwithstanding its transnational effects is the setting of forest fires in the Amazon basin and in Indonesia. In both cases, there is compelling evidence that these fires had been deliberately set by businesses seeking to clear the forests for economic development.\textsuperscript{80}


\textsuperscript{77} A case in point could be the 1986 meltdown at the Chernobyl plant in the former Soviet Union. See Berat, supra note 48, at 345 (There is substantial evidence that although Soviet scientists and governmental officials were aware that the Soviet nuclear power plant design was flawed and had the potential for causing unmitigated disaster, they persisted in maintaining old plants and built new ones without design modification.).

\textsuperscript{78} See Douglas Frantz, Sovereign Islands: Gaps in Sea Laws Shield Pollution by Cruise Lines, N.Y. TIMES, January 3, 1999, at Al. (documenting pollution activities by the Royal Caribbean Cruise Lines, proof of which induced United States courts to order a $9 million fine and a promise that the dumping practices would cease); See Matthew L. Wald, Cruise Line Pleads Guilty to Dumping of Chemicals, N.Y. TIMES, July 22, 1999, (documenting further pollution activity by Royal Caribbean after the original fine, which lead to a guilty plea to an additional $18 million fine). Although United States authorities were ultimately successful in asserting jurisdiction over the cruise ships and subjecting them to United States law, this was not an easy process. "The ships fly foreign flags and the parent companies are registered in foreign countries, often putting them outside the reach of the authorities in this country." See Wald, supra note 79.

\textsuperscript{79} Eight Countries Agree to Fight Environmental Crime, N.Y. TIMES, April 6, 1998, at A4.

\textsuperscript{80} John Klotz, 20:12 NATIONAL L.J., (November 17, 1997) at A18 (col. 3). For the Indonesian context alone, see Randy Lee Loftis, The Tropics Are on Fire, TORONTO STAR, June 6, 1998, at C6 ("evidence shows that settlers were being paid by large corporations to burn forests to convert land into corporate-owned palm or rice plantations"). "The Indonesian Environmental Forum estimates that at least two million hectares of forests and other land were burned in 1997." See ORAN R. YOUNC, INSTITUTIONAL DIMENSIONS OF GLOBAL ENVIRONMENTAL CHANGE: SCIENCE PLAN 31 (1999). The effects on the environment are clear: immediate destruction, an inability of ecosystem regeneration, as well as contribution to global warming. In the end, this destruction comes full circle to affect humanity: through death and
Nonetheless, even if negotiators had the willingness and succeeded in
according the ICC jurisdiction over ecocide as a “most serious crime[ ] of
care to the international community as a whole,” uncertainty would linger
as to the ICC’s effectiveness in terms of being able or suited to enforce such a
prohibition. As a result, collapsing environmental crimes within the ICC might
not be the most effective way to sanction such crimes. This Article identifies
five reasons why this might be so: (1) environmental crimes may become lost
amid the hurly-burly of the ICC’s activities; (2) ICC personnel may have low
environmental expertise and there may consequently be very high transaction
costs involved in “getting up to speed” on environmental issues; (3) the
sanctions which the ICC can order are not appropriate to correcting
environmental desecration; (4) there is limited scope under the Rome Statute
to integrate preexisting international law in the area of environmental crimes;
and (5) environmental harm may well be best deterred by a negligence standard
which is essentially incompatible with the mandate of a permanent international
court designed to punish the most serious crimes of concern to humanity. This
Article will now consider each of these in turn.

A. Environmental Concerns Lost in the Shuffle

Clearly, one of the major successes of the Rome Statute is that it creates
an institution to actually punish the conduct it prohibits. Nonetheless, from the
environmental point of view, the extent to which “environmental crimes” will
receive the ICC’s attention is uncertain given the broad array of other crimes
to which it will have to direct its energies. The environmental war crime
cstitutes only one provision out of dozens in Part 2 of the Rome Statute. And
A[t]his provision has largely escaped notice amid the larger debate about the
creation of the court and the scope of its jurisdiction.” Article 8(2)(b)(iv)
remains peripheral to the ongoing discussions of the Working Group on the
Elements of Crimes held at the Preparatory Commission
sessions. As a result,
there is no indication that, as work on the establishment of the ICC progresses,
the environmental war crime will be able to attract the attention it requires in
order to be effectively implemented.

disability owing to the effects of asthma and smog-related illnesses, and, in the case of the Indonesian fires,
creating smoke and haze which may have induced a plane crash in Sumatra which took the lives of 234
people. See Loftis, supra note 81.
81. Rome Statute, supra note 1, at art. 5(1).
82. Austin and Bruch, supra note 15, at 32.
83. See Preparatory Commission for the International Criminal Court, Second Session, supra note
49; See also supra note 54.
B. Low Environmental Expertise of the Judges and Prosecutors

Judges and prosecutors on the ICC will likely not have expertise in the area of environmental law, policy or science. This can heighten the transaction costs of proceeding judicially, as well as produce ineffective jurisprudence. Were environmental crimes to be litigated in a separate forum or before a specialized agency, there could be a greater guarantee of some level of scientific expertise.

C. Inappropriate Sanctions

Part 7 of the Rome Statute offers the most contemporary compilation of the international community’s thinking on how international crimes ought to be punished. The punishment provisions of the Rome Statute contain two limitations on the effectiveness of Article 8(2)(b)(iv).

First, the jurisdiction of the ICC is limited to natural persons. This makes it impossible to find any institutional or state liability should it be difficult to prove that the actions of one or some individuals accounted for the environmental desecration. This is unlike the Council of Europe's Convention on the Protection of the Environment Through Criminal Law, Article 9 of which establishes jurisdiction over corporate offenders together with natural persons.

Second, sentencing is limited to imprisonment, fines, and forfeiture of the proceeds of the crime. There does not appear to be much room to compel restitution, remediation of blight, establish civil liability or, simply put, to clean up the damage. A specialized tribunal could avoid some of these. Making mention of the International Court of Justice begs the question whether it could serve as an adjudicator of environmental crimes. In the past, the International Court of Justice has had limited experience with environmental matters, although it has taken some very important decisions, such as the Nuclear Tests Cases (Australia v. France) 1974 I.C.J. 253; Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States) 1986 I.C.J. 16; and most recently in Fisheries Jurisdiction Case (Spain v. Canada) (Dec. 4, 1998). It has also recently created an Environmental Chamber with a view to playing a more proactive role in resolving environmental disputes. Nonetheless, the impediments to the effectiveness of the International Court of Justice to adjudicating environmental crimes are significant: (1) the requirement that both litigants consent to the jurisdiction of the court, which is impractical in any criminal context where it is inexorable that one litigant will unwillingly be dragged into court; and (2) there is simply no jurisdiction to hear disputes involving individuals or non-natural legal persons.

84. For example, in the recent International Court of Justice’s decision in Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Sept. 25, 1997, No. 92 General List, <http://www.icj-cij.org/docket/docs/icj/cases/cases_text/cases_text_92_genlist.htm>), the judges had to be educated in the environmental science aspects of the dispute. Although there is much to be gained from educating lay people on environmental issues, this can involve significant time as well as financial costs. A specialized tribunal could avoid some of these. Making mention of the International Court of Justice begs the question whether it could serve as an adjudicator of environmental crimes. In the past, the International Court of Justice has had limited experience with environmental matters, although it has taken some very important decisions, such as the Nuclear Tests Cases (Australia v. France) 1974 I.C.J. 253; Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States) 1986 I.C.J. 16; and most recently in Fisheries Jurisdiction Case (Spain v. Canada) (Dec. 4, 1998). It has also recently created an Environmental Chamber with a view to playing a more proactive role in resolving environmental disputes. Nonetheless, the impediments to the effectiveness of the International Court of Justice to adjudicating environmental crimes are significant: (1) the requirement that both litigants consent to the jurisdiction of the court, which is impractical in any criminal context where it is inexorable that one litigant will unwillingly be dragged into court; and (2) there is simply no jurisdiction to hear disputes involving individuals or non-natural legal persons.


86. Rome Statute, supra note 1, at art. 77.
up the environmental harm. This is again unlike the Council of Europe’s Convention on the Protection of the Environment Through Criminal Law, Article 6 of which provides that sanctions include imprisonment, fines, as well as reinstatement of the environment.\(^{87}\) This is also unlike the UNCC’s approach to remedying environmental crimes committed during the Gulf War.\(^{88}\) Nor does the ICC have injunctive powers to stop violations from occurring.

Without the ICC being able to order restorative or injunctive remedies, the curative nature of the punishment for causing “widespread, long-term, and severe” damage to the natural environment is limited at best. It is true that the Rome Statute permits fines and assets collected to be transferred to a Trust Fund for the benefit of victims of the crime.\(^{89}\) Access to this Trust Fund is provided for in Article 75, which permits the ICC to make an order specifying reparations to victims for purposes of restitution, compensation, and rehabilitation. However, the Trust Fund does not address a situation where it is the natural environment directly, and humanity only indirectly, which bears the burden of the damage. In addition, the magnitude of wartime environmental harm may be so vast that resources transferred from individual defendants simply cannot go very far in terms of remedying that harm. By way of example, in the Gulf War alone Kuwait’s environmental claims filed with the UNCC total over $15 billion.\(^{90}\) Another concern is that “to the extent that charges of environmental war crimes are ancillary to other serious charges, the concern for using the trust fund to aid human victims doubtless will take priority over addressing environmental harms.”\(^{91}\) This, once again, returns us to the problem of pursuing environmental goals in a regime principally designed to address genocide, persecution, and murder.

As a result, there is cause for concern that environmental crimes will not only be poorly cognizable under the ICC, but also that the punishment for wrongdoing will not address the unique nature of these crimes.

---


88. See supra note 14. The UNCC is only beginning to turn to the environmental claims which have been filed. Nonetheless, initial decisions by the UNCC in other areas may reveal limitations on its effectiveness to assess compensation for environmental harms. For example, in its decision on contractual claims issued on July 1, 1998, the UNCC limited many of the asserted losses on the basis that the claimants had not established a sufficiently direct causal link to Iraqi aggression: more particularly, the UNCC required “specific proof that the failure to perform was the direct result of Iraq’s invasion and occupation of Kuwait.” See Austin and Bruch, supra note 15, at 32, 35. In the end, the contractual claimants received less than one-tenth of the damages they had asserted. Id. at 32. Rigorous requirements of causality and directness of damage may make it difficult for environmental and public health claims to succeed.

89. Rome Statute, supra note 1, at art. 79.

90. Austin and Bruch, supra note 15, at 33.

91. Id. at 39.
D. Limited Scope of Judicial Interpretation

The list of enumerated war crimes under Article 8(2)(b) appears to be exhaustive. After all, the use of the term "namely" implies that the ICC is not to have jurisdiction over serious violations of the laws and customs of war which are not listed in Article 8(2)(b). There is thus little opportunity for judicial interpretation to reach beyond the enumerated environmental war crime. To this end, it might be difficult for the ICC to use Article 2192 to incorporate in its jurisdiction the very small number of international legal materials which may provide more proactive sanction of environmental war crimes than that found in Article 8(2)(b)(iv).93 This constitutes further evi-

92. Rome Statute, supra note 1, at art. 21(1), which states that the Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

93. In addition to the ENMOD Convention and Protocol I, these fragments include the International Law Commission Draft Articles on State Responsibility (provides that an international crime may result from, inter alia, a serious breach of an international obligation of essential importance for the safe-guarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas). See INTERNATIONAL LAW COMMISSION’S DRAFT ARTICLES ON STATE RESPONSIBILITY, art. 19(3)(d) (Shabtai Rosenne ed., 1991). This is one of the few international legal documents prior to the Rome Statute which demonstrated a willingness to criminalize environmental degradation. The International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind recognizes as “war crimes:” (i) extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly; (ii) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (iii) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; and (iv) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs. See INTERNATIONAL LAW COMMISSION DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, art. 20, G.A. Res. 97, U.N. GAOR, 33d Sess., Supp. No. 45, at 220, U.N. Doc. A/33/45 (1978); amended by G.A. Res. 151, U.N. GAOR, 42d sess., Supp. No. 49, at 292, U.N. Doc. A/42/49 (1987). Some of these crimes were incorporated into the Rome Statute. See, e.g., Rome Statute, supra note 1, at arts. 8(2)(a)(iv), 8(2)(b)(xvii), 8(2)(b)(xviii), 8(2)(b)(xx). The 1907 Hague Regulations deem it prohibited to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war. See Regulations Respecting the Laws and Customs of War on Land, annexed to the Convention Respecting the Laws and Customs of War on Land, art. 23(g), Oct. 18, 1907, 36 Stat. 2277. Although not explicitly mentioned, the natural environment can be considered to constitute “property;” however, it is unclear whether the natural environment within the global commons would fall within the notion of “property” since it is neither privately nor nationally owned. For a review of other internationally negotiated provisions which might provide ancillary protection to the environment during wartime, see Richards and Schmitt, supra note 7, at 1067-73. There are also some soft law agreements which may inform the content of international standards. See World Charter for Nature, G.A. Res. 37/7 U.N. GAOR, 37th Sess., 48th plen. mtg. (1982), Principle 5 (“Nature shall be secured against degradation caused by warfare or other hostile activities.”). See also Rio Declaration on Environment and Development, UN Doc. A/CONF.151/5Rev.1, reprinted in 31 I.L.M. 874 (1992), Principle 24 (“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and
idence of the limited ability of the ICC to accommodate environmental protection concerns. After all, without the flexibility to go beyond the words of the Rome Statute notwithstanding developments in international environmental law, the ICC may not be able to do justice to any such developments.

E. No Room for Negligence or Recklessness

The ICC is designed to deter criminal behavior. Unlike direct humanitarian abuses, environmental crimes during warfare may often involve conduct which tends more to the negligent, reckless, or willfully blind than to the intentional. Intention is always difficult to prove. So, too, is causation. Consequently, in order for the ICC to remain within its present mandate it will have to let go all but the most flagrant incidents of deliberate environmental desecration.

As a result, some of the recommendations suggested in this Article to enhance the effectiveness of Article 8(2)(b)(iv) may simply not be able to be accommodated by the present mandate of the ICC.\(^4\) Two commentators have offered the following well-placed remarks regarding two of these recommendations:

\[\text{[I]t is difficult to imagine how the [ICC] could relax both the threshold of damage and the intent requirement while remaining within its existing mandate. The countries that acceded to the Rome Statute simply could not have intended to let their military officers be prosecuted for any action, committed with any state of mind, that causes any environmental damage.}\(^5\)

If only the most egregious form of environmental insecurity has been caught by the ICC, does this augur well for the future promotion of environmental security within the structures of international criminal or humanitarian law? In the end, these structures may only be able to address environmental insecurity in a very limited fashion. The question thus arises

---

\(^4\) See also Drumbl, supra note 77, at 129-30, 133 (provides a more detailed discussion of these recommendations).

\(^5\) Austin and Bruch, supra note 15, at 39.
whether encouraging remediation as a “punishment” (instead of individual imprisonment, fines, and the resultant stigmatization) might bring more nations on board in terms of sanctioning less egregious (yet, when aggregated, likely more destructive) forms of environmental destruction during armed conflict. If so, then an organization supervising a strict liability regime supplemented by a remediation fund might be a preferable institutional device. Such an organization could be established on a regional or ad hoc basis (such as the UNCC). On the other hand, such an institution may be capable of development as a permanent multilateral entity which could minister to the remediation of global environmental harm. If the fund were to operate on an “at-fault” basis, then it could be financed by the international community yet retain subrogation rights against perpetrators of environmental harm. If the remediation fund were to operate on a “no-fault” basis, it could be capitalized by international contributions assessed by the size and nature of a nation’s armed forces (reflecting the capacity of those forces to create environmental harms).\(^96\)

Capitalization can also be sought from the private sector, namely manufacturers of weapons. In this latter regard, the International Fund for the Compensation for Oil Pollution Damage can serve as a precedent, as it is in part capitalized by “fees imposed on oil transported on the high seas, and supplemented by contributions from tanker owners, oil producers, refiners, and marketers.”\(^97\) In the least, such funds can assist immediate mitigation efforts which will usually reduce the long-term costs of remediation. In this latter regard, Austin and Bruch recommend the creation of an “emergency response task force” which would be financed by the fund and could spearhead initial mitigation efforts.\(^98\)

V. PUNITIVE SANCTION, PROACTIVE PROTECTION, OR ENVIRONMENTAL JUSTICE?

A more fundamental question lurks beneath any evaluation of the ICC as a mechanism to promote environmental security. Essentially, the ICC represents a punitive, retributive justice paradigm in which certain serious crimes against the international community are to be redressed through the prosecution and imprisonment of selected individuals. The foundational question for international environmental lawyers is whether a punitive methodology will actually promote environmental security.

---

96. Id. at 41.
97. Environmental funds in the United States have also been proffered as potential precedents. These include Superfund, the Oil Spill Liability Trust Fund, the Abandoned Mine Reclamation Fund, the Leaking Underground Storage Tank Trust Fund, and the Black Lung Disability Trust Fund. Id.
98. Id. at 42.
It is clear that considerable symbolic and precedential value can emerge from the criminal punishment of invidious perpetrators of intentional environmental desecration. However, what about the practical effect? Cases of intentional environmental destruction do not, when aggregated, constitute the most significant source of harm to the environment. Since the ICC can only capture the intentional infliction of environmental harm, it leaves undeterred the activities which cause the greatest amount of environmental harm - negligent or reckless conduct. As a result, the question arises whether a greater level of deterrence can be achieved through preventative measures as opposed to the threat of criminal punishment. This is a question that environmental advocates at the domestic level have long considered. At the domestic level, there has been much discussion regarding the limits of punitive ex post punishment as a device to promote environmentally respectful behavior. Many advocates prefer a focus on including as policy devices incentive-based regulation and proactive ex ante prevention. Is there any reason why such a methodology might not prove beneficial at the international level?

Implementing this second approach - proactive protection - will entail linkages beyond the legal context. Examples include the creation of economic disincentives to producing environmentally destructive weaponry, technology transfers to assist developing countries to pursue national security interests in more of an environmentally friendly manner, and financial assistance mechanisms, for example for the safe decommissioning of nuclear weapons. Linkages to trade and investment should be developed so as to create disincentives to export and sell the more environmentally injurious military technology. One final linkage which is of considerable importance involves international peace-keeping or peace-enforcement forces. These could be mandated to ensure environmental, along with humanitarian, protection. Allotting these international forces a “green-keeping” mandate could help integrate international environmental norms into internecine conflict. By way of example, were United Nations involvement in Somalia to have had a “green-keeping” mandate, then practices of deforestation and assaults on water purity - which were commonplace in the conflict - could have been much better addressed. Ultimately, the prevention of environmental crime cannot be disaggregated from the fact that environmental scarcity and resource depletion are often the cause of military conflict.99 As a result, equipping nations (through technology transfers, transparency of information or financial

---

99. By way of example, the Rwandan conflict was partly precipitated by demand for arable land. Over the past three decades, average farm size has declined from two hectares per family to 0.7 hectares. On the relationship between agricultural land-use and the Rwandan genocide. See Guenthar Baechler, Rwanda: The Roots of Tragedy, Battle for Elimination on an Ethno-political and Ecological Basis, in ENVIRONMENTAL DEGRADATION AS A CAUSE OF WAR, VOLUME II, 461-502 (1996).
assistance) to engage in proper environmental management and sustainable
development could have the collateral benefit of mitigating military aggression.

A relatively new wave of litigation in the United States reveals a third
approach to attaining environmental security: environmental justice claims
under the United States Constitution100 or under Title VI of the Civil Rights
Act. 101 These claims meld environmental protection and civil rights. The nub
of these claims stems from the factual observation that “environmental
degradation often has a distinctly racist aspect.”102 More specifically:

[Reports generally indicate that people with relatively low incomes
and/or people of color are more likely to have hazardous waste
treatment facilities sited in their neighborhoods than are members of
the population in general. Members of politically less powerful
groups are exposed to greater risks from hazardous waste related
problems than the overall population of the United States, and are
thus disproportionately carrying certain environmental burdens of
modern society.]

In response to this difficult situation, the environmental justice paradigm
attempts to create “equal protection from ecological hazards for all communi-
ties.”104 Aggrieved parties have argued that the uneven distribution of
environmental burdens on disempowered minority groups infringes the Equal
Protection Clause.105 Others have submitted that decisions to locate environ-
mental facilities in certain regions of the country evidence discrimination in the
expenditure of federal funds.106 The argument has also been raised that
Environmental Protection Agency (EPA) regulations promulgated to implement

---

102. Anthony D. Taibi, Comment, Environmental Justice, Structural Theory, and Community
103. Weintraub, supra note 4, at 568-69.
104. Lincoln L. Davies, Working Towards a Common Goal? Three Case Studies of Brownfields
Redevelopment in Environmental Justice Communities, 18 STAN. ENVTL. L.J. 285, 287 (1999). “[L]ow-
income and minority communities bear the brunt of the industrialized world’s environmental contamination
and are often the last groups to receive funding for cleanups.” Id. at 288.
105. U.S. CONST. Amends. V, (“[n]o person shall... be deprived of life, liberty, or property, without
due process of law;”) XIV § 1 (applies to discriminatory actions taken by the states).
shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits
of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).
See also Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000(d)(1), 602 (“Each Federal department and
agency which is empowered to extend Federal financial assistance to any program or activity... is authorized
and directed to effectuate the provisions of section 2000(d) of this title... by issuing rules, regulations, or
orders of general applicability.”).
Title VI provide an enforceable cause of action should the exercise of the EPA’s authority to manage environmental policy subject individuals to discrimination.\(^\text{107}\)

Environmental justice litigation has only had limited success. No court has found a violation of the Equal Protection Clause.\(^\text{108}\) Courts have held that Title VI prohibits intentional discrimination only.\(^\text{109}\) Intentional discrimination, as opposed to disparate impact, can be very difficult to prove in environmental justice cases.\(^\text{110}\) As for the claim alleging violation of the EPA regulation, some courts have expressed doubt as to the existence of a private right of action to enforce such a claim.\(^\text{111}\) The highest profile environmental justice case thus far, Seif v. Chester Residents Concerned for Quality Living, involved a claim brought under the EPA regulations.\(^\text{112}\) The challenge was to the issuance of a permit to construct and operate a waste treatment facility, more specifically a soil incinerator. The factual underpinnings to this dispute are typical of many environmental justice claims. Chester is a city of 42,000 inhabitants located in Delaware County, Pennsylvania.\(^\text{113}\) Although Delaware County’s 500,000 residents are overwhelmingly white (91%), Chester’s population is two-thirds African-American.\(^\text{114}\) The complainants allege that five of Delaware County’s waste treatment facilities are located in Chester; the remaining two facilities are located in predominantly white areas.\(^\text{115}\) The fact that the state permitted the

\(^\text{107}\) Pursuant to Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000(d)(1), 602, the EPA adopted regulations which state: “A recipient shall not use criteria or methods of administering its program which have the effect if subjecting individuals to discrimination because of their race, color, national origin, or sex.” See 40 C.F.R. 7.35(b). This prohibition would thus prevent intentional as well as disparate impact discrimination.


\(^\text{110}\) See Bradford C. Mank, Is There a Private Cause of Action Under EPA’s Title VI Regulations? The Need to Empower Environmental Justice Plaintiffs, 24 COLUM. J. ENVTL. L. 1, 10-13 (1999).


\(^\text{113}\) Id. at 927.

\(^\text{114}\) Id.

\(^\text{115}\) The two permits granted for white areas covered facilities with a combined waste capacity of 1,400 tons per year, whereas the five permits granted in African-American areas were for facilities with a combined waste capacity of over 2,100,000 tons per year. Id.
new treatment facility to be located in Chester notwithstanding this pre-existing disproportionality prompted residents to sue the state, alleging “environmental racism” in the administrative decisions to allocate permits. The District Court dismissed the lawsuit. The Third Circuit Court of Appeals reversed, finding the complainants entitled to an implicit private right of action under the EPA regulations and thus permitting the claim to proceed. On June 8, 1998, the United States Supreme Court gave itself its first opportunity to consider environmental justice by granting certiorari to review this dispute. However, on August 17, 1998, the Supreme Court dismissed its grant of certiorari, vacated the Chester Residents judgment, and remanded the case back to the Third Circuit with instructions to dismiss. The vacatur was based on the fact the dispute had become moot: on April 30, 1998, before the Supreme Court granted certiorari, the soil incinerator permit expired and was revoked as the applicant indicated it no longer planned to site a waste treatment facility in Chester. The vacatur of the Third Circuit decision in Chester Residents removes an important precedent to support environmental justice claims. However, this vacatur does not mean that the Third Circuit decision is bad law. The Supreme Court has not yet spoken on this issue. As a result, the legal future of environmental justice claims in the United States may still carry promise. In fact, notwithstanding the procedural hurdles inherent in having an environmental justice claim heard by a court, the possibilities of facing an environmental justice lawsuit have influenced government policy in the United

116. Id. at 415.
117. Id.
118. Chester Residents, 132 F.3d at 925.
120. Id. at 974 (1998).
121. Mank, supra note 111, at 50. In situations where the underlying controversy is independently removed, the normal practice of the Supreme Court is to vacate the decision under appeal. Id. at 51-2.
122. Recent decisions have affirmed the existence of a private right of action to challenge administrative regulations on the grounds of disparate impact. See, e.g., Powell v. Ridge, 1999 U.S. App. LEXIS 20092 (3rd Cir. 1999); Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir. 1999); Sandoval v. Hagan, 7 F.Supp.2d 1234 (M.D. Ala. 1998).
123. One commentator has suggested that “[t]he Supreme Court seems likely to decide this vital issue.” See Mank, supra note 111, at 6. Nonetheless, “environmental justice plaintiffs may not rely on the [Chester Residents] decision as precedent in the Third Circuit or even cite it as a valid judgment in other circuits.” Id. at 51.
124. However, a recent decision of the Fourth Circuit Court of Appeals may dampen this promise. See Goshen Road Environmental Action Team v. United States Department of Agriculture, 1999 WL 187264 (4th Cir. 1999) (siting a wastewater treatment facility in a predominantly African-American neighborhood did not violate environmental justice policy concerns).
Concerns over lawsuits and fears regarding their perceived effects have also affected the practice of environmental management. Might the fertile basis of internationally-negotiated anti-discrimination and human rights conventions not provide solid ground for environmental justice claims? Prohibitions against discrimination are found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on All Forms of Racial Discrimination. Important regional agreements prohibiting discrimination are found in the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the American Convention on Human Rights.

125. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). The Order provides that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." Id. Agencies are required to conduct programs which "substantially affect human health or the environment" so as not to "subject[] persons to discrimination because of their race, color, or national origin." Id. However, the Order states that it is not intended to create a right of judicial review against the United States. Id.

126. By way of example, a "broad" civil rights investigation has been launched in response to claims that the concentration of dozens of garbage transfer stations in the South Bronx discriminates against minority residents. See Paul Zielbauer, Garbage Transfer Stations Face Civil Rights Inquiry, N.Y. TIMES (March 7, 1999) at A1. More specifically, the investigation will "seek to determine whether dozens of garbage transfer stations, and the hundreds of trucks that feed them, have spawned widespread respiratory and other health problems that violate the civil rights of South Bronx residents, the vast majority of whom [n.b. 95%] are black or Hispanic." Id. Similar investigations had previously been initiated in Michigan and Louisiana. Id.

127. Universal Declaration of Human Rights, U.N. G.A. Res. 217 (Dec. 10, 1948), art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.").

128. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966), art. 2 ("Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.")., art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

129. International Convention on the Elimination of All Forms of Racial Discrimination, 5 I.L.M. 352 (1966), at arts. 2, 5 (State Parties guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law . . . in the enjoyment of the right to public health).

130. European Convention for the Protection of Human Rights and Fundamental Freedoms, 312 U.N.T.S. 221, as amended (Nov. 4, 1950), art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.").

131. American Convention on Human Rights, 9 I.L.M. 673 (November 22, 1969), art. 24 ("All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.").
Notwithstanding the fact these conventions may permit international environmental justice claims, thus far there has been very little literature exploring the use of international human rights as a device to propound environmental security. This is unfortunate since internationalizing environmental justice recognizes that "environmental security may be ... a global idea, only fully achievable as part of a universalization of environmental responsibility." For international lawyers, environmental justice may be attractive in two types of situations: (1) the equal treatment of individuals within a state; and (2) the equal treatment of individuals between states.

First, environmental justice can help combat "environmental cleansing" the deliberate misuse of the natural environment as a tool to promote the politics of racial, ethnic, or class hegemony within a nation-state. Environmental cleansing can deny individuals, groups and communities the "minimum quality of environment" needed to sustain ways of living or even lives and, as such, further political goals such as forced relocation, subjugation, assimilation, or internal colonialism. In this regard, the creation of environmental insecurity may well "reflect the governing body's discriminatory use of power." When the courts and legislatures of the nation-state in question offer no recourse, individually enforceable remedies under international conventions.
or political pressure applied internationally may constitute the best available options to redress the wrongs.

Second, environmental justice can address situations in which developing countries and people of color disproportionately bear the environmental externalities of the world’s industrialization. One important example is the export of hazardous waste from the developed world, where it is produced, to the developing world, where it is to be disposed.\textsuperscript{136} Although developing countries may be paid to receive these wastes (often quite generously), they often lack the technology to safely and adequately dispose of them upon receipt; they may also lack the regulatory and scientific infrastructure to supervise such disposal.\textsuperscript{137} This then creates profound environmental insecurity in local communities. One commentator has argued that “the shipment of hazardous waste from developed to developing countries is environmental racism on an international scale.”\textsuperscript{138} Although certain recently negotiated conventions\textsuperscript{139} provide disincentives to and in some cases even prohibit the shipment of certain wastes from developed countries to developing countries, the characterization of these shipments as infringing environmental justice allows nations not signatories to these agreements to be held to similar standards. Embedding the prohibition against such shipments in the discourse


\textsuperscript{137} See Park, supra note 137, at 668-70. As a result, the cost of disposal in these developing countries for the polluter is much lower than it would be were the disposal to occur in a developed country. See \textit{id.} (“In 1989, in Africa, waste disposal costs were about forty dollars per ton. In contrast, the cost was four to twenty-five times this amount in Europe and in the United States, twelve to thirty-six times greater.”). \textit{See also} Marbury, supra note 137, at 257-58, 260 (“Given developing nations’ inexperience in handling hazardous waste and the large quantities of such waste generated each year, the possibility of a major environmental disaster exists.”).

\textsuperscript{138} Park, supra note 137, at 660. \textit{See also} Marbury, supra note 137, at 291 (“Hazardous waste exporting is just environmental racism on a global scale. The main similarity between the two is who shoulders the burden of living near and with the hazardous waste. Under each regime, the poor are forced to shoulder a disproportionate amount of national and global burdens.”).

of human rights also allows a broader range of exported substances to be subject to review: for example, the adverse environmental impacts caused by the export of dangerous or environmentally risky products to the developing world. Should these products not constitute "hazardous wastes," then they fall outside the scope of the international conventions. However, the distributional implications of such exports could well be caught by international anti-discrimination standards applied to the environmental context.

Elevating environmental justice to the international level will require the creation of new institutions. What tribunals, courts, or agencies can determine the existence of environmental injustice? Are domestic courts or existing international human rights commissions (for example the United Nations Commission on Human Rights) sufficient? Or will new international human rights tribunals need to be created? On a related note, elevating environmental justice to the international level will also require the establishment of new rights. For example, is there an internationally recognized right to public health or security of the person? Such a right must exist in order for there to be a remedy for its infringement by discriminatory environmental mismanagement or insecurity. In bridging this particular gap, advocates for environmental justice should be encouraged by the Stockholm Declaration, which as early as 1972 contemplated the linkages between justice, equality, and environmental well-being:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

A subsidiary question which arises (and has been particularly pivotal in the United States jurisprudence) is whether the discrimination must be intentional or whether proof of discriminatory impact suffices to justify a complaint.

In sum, the opportunities for environmental justice claims as a device to promote transnational environmental security remain inchaoate and unexplored. It remains, though, that environmental justice claims at the intra-state level may provide important linkages to the political right of self-determination. Such claims recognize that maintenance of a "minimum quality of the environment" is a prerequisite to the existence (and enjoyment) of civil and political rights, as well as the dignity of the individual. Environmental justice claims can also promote democratization by encouraging local and citizen group involvement

140. See Popovic, supra note 23, at 68 (discussing the right to live as broader than the traditional concept of the right to life).
in the political process.\textsuperscript{142} By "permitting individual victims to activate international enforcement procedures," these claims increase political participation together with transparency of information.\textsuperscript{143} Environmental justice claims at the macro, \textit{inter-state} level may help link environmental protection with socio-economic rights, such as the right to development. Opportunities for development may be hindered when the developed world passes the costs of its industrialization onto developing nations. Ultimately, a macro, transnational conception of environmental justice can constitute a theoretical justification for the promotion of equality in the sharing the benefits and burdens of environmental management globally. As for the burdens, environmental justice may justify distributive equality in terms of shouldering the responsibilities of dealing with global environmental problems (\textit{e.g.} climate change, protecting the ozone layer). True distributive equality in this regard would require the developed world to bear a considerably larger burden of assuming these costs and responsibilities. This, in turn, feeds into the discourse of "common but differentiated responsibilities" between developed and developing countries which is growing into a principle of international environmental law.\textsuperscript{144}

In the end, the question is not really whether punitive sanction or proactive protection or environmental justice should constitute the dominant approach to promote environmental security. Instead, a polycentric approach blending all three paradigms might maximize policy results. Such a multifaceted approach could promote environmental security by criminally punishing the most invidious offender, dissuading the negligent offender through incentive-based schemes, cleaning up blighted communities, according individuals a medium to air grievances, and encouraging the global community to equally shoulder the environmental externalities of industrialization.

\textsuperscript{142} This has been one of the strengths of the environmental justice movement in the United States. \textit{See} Taibi, \textit{supra} note 103, at 491-92. ("[T]his movement comprises a number of discrete and mostly unaffiliated groups whose identity and membership largely center on a particular location or issue. These groups are led by and draw their ranks not from educated professionals but from the more typically politically alienated lower middle class."). On the international level, \textit{see} Council of Europe, \textit{Convention on the Protection of the Environment Through Criminal Law, supra} note 71, at art. 11 (parties may grant environmental non-governmental organizations the right to participate in criminal proceedings concerning offenses under the Convention).

\textsuperscript{143} Popovic, \textit{supra} note 23, at 89. \textit{See also id. at} 88 ("A human rights mechanism would enhance the prospects for protecting the environment because it would help the international community see the environmental impact of war from the perspective of the most affected individuals and groups.").

\textsuperscript{144} \textit{See}, \textit{e.g.}, Philippe Cullet, \textit{Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations}, 10 \textit{E.J.I.L.} 549, 577 (1999).
VI. CONCLUSION

Article 8(2)(b)(iv) of the Rome Statute criminalizes the willful infliction of "widespread, long-term and severe damage to the natural environment." The inclusion of this crime within the jurisdiction of the ICC is cause for limited celebration and some disappointment. The disappointment flows from the fact that such conduct is already "prohibited" by virtue of Protocol I and the ENMOD Convention. Nonetheless, the Rome Statute does provide a significantly more viable mechanism to sanction this illegal conduct. It will, however, be very difficult to prove "widespread, long-term, and severe damage;" proof will be rendered more problematic owing to the conjunctive nature of these terms. Additionally, the environmental war crime requires a very significant level of knowledge and intentionality. Criminal behavior is not sanctioned on an objective basis and, consequently, ignorance of the law might serve as a defense. This would be less than desirable as environmental education and transparency of knowledge would then be discouraged. The availability of military advantage as a defense to the intentional infliction of widespread, long-term and severe damage to the natural environment may further denude the practical effect of Article 8(2)(b)(iv).

The inclusion of environmental crimes within the Rome Statute should also give rise to considerable reflection. The principle point of contemplation is the usefulness of the ICC as a device to promote environmental security. Ultimately some of the foundational limitations of the ICC as a device to promote such security flow not only from its structure, but also from the punitive paradigm it embodies. As a result, this Article suggests that proactive protection and environmental justice be woven into the international legal response to environmental crimes. Proceeding with this blended approach allows environmental security to serve as a lightning-rod uniting disparate fields such as international criminal law, the law of war, international trade law, international humanitarian law, and international anti-discrimination law. Only through such a polycentric approach can environmental security be promoted outside of the narrow confines of widespread long-term and severe damage intentionally inflicted during an international armed conflict.
I. INTRODUCTION

International human rights law has only very recently begun to address issues of sexual identity. When international human rights law was being developed after World War II, in the shadow of the horrors of the Nazi regime, same-sex sexual activity was illegal in most nations. The status of gay men and lesbians as criminals and/or as mentally ill no doubt meant that rights associated with sexual identity were not even imagined as part of the corpus of international human rights law. This was the case despite the fact that lesbians and gay men were explicitly targeted by the Nazi regime in Germany and interned in concentration camps. Reform of the criminal law began in Britain in 1967, and the reform process has spread to most western countries. But many nations, including seventeen United States states, still criminalize same-
sex sexual activity. And gay and lesbian identity remains stigmatized in most countries, even those where decriminalization has occurred.

Notwithstanding the continued stigmatization and criminalization of same-sex sexual activity, in the last decade we have seen the emergence of gay, lesbian, and transsexual rights issues on the international stage. In Part (I), of this paper, I will provide a brief overview of the development of international human rights law in the area of sexual identity. In Part (II), I will look at refugee law as a case study that offers us some insight into the way in which this development has occurred. In particular, this section will highlight the way in which international human rights law has focussed very much on sexual identity, rather than on non-normative sexual behaviors. In Part (III), I will offer some thoughts on the direction international human rights law might take from here. I will suggest that it is desirable to move away from the identity model as the sole focus and towards a model that seeks to deal more generally with sexuality. One way in which this could be achieved is through the articulation of a right to sexual self-determination.

II. SEXUAL IDENTITY AND HUMAN RIGHTS: AN OVERVIEW

A. Europe

The development of international human rights law in the area of gay and lesbian sexuality began in the 1980s, in Europe, when the European Court of Human Rights held in two landmark cases that criminalization of consensual adult sex between men in private violated the right to privacy protected by the European Convention on Human Rights. Over the subsequent years, the European Court of Human Rights has developed a reasonably extensive jurisprudence on sexual identity and human rights, not all of it positive. Gay men and lesbians have been quite successful in invoking the right to privacy under the European Convention in cases ranging from the discriminatory age of consent in Britain to the ban on lesbians and gay men serving in the armed forces in Britain. Not all the privacy cases have succeeded, however. A challenge to the criminalization of consensual sado-masochistic (S-M) sexual practices in Britain failed.

7. Laskey, Jaggard and Brown v. United Kingdom, 1997 WL 1104639 (Eur. Ct. H.R., Feb.1997). Although the criminal law in question (the common law of assault) did not, at least on its face, discriminate on the basis of sexual preference, the British courts seemed to be influenced by this fact: the judgment in the
In contrast to the general success of privacy arguments, lesbians and gay men have been less successful in the areas of equality and respect for family life under European law. Discriminatory provision of employment benefits to heterosexual couples has been upheld by the European Court of Justice, and, to date, no gay or lesbian family arrangement has been protected under Article 8 of the European Convention, which provides for respect for family life, as gay and lesbian relationships, even those involving children, are not recognized as "family" under the Convention. However, there are some indications that this situation may change. The European Court of Human Rights ruled, as I was writing this paper, that the non-discrimination clause of the European Convention, Article 14, prohibits discrimination on the basis of sexual orientation. In the case in question, the applicant had been denied custody of his child because he was gay. He claimed interference with his private and family life under Article 8 and Article 14 of the Convention, and the Court upheld his claim. The fact that the extension of Article 14 to sexual orientation came in a case concerning family issues suggests that protection for lesbian and gay families may eventually emerge in the European system.

In contrast to the record of lesbians and gay men, transsexuals have been on the whole successful in Europe in invoking the right to equality, but unsuccessful in invoking the right to privacy and respect for family life. House of Lords contains some comments that suggest that the sexual preference of the participants was relevant to their conviction. See R. V. Brown, 2 All E.R. 75 (1993); and, in a different case concerning sadomasochistic activity between husband and wife, charges were dismissed, at least in part because they were married and the state ought not to interfere in the marital relationship. See R v. Wilson, Q.B. 47 (1996).


9. See Pieter van Dijk, The Treatment of Homosexuals Under the European Convention on Human Rights in KEES WAALDUK AND ANDREW CLAPHAM (EDS), HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 179, 189-92 (1993). Van Dijk observes that the interpretation of "family life" in the heterosexual context has been broad, in contrast to the narrow and exclusionary interpretation in the context of same-sex relationships. Although the van Dijk piece is now six years old, there have been no subsequent cases that reverse the exclusion of lesbian and gay families from the notion of "family" under the European Convention. Indeed, in 1998 in Grant the European Court of Justice expressly reaffirmed that same-sex relationships do not constitute "family" under European law. See Grant v. Southwest Trains, All E.R. (EC) 193, ¶ 33-35 (1998).


B. The United Nations

In the United Nations human rights system, events concerning international human rights and sexuality have occurred mostly outside the judicial arena. Non-governmental organizations (NGOs) have played an important role in achieving visibility for lesbian and gay concerns in the international sphere. Two gay and lesbian NGOs, the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission (IGLHRC), have, for many years, tried to bring lesbian and gay issues into the international arena with mixed success. In 1993, ILGA was granted consultative status to the United Nations Economic and Social Council. This allowed ILGA, along with scores of other NGOs, to participate in United Nations conferences and some United Nations meetings, though not to participate in United Nations decision-making. This status was short-lived, however, as the United States led a campaign to oust ILGA from its consultative status based on the fact that some national member organizations, including the United States based North American Man-Boy Love Association (NAMBLA), advocated inter-generational sex. Although ILGA eventually expelled NAMBLA and two other national organizations from its ranks, its accreditation was nonetheless suspended, as one other national member organization was alleged to support pedophilia. As a result of the controversy, the United Nations AIDS program has indicated that it will not fund any project linked to ILGA. Currently, no gay and lesbian NGO has consultative status at the United Nations.

Mainstream NGOs have also begun, in the last 10 years, to play an important role in the area of sexuality and human rights. In 1991, Amnesty International included people imprisoned for their homosexual sexual activity partner and their children did constitute a family for the purposes of Article 8 of the Convention. However, Article 8 imposes no obligation on states to recognize as the father of a child a person who is not the biological father of that child, hence there was no breach of the Convention).

14. ILGA had been seeking consultative status with ECOSOC since 1991, but its application was extremely controversial, ultimately requiring the NGO Committee of ECOSOC to depart from its traditional consensus decision-making model and put ILGA’s application to a vote. See Wayne Morgan and Kristen Walker, Rejecting (In)tolerance: Tolerance and Homosex 20 MELB. U. L. REV. 202, 213-4 (1995).

15. For a detailed description and analysis of the events surrounding ILGA’s removal from consultative status, see Joshua Gamson, Messages of Exclusion: Gender, Movements and Symbolic Boundaries, 11 GENDER AND SOCIETY 178, 183-87 (1997).

or identity in its definition of "political prisoner," and since then, several other mainstream NGOs have begun to address lesbian and gay issues. 

In terms of the United Nations itself, activity has been more recent still. In 1993, gay and lesbian rights issues were raised by activists at the Vienna Conference on Human Rights – this was the first time these issues had been spoken of at a major United Nations conference. In 1995, lesbian rights were raised by women’s NGOs at Beijing and references to sexual orientation were included in the draft Platform for Action, although they were bracketed. All these references were ultimately removed from the final Platform for Action, however.

In the area of judicial or quasi-judicial decisions, there is but one within the United Nations system. In 1994, the United Nations Human Rights Committee handed down its views in the Toonen communication concerning Australia, where one state, Tasmania, criminalized private consensual sex between men. The Committee held that the Tasmanian law violated the right to privacy in the ICCPR. This was a significant milestone in the battle for gay and lesbian rights. There have not yet been further cases in the United Nations human rights system, but there is a pending case of interest, concerning New Zealand’s refusal to allow same-sex couples to marry.


18. For example, the Lawyers’ Committee for Human Rights, the International Human Rights Law Group, the International Commission of Jurists, Human Rights Watch and the Center for Women’s Global Leadership. See Laurence Helfer and Alice Miller, Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence, 9 HARV. HUM. RTS. J. 61, n. 138 (1996).


Notably, most of the events described above center on sexual identity categories, rather than on non-normative sexual activity. This can be problematic, as it redefines existing identity categories and may also reflect culturally specific understandings of sexuality. It also excludes from human rights protection those whose sexuality is non-normative or stigmatized, but whom do not fit into sexual identity categories as traditionally conceived. For a more detailed illustration, I turn to the example of refugee law.

III. REFUGEE LAW AND SEXUALITY

The Refugee Convention provides that a refugee is a person who,

[o]wing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.

It is now accepted by the major refugee receiving countries, including the United States, Canada, Britain, Australia, New Zealand, Germany, and the Netherlands, that gay men and lesbians may constitute a particular social group for the purposes of the Refugee Convention and thus are entitled to protection if they are persecuted because of their sexual identity. Canada has also accepted that transsexuals may constitute a particular social group.

The cases have generally treated homosexuality as something immutable or, in some cases, either unchangeable or something the individual should not be required to change. In all jurisdictions, the emphasis has been on the identity category "homosexual," rather than on the individual's sexual behavior. This emphasis on sexual identity is underscored by the fact that "mere" criminalization of same-sex sexual activity is not generally recognized as persecution. Rather, there must be some serious detriment to a person because of his or her identity or status as gay or lesbian, not just because of his or her sexual activity.

In this regard it is interesting to note that heterosexuals who violate social norms concerning sex — by engaging in sex outside marriage or sex for money,


for example—have, to date, received less protection under refugee law than gay and lesbian claimants. In Australia there have, to date, been no cases where those engaging in sex work, adultery, or fornication have been accepted as constituting a "particular social group" for the purposes of the Refugee Convention, although both adultery and fornication have been the basis for several claims for refugee status.

A. Adultery

A woman who committed adultery in Iran successfully obtained refugee status in Australia. The basis was persecution on the basis of membership in the social group of "women in Iran who have refused to submit to the severity of the Islamic code as it is enforced by the (Iranian) government." In contrast, a man who engaged in adultery was unsuccessful in claiming refugee status in Australia. He argued that the Iranian law against adultery constituted persecution on the basis of religious belief. The Australian Federal Court did not accept that the application of a generally applicable criminal law concerning adultery constituted persecution on the basis of religious belief, unless the application of the law was itself discriminatory.

B. Fornication

Fornication, that is, consensual sex between unmarried adults, has been the basis for several claims for refugee status in Australia. However, these claims have not been based on the argument that "fornicators" constitute a particular social group and they have been unsuccessful. In one case, the claimant feared he would be killed by the family of the woman with whom he had sexual relations. The Australian Refugee Review Tribunal did not accept that this constituted persecution for a Convention reason. In Z v. Minister for Immigration and Multicultural Affairs, also concerning Iran, Z had engaged in fornication and was threatened with prosecution and punishment of stoning, or perhaps whipping, if he failed to marry the woman concerned. Here the social group, as argued by the applicant, varied from "single Iranians . . . required, on
penalty, to marry in consequence of relationship with a member of the opposite sex” to “single adult male Iranians, inherently possessed of sexual drive.” The Federal Court did not decide on the social group question, however, as it found that the applicant’s fear was of the application of a law of general application, which did not constitute persecution for a Convention reason.  

C. Sex Work

There have been no Australian cases of which I am aware in which a claimant argued that “sex workers” constitute a particular social group or where a person has claimed a fear of persecution based on his or her profession as a sex worker. However, fear of “forced prostitution” has been argued as constituting a well-founded fear of persecution. This was rejected by the Tribunal in each case on the basis that the persecution alleged was not for a Convention reason.

The failure to consider adulterers, sex workers, and fornicators to be particular social groups seems to be, at least in part, because adultery, fornication, and prostitution are seen as behaviors, not identities. Adultery, fornication, and sex work are not seen as constituting particular kinds of people in the way that same-sex sexual activity, for example, is seen as constituting a particular kind of person, namely the “homosexual.” The sex of one’s sexual partner is seen as something fundamental to one’s identity, something immutable, difficult to change, or that one should not be required to change. "Homosexual" is something a person “is.” In contrast, adultery, fornication, and prostitution are viewed simply as “things a person does,” and thus, are not seen as attracting the operation of the Convention in the same way. Although protection has been given in some cases concerning adultery, this has been based more on gender than on sexual behavior.

Thus, where sexuality is concerned, refugee law has protected those who fit themselves within an identity category such as gay or lesbian. But it has not, to date, protected those whose sexual behavior violates social norms and who do not fit within a recognizable, essentialized identity category.


32. This distinction between “things one does” and “things one is” has been drawn in a number of cases. See Morato v. Minister for Immigration and Ethnic Affairs, 111 A.L.R. 417, 420, 422 (1992); Ram v. Minister for Immigration and Multicultural Affairs, 130 A.L.R. 314, 319 (1997); Australian Refugee Review Tribunal Decision, V97/06522 (1998) (visited Feb. 19, 2000) <http://www.austlii.edu.au>.
IV. WHERE TO FROM HERE?

To date, most human rights activism and jurisprudence in the area of sexuality has been concentrated in several disparate locations. First, there is gay/lesbian/bisexual/transsexual rights activism, which has centered primarily on the right to privacy in the criminal law context; the right to equality, often in the area of relationship recognition; and the right of transsexuals to recognition of their new sex. Second, there is extensive work around women’s sexuality by feminist scholars and activists. Here, the focus has been broader and has included reproductive rights, rape, sexual trafficking, sexual health, and female genital mutilation – with some attention to women’s right to sexual autonomy and lesbian sexuality. Third, there has been some activism by sex workers at an international level. But this has not yet received a great deal of mainstream human rights attention, in part because sex worker rights are controversial within the feminist movement, a large segment of which seeks to end prostitution rather than champion sex workers’ rights.

Although there have been some coalitions between these various groups, there has not, to date, been any sustained action around sexuality more broadly conceived. Nor has there been, until recently, any attempt to articulate a rights framework specific to sexuality. Rather, rights work in the area of sexuality has generally focused on fitting sexuality issues within the existing human rights framework, particularly the rights of equality and privacy. While this work has produced some significant advances, it nonetheless has some limitations, as it often fails to challenge dominant conceptions of sexuality.

As an alternative approach, I suggest that we articulate a right to sexual self-determination, rather than either privacy or non-discrimination on the basis of sexual identity. Thus, rather than pursuing an international declaration or convention on sexual rights that simply adds sexual orientation as a category of non-discrimination to existing civil and political rights, we need to imagine and enumerate new rights claims around the area of sexuality. This does not mean that we cannot or should not use the language of identity categories — visibility of particular non-normative sexual activities and preferences is clearly


34. This is suggested by Eric Heinze. See ERIC HEINZE, SEXUAL ORIENTATION: A HUMAN RIGHT 289 (1995). For a more detailed discussion of Heinze’s approach and the limitations with it, see Walker, supra note 33.
important and can challenge the present heterosexism of human rights law. However, we must be careful to acknowledge the cultural specificity of such categories and their narrow focus. Sexual self-determination is not just about freedom and equality for lesbians and gay men, rather, it is about valuing sexual diversity.

My notion of sexual self-determination is thicker than a simple assertion of a right to liberty, although liberty is clearly an aspect of self-determination. Rather than merely seeking an absence of state regulation of behavior, sexual self-determination also seeks to achieve the conditions under which individuals can make choices about their sexuality – albeit choices constrained by local social and cultural traditions and knowledge. This involves not only the absence of criminal law regulating consensual sexual activity, but the fostering of social structures that recognize individual and joint choices about important relationships and permit the expression of sexuality by individuals, couples, and groups. This requires the creation of a society in which diversity of sexual expression is recognized as good and fostered; in which there is education on diverse sexualities; and in which we are not constrained in our sexual activities by poverty and sickness. It is, in short, a transformative social project not limited to simply claiming existing rights. I argue that any international instrument dealing with sexuality ought to proceed from the premise of sexual self-determination. It ought to enumerate a right to engage in consensual sex, including public sex, paid sex work, and a right to freedom of sexual speech and expression. It should provide for freedom from coercive sex, including sexual trafficking and freedom from violence because of sexual difference. It should provide for recognition of important sexual relationships and should recognize reproductive rights, including abortion. It should recognize rights for those with HIV or AIDS and should provide rights for those who violate traditional gender norms, including but not confined to transgender folk. It should also provide for sex education and sexual self-determination for young people.

35. As Dianne Otto has observed, "recognizing the risks of identity politics does not have to lead to its rejection. This recognition could also lead towards understanding and practicing identity in a different way – as always contested, as contingent and dynamic, rather than definitive and static." See Dianne Otto, Sexualities and Solidarities: Some Thoughts on Coalitional Strategies in the Context of International Law, 8 AUSTRALASIAN GAY AND LESBIAN L. J. 27, 33 (1999).

Any articulation of sexual rights needs also to acknowledge the links between economic and social rights and sexuality. For example, we need to recognize the links between poverty and sexual oppression, particularly for women. Similarly, rights to sexual health are essential, especially in the context of HIV and AIDS.

This list is not, and is not intended to be, comprehensive. It is, rather, a starting point for debate on these issues. It is important, I argue, for those of us working on sexuality issues from diverse perspectives to try to articulate the commonalities between us and also to assess our differences. Perhaps it will not be possible to develop a consistent formulation of a right to sexuality. Perhaps such a project is simply to broad or too abstract; or perhaps sexuality is too culturally specific to allow for a universal right to sexual self-determination. But, even if this is so, a dialogue on these issues can only advance our understanding of sexuality and the ways in which international human rights can protect sexual expression.

37. See, e.g., Dianne Otto, Questions of Solidarity and Difference: Towards Transforming the Terms of Lesbian Interventions in International Law, forthcoming, in Victoria Brownworth and Ruthann Robson (eds), Seductions of Justice: Lesbian Legal Theories and Practices. (Manuscript on file with the author).
TERRORISM ON TRIAL: THE LOCKERBIE CRIMINAL PROCEEDINGS

Michael P. Scharf

I. INTRODUCTION .................................... 355
II. FROM LOCKERBIE TO CAMP ZEIST ...................... 356
III. SCOTTISH JUSTICE AT CAMP ZEIST ................... 358
IV. "IF THE CIRCUIT BOARD DOESN'T FIT, YOU MUST ACQUIT"
   A PREVIEW OF THE LIKELY OUTCOME OF THE TRIAL .... 359
   A. The Prosecutor's Case ........................... 359
   B. The Defense's Case .............................. 360
V. CONCLUSION ...................................... 361

I. INTRODUCTION

On December 21, 1998, a bomb exploded in the cargo hold of Pan Am Flight 103 killing all 259 passengers and crew, as well as eleven residents of the town of Lockerbie where the wreckage of the Boeing 747 crashed 31,000 feet below. After years of negotiations and diplomatic maneuvering, Libya recently surrendered the two Libyan officials accused of the bombing (Abdelbasset Ali Ahmed Al-Megrahi and Ali Amin Khalifa Fhimah) for trial in the Netherlands before a panel of Scottish judges. The trial is set to begin on May 3, 2000.

Experts are already calling this "the trial of the century," - though the label is somewhat misplaced given that the century will only be a few months old when the trial begins. There is no question, however, that this will be the most important and unique, as well as the longest and most expensive, trial in Scottish Legal History. This article, which is an expanded version of a speech delivered at International Law Weekend '99 at the House of the Association of the Bar of the City of New York, describes the events that led to this historic trial, analyzes the unique aspects of the proceedings, and previews the likely outcome of the criminal case.1

1. This article draws from the following public sources: Lockerbie Trial Briefing, (visited July 19, 1999) <http://www.law.gla.ac.uk/lockerbie> (includes indictment, the UK-Netherlands Agreement, correspondence between the United Nations Secretary-General and Libya/the United Kingdom/the United States, and Security Council Resolutions 731, 748, 883, and 1192); How the Deal was Done, The Guardian
II. FROM LOCKERBIE TO CAMP ZEIST

Pan Am 103 was blown up just five months after the United States Frigate Vincennes mistakenly fired a missile at and shot down an Iran Air airliner, killing all aboard and provoking the Iranian Parliament to publicly call for revenge against America. Two months before the Pan Am 103 bombing, German police raided an apartment in Frankfurt, Germany, belonging to members of the Popular Front for the Liberation of Palestine - General Command (PFLP-GC), a terrorist group which operated out of Syria. The raid disclosed an arsenal of terrorist weapons, including a Toshiba radio cassette player converted into a bomb, just like the one that was discovered in the wreckage of Pan Am 103. In light of these events, United States officials initially stated that they believed either Iran or the PFLP-GC (rather than Libya) was behind the Pan Am bombing.

It was not until three years after the Lockerbie disaster that the United States and United Kingdom publicly cast the blame on Libya. In November 1991, the United States and the United Kingdom formally charged Al-Megrahi and Fhimah with conspiracy, murder, and destruction of Pan Am 103. According to the charges, the government of Libya ordered the bombing of Pan Am 103 in revenge for the United States bombing of Tripoli two years earlier. Al-Megrahi, a Libyan Intelligence Officer, allegedly prepared a suitcase containing a bomb in a Toshiba radio cassette player. Fhimah, who worked for Libyan Arab Airlines on Malta, allegedly planted the suitcase on an Air Malta plane bound for Frankfurt Germany. In Frankfurt, the suitcase was loaded onto a Pan Am feeder flight to London, and at London's Heathrow Airport, it was transferred to Pan Am 103.

Though neither country had an extradition treaty with Libya, the United States and United Kingdom both demanded that Libya immediately surrender Al-Megrahi and Fhimah to them for trial. Citing the "lynch mob atmosphere" prevailing in the United States and United Kingdom concerning this case, as well as its right to undertake its own prosecution of the accused under the Montreal Aircraft Sabotage Convention, Libya refused to comply with the United States and United Kingdom demands.

In 1992, the United Nations Security Council responded to Libya’s refusal by adopting Resolution 748, which imposed sanctions on Libya to impel it to hand over the two accused for trial, make compensation to the victims’ families, and demonstrate with concrete actions its renunciation of terrorism. As expanded in 1993 with the adoption of Security Council Resolution 883, the sanctions required the members of the United Nations to freeze Libyan government funds in their banks, impose an embargo on military and oil production equipment on Libya, and prohibit flights arriving from or destined for Libya.

Libya responded by offering to extradite Al-Meghrahi and Fhimah to Malta, where their acts allegedly took place. However, the United States and United Kingdom rejected the offer on the ground that Malta was so close geographically to Libya that its judiciary would be susceptible to improper influence. As an alternative, in 1994, Libya proposed trial before a Scottish court, provided it sat in a neutral country such as the Netherlands. At first, the United States and United Kingdom rejected the offer, believing it to be merely a propaganda ploy. During the next few years, however, it became increasingly clear that, despite sanctions, the two Libyans would not be surrendered for trial. Meanwhile, a growing number of countries were expressing their opposition to the sanctions, and enforcement of the sanctions began to erode. Finally, in August 1998, the British Government of Tony Blair persuaded the United States to agree to Libya’s plan.

The final deal with Libya contained the following elements: (1) The Security Council imposed sanctions would be suspended when Libya surrendered Al-Megrahi and Fhimah to the Netherlands for trial before a Scottish panel of judges at Camp Zeist, part of the decommissioned United States Soesterberg air base outside of Utrecht; (2) Al-Megrahi and Fhimah would be permitted to fly on a non-stop flight from Libya to the Netherlands so that they would not be susceptible to arrest in a third country; (3) While in the Netherlands, Al-Megrahi and Fhimah would stand trial only for the Pan Am 103 case, and if acquitted, would be returned directly to Libya; (4) If Al-Megrahi and Fhimah are convicted, United Nations monitors would be permanently stationed inside Barlinnie Prison in Scotland where the two would serve sentence; and (5) The United Kingdom would permit Libya to establish a consulate in Edinburgh to watch over Al-Megrahi and Fhimah’s interests, despite the absence of diplomatic relations between the United Kingdom and Libya. In addition to these five conditions, press reports indicated that the United Kingdom had agreed that no senior Libyan intelligence officers would be required to testify at the trial and that the prosecution would not try to trace the orders for the bombing to Khaddafi himself. Scottish prosecutors have insisted that no such deal has been made.

On April 6, 1999, Al-Megrahi and Fhimah arrived in the Netherlands. Later that day, pursuant to Security Council Resolution 1192 (1998), the United Nations sanctions were suspended when Secretary-General Kofi Annan
communicated formally to the Security Council the successful handover of the two accused.

III. SCOTTISH JUSTICE AT CAMP ZEIST

The Scottish rules of evidence and procedure that will govern the Pan Am 103 trial differ from the United States rules in several notable respects which may affect the outcome of the trial.

Under the Scottish rules, for example, there is no requirement that probable cause be confirmed at a preliminary hearing to test the sufficiency of the Prosecutor’s case prior to trial. In contrast, had the case been tried in the United States, a magistrate would have to independently determine through an open and adversary hearing that there are substantial grounds upon which a prosecution may be based. This screening process is said to prevent hasty, improvident, or improper prosecutions.

It is a peculiarity of the Scottish system that no one may be convicted without corroboration. This requires that, for every element of the crime, there must be credible evidence from more than one source. A single piece of evidence of guilt, no matter how compelling, cannot support a conviction. This corroboration requirement will make it more difficult to obtain a conviction in the Lockerbie court than if the case had been tried in the United States.

At the request of the defense, the Lockerbie court will be composed of a panel of three judges, rather than a fifteen-member Scottish jury. Yet, as with a Scottish jury, the three-judge panel can rule by a simple majority. This is to be contrasted with the United States practice of requiring a determination of guilt by a “substantial majority” (a minimum of nine out of twelve jurors) in a federal felony case. In contravention to the strict corroboration requirement, this will make it somewhat easier to obtain a conviction in the Lockerbie court than if the case were tried in the United States.

Another aspect of Scottish criminal procedure that may enhance the prospects of conviction as compared to a United States proceeding is the broad Scottish hearsay exception for unavailable witnesses. An out of court statement may be introduced not only if the witness is dead or has disappeared (as in the United States), but also if the witness simply refuses to appear at Camp Zeist to testify. This is important since the Scottish court sitting in the Netherlands lacks the power to compel the appearance of witnesses outside of Scotland.

Perhaps the greatest difference between the Lockerbie court and a United States court concerns the range of verdicts that are possible. Where the United

---

2. On the other hand, two eyewitness accounts would be sufficient; a single eye-witness account may be corroborated by circumstantial evidence pointing to the guilt of the accused, and it is even possible for two pieces of circumstantial evidence to corroborate each other.

States only has "guilty" and "not guilty," the Scottish court can issue three possible verdicts: "proven," "not proven," and "not guilty." "Not proven" in Scotland usually means that the jury thinks the defendant is guilty, but that the proof of guilt was not beyond a reasonable doubt. The existence of this third option may make it easier for the judges to acquit Al-Megrahi and Fhimah, because they can do so while simultaneously explaining in their written judgment that they nonetheless thought the defendants were guilty.

If the defendants are convicted, they cannot be subject to the death penalty, which has been outlawed in the United Kingdom. The sentence for murder is a mandatory life imprisonment, with no possibility for a reduction of sentence in light of mitigating factors. There is no prescribed sentence for a conspiracy conviction, which would be up to the discretion of the judges.

Finally, in contrast to the United States double jeopardy principle, the Scottish prosecutors can appeal an acquittal on a legal point. The appeal is to the High Court (a panel of five Scottish judges in Edinburgh), which can order a new trial if it concludes that the verdict rested on an error of law.

IV. "IF THE CIRCUIT BOARD DOESN'T FIT, YOU MUST ACQUIT" A PREVIEW OF THE LIKELY OUTCOME OF THE TRIAL

A. The Prosecutor's Case

From the indictment and the discovery proceedings in the civil case against Libya, one can glean what the prosecution's key evidence is in this case.

One of the most important pieces of evidence was the discovery in the Pan Am 103 wreckage of an unaccompanied suitcase bearing tags from Valletta, Malta. The charred suitcase contained clothing traced to a shop called "Mary's House" in Malta. The owner of the shop, Tony Gauci, has identified Al-Megrahi as the person who purchased the items in question. The Prosecutor will argue that Al-Meghrahi filled the suitcase with this clothing, in addition to the Toshiba radio-bomb, so that it would not appear suspicious to airport security personnel.

Also important to the Prosecution's case was an intercepted radio message from Tripoli to a Libyan government office in Berlin on December 22, 1988 that said, "mission accomplished."

After months of searching through the debris of some 10,000 items spread over 850 square miles, the Lockerbie investigators found the most important piece of evidence of all - a small fragment of a circuit board from the electronic timer that had triggered the bomb. The FBI Lab, headed by Thomas Thurman, matched the fragment, which was smaller than a thumb nail, to a timer seized earlier from Libyan agents in West Africa. That timer was traced to an electronics company in Zurich, Switzerland called Mebo, which admitted that it had sold twenty such timers to the Libyans in 1985.
Finally, the Prosecution will present its star witness - a Libyan defector, presently in the United States witness protection program, who used to work for Libyan Arab airlines in Malta. He is expected to testify that early on the day of the Pan Am 103 bombing, he saw Fhimah put the suitcase containing the bomb aboard the Air Malta Flight to Frankfurt.

B. The Defense's Case

The Defense will suggest that Pan Am 103 was blown up not by Libya, but by Iran or the PFLP-GC, as the criminal investigators originally suspected. Under Scottish law, this is the special defense of "incrimination." It is permissible to blame "persons unknown" in Scottish law. A special defense is special only in the sense that it must be announced prior to trial. It does not shift the burden of proof to the defense.

But if Libya was not behind the bombing, why the radio transmission from Tripoli saying "mission accomplished?" To answer that question, the Defense is likely to call Victor Ostrovsky, a former Mossad Secret Service agent and author of By Way of Deception. In his book, Ostrovsky tells how Israeli commandos set up a transmitter in Tripoli that generated a false signal about "success" after the 1986 LaBelle Disco Bombing. Believing Libya was behind the attack on the German nightclub where United States servicemen were killed and injured, the United States retaliated by bombing Tripoli a few weeks later. The Defense will suggest that the Israelis likely accomplished the same feat in 1988, thereby once again incriminating their enemies, the Libyans.

And how will the Defense deal with the circuit board, which had been sold by Mebo to the Libyan Government? The Defense is likely to call Edwin Bollier, the director of Mebo, who will testify that the fragment found in the Pan Am 103 wreckage does not in fact match the timers that his company sold the Libyans in 1985. Bollier told CBS "60 Minutes" in April 1999, that investigators had shown him a photograph of the Lockerbie fragment. In contrast to the circuit boards that he sold to Libya, which were smoothly printed by machine, that photograph shows clearly that the Lockerbie fragment was roughly soldered as if made by hand.

In addition, Bollier has publicly stated that he had previously sold roughly soldered handmade timers similar to the one used in the Lockerbie bomb to the Stasi, the East German secret police. And the Stasi was known to have supplied weapons and explosives to Palestinian terrorist groups including the PFLP-GC, the original Lockerbie suspects. Bollier has also said that a few months before the Lockerbie bombing in 1988, he reported a break in at his company in which photographic blueprints for a circuit board like the one used to blow up Pan Am 103 were stolen. Whoever had the blueprints was in a position to make the Lockerbie circuit board and timer. Thus, the Defense has ammunition to argue
that the necessary connection between the Lockerbie circuit board and Libya is broken. And to bolster its case, the defense will point out that Thomas Thurman, the FBI forensic expert responsible for the Pan Am 103 investigation, was forced out of the FBI after a Justice Department inquiry found that he had allowed examiners in his explosives unit to overstate conclusions in favor of the prosecution in several cases.

There seems to be little doubt that the clothes in the suitcase containing the bomb were bought at Mary’s House in Malta. But Tony Gauci, the eyewitness who links Al-Megrahi to the mysterious suitcase, identified Al-Megrahi from a photo a year after the bombing. Prior to the photo ID, Gauci said the person who purchased the clothing was fifty years old, six feet tall, and heavily built. Al-Megrahi was then only thirty-six, just five foot eight, and slight of build. And after the ID, Gauci later identified the person who purchased the clothing as Mohammed Abu Talb, a PFLP-GC terrorist who was in Malta at the time in question and is now serving a life-sentence in jail in Sweden.

Finally, the Defense will try to impeach the Libyan defector by pointing out that he stands to gain $4,000,000, which is the reward that has been raised by the United States and Air Pilots Association for evidence which leads to a conviction of Megrahi and Fhima.

V. CONCLUSION

Given the peculiarities of the Scottish procedures and the problems with the prosecution’s case which are discussed above, it will be very difficult for the prosecution to obtain a conviction in the Lockerbie case. And no matter the outcome, the Lockerbie criminal proceedings will play into Colonel Khaddafi’s hands.

If the verdict is “not proven,” Colonel Khaddafi can claim he was not behind the bombing. Even if found guilty, Al-Megrahi and Fhimah are unlikely to implicate Khadaffi because their families remain in Libya. They will take the fall and Colonel Khaddafi can claim that the trial never proved that he was involved. Most importantly, the Security Council has already lifted the sanctions on Libya, thus putting an end to Colonel Khaddafi’s pariah status. International trade with Libya is booming since the surrender of Al-Megrahi and Fhima, and even the United States seems poised to remove Libya from its list of terrorist-supporting states.

Faced with no trial, or this trial, perhaps this was the best possible solution. The families of the victims of the bombing will finally see some sort of closure to their ordeal. Yet, they will not necessarily see justice done, nor the full truth told in the case.
THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER NATIONALS OF NON-PARTY STATES*
(Conference Remarks)

Madeline Morris**

The Rome Treaty for an International Criminal Court (ICC) provides for the establishment of an international court with jurisdiction over genocide, war crimes, and crimes against humanity. The Treaty provides that, in some circumstances, the ICC may exercise jurisdiction even over nationals of states that are not parties to the Treaty and have not otherwise consented to jurisdiction. Specifically, Article 12 provides that, in addition to jurisdiction based on Security Council action under Chapter VII of the United Nations Charter and jurisdiction based on consent by the defendant’s state of nationality, the ICC will have jurisdiction to prosecute the nationals of any state when crimes within the Court’s subject matter jurisdiction are committed on the territory of a state that is a party to the Treaty or that consents to ICC jurisdiction for that case. That territorial basis would empower the Court to exercise jurisdiction even in cases where the defendant’s state of nationality is not a party to the Treaty and does not consent to the exercise of jurisdiction.

The United States has objected to the ICC Treaty on the ground that, by purporting to confer upon the Court jurisdiction over the nationals of non-consenting non-party states, the Treaty would bind non-parties in contravention of the law of treaties. This objection has given rise to a heated controversy. The question of ICC jurisdiction over non-party nationals poses a genuine dilemma. There are legitimate and very important concerns on each side of this matter.

Let me tell you what I think is at stake. On the one hand, there is the pressing need for justice in cases of genocide, war crimes, and crimes against humanity. That need is pressing, if for no other reason, because of the interest of victims in seeing justice done. There is also the important and related fact that the sense that justice has been served may help to break cycles of violence in societies in which revenge and retaliation may otherwise take the place of trial and punishment. Those reasons are enough to qualify the need for justice as a pressing need. Perhaps prosecutions also would deter future crimes of mass violence. That, we do not know. Either way, the need for justice is a

---

* Copyright, Madeline Morris, 1999.
** Professor of Law, Duke University.
compelling one, and the ICC may make some important contribution in that cause.

This brings us to the issue of the ICC's jurisdiction. The crimes of genocide, war crimes, and crimes against humanity are often committed with the collusion of governments. Those governments are unlikely to consent to ICC jurisdiction over their nationals for crimes that the government supported or condoned. The Rome Treaty responds to that serious problem by providing that, in some cases, the Court will have jurisdiction even without the consent of the defendant's state of nationality and even if that state is not a party to the Treaty. This sort of jurisdiction makes some sense. It makes sense to give the Court robust jurisdiction lest a rogue regime should be able to shield its nationals from justice. And, when viewed from this perspective, it is hard to see how any state could legitimately object. If the Court's subject matter jurisdiction is limited to established international crimes and the process of the Court is fair, then no state — party or non-party — should have legitimate objections to the Court's exercising jurisdiction over its nationals.

This reasoning might cause us to see ICC jurisdiction over non-party nationals as relatively unproblematic were it not for the fact that the ICC will inevitably hear two different types of cases. There will be cases involving strictly a determination of individual culpability, and cases that will focus on the lawfulness of the official acts of states. There will, in ICC cases, always be an individual defendant in the dock. But if the conduct forming the basis for the indictment was an official act taken pursuant to state policy and under state authority, then the case will, in effect, be an adjudication of the lawfulness of the state's acts and policies. In such cases, the state whose conduct is questioned might acknowledge the conduct and maintain that the conduct was lawful; or the state might deny that the alleged acts in fact occurred. In either event, the case will represent an adjudication of the lawfulness of a state's conduct and, in that sense, will constitute a legal dispute between states.

For individual culpability cases, the ICC will share much in common with other criminal courts. For official acts cases, the ICC will resemble much more an international court for interstate dispute adjudication. For the former, robust jurisdiction is appropriate for the reasons I have touched on. For the latter, flexibility and consensuality of jurisdiction are important, as reflected in the jurisdictional regimes of other international courts that adjudicate interstate disputes, such as the ICJ, the Law of the Sea Tribunal, and the WTO dispute settlement system. The ICC, thus, requires a jurisdictional structure that is both sufficiently aggressive to make the Court effective in the prosecution of criminals and also sufficiently consensual to make the Court a suitable institution for the adjudication of international disputes. It is this need for the ICC's jurisdictional structure to accommodate these two conflicting requirements that creates our dilemma.
Let me focus for a moment on why compulsory jurisdiction to adjudicate interstate disputes in an international court may raise serious concerns for states. Particularly where an interstate dispute concerns an area of unsettled law, litigation may entail more risk than states can be expected to accept. If the subject matter is important and the law is unsettled, allowing a third party to, in effect, decide the binding law of the matter is a very perilous course of action. Relatedly, compulsory jurisdiction may be problematic insofar as compromise outcomes of various sorts may be desirable in interstate dispute type cases, but are unlikely to emerge from adjudicated rather than negotiated resolutions. It is also important to recognize here that the decisions of an international court will be more authoritative than would those of any individual state’s courts. Thus, an international court would have the power to create law in a manner disproportionate to that of any state. This may be more law-making power than some states are comfortable granting to one international institution—especially in sensitive areas involving military activities and international security. Moreover, the law developed by an international court would not be susceptible to revision or reversal through any legislative process, as would be the case in municipal justice systems. States may have legitimate concerns about the compulsory jurisdiction of such a court. Finally, states would need to be more concerned about the political impact of adjudications before an international court than before an individual state’s courts. An even-remotely successful international court will have significant prestige and authoritiveness. The political repercussions of such a court’s determining that a state’s acts or policies were unlawful would be very substantial indeed, and categorically different from the repercussions of the same verdict emerging from a national court. States may therefore be put to a choice, in some cases, of either revealing sensitive data as defense evidence or withholding that evidence and thereby risking severe political costs in case of a guilty verdict.

These are, in very abbreviated form, the legitimate and significant concerns that may give states pause in accepting ICC jurisdiction. This is not to say whether states ultimately should or should not accept ICC jurisdiction. Rather, the point is that the implications of jurisdiction exercised by an international court are very different from those of jurisdiction exercised by national courts. The two kinds of jurisdiction therefore raise very different concerns for states.

Now, you may say, “It is true that there are these political and policy considerations at stake for states, but those are not legal bars to jurisdiction.” You may say, “The lawfulness of ICC jurisdiction over non-party nationals is unproblematic, and so states—whatever their policy concerns—are obliged to accept that jurisdiction.” Here is where I believe that an error is made.

ICC jurisdiction over non-party nationals has been justified as a form of delegated jurisdiction. The theory is that states parties, in effect, delegate their
universal or territorial jurisdiction to the ICC. However, there are very significant differences in the consequences and implications of ICC jurisdiction as distinct from state jurisdiction, in the ways I have just described. For that reason, it should not be quickly presumed that the option of delegating a state’s jurisdiction to an international court is necessarily part of the customary law of universal or territorial jurisdiction. Because different state interests are affected by state jurisdiction and international jurisdiction, consent to or acquiescence in state-exercised jurisdiction is not equivalent to consent to or acquiescence in jurisdiction exercised by an international court.

The international law of jurisdiction (universal, territorial, and so on) is customary law. It has developed through the consent, acquiescence, and practice of states. Its legitimacy rests precisely on the fact that, in the course of the law’s development, states have accepted a particular jurisdictional principle as law and have acted accordingly.

Unsurprisingly, states decide whether to accept the development of particular principles or rules of law based on the implications of those rules for states’ interests, however they define those interests. If the concept of the “incremental development of customary law” is to mean anything coherent, it must mean that a development can be considered incremental only if the development would not fundamentally change the impact of the law on states’ interests. Customary law, if it is to maintain any claim to legitimacy, cannot proceed by ambush and surprise. We cannot say to states,

This “development” of customary law was unforeseeable and not part of what was anticipated as the law developed through state practice and *opinio juris*. In fact, this “development” has a significantly different impact on your interests than the rule that it developed from. But, nevertheless, you are now bound to accept this innovation because it has been deemed incremental.

That would not be legitimate, and it also would not work.

This is why I believe that the concerns that states may have with ICC jurisdiction are not “mere policy concerns” but are, in fact, of fundamental legal significance. It cannot be said that the option of delegating states’ jurisdiction to an international court is already an established feature of the customary law of universal or territorial jurisdiction. And the fact that the impact of international jurisdiction on state interests is significantly different from the impact of state-exercised jurisdiction means that we cannot label the move to include delegability as an “incremental development.”

There is no instance of prior state practice involving the delegation of states’ jurisdiction to an international court without the consent of the defendant’s state of nationality. The International Criminal Tribunals for the
former Yugoslavia and Rwanda base their jurisdiction on Security Council powers under Chapter VII. The Tokyo Tribunal after WWII based its jurisdiction on Japan's consent. And the Nuremberg Tribunal based its jurisdiction on the consent of the Allies, acting as the German sovereign. As the Nuremberg judgment stated:

[T]he making of the Charter [establishing the Nuremberg Tribunal] was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.

Thus, the Nuremberg Tribunal relied on the right of the Allies to exercise sovereign prerogatives in Germany as the basis for its jurisdiction. There are excellent arguments for the view that the Nuremberg Tribunal should not have done so. But that is what it did. Its jurisdiction may have been flawed for that reason — but that would mean only that its jurisdiction was flawed, not that the jurisdiction rested on some basis other than the one stated by the court.

The net result is that none of the four modern international tribunals has exercised the delegated jurisdiction of states in the absence of consent by the defendant's state of nationality. Therefore, there appears to be no prior instance of state practice to support the ICC's exercise of universal or territorial jurisdiction delegated to it by states without the consent of the defendant's state of nationality.

Now, you may say, "You're quibbling. If each of the states parties to the ICC Treaty would have the right to prosecute these defendants, then surely those states can get together and prosecute them in an international court which they create." You may say, "Even if there are no prior instances of state practice of such delegated jurisdiction, the innovation is 'incremental' - states can prosecute in their national courts or in an international court — it's such a minor change."

But, here is precisely where we see that, from the point of view of states' interests, the implications of the innovation are very significant and not minor or incremental at all. States, for the reasons I have briefly elaborated, may be unwilling to have their interstate disputes adjudicated by an international court, even while those same states may accept universal and territorial jurisdiction and, thus, accept the prosecution of their nationals in the courts of other individual states.

Thus, when we speak of the delegation of states' jurisdiction to an international court, we are speaking not of an "incremental development" but of a substantial and significant legal change. Such substantial changes cannot and should not be accomplished through labeling them as minor or incremental
developments in customary international law. An attempt to characterize a major change as a minor change is bound to meet with resistance, just as we have seen in the ICC context.

Before closing, I would like briefly to address two different arguments, sometimes raised in this context, that I think we probably need not detain ourselves with. I will mention them here in passing, though I say much more about them in my paper.¹ The first of these arguments is that the Rome Treaty has itself created new customary law permitting jurisdiction over non-party nationals. That claim seems to me to be very premature, for reasons that I take to be self-evident. If I am wrong about that and there is disagreement on the point, I would be happy to discuss it.

The other argument sometimes made is that the terrorism treaties demonstrate that states can create otherwise non-existent jurisdiction in treaties and then apply that jurisdiction to non-parties. The terrorism treaties do, indeed, provide that states parties will have, in effect, universal jurisdiction over the crimes covered in the treaties. But, as I discuss at some length in the paper,² this does not indicate that states can create jurisdiction that they would not have individually by signing a treaty, and then impose that jurisdiction on non-parties. The better interpretation of the significance of the terrorism treaties is that those treaties, in effect, propose new customary law. Non-party states can respond to that proposal by acquiescing in or objecting to the jurisdiction. If they acquiesce, then the jurisdiction defined in the treaties will, in time, become customary law. If non-parties object, then the bid to create new custom will likely fail. So far, in the case of the terrorism treaties, we have seen acquiescence. That has not been true regarding the jurisdictional provisions of the ICC Treaty — and therein lies the relevant and crucial distinction. Once again, I would be happy to discuss the terrorism treaties further but, in truth, I think that they are off point.

What I think is really relevant here, in conclusion, is that there are meaningful concerns about the compulsory adjudication of interstate disputes that might cause a state to reject the jurisdictional regime of the Rome Treaty. These concerns cannot, I believe, be dismissed as being non-legal in character. Rather, the fact that the ramifications of international jurisdiction and state-exercised jurisdiction are very different is entirely relevant to and, indeed, calls sharply into question, the lawfulness of ICC jurisdiction over non-party nationals.

---

² See id.
For these reasons, I believe that, as I began by saying, what we have is a genuine dilemma — not excuses or pretexts, but legitimate concerns on each side. I feel deeply, as we all do, the need for enforcement of the body of law intended to reduce the human suffering caused by genocide, war crimes, and crimes against humanity. I want for us to make progress on the particular obstacle to an effective ICC that we are considering today. I believe that we stand a chance of doing so only if we see realistically the valid concerns on both sides of this issue and take those concerns seriously into account in examining whether there may be a workable resolution.
Britain's Highest Court has decided that a treaty requires the British to honor a Spanish request for the extradition of General Augusto Pinochet Ugarte, Chile's strong man from 1973 until he "retired" with a rank of "Senator for Life" in Chile. The decision has raised the hopes of many that Pinochet would finally be made to face the moral evils that many think justify criminal punishment. Less noticed, it has aroused the apprehension of those concerned with the structure of international society and the place of "law" in it. Assuming that Pinochet is in fact responsible for the evils his government has been accused of, I am reminded of Robert Bolt's play, A Man for All Seasons, in which St. Thomas More refuses to cut a road through the law to catch a wicked person:

And when the last law was down, and the Devil turned round on you - where would you hide ...? This country's planted thick with laws . . . , man's laws, not God's — and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.\(^2\)

The first rule of law is its distribution of authority; Constitutional Law. No matter how wicked a person, before he or she can be tried, a court must be found with jurisdiction over the person and the offense. Since Spanish criminal law does not apply to events in Chile any more than it applies to events in the United States, the first question is whether Spain has the necessary jurisdiction to apply to Pinochet its version of "international criminal law." There are many reasons why it does not. Spanish judges given authority in a Spanish legal order do not represent the international legal community; they represent the Spanish legal community. If under the law of Spain they can apply the Spanish version of "international criminal law" to the acts of a Chilean, Pinochet, in Chile, that remains an authority derived from Spanish constitutional law, not

---

* Distinguished Professor of International Law, The Fletcher School of Law & Diplomacy at Tufts University.


2. Id.
from international law. Secondly, under the unwritten constitution of international society, derived from history, practice, and political necessity, like the unwritten British Constitution, all states are equal. If Spain can try Pinochet for violations of the Spanish version of international criminal law, then Iran can try Salman Rushdie under the Iranian version of international criminal law. Nor does the oft-mentioned example of piracy stand close inspection; the opinions of publicists and even dicta in tribunals does not make a convincing precedent, and the reasons why no country arrests or tries a foreign pirate who has attacked only third country shipping are clear. Would the United States accept the authority of Haiti or Cuba to rule the waves in that way? In main-stream international law texts jurisdiction is divided into segments. Even if a state has "jurisdiction to prescribe," that is the authority to make illegal by its own version of international law some acts by foreigners in so-called "universal jurisdiction" cases, it does not necessarily have "jurisdiction to enforce." It is the lack of that "jurisdiction to enforce" that makes it necessary for Spain to request cooperation, extradition, from the United Kingdom. Even if Pinochet is extradited, thus placing him within Spain's territorial "jurisdiction to enforce," that does not mean that Spain has "jurisdiction to adjudicate" in a criminal matter. I know of no case in which a war criminal or other supposed violator of "international criminal law" from a major power has ever been tried by a neutral tribunal.

The precedents in law all go the other way and have nothing to do with "chief of state" immunity. States in general do not interfere in the internal affairs of their neighbors but, except for spies, allow total personal immunity for any agent of state acting in a public capacity even if acting abroad. For example, France recently argued that the French agents involved in sinking the Greenpeace in New Zealand, because they acted for France, should be relieved of their liability under New Zealand's criminal law, even though the French actions were illegal as a matter of international law and their agents acted criminally under New Zealand's criminal law. Eventually, the convicted French agents were released to France as the result of the intermediacy of the United Nations Secretary General.

If there was a rule of international constitutional law under which Pinochet could be tried in Spain for his official actions, that rule could not apply equally among the sovereigns of the world who are supposedly equal before the law. Not only does the Salman Rushdie example indicate the problems, but, even more obviously, it would be politically disastrous to the cause of peace and reconciliation for a neutral state to attempt to indict Yasir Arafat, Ariel Sharon, various Russian and Chechen leaders, Margaret Thatcher, Gerry Adams, Milosevic, Izetbegovic, Tudjman - but the list is endless. However desirable it might seem, without forbidding revolutions by international law and placing international "guardians" over even democratically elected governments, it is
currently impossible to put the world into the hands of people who would agree that various particular atrocities could never be justified in the interest of stability, order, security of person, and property. When Plato made a similar suggestion, he noted that those best fit to be the “guardians” of society would not want the job.

What are the alternatives? For one, instead of a criminal action in Spain under the Spanish version of international criminal law, what about a normal civil suit against Pinochet in the United Kingdom (or anywhere else Pinochet is physically present or has assets) for the damage he has inflicted on anybody? Such suits are not uncommon. They are resolved by national courts referring to an applicable system of law, which might be the law of Chile, under which Pinochet has immunities, but might be international claims law. It depends on the “choice of law” rule of the tribunal; a thing to be investigated by plaintiffs’ attorneys and argued before a tribunal that has “jurisdiction to enforce” over the defendant and “jurisdiction to adjudicate” in the particular case. This difference between civil and criminal causes was illustrated in the United States most notably in the O.J. Simpson affair; he was acquitted in a criminal trial and convicted in a civil action. Another possibility is an ordinary international claim by Spain against Chile for the “denial of justice” to Pinochet’s Spanish victims. Again, the procedures are well-precedented and do not involve the complexities of proving the rules of a supposed international criminal law. A third possibility is the “Waldheim” solution: Kurt Waldheim was never tried by anybody and it is still not known if he committed any war crimes, but he cannot get a visa to visit any place outside of Austria. Pinochet, like other persons of dubious moral standing, but undoubted pride and political significance back “home,” can be restricted to his home turf by governments that agree that his past actions fall below their moral standards. Had the British taken this view, Pinochet would not have been given a visa, could not have visited England, and there would have been no extradition request or Pinochet case in the United Kingdom.
The Convention for the Prevention and Punishment of the Crime of Genocide protects "national, ethnical, racial and religious" groups from intentional physical destruction. It imposes a variety of obligations upon States with respect to individual criminal liability for the crime. "[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation," said the International Court of Justice in its celebrated advisory opinion.

The enumeration of the groups protected by the Convention's definition of genocide is perhaps its most controversial aspect. Critics have argued that the omission of political, economic, social, gender and other groups is illogical and incompatible with the Convention's lofty mission. Some domestic legislatures, when enacting implementing legislation, have expanded the list of groups covered by the term genocide, the most extensive of these being the recent amendment to the French Code penal which defines genocide as the
intentional destruction of any group based on arbitrary criteria. Indeed, since the Convention’s adoption in 1948, surely far more has been said and written lamenting the restrictive scope of the groups covered by the definition found in article II of the Convention than on its interpretation per se.

The first judicial interpretation of the enumeration of groups protected by the Genocide Convention dates to September 1998, fifty years after the Convention’s adoption. In Prosecutor v. Akeyesu, a Trial Chamber of the International Criminal Tribunal for Rwanda wrestled with the application of the enumeration to the Tutsi victims of the 1994 genocide in Rwanda. Perplexed by difficulties in determining how to categorize the Tutsi group, the Trial Chamber ultimately ruled that article II of the Genocide Convention should be interpreted to apply to all “stable and permanent” groups, whether or not the Tutsi could be neatly fit within the scope of the terms “national, ethnic, racial or religious.” Months later, a second Trial Chamber of the same Tribunal, in Prosecutor v. Kayeshema and Ruzindana, took a very different approach to the issue, ruling that the Tutsi were an ethnic group not because they met the definition in any objective sense but because Rwandan laws had defined them as such.

This paper examines the conflicting interpretations produced by different Trial Chambers of the International Criminal Tribunal for Rwanda with respect to the enumeration of groups protected by the prohibition of genocide.

I. HISTORICAL CONSIDERATIONS

The Polish jurist Raphael Lemkin, in his 1944 work *Axis Rule in Occupied Europe*, invented the term genocide, defining it as a crime directed against “the national group as an entity.” A close reading of Lemkin’s writings shows that he viewed the prohibition of genocide as an extension of the protection of what were called “national minorities” in the inter-war treaty regime. It is true that Lemkin spoke of “political” and “economic” genocide, but here he referred not to the group protected but rather to the nature of the persecution. Lemkin’s approach to the forms that genocide might take, including destruction of political, economic and cultural institutions, was far broader than what would

---

5. The Eichmann case involved interpretation of Israeli legislation modelled on article II of the Genocide Convention. While the two judgments construe several important elements of the definition, they do not give any attention to the enumeration of groups: A.G. Israel v. Eichmann, (1968) 36 I.L.R. 5 (District Court, Jerusalem); A.G. Israel v. Eichmann, (1968) 36 I.L.R. 277 (Supreme Court).
later take shape within the *Convention*. But as for the nature of the groups protected, his narrow conception is quite faithfully reflected in article II of the *Convention*.

The term "genocide" was used by the prosecution during the Nuremberg trial of the major war criminals to describe the destruction of the Jewish population of Europe. The judges, however, did not adopt the term, and qualified the persecution of Jews by the Nazi regime as a crime against humanity. A few months after the Nuremberg judgment of September 30 - October 1, 1946, genocide was the subject of a General Assembly resolution. The first draft of General Assembly Resolution 96(I) spoke of "national, racial, ethnical or religious groups," echoing almost exactly the terminology later enshrined in the 1948 *Convention*. However, a drafting sub-committee of the Sixth Committee changed this to "racial, religious, political and other groups."

No recorded debates of the sub-committee exist to explain the addition of "political and other groups," and the summary records of the plenary Sixth Committee are silent on the subject. It has subsequently been argued that the presence of "political and other groups" within the 1946 definition suggests the existence of a broader concept of genocide than that expressed in the *Convention*, one that reflects customary law. But given the meager record of the debates, the haste with which the resolution was adopted, the novelty of the term, and the fact that the subsequent *Convention* excludes "political and other groups," such a conclusion seems adventurous at best. That Resolution 96(I) also omits ethnic and national groups is a further argument against it being taken as an authoritative list on this issue.

During the subsequent drafting work on the *Convention*, although debate raged about the specific groups to be included, particularly political groups, there is no doubt that the drafters intended to list the protected groups in an exhaustive fashion. Inclusion of "national groups" within the enumeration raised little controversy during the drafting of the *Convention*. As delegates explained, the term was well-understood within the context of the "minorities problems" in Eastern Europe between the two wars. Concern that "national" might be confused with "political" led Sweden to propose the addition of the term "ethnical." The reference to "racial" groups posed the least problem for the drafters of the *Convention*. There are no significant references to discussion...
of the term "racial" in the *travaux préparatoires*, suggesting that it is very close to the core of what the *Convention* was intended to protect. Although some questioned the inclusion of religious groups, these were accepted on the understanding that they were closely analogous to ethnic or national groups, the result of historical conditions that were in reality as defining of the group in an immutable sense as racial or ethnic characteristics.

Subsequent to the adoption of the *Convention*, the International Law Commission regularly flirted with the idea of modifying the text of article II of the *Convention* so as to give the enumeration of protected groups a non-exhaustive character, but it eventually returned to the original 1948 version. When it created the *ad hoc* Tribunals, the Security Council also retained the 1948 definition. There were isolated attempts to amend the definition of genocide during the drafting of the *Rome Statute*, but the final version also repeats the 1948 text without modification.

II. AKAYESU: "STABLE AND PERMANENT GROUPS"

The Trial Chamber of the International Criminal Tribunal for Rwanda, in its September 2, 1998 decision in *Akayesu*, considered the enumeration of protected groups in article III of the *Genocide Convention* (the model for article 2 of the *Statute of the International Criminal Tribunal for Rwanda*), to be too restrictive. The categorization of Rwanda's Tutsi population clearly vexed the Tribunal. For the Tribunal, the word "ethnic" came closest, yet it too was troublesome because the Tutsi could not be meaningfully distinguished, in terms of language and culture, from the majority Hutu population.

The Rwandan Tutsis are, it is widely believed, descendants of Nilotic herders, whereas the Rwandan Hutus are considered to be of "Bantu" origin from South and Central Africa. Historically, their economies were different, the Tutsis raising cattle while the Hutus tilled the soil. There are genomic differences, a typical Tutsi being tall and slender, with a fine, pointed nose, a


typical Hutu being shorter with a flatter nose. These differences are visible in some, but not in many others. Rwandan Tutsis and Hutus speak the same language, practice the same religions, and have essentially the same culture. Mixed marriages are common. Distinguishing between them was so difficult that the Belgian colonizers established a system of identity cards, and determined what Rwandan law calls “ethnic origin” based on the number of cattle owned by a family.\footnote{André Guichaoua, \textit{LES CRISES POLITIQUES AU RWANDA ET AU BURUNDI} (1993-1994) (1995); Jean-Pierre Chrétien, \textit{LE DÉFI DE L’ETHNISME; RWANDA ET BURUNDI: 1990-1996} (1997); G. Prunier, \textit{THE RWANDA CRISIS, 1959-1994, HISTORY OF A GENOCIDE} (1995); Filip Reyntjens, \textit{L’AFRIQUE DES GRANDS LACS EN CRISE} (1994).}

Confronted with the prospect that none of the four terms of the definition might apply, the Tribunal concluded that the \textit{Convention} could still extend to certain other groups, although their precise definition was elusive. Pledging fidelity to the \textit{Convention}'s drafters, the \textit{Akayesu} judgment declared:

On reading through the travaux préparatoires of the Genocide Convention (Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly), it appears that the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

The Trial Chamber continued:

Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide
Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.\(^\text{18}\)

With this approach, the Rwanda Tribunal encompassed the nation's Tutsi population within the definition of genocide, even if the term "ethnic group" was deemed insufficient.

The *Akayesu* analysis is open to criticism on several fronts. In the first place, it quite brazenly goes beyond the actual terms of the *Convention* definition, invoking the intent of the drafters as a justification. The problem is that the drafters chose the four terms in order to express their intent. If they meant to protect all "stable and permanent groups," why didn't they simply say this? The role of the *travaux préparatoires* is to assist in clarifying ambiguous or obscure terms, or those that are manifestly absurd or unreasonable,\(^\text{19}\) not to add elements that were left out. As was stated by Sir Percy Spender and Sir Gerald Fitzmaurice of the International Court of Justice: “The principle of interpretation directed to giving provisions their maximum effect cannot legitimately be employed in order to introduce what would amount to a revision of those provisions.”\(^\text{20}\) Reading in terms that are not already present in the text is also particularly objectionable when the treaty defines a criminal offence, which should be subject to restrictive interpretation and respect the rule *nullum crimen sine lege*.\(^\text{21}\) If the "stable and permanent" hypothesis is to be sustained, it must rely on a construction of the actual words that appear in article II.

A general discomfort with the term "racial group" may explain why the International Criminal Tribunal for Rwanda, in its September 2, 1998 judgment in the *Akayesu* case, was reluctant to classify the Tutsi as a racial group. The general conception of Tutsi within Rwanda is based on hereditary physical traits, even though these may be difficult to distinguish in many cases. According to the Rwanda Tribunal, “[t]he conventional definition of a racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”\(^\text{22}\)

This definition, adopted by the Tribunal in 1998, is considerably more restrictive than the recognized meaning of the term "racial" in 1948. An indication of usage at the time is provided by the Oxford English Dictionary, which proposes several definitions of race, of which the most appropriate are: "A group of persons, animals, or plants, connected by common descent or

---

18. *Akayesu*, *supra* note 6, at ¶ 515.
22. *Akayesu*, *supra* note 6, at ¶ 513.
origin;" "A group or class of persons, animals, or things, having some common feature or features." This definition can be extended without difficulty to cover national, ethnic, and even religious minorities, and that is indeed how the term was understood in 1948, although this no longer corresponds with modern-day usage. For example, the Permanent Court of International Justice, in a 1935 advisory opinion, spoke of the "the preservation of [the] racial peculiarities" of national minorities. A special United Nations Declaration of December 17, 1942 denounced ill-treatment of the "Jewish race" in occupied Europe. The judgment of the International Military Tribunal at Nuremberg noted that judges in Germany were removed from the bench for "racial reasons," a reference to treatment of Jewish jurists. It also condemned Julius Streicher for crimes against humanity because his incitement to murder and extermination at a time when Jews in the East were being killed under the most horrible conditions constituted "persecution on political and racial grounds." A British war crimes tribunal at the end of the Second World War convicted Nazis for their "persecution of the Jewish race." The International Military Tribunal for the Far East charged the Japanese government with failing to take into account the "racial needs" and "racial habits" of prisoners of war.

Although the term "racial group" may be increasingly obsolete, the concept persists in popular usage, social science, and international law. Understandably, progressive jurists search for a meaning that is consistent with modern values and contemporary social science. This must be the explanation for the Rwanda Tribunal's insistence upon hereditary traits as the basis of a definition. Yet it is unquestionable that the meaning of "racial groups" was much broader at the time of the drafting of the *Convention*, when it was to a large extent synonymous with national, ethnic, and religious groups. That

24. ETHNIC RELATIONS: A CROSS-CULTURAL ENCYCLOPEDIA 195 (David Levinson, ed., 1994). But in the early 1980s, a court in The Netherlands concluded that Jews were covered by the word "race" in the country's Penal Code, because "[t]he widely held opinion is that the term 'race' in § 429(4) cannot be construed solely in the biological sense but rather ... must be viewed as defining 'race' by reference also to ethnic and cultural minorities." S.J. Roth, The Netherlands and the 'Are Jews a Race? Issue, 17:4 PATTERNS OF PREJUDICE 52 (1983).
26. Quoted in MANFRED LACHS, WAR CRIMES, AN ATTEMPT TO DEFINE THE ISSUES 97-98 (1945).
27. France et al. v. Goering et al., supra note 10, at 419 (I.M.T.).
modern judicial interpretation results in less protection now than fifty years ago is surely a perverse result.

On closer scrutiny, three of the four categories in the Convention enumeration, national groups, ethnic groups, and religious groups seem to be neither stable nor permanent. Only racial groups, when they are defined genetically, can lay claim to some relatively prolonged stability and permanence. The day after the General Assembly adopted the Genocide Convention it approved the Universal Declaration of Human Rights, which proclaims the fundamental right to change both nationality and religion, thereby recognizing that they are far from permanent and stable. National groups are modified dramatically as borders change and as individual and collective conceptions of identity evolve. Nationality may be changed, sometimes for large groups of individuals where, for example, two countries have joined or secession has occurred. Religious groups may come into existence and disappear within a single lifetime. As for ethnic groups, individual members may also come and go, although there will often be formal legal rules associated with this, determining ethnicity as a result of marriage or in the case of children whose parents belong to different ethnic groups.

Furthermore, it is not at all clear from a reading of the travaux préparatoires of the Convention that the intent of the drafters “was patently to ensure the protection of any stable and permanent group,” as the Rwanda Tribunal claimed. In fact, reference to groups which are “stable and permanent” occurred only infrequently during the drafting, and other, complex justifications for the choices of the General Assembly were also given in the course of the debates. What a review of the drafting history reveals is that political groups - perhaps the best example of a group that is not stable and permanent - were actually included within the enumeration until an eleventh-hour compromise eliminated the reference. The debates leave little doubt that the decision to exclude political groups was mainly an attempt to rally a minority of Member States, in order to facilitate rapid ratification of the Convention, and not a principled decision based on some philosophical distinction between stable and more ephemeral groups.

Nor is there any support for the “stable and permanent” hypothesis in national legislation introducing the crime of genocide in domestic penal codes. It is true that several States have departed from the Convention definition, but none has taken the “stable and permanent” approach.

The Trial Chamber’s imaginative interpretation in Akeyesu, designed to address its discomfort with defining the Tutsi as an ethnic group, is particularly

puzzling because in the same judgment the Trial Chamber convicted the accused of crimes against humanity, in that he was responsible for a "widespread or systematic attack on the civilian population on ethnic grounds."32 Surely the word "ethnic" means the same thing in article 4 of the Statute as it does in article 2 of the Statute? Yet the Rwanda Tribunal did not see any need to enlarge the definition of crimes against humanity!

III. Kayeshema: Pure Subjectivity

Determining the meaning of the groups protected by the Convention seems to dictate a degree of subjectivity. It is the offender who defines the individual victim's status as a member of a group protected by the Convention.33 The Nazis, for example, had detailed rules establishing, according to objective criteria, who was Jewish and who was not. It made no difference if the individual, perhaps a non-observant Jew of mixed parentage, denied belonging to the group. As Jean-Paul Sartre wrote in Réflexions sur la question juive, "[l]e juif est un homme que les autres hommes tiennent pour juif: voilà la vérité simple d'où il faut partir. En ce sens le démocrate a raison contre l'antisémite: c'est l'antisémite qui fait le juif."34 Problems with the four categories in article II of the Convention have led some writers to argue for a purely subjective approach.35 If the offender views the group as being national, racial, ethnic, or religious, then that should suffice, they contend. In Rwanda, Tutsis were betrayed by their identity cards, for in many cases, there was no other way to tell.

In Kayeshema and Ruzindana, another Trial Chamber of the International Criminal Tribunal for Rwanda adopted a purely subjective approach, noting that an ethnic group could be "a group identified as such by others, including perpetrators of the crimes."36 Indeed, it concluded that the Tutsi were an ethnic group based on the existence of government-issued official identity cards describing them as such,37 quite clearly failing to endorse the "stable and

32. Prosecutor v. Akayesu, supra note 6, at ¶ 652.
33. For consideration of this question from the standpoint of minorities law, see, John Packer, On the Content of Minority Rights, in DO WE NEED MINORITY RIGHTS 124-25 (J. Raikkä, ed., 1996); John Packer, Problems in Defining Minorities, MINORITY AND GROUP RIGHTS TOWARDS THE NEW MILLENNIUM (B. Bowring, D. Fottrell, eds., 1999).
34. Jean-Paul Sartre, Réflexions sur la question juive 81-84 (1954).
37. Id. at ¶ 522-30.
permanent” analysis of the Akayesu judgment. 38 However, it did not explicitly disagree with the other Trial Chamber’s analysis.

This approach is appealing up to a point, especially because the perpetrator’s intent is a decisive element in the crime of genocide. The flaw of this approach is allowing, at least in theory, genocide to be committed against a group that does not have any real objective existence. To make an analogy with ordinary criminal law, many penal codes stigmatize patricide, that is, the killing of one’s parents. But the murderer who kills an individual believing, erroneously, that he or she is killing a parent, is only a murderer, not a patricide. The same is true of genocide. Although helpful to an extent, the subjective approach flounders because law cannot permit the crime to be defined by the offender alone. It is necessary, therefore, to determine some objective existence of the four groups.

It is also significant that several references to “group” appear within article II of the Convention. The term is used both within the chapeau, which describes the mental element or mens rea of the offence, and the five paragraphs that follow, which set out the punishable acts of genocide. Had the concept of groups appeared only in the portion of the text dealing exclusively with the mental element, namely the chapeau, the subjective argument would have more force. It would be sufficient to identify a genocidal intent where the accused believed that the group existed. However, the provision goes further and requires, in the definition of the actual acts of genocide, that they be directed against “members of the group.”

IV. DEFINING THE GROUPS: AN OBJECTIVE APPROACH

The High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe, Max van der Stoel, was once quoted saying that although he could not define the term, “I know a minority when I see one.” 39 Put differently, difficulty in constructing a definition does not render an expression useless, particularly from the legal point of view. The four terms — national, ethnical, racial, and religious — necessarily involve a degree of subjectivity because their meaning is determined in a social context. For example, issue may be taken with the term “racial” because the existence of races themselves no longer corresponds to usage of progressive social science. 40 However, the terms “racial” as well as “race,” “racism,” and “racial

38. Id. at ¶94.
40. According to the Commission of Experts on Rwanda, “to recognize that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or
"group" remain widely used and are certainly definable. They are social constructs, not scientific expressions, and were intended as such by the drafters of the Convention. To many of the delegates attending the General Assembly session of 1948, Jews, Gypsies and Armenians might all have been qualified as "racial groups," language that would be seen as quaint and perhaps even offensive a half-decade later. Their real intent was to ensure that the Convention would contemplate crimes of intentional destruction of these and similar groups. The four terms were chosen in order to convey this message. International law knows of similar examples of anachronistic language. One of the earliest multilateral treaties dealing with human rights was aimed at "white slavery." Its goal, the eradication of forced prostitution on an international scale, remains laudatory and relevant, although the terminology is obviously archaic.

The four terms in the Convention not only overlap, they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection. This was certainly the perception of the drafters. For example, they agreed to add the term "ethnical" so as to ensure that the term "national" would not be confused with "political." On the other hand, they deleted reference to "linguistic" groups, "since it is not believed that genocide would be practised upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics." The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other.

The 1996 report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind adopts this approach in considering "tribal groups" to fall within the scope of the definition of genocide. It is not difficult to understand why tribal groups fit within the four corners of the domain, whereas political and gender groups do not. Yet in concluding that tribal groups meet the definition of genocide, it seems unnecessary to attempt to establish within which of the four enumerated


categories they should be placed. In the same spirit, the Canadian *Criminal Code*’s genocide provision includes the term “color” in its list of protected groups. We readily understand that groups defined by “color” are also protected by the *Convention* without it being important to determine whether they are in fact subsumed within the adjectives national, racial, ethnical, or religious.

There is a danger that a search for autonomous meanings for each of the four terms will weaken the overarching sense of the enumeration as a whole, forcing the jurist into an untenable Procrustes bed. To a degree, this problem is manifested in the September 2, 1998 judgment of the International Criminal Tribunal for Rwanda in the *Akayesu* case. It also appears in the definitions accompanying the genocide legislation adopted by the United States of America. Deconstructing the enumeration risks distorting the sense that belongs to the four terms, taken as a whole.

Raphael Lemkin conceived of genocide as a crime committed against “national groups,” something made apparent by frequent references in his book *Axis Rule in Occupied Europe*. In his famous study, he associated the prohibition of genocide with the protection of minorities. Lemkin clearly did not intend the prohibition of genocide to cover all minorities, but rather those that had been contemplated by the minorities treaties of the inter-war years. The term “national” had an already well-accepted technical meaning, having been used to describe minorities in the legal regime established in the aftermath of the First World War. For Lemkin, genocide was above all meant to describe the destruction of the Jews, who cannot in a strict sense be termed a national group at all. Yet the term’s usage was clear enough in what it covered and what it was meant to protect. The historical circumstances and the context of Nazi persecution further enhanced this perspective. The etymology of the term “genocide” also confirms this. In ancient Greek, *genos* means “race” or “tribe.” It does not refer to any group in the abstract, or even to groups defined on the basis of political view, or economic and social status.

Attacks on groups defined on the basis of race, nationality, ethnicity, and religion have been elevated, by the *Genocide Convention*, to the apex of human rights atrocities, and with good reason. The definition is a narrow one, it is true, but recent history has disproven the claim that it was too restrictive to be of any practical application. For society to define a crime so heinous that it will


occur only rarely is testimony to the value of such a precise formulation. Diluting the definition, either by formal amendment of its terms or by extravagant interpretation of the existing text, risks trivializing the horror of the real crime when it is committed.
THE GUATEMALAN HISTORICAL
CLARIFICATION COMMISSION FINDS
GENOCIDE

Jan Perlin*

I. LEGAL FRAMEWORK ........................................... 392
II. ANALYSIS OF RESPONSIBILITY ............................... 393
III. HISTORICAL ROOTS OF GENOCIDE IN GUATEMALA ........... 397
IV. THE TRUTH ABOUT GENOCIDE ................................ 399
V. THE LEGAL ANALYSIS ........................................ 402
VI. CONCLUSION .................................................... 411

In those days they wanted to kill all the indigenous people. He was in charge of the country then - that Lucas García, is he in jail yet? What's happening with that?

---

* Jan Perlin teaches in the International Human Rights Law Clinic, American University, Washington College of Law. Ms. Perlin began her work as an international human rights lawyer when she began six years of service with the United Nations. She was a field investigator with the teams that verified compliance with the peace accords in both El Salvador and Guatemala, and ran projects to build the justice system in Guatemala. In her last assignment she provided legal counsel to the Guatemalan Historical Clarification Commission. Prior to her United Nations' service, Ms. Perlin was a public defender with the New York City Legal Aid Society.

1. Genocide is defined as: “...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
   a) Killing members of the group;
   b) Causing serious bodily or mental harm to members of the group;
   c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   d) Imposing measures intended to prevent births within the group;
   e) Forcibly transferring children of the group to another group.”
   It should also be noted that under the Convention the attempt to commit genocide or complicity in genocide are also contemplated as punishable acts. Convention on the Prevention and Punishment of Genocide.

2. “En ese tiempo querían matar a los indígenas. El manda al país. ¿Está Lucas García preso? ¿Cómo va esa cosa?” Collective Testimony-Rabinal, in Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3362. Author’s translation. All cites to the final report of the Historical Clarification Commission, Guatemala: Memory of Silence, refer to the complete Spanish-language version, unless otherwise specified. The cites contain Volume, Chapter, Section and paragraph numbers instead of page numbers because the paragraph numbers correspond to both the print and electronic versions of the complete report, which can be found online at <http://www.hrdata.aaas.org/ceh>. General Lucas García served as president from 1978 to March 1982, when he was unseated in a coup d’etat and replaced by General Rios Montt, now Secretary-General of the FRG party and recently elected to a seat in the Guatemalan National Assembly. Rios Montt was also unseated in a military-sponsored coup in August, 1983.
Well you know, they wanted to finish off all the villages, but we were lucky, thank the Lord, because we were able to get away, 'cause for them to finish the job meant not just frightening people, not just killing one, or two, or three - it meant finishing off everyone once and for all, because like I heard as I was leaving - escaping from under streams of bullets - I heard a soldier say, "come on men, let's go kill, kill them all - because now it's time to kill."

On December 29, 1996 the Guatemalan government and the Unidad Revolucionaria Nacional Guatemalteca (URNG), signed peace accords bringing an end to thirty-four years of internal armed conflict. As part of the transition to peace it was agreed that a commission be created to document and clarify the history of the violence and the causes of the conflict. This commission would also be called upon to formulate recommendations about how to "encourage peace and national harmony."

On the other hand, the Guatemalan truth and national conciliation package would permit criminal trial and punishment for persons found responsible for torture, forced disappearance and genocide. This position represented a compromise on the hotly debated issue of amnesty. By allowing these crimes, representing gross violations of human rights, to be exempted from the list of offenses whose prosecution could be suspended under the 1996 National Reconciliation Law, impunity for those violations would arguably be limited. On the other hand, the truth-telling function normally associated with criminal trials would be delegated to the Historical Clarification Commission, where

3. "Ellos pues quisieron terminar a las aldeas pero que suerte tenemos a nuestro Señor porque logramos escapar, porque ellos que para terminar no es para asustar a la gente, no es para matar a uno, dos o tres, sino que para terminar de una vez, porque según he oído cuando salí pues de escapar bajo chorros de tiros, entonces o que dijo un soldado que maten muchachos, maten a todos porque ahora ya es tiempo de matar." Collective Testimony from Pexla Grande, Nebaj, Quiché, in Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3226. Author's English translation.

4. Unidad Revolucionaria Nacional Guatemalteca, a coalition of the four opposition guerrilla organizations, the EGP (Ejército Guerrillero de los Pobres), ORPA (Organización del Pueblo en Armas) FAR (Fuerzas Armadas Revolucionarias, formerly Fuerzas Armadas Rebeldes), and the PGT (Partido Guatemalteco de Trabajadores) that came together to form the URNG in 1982. Before that they operated independently with the PGT operating primarily in the political arena, albeit clandestinely. The other three organizations, formed at different historical moments had both a political branch and military units throughout the conflict.


6. Decree Law # 145-96 was proposed on presidential initiative. Negotiated in the context of the peace talks, the law was a product of an agreement between the parties to the conflict with the aid of the United Nations moderator.

7. Guatemala Peace Agreements, supra note 5. [hereinafter Oslo Accord].
judgments about responsibility for human rights violations would take into account a broad historical context. The duty to discover and speak the truth in its final report was limited only by the prohibition against "individualizing responsibility" for the "human rights violations and incidents of violence" it documented. The Oslo Accord memorialized the agreement between the Guatemalan Government and URNG on the creation of the Historical Clarification Commission, and constituted an essential component of the overall peace process.

While the Commission's role in the peace process did not contemplate criminal prosecutions, its mandate gave it the power to render judgments based on international human rights law applicable to the Guatemalan conflict. A legal framework had to be constructed that would underlie the Commission's judgments and shape its conclusions. A good deal of time was spent focusing on the scope and methods of information-gathering and on the determination of which sources of law should be applied and how. The Accord's call for the clarification of "human rights violations" and "incidents of violence" related to the conflict, provided the principal guidance on the scope of the inquiry. In addition, references contained in other agreements, comprising the final peace

8. Id. ¶ 1.
9. Some argue that the Commission was further handicapped by his inability to subpoena witnesses and compel the production of documents. It is interesting to note in this regard, that the final report reproduces the correspondence reflecting the dialogue between the Commissioners and the Government on the issue of government collaboration in the production of information. Also noted are efforts to gather information from other governments. See Guatemala: Memory of Silence, Annex III and Vol. I, Methodological Considerations.

10. The Oslo Accord also stated that the Commission's work would have "no judicial effect." This declaration is largely moot, as the Commission points out, because it did not have the power to suspend the exercise of citizen rights to complain of past abuses or prosecutorial obligations to pursue those complaints in the national judicial system. Practically speaking, the Report and its conclusions are of limited evidentiary value without the presence of the underlying witnesses and documentation. The Commission's additional obligation to maintain confidentiality, ("The Commission's proceedings shall be confidential so as to guarantee the secrecy of the sources and the safety of witnesses and informants." Oslo Accord), means that a prosecutor would have to discover the identity of witnesses through independent means. However, it is entirely possible that the Commission's factual analyses, legal arguments and the references to historical and social context will inspire a framework for victims and conscientious prosecutors to seek redress for the gross violations of human rights documented, without in any way violating this limitation on the Clarification Commission mandate. See the Report's discussion of the Commission's mandate, Vol. I, Mandate and Procedures, ¶ 68. In fact, some prosecutions relating to public officials' criminal responsibility for forced disappearances have already been filed. For instance, the accusation of Adriana Portillo against Donald Alvarez Ruíz, Germán Chupina Barahona, Pedro García Arredondo, and Manuel de Jesús Valiente Téllez all of whom held positions of authority over security forces, for the disappearance of five family members in 1981. See Acusación en MP, Prensa Libre, 4 agosto de 1999.

11. The Comprehensive Human Rights Agreement called on the United Nations to verify the observance of human rights with "particular attention to the rights to life, integrity and security of persons, to individual liberty, to due process, to freedom of expression, to freedom of movement, to freedom of
accord, gave preference to monitoring breaches of fundamental human rights, such as the rights to life, liberty, security, expression, association, movement, and due process. This hierarchy of values was further defined by the United Nations' ongoing verification of the behavior of both State and opposition actors. While there would be no criminal sanctions imposed by this body, the force of the Commission's recommendations depended on the strength of its investigations and the solidity of its historical and legal analysis.

I. LEGAL FRAMEWORK

The legal framework incorporated those international treaties ratified by Guatemala, among them the Convention on the Prevention and Punishment of the Crime of Genocide, Common Article 3 of the Geneva Conventions and Additional Protocol II. International customary law, particularly jus cogens norms, were also used to frame the legal inquiry, including the concept of "crimes against humanity," which has eluded a uniform codification. While association, and to political rights." Comprehensive Human Rights Agreement, Part X, International Verification by the United Nations, § 12, in The Guatemala Peace Agreements, United Nations Department of Public Information (1998), p. 30.

12. The Commission had as one of its purposes, to "formulate specific recommendations to encourage peace and national harmony in Guatemala. The Commission shall recommend, in particular, measures to preserve the memory of the victims, to foster a culture of mutual respect and observance of human rights and to strengthen the democratic process." Oslo Accord, supra note 5, at .


14. Guatemala ratified the Additional Protocols to the Geneva Conventions in 1987, and the Geneva Conventions themselves in 1952. The Commission determined that Additional Protocols II "reflected the uses and practices universally accepted as customary international law and/or as juridical principles universally accepted based on common Article 3. This is reason why these norms should be considered as a valid and relevant point of reference." Guatemala: Memory of Silence, Vol. II, Ch. II, Sec. VIII Legal Framework, § 1685. Author's translation.


16. While the Commission does not settle on a particular definition for crimes against humanity, the following analysis best reflects its understanding of the unique elements of those crimes: "The Tribunal in the Justice Case affirmed that crimes against humanity encompassed inhumane acts and persecutions that were "systematically organized and conducted by or with the approval of government." The implications of this aspect of its decision were not lost on the Tribunal, which observed "Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions," that is, become international crimes. At the same time, those charged with crimes against humanity could not escape liability by claiming the traditional immunities extended by international law to acts of state and to individuals whose official positions ordinarily entitled them to claim immunity from the jurisdiction of other states." Diane Orentlicher, Genocide and Crimes Against Humanity: Early Warning and Prevention, December 8-10, 1998, United States Holocaust Memorial Museum Genocide and Crimes Against Humanity: The Legal Regime, Citations omitted. On file with author.

17. Crimes against humanity have been codified with varying terms and definitions in the post world-war two international tribunals, including most recently the ones approved by the Security Council for
the Commission makes note of the human rights protections contained in the Guatemalan Constitutions in force during the conflict, it also points out that these provisions were systematically violated by successive governments. Finally, contemporary interpretations of international human rights law were applied based on the understanding that the nucleus of fundamental rights framing the analysis of the violence were all derived from the essential principles contained in the Universal Declaration of Human Rights, and therefore part of binding customary international law or internationally recognized principles of law, from the time the conflict began in 1962.

II. ANALYSIS OF RESPONSIBILITY

This entire framework was applied to both the State and the guerrilla. However, the acts committed by the guerrilla were referred to as “incidents of violence” or violations of international humanitarian law, and not human rights violations, per se. The Commission was reluctant to find that the guerrilla had committed human rights violations in the strict sense of the word, inasmuch as the guerrilla did not have the same affirmative obligation to promote and guarantee human rights as do the States. Therefore, the concept of “incident of violence” referred to in the Oslo Accord became the relevant term. However, it was determined that both the military and the guerrilla were obligated to comply with humanitarian law norms during the entire period of the conflict.

Yugoslavia and Rwanda. The most recent codification is contained in the Rome Statute of the International Criminal Court, 1998. However, even the Rome Statute acknowledges that alternative definitions may be valid. See Article 10, Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.


19. The guerrilla actions were judged under the framework of International Humanitarian Law that, according to the Commission, included the fundamental principles underlying international human rights law generally. Thus, the guerrilla was not said to have committed human rights violations per se, because the guerrilla was not obligated in the same way as the State to provide certain affirmative guarantees. Rather the guerrilla was said to have violated international humanitarian law and through those actions offended fundamental principles of human rights. Guatemala: Memory of Silence, Vol. II, Ch. II, Sec. VIII, Legal Framework, ¶ 1658. In order to achieve parity in the analysis and assure the most equal treatment of both parties, both sources of law were applied then, in principle, to both parties and regarded, in any event, as being mutually reinforcing and consistent in their goal of protection of fundamental rights such as life, security of the person, liberty, and due process. Guatemala: Memory of Silence, Vol. II, Ch. II, Sec. VIII, Legal Framework, ¶ 1676.

20. Id. ¶ 1662.

21. There is one reservation expressed regarding the application of humanitarian law, in consideration that the threshold for establishing an internal conflict was not necessarily reached during every moment of its thirty-four year duration. The obstacles to consistent levels of documentation for a conflict that endured over such a long period of time is a significant one in an exercise designed to render specific judgments. However, it is interesting to note that laws embodying the essence of humanitarian law protections and perhaps implementing legislation for Common Article 3 and the Additional Protocol II, can
Thus, the guerrilla was evaluated on the basis of its compliance with humanitarian law obligations under Common Article 3 and Additional Protocol II to, for example, treat prisoners in a humane manner, refrain from summary executions, avoid injury to civilians, refrain from inflicting torture, from destroying private property, engaging in pillage, etc. Regarding forced disappearances commonly attributed to the State because of the peculiar requirement that the State have denied custody of the victim for the purpose of obscuring their fate, guerrilla actions that resulted in the disappearance of persons were said to constitute an infringement of the right to life, liberty and physical security and a violation of humanitarian law, but not a human rights violation. In contrast, Guatemalan State responsibility was framed in terms of the direct commission of human rights violations and violations of international humanitarian law.

Due to the nature of its mandate, the Commission’s analysis of responsibility under this broad human rights framework focused on institutional, rather than individual responsibility for human rights violations. In addition to the acts of its own agents, violations were attributed to the State where individuals acted with the collaboration, consent, support, tolerance or acquiescence of State institutions, agents or public officials, or where individual violent acts related to the armed conflict went uninvestigated and unpunished, even when there was no indication the State had prior knowledge of those particular acts. In this way, the persistent impunity for human rights violations characteristic of the conflict was attributed to the State’s systematic failure to act on behalf of victims or to investigate or punish violators. Additionally, patterns of

be found in the Guatemalan Penal Code. See, e.g., Penal Code Decree # 17-73 as reformed, 1997, Art. 378. Crimes against humanitarian obligations: Whomsoever violates or infringes humanitarian obligations, laws or agreements regarding prisoners or hostages of war, those wounded in battle or whomsoever commits any inhuman act against the civilian population or against hospitals or places designated for the wounded will be sentenced from twenty to thirty years in prison. Author’s translation. The sentence for this crime is the same sentence provided for in the case of genocide. Id. at Article 376 (Genocide).

22. Guatemala has the dubious honor of being the site of the first documented mass disappearance in the Americas. The case of the “28 disappeared” document in the Commission’s Report occurred in 1966. Recently released CIA documents affirm that the then Guatemalan government had the victims in custody and killed them, vowing to deny they had ever been held by the State. To date, there has been no official acknowledgement of this incident. See Illustrative Case No. 68 in Annex I, Vol. 1 of the Commission’s Report.


24. I will only refer to the analysis of State violence, given that only the State was found to have committed genocide and the State was found responsible for ninety-three percent of the violations registered by the Commission directly. The guerrilla was found responsible for three percent of the violent incidents registered.

25. The army, civil defense patrollers, military commissioners and police comprised the great majority of responsible institutions whose acts were attributed to the State.

deliberate obstruction of justice by State agents are amply documented in the report. Impunity is a phenomenon that the United Nations Human Rights Verification Mission in Guatemala (MINUGUA), pointed to in 1995 as the single largest obstacle to progress in the respect for human rights in Guatemala, and that fact continues to represent a major point of contention in evaluating advances in the peace process.

The process of investigation included not only the gathering and analysis of relevant testimony and documentation, but also involved an examination of the country's broader political and social history. The result was an understanding of the dynamics and modus operandi of the violence. Through the documentation of reiterated and similar practices over time and geographic locations, much was learned about the levels of planning and coordination involved in the perpetration of the human rights violations. Moreover, because the Commission's goal was historical clarification, that is to say, truth-seeking from the historical and human rights legal perspectives, the focus on institutional rather than individual actions became the most appropriate vehicle for substantiating concrete recommendations. By demonstrating how State institutions had become distorted in the service of undemocratic, destructive and violent ends in the past, the Commission's recommendations became directly relevant to the peace process. Thus, the focus became the implementation of measures designed to guarantee that the past would not repeat itself and that the promotion of fundamental human rights would be a priority for the future. The implementation of measures designed to guarantee that the past would not repeat itself as well as promoting the effective future enjoyment of fundamental human rights was demonstrated.

The Commission's overall conclusion on State responsibility observed that:

27. Id., See especially the discussion on "Forced Disappearances" in Vol. II Ch. II, § XI, specifically regarding the element of official denial of custody and on impunity in Vol. III. Ch. XVI on "Denial of Justice," ¶ 2634.
29. The still unsolved murder of Monseflor Juan Gerardi, head of the church's human rights office, two days after his presentation of the final report of the Historical Memory Project (Recuperacion de la Memoria Historica-REHMI) on the conflict, was an important theme in the presentation of the Historical Clarification Commission Report ten months later. That case continues to highlight the difficulty of overcoming the intolerance, violence and impunity generated by the conflict. Witnesses, prosecutors and judges have left Guatemala, often with the aid of the international community, because of death threats related to their participation in helping carry that investigation and prosecution forward.
30. The recommendations are organized under the following categories: (1) measures for remembering the victims; (2) reparations; (3) measures for promoting a culture of mutual respect and observance of human rights; and (4) measures designed to strengthen the democratic process.
Most of the human rights violations made known to the Commission and which were perpetrated by State agents or allied para-military groups came about with the knowledge, or by order of the highest military authorities... The results of our investigations demonstrate that, in general, the excuse that mid-level commanders acted with a wide margin of autonomy... is unsubstantiated and totally lacking any basis whatsoever.  

These findings, while attributing direct responsibility to the State for the overwhelming majority of the violence, pointed out the specific role of the executive, judicial, and legislative branches in committing human rights violations and, ultimately, in fashioning the counter-insurgency State. The Report also noted the active participation of various sectors of civil society, including political parties, economically powerful groups, churches, members of the university community, etc., in the counter-insurgency effort. On the basis of an overall historical analysis, the Commission concluded that the conflict had been more than a war between two armies, with the State on one side and the guerrilla on the other. Rather, it represented the consequences of employing the State machinery to carry out a policy of intolerance, exclusion, and racism. The Oslo Accord, by authorizing the application of a broad human rights legal framework, gave Guatemala the opportunity to reorder its priorities and objectives and, in turn, create new expectations about the role of the State and its institutions in society. This combined focus on institutional action and historical context, was also the point of departure for the Commission's exploration of whether genocide had been committed.

31. Speech by Christian Tomuschat upon the occasion of the presentation of Guatemala: Memory of Silence, Feb. 25, 1998, on file with author. Author's translation. Tomuschat continued: On the basis of having concluded that genocide was committed, the Commission also concludes that, without prejudice to the fact that the participants in the crime include both the material and intellectual authors of the acts of genocide committed in Guatemala, State responsibility also exists. This responsibility arises from the fact that the majority of these acts were the product of a policy pre-established by superior order and communicated to the principal actors. The State also failed to comply with its obligation to investigate and punish the acts of genocide committed within its territory. 


32. The Report contains an entire section on the denial of justice, where it describes the complicity in and direct perpetration of human rights violations by the judicial branch during the conflict. Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XVI, Denial of Justice. Later on in Vol. IV on the consequences of the conflict, there is a sub-heading discussing the phenomenon of impunity in Guatemala.
III. HISTORICAL ROOTS OF GENOCIDE IN GUATEMALA

The Commission's final report containing its analysis, conclusions and recommendations, *Guatemala: Memory of Silence*, was made public on February 25, 1999. The Commissioners attributed the roots of the conflict to the profound and historical divisions in Guatemalan society. Those divisions, at the same time, ideological, social, economic and political fueled the early and rapid formation of a counter-insurgency State under the auspices of a National Security Doctrine whose stated priority was the defeat of the "internal enemy." The Report, even while acknowledging that the United States played a role in the initiation and development of the conflict through its hegemonic foreign policy, interference in Guatemala's internal affairs and sometimes "direct... support... [for] some of the State's illegal operations," nevertheless concluded that the diehard roots of the conflict were homegrown.

One of the most deeply rooted divisions in Guatemalan society is manifested in the extreme racism against the indigenous population, which comprises a significant portion of the nation's citizenry. While that racism is

---

33. It has been suggested that a "truth commission" be formed to inquire into the United States role in Guatemala leading up to and during the conflict in Guatemala. This moral inquiry could likewise take the form of legal conclusions about the obligations of States in relation to the human rights of citizens of foreign nations. Given the increasing sensitivity to international obligations to protect human rights and the advancement of human rights law, such an inquiry would contribute a great deal to illustrating the way in which countries might confirm their commitment to protect those rights. The excuse that the cold war demanded drastic responses would put the United States on the same side of the debate as the Guatemalan security forces responsible for the atrocities and who have voiced those same arguments.

34. Speech, Professor Tomuschat, on occasion of the presentation of *Guatemala: Memory of Silence*, February 25, 1999, text on file with author. Author's translation.

35. The *Oslo Accord* mandated that the Commission consider both internal and external factors in its clarification of the causes of the conflict. The Commission also alluded to the provision of military training for the Guatemalan guerrilla by Cuba and noted that other than the United States declassified documents, other countries, like Argentina and Nicaragua failed to respond with information requested by the Commission. Israel responded that it had no information about official aid and that it could not control the private activities of its citizens abroad. *Guatemala: Memory of Silence*, Vol. 1, ¶ 129. There is literature supporting allegations of direct training and involvement of intelligence specialists from Israel and Argentina aiding the Guatemalan military, particularly in urban counter-insurgency operations and during the period when the United States withdrew some of its military support in the late 70s. Clearly, however, the overwhelming aid and support for the development of the counter-insurgency apparatus came from the United States. See *Guatemala: Memory of Silence*, Vol. 1, Annex 7, a graph detailing the international context of the conflict from 1962-96.

36. The data on the number of indigenous people in Guatemala is debated, as is the question of the criteria for determining ethnic identity. The estimates range from forty to sixty percent of the population. The present government has asserted that the indigenous population does not exceed forty percent while others claim that this group comprises 60-80% of the population. This difference of opinion not only reflects the unreliability of the censuses, but differing concepts of how to determine ethnic identity. The Commission relied heavily on the victims' self-attribution of identity as well as on information contained in national censuses. The national censuses relied on in the REPORT, contain data regarding numbers of Indigenous and Ladino population in each of the municipalities.
not often acknowledged publicly, there is a clear historic reality demonstrating
that the indigenous peoples have not been treated as full citizens. Whether your
measure is the level of investment of public monies in areas primarily populated
by Mayans,37 the overwhelming poverty, low life expectancy, among other
measures of well-being, the absence of indigenous languages in the justice
system, public education or other services, or whether it is the not-so-distant
reality of compulsory forced labor for indigenous peasants, the message is clear.
The deep-seated racial hatred and mistrust represented by a long history of
repression and severe discrimination precipitated the grossly disproportionate
levels of violence directed by the State against the Mayan-indigenous peoples
within the overall context of this fratricidal conflict. The historic attribution of
particular characteristics to the “indigenous masses,” an integral part of the
racist construct, determined the choice of military tactics against geographically
defined portions of this group when it was determined that ‘they’ constituted
a threat.

The ethnically Mayan-indigenous population suffered a full eighty-three
percent of all of the violations registered directly by the Commission.38
Without underestimating the brutality and intensity of the State-sponsored
violence against the Ladino39 or non-indigenous population,40 the acts of

37. There are twenty-one separate ethnic identities that comprise the Mayan-indigenous population of Guatemala. The remaining indigenous groups are the Xinca and Garifuna. They have historically inhabited primarily the Atlantic coast regions of the country.

38. “[T]he Mayan population has paid the highest cost for the irrational logic of the armed conflict, particularly during the years of heaviest violence from 1978-83 when, in various regions of the country the military identified groups of the Mayan peoples as natural allies of the guerrilla. This false conviction increased the number and aggravated the nature of the human rights violations that were perpetrated against the Mayans. This fact is evidenced by the aggressive, racist and extremely cruel nature of the violations that resulted in the massive extermination of defenseless Mayan communities.” Presentation Speech, Professor Christian Tomuschat, Feb. 25, 1999, on file with author. Author’s translation.

39. The “Ladino” population in Guatemala refers to the identity with group comprised by those
descended from the Spanish conquerors. The large mestizo, or mixed Mayan-Spanish population, comprises
the largest portion of the ‘Ladino’ group. This group identifies itself and is identified as separate from the
Mayan-indigenous ethnic group. Guatemala: Memory of Silence, Vol. I, Ch. I, Sec. II, Historical Causes,
§ 250. See also generally, Vol. III, Ch. II, Sec. XVIII Violations of the Rights to Existence, Integrity and
Cultural Identity of the Indigenous Peoples.

40. There is no parallel among the documented abuses against the Ladino population. Members
associated with particular professions or types of organizations, such as unions, peasant leagues, opposition
political parties, law and humanities professors, schoolteachers, student organizations, the church and even
the judiciary were singled out for attack. Indeed, based on the Commission’s information if genocide against
political groups was recognized, some of the political and union organizations would have had very credible
claims that genocide had been committed against them. But, in neither of these cases is there a wholesale
attack on entire towns, killing everyone and destroying homes and means of subsistence. Some may claim
this reflects the difference between urban and rural guerrilla warfare tactics. I am unconvinced. As I see it,
the ethnic identification among Ladinos meant that they could not entirely destroy the “other,” because they
would be destroying a part of themselves. The divisions among Ladinos were based primarily on class,
although political association and other perceptions about “loyalty” also played a role.
genocide, the report concludes, reflect a strategy and approach that maximized the numbers of dead, tortured and disappeared, based on the ethnicity of the victims.41

There is a measure of justice in revealing the stark reality of a purpose behind the deaths of tens of thousands and the suffering of hundreds of thousands more human beings. In the end, the Commission’s finding of State-sponsored acts of genocide against groups of Mayan-indigenous peoples placed squarely in the center of national debate one of the deepest fissures in Guatemalan society, the struggle over the recognition of Guatemala’s multiethnic and multicultural national identity.42

IV. THE TRUTH ABOUT GENOCIDE

Truth has many attributes, including an individual and social significance.43 While individual truth may vary according to perspective, social truth demands the airing of multiple coexisting and often divergent, points of view. The truth about genocide in Guatemala, while determined by a legal definition, must take into account the experiences and perspectives of both the aggressors and the victims.

The truth of genocidal intent centers around the process of the construction of the “other,” as the enemy. Statements by public officials, written references contained in military documents and testimonies from members of the military44 indicated the choices of strategy and tactics at the command levels. Those references betray the belief that the indigenous population possessed certain inherent characteristics such as belligerency, unpredictability, gullibility, mistrust, and defiance of the State and its institutions. The group the Report refers to as “Mayan-indigenous peoples,” was identified in military documents as the “indigenous highland peasants” or the “great masses of indigenous people.”45
The perceived propensity to sympathize with or to be part of the guerrilla, based on monolithic preconceptions, is repeatedly affirmed by military strategists. At the same time, references to the “great masses of indigenous people” and their general situation of poverty and oppression serve to enhance the stereotype of the Mayans as natural enemies. Rather than deriving an obligation to address the poverty or marginalization identified as the source of disaffection, these elements become yet another justification for the perception of the “other,” as enemy. The conclusion of a military intelligence manual is representative of this attitude when it asserts that, “[T]he enemy has the same sociological characteristics as the inhabitants of our highlands.”

This clear allusion to the Mayans, given that they constitute the overwhelming majority of the inhabitants of the highland areas of Guatemala is characteristic of the double-speak that attempts to rationalize and, at the same time, obscure an entrenched sense of the “other.”

The environment that permitted the creation of this construct is aptly summed up by Guatemalan anthropologist, Marta Casaus Arzú. Upon completing an empirical study about attitudes towards race and class among members of Guatemala’s dominant classes, she reports that in addition to the expressed preferences for miscegenation or continuing segregation as a means of containing or resolving “the indigenous problem,” some reported “preferring ethnic cleansing... between four and ten percent... indicating their choice of drastic and profoundly intolerant solutions for the indigenous population. This sector expresses on various occasions being in favor of the extermination of the indigenous population, of their disappearance both physically and culturally.”

Alternatively, or perhaps additionally, the military tactic of destruction was motivated by a fear that the support of this large community-based rural population could result in a serious political and military challenge, including the possibility of international recognition for the guerrilla forces were they able to wrest control over a part of the national territory. In either event, the Commission concluded that at the time and in the regions under consideration, the enemy was conceived in ethnic terms, and that the violent acts constituting genocide comprised, in turn, the implementation of the stated military objective.

46. The Commission resolved the issue of identity by reference to subjective and objective manifestations of this construct. The Constitutional recognition of the existence of Mayans, the allusions in official documents reflecting perceptions of Mayans or indigenous as essentially a single group and the self-identification of the Mayan-Indigenous peoples based on a number of factors. (See Akayesu, shared language and geography).

47. Guatemala: Memory of Silence, Vol. III Ch. XXI, Genocide, ¶ 3229.

to destroy the guerilla and its parallel organizations. However, this time the destructive intent was directed at a particular ethnic group.  

In the Commission's view, the motive for these genocidal acts (e.g., to win the war) was distinguishable from the intent with which they were carried out. Thus, it was concluded that in each of the four regions studied, the totality of the killings, torture, including rape and other forms of sexual violence, the destruction of entire villages and Mayan religious and cultural symbols, community and religious leaders among other atrocities "perpetrated by State agents or allied para-military groups with the knowledge, or by order of the highest military authorities," were all carried out with the intent to destroy a substantial part of the Mayan-indigenous peoples present in those areas of operations at the time of the attacks.


On the basis of having concluded that genocide was committed, the Commission also concludes that, without prejudice to the fact that the participants in the crime include both the material and intellectual authors of the acts of genocide committed in Guatemala, State responsibility also exists. This responsibility arises from the fact that the majority of these acts were the product of a policy pre-established by a superior command and communicated to the principal actors. The State also failed to comply with its obligation to investigate and punish the acts of genocide committed within its territory. Author's translation.

51. The author stated in Guatemala: Memory of Silence Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3225.

The destructive capacity of the aggressor is determined . . . by the physical scope of his actions, that is, the portion of the population capable of suffering the attack given the area within which the destructive acts occurred. So, for example, the genocidal acts committed by a single military unit that operated in a particular region can only be analyzed in relation to the overall population of a particular ethnic group inhabiting that particular region. Consequently, in determining whether a substantial portion of the group was affected, the analysis measured the destruction proportionally according to the numbers of people belonging to the ethnic group that fell within the physical scope of the operation.

Author's translation, original in Spanish follows.

La capacidad destructiva de la acción del autor está determinada, a su vez, por su área de dominio que es la parte de la población sobre la cual podría ejercer las acciones de exterminio. Por ejemplo, las acciones de genocidio que cometió una unidad militar que operaba en una determinada región, únicamente se pueden analizar con relación a la población de determinado grupo étnico que se encontraba en esa región. En consecuencia, para determinar si se afectó a una parte substancial del grupo, el análisis se realizó tomando en cuenta la proporción de población del grupo étnico que se encontraba bajo el área de dominio del autor."

52. The study analyzes the totality of acts and circumstances from 1980-83 in these regions, but concludes that acts of genocide occurred there during 1981 and 82, the period representing the crescendo of destructive violence. Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XXI Genocide, ¶ 3586 and ¶ 3601.
V. THE LEGAL ANALYSIS

The International Criminal Tribunal for the former Yugoslavia (ICTY) in its Rule 61 Decision in the case against Karadzic and Mladic provided the Commission with an important framework for the discussion of intent. That decision validated the idea that genocidal acts could occur even where the overall objective of the aggressor was not necessarily genocide. An ICTY Trial Chamber laid out three categories of analysis for interpreting the specific intent requirement for genocide:

1. the general political doctrine of the aggressor;
2. the repetition of discriminatory and destructive acts; and
3. the perpetration of acts which violate or are perceived by the aggressor as violating the foundations of the group, whether or not they constitute the enumerated acts prohibited in genocide definition, and so long as they are part of the same pattern of conduct.

This third category permitted the consideration of acts traditionally qualified as representative of the concept of “cultural genocide,” and historically excluded from the genocide definition, which is limited to the construct of physical or mental destruction. The Commission considered acts of cultural destruction as signposts of the subjective intent of the attackers, when they were committed together with the acts of physical destruction specifically proscribed in the Genocide Convention. Thus, incidents of bombing of sacred Mayan lands used for ritual worship or the deliberate burning of huipiles, traditional dress reflecting both the geographic origin and ethnicity of the wearer, or the prohibition on ritual burial of the dead were indicative of an intent to destroy the group, as such.

53. ICTY Case No. IT-95-5-R61 & No. IT-95-18-R61, Karadzic and Mladic, Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61, July 11, 1996.
55. Art. 11(b) of the Genocide Convention reflects this view when it prohibits acts “causing serious physical or mental harm to members of the group” when they are committed with the intent to destroy the group, in whole or in part, as such. See also Kelly Dawn Askin, WAR CRIMES AGAINST WOMEN (1997). “The process of ‘systematic human destruction is not only limited to physical extermination but also extends to other forms of dehumanization.’ Genocide can be demonstrated by an intent to destroy, wholly or partially, physically or emotionally, an ethnic group.” Id. at 338, (emphasis added), (citation omitted). See also Adrien Katherine Wing and Sylke Merchán, Rape, Ethnicity and Culture: Spirit Injury from Bosnia to Black America, 25 COLUM. HUM. RTS. L. REV. 1 (1993).
On the other hand, the religious and cultural significance that the Mayans attribute to the cultivation of the land, and particularly of maize, also weighed in on a second part of the analysis. The all-encompassing destruction represented by the 'scorched earth' tactics left fleeing survivors, who lived under marginal economic conditions in any event, with virtually no means of subsistence, including no access to food, water, or shelter. These devastated communities compelled to flee into unsettled mountain areas to seek refuge from attack, were especially prone to disease in their weakened state. This led to the conclusion that the destruction of homes and crops and entire villages that formed part of the military attack, in addition to demonstrating a genocidal intent, constituted the deliberate infliction of conditions of life calculated to bring about the partial physical destruction of the group.\(^5\)

The overall approach to the issue began through the evaluation of information contained in the database that registered the violations reported to the Commission directly. Measured by numbers of deaths, the years from 1981-83 were identified as constituting the most violent period of the conflict. An analysis of military strategies and patterns of violence leading up to and following that period, including levels of guerrilla activity, revealed three stages of military action that occurred in each of the four regions where acts of genocide were documented.

The first stage, beginning prior to 1980, demonstrated a pattern of selective repression\(^5\) characterized by the military targeting of the local community, religious, and political leaders for death. These types of actions increased in frequency over time and continued appearing in the second stage as well. The second-stage violence reflected as its dominant mode, "indiscrimin-
inate massacres\textsuperscript{58} and "scorched earth" tactics, where survivors were compelled to either face starvation in the mountains or turn themselves in to suffer death, torture or mistreatment. During the third stage, military efforts reflect a focus on measures to consolidate the control gained through the campaign of terror that resulted in the destruction and displacement of large portions of the population. Offers of amnesty were made, based on the idea that the fleeing population was somehow guilty of offenses. Effectively, the offer of amnesty constituted an exchange of relative safety for signing a loyalty oath and submitting to military control. The entrenchment of total military control over the rural areas was achieved through the consolidation of the system of military commissioners,\textsuperscript{59} Civilian Defense Patrols and the organization of model villages under the auspices of national and local "reconstruction" committees. During this final period, rapes, killings, disappearances, and torture continued on a diminished scale against this captive population.

The selective repression characteristic of the first stage debilitated the communities\textsuperscript{60} and left them without resources to organize their own defense. During this stage, apart from spreading terror, the military gathered information for intelligence assessments aimed at destroying the capability for local communities to organize among themselves. The army often used its intelligence capabilities, including masked informers, to forcibly recruit, torture, or other wise single-out religious and political leaders, health workers, and teachers, etc. Often members of these same communities were compelled to participate in or witness the humiliation, torture, and death of respected members of their own communities. The act of targeting leaders was

\textsuperscript{58} In my view the use of the word "indiscriminate" is somewhat misleading given the argument that indigenous peoples were specifically being targeted. The idea being conveyed is that there was no effort to separate out people as targets based on some objective criteria. Rather, the fact of ethnic affiliation was sufficient to determine that they were a target, even if, as in the case of infants and young children, they could not be said rationally to pose any possible military threat.

\textsuperscript{59} The numbers of military commissioners increased greatly in the 1960s. Previously, apart from military recruitment, the commissioners were used as middlemen to enforce the system of compulsory seasonal labor imposed on the indigenous peasants and at other times as the middlemen in the business of supplying seasonal agricultural laborers to the large-scale plantations, found primarily in Guatemala's southern coast. The REPORT talks about the role of military commissioners and civil defense patrollers in the conflict and as part of the military strategy. See Guatemala: Memory of Silence, Vol. II, Ch. II, Sec. V and VI, respectively.

\textsuperscript{60} Based on an interpretation of references contained in various Guatemalan Constitutions since 1945, the following is a definition of the designation "community:" "(a) the terms 'groups' or 'communities' allude to entities that have a collective existence. It is not just a matter of individuals. It is the collectivity that is the subject of rights and has the right to exist as such; (b) the concept of 'community' supposes the existence of a collective identity and of an historical and socio-cultural identity that gives it cohesion. It does not refer to a recently formed group. One is born and lives in the community." Guatemala: Memory of Silence, Vol. III, Ch. II, Section XVIII, Violations of the Rights to Existence, Integrity, and Cultural Identity of the Indigenous Peoples, ¶ 2861.
considered by the Commission to be directed at destroying the foundations of the Mayan communities under attack. While the Commission refers to the deliberate singling-out of leaders as an indication of intent to destroy the group, it is the second-stage violence that exposes the determination to destroy the group. During this stage the attacks became more generalized, targeting not only leaders but also all members of the community, including men, women, children, infants, and the elderly. As one declassified CIA document put it: "The army’s well-documented belief that the indigenous-Ixil population is almost totally in favor of the EGP, has created a situation where you can expect that the army will give no quarter to combatants and non-combatants alike." 

Not only did the scope of the violence broaden, but also the mobilization of forces reflected high-level coordination and planning in the attacks. For example, the Ixil region and the northern strip of the Huehuetenango Department (Maya-chuj and Maya-q’anjobal) where different military units were mobilized even included the use of air support. In the municipality of Zacualpa, Quiché (Maya-k’iché) the Commission identified a force of three platoons aided by civil patrollers, with possible collaboration from a special military strike force.

In other regions where there was a less apparent showing of military might, deliberate actions were taken to exploit local tensions between the Ladino-controlled municipal township and the primarily indigenous villages, over local resources. In the municipality of Rabinal (Maya-achi) in Alta Verapaz, the Commission’s information indicates the violence was primarily perpetrated by a local military detachment together with Civil Defense Patrols.

61. The constituted violations that represent the predominant mode of destruction in the period when genocide occurred were, by definition, attacks on defenseless civilian population. Defenseless is defined by the Commission’s Report as a situation of total or relative defenselessness, given that in some communities they tried to defend themselves with machetes and stones against attacks by armed soldiers. Thus, whether the Mayan-Ixiles sympathized or not with the EGP faction of the guerrilla, is irrelevant for determining whether the attacks were massacres. This is consistent with the perspective of human rights and humanitarian law.


63. The Gumarcaj Strike or Task Force took its name from the seat of the Quiché government destroyed by the Spanish as part of its conquest of Guatemala. Gumarcaj is on the outskirts of the City of Santa Cruz del Quiché and Mayan ritual ceremonies are still celebrated there.

64. The Civilian Self-Defense Patrols were formed as part of the military strategy to control the local population and prevent the entrenchment of the guerrilla in the countryside. The patrollers were obligated to patrol regularly and report their observations to the military commissioner or local military commander. Often the patrols resulted in the capture of a person or persons to be handed over to the military or other authorities or they were attacked directly by the patrollers for suspected guerrilla activity. The patrollers were also victims of the violence when they were obliged to commit acts of violence against others, or when they were themselves attacked or killed by the military. Patrolling was one form of demonstrating fealty but accusations also made patrollers themselves targets. They were considered by the Commission as
This modality was also used in areas where larger numbers of troops were deployed. For example, the Ixil region and the northern strip of Huehuetenango Department (Maya-chu and Maya-g’anjobal) different military units were mobilized and included the use of air support. The methods used to promote attacks by members of the Mayan-indigenous ethnic group against members of their own ethnic group, were interpreted as a deliberate strategy directed at destroying the group’s very foundations.

In each of the four regions, the report explores the strategic location as a transport corridor for the guerrilla and an area where the guerrilla had the political sympathy of members of the local population because of organizing work with peasant leagues that had been formed under the Arbenz Government in the 1950s, in conjunction with land reform efforts. In Rabinal, it is not unlikely, according to the Commission’s account, that one of the factors that determined the target group was the Achi communities’ reluctance to give up communal lands to a large dam project which was considered beneficial to other local interests. On the other hand, Rabinal also represented a geographically-strategic location as a transport corridor for the guerrilla and an area where the guerrilla had the political sympathy of members of the local population because of organizing work with peasant leagues formed under the Arbenz Government in conjunction with land reform efforts that government. These additional layers of motive, all of which were related to the conflict and its underlying causes, did nothing to dissipate the Commission’s conviction that the acts under consideration in each of the four regions during the 1981-83 period, demonstrated the same pattern of genocidal intent and action. The determination to enter the second stage of the violence was a deliberate military decision in the Commission’s view.

At the same time that the attacking group’s general political doctrine identified members of the group, “Mayan-indigenous peoples” as the target, the similarities in the patterns of violence within and among the four regions and the disparate impact of the violence on the Mayans as opposed to the Ladino population inhabiting the same geographic areas, reflected a pattern of repetitive and discriminatory acts of violence.

agents of the State responsible for acts of violence, however, the obligatory nature of the patrols also constituted a violation of the patrollers’ right to freely exercise their rights of association, as well as an illegal delegation of State police powers. The specific section of the PACs, explores the operation of the patrols, their formation, training, structure, functions, and their role in the overall counter-insurgency strategy.

65. The conclusion that the acts were discriminatory is supported in two ways. One, the statistical conclusion showing a disparate proportional impact between numbers of Indigenous and Ladino victims from among the population in each of the areas studied. Second, the narrative portion relates instances where the Ladino population was specifically excluded from attack or warned to leave the area in advance of the attack.
The patterns in the way the massacres were conducted reflected planning on the one hand and measures designed to maximize the number of victims, on the other. They were carried out on market days when people from outlying areas would gather in the towns, or the community would be called to gather in the town center, only to be surrounded and attacked. Women and children were often separated from the men in order to begin the macabre ritual of torture, killing, and destruction. Sixty-four percent of the massacres occurring during the thirty-four year conflict took place between June 1981 and December 1982.

Of particular relevance to the Commission was the observation that:

When faced with all the available alternatives to combat the insurgency, the State opted for the one that was most costly in human lives from among the civilian non-combatant population. Ruling out other options, such as political struggle to arrive at agreements with the non-combatant civilian population it considered disaffected, their relocation to areas outside the conflictive zones, or the arrest of insurgents, the State opted for the annihilation of those it considered to be its enemies. The State made this determination despite the fact that it had access to the sources of information necessary to identify the insurgent combatants, assess their military capacity, and enable them to distinguish the insurgents from civilian non-combatants.

66. The Commission defined massacre as an attack on the defenseless. In the cases where there was resistance, if it was so disproportional to the attack that the resistance was futile, the incident was still qualified as a massacre.

“... What characterizes the majority of the massacres, apart from the executions, is an accumulation of grave violations of human rights, such as torture, cruel and inhuman treatment, forced disappearances and rape, and also aberrant acts such as the mutilation of cadavers, and the destruction of personal, communal, and religious property.

The CEH [Historical Clarification Commission] has defined a massacre as the arbitrary execution of more than five people, committed in a single place and as part of a single operation, when the victims are in a state of absolute or relative defenselessness.”

67. "Lo que caracteriza a la mayoría de las masacres, además de las ejecuciones, es una acumulación de graves violaciones de derechos humanos, como torturas, tratos crueles, desapariciones forzadas y violaciones sexuales, y también hechos aberrantes, tales como la mutilación de cadáveres, y la destrucción de bienes de personas, comunitarios y destinados al culto.

"La CEH ha definido una masacre como la ejecución arbitraria de más de cinco personas, realizada en un mismo lugar y como parte de un mismo operativo, cuando las víctimas se encontraban en un estado de indefensión absoluta o relativa." Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XX, Collective Violence against the Collective Population, ¶ 3058-59.

The means of the violence, its extreme barbarity and deliberately public nature, were other indicators of the intent to destroy the group by causing serious physical or mental harm to members of the group. These extremes, representing the nuance captured by the third category of acts, designed to attack the very foundations of the group, included: the display of mutilated, tortured, and sexually violated victims; obligating members of the group to commit acts of violence against one another and in full view of the entire community; the killing of girl-children, infants, women, and the elderly; systematic, public and gang rapes of women; including girls and pregnant women; and the gouging of fetuses from women's bodies. The sexual mutilation and display of cadavers and similarly horrific acts were the kinds of brutality that the Commission opined was designed to not only physically destroy members of the group, but to destroy any basis for social cohesion within the group. The dehumanization of the victims by their aggressors was both another layer in the construction of the enemy "other," and a means of attacking the group's very foundations.

The tactic of turning members of the group against one another was also a way of inflicting serious mental harm on members of the group. It varied in its modality. Different shades of "obligation" were represented, from direct threats on life to inciting mistrust among neighbors or neighboring communities. In both cases the Commission determined they were borne of a conscious decision to compromise the loyalties of the members of the group as one avenue of its destruction. Those people who were obligated, upon threat of death or serious physical harm to themselves or others, to either perpetrate atrocities against members of their own communities or to witness them, had been caused "serious mental harm" as proscribed under the Genocide Convention. They were included, if not statistically, then in principle, as among the victims of the genocidal attacks.

Similarly, the accounts of sexual violence took on particular importance for the Commission beyond constituting a cause of death or serious physical and mental harm. Eighty-nine percent of the rape victims registered by the Commission were indigenous women and girl-children, the latter constituting thirty-five percent of the victims. The sexual violence against women during the height of the violence was most often a prelude to their murder. The rapes were inflicted in a way that the entire community would share the shame and terror. Like the obligation to participate in the torture and murder of neighbors or community leaders, these occurrences, in addition to damaging the women

69. The effect of destroying the social cohesion of the group characteristic of these acts [causing physical and mental harm to members of the group] corresponds to an intent to annihilate the group physically and spiritually. Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3592.
themselves altered the relationship between them and other members of their communities. This form of violence, almost exclusively directed against women and girl-children, was an act of violence not only against individual women as women or girl-children as girl-children, but also an attack against their ethnic group as a whole. In Mayan society, as in many others, women play roles of significance both to the biological reproduction and social continuity of the group. For the commission, the systematic, public, massive and graphic perpetration of sexual violence against Mayan-indigenous women and girl-children betrayed an intent to destroy both individual members of the group and the social ties that bound it together.

While the Commission does not reach the explicit conclusion that these practices constituted the "imposition of measures intended to prevent births within the group," as prohibited by Art. III(d) of the Genocide Convention, the section on sexual violence against women does contain testimonies attesting to the effects of these types of violence on the physical and psycho-social ability of the women affected to form intimate relationships or exercise their reproductive prerogative in the context of their communities. The only explicit references to "measures that impeded births within the group" allude to the reported cases where fetuses were ripped from their mother's wombs or of sexual mutilation.70

The special section on Sexual Violence against Women71 reveals much about the effects of the violence on the indigenous communities as a whole. The vast majority of testimonies about the rapes came from persons other than the direct victims of these acts, demonstrating a reluctance of the surviving victims to speak about how they were attacked.

In most cases the suffering of women rape victims is unknown by even their closest family members, children, husband, or parents, and in the cases where the whole community knows, it is silenced or denied, a fact which demonstrates the extreme shame that rape survivors and their communities feel.72 This fact also demonstrates the extent to which the victimized women are compelled to suffer from the effects of rape alone and in silence.

While it is recognized that rape was used on a massive and systematic scale as part of the overall insurgency attack and despite the Commission's acknowledgment that rape can constitute a crime against humanity under international criminal law, it does not state a general determination with regard to rape in the Guatemalan conflict. Instead, the findings on genocide assert that the sexual violence causing serious physical or mental harm to members of the

70. There are accounts of rape and other forms of sexual violence against men, but they constituted less than one percent of the sexual violence reported.
71. Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XIII.
72. Id. ¶ 2382.
group and committed in the context of the violence in the four regions studied, were constituent acts of genocide and, at the same time, indicia of the intent to destroy the group. The Commission clearly relies on the record of the systematic use of brutal and often public sexual attacks against women and girl-children as evidence of the intent to destroy the group, as such.\textsuperscript{73}

The conclusion that genocidal acts had been committed in all four regions was reached on the basis of the analysis I have just described. There are additional facts and circumstances not specifically mentioned which are similar to some of the ones discussed here. There are also attendant circumstances which were not specifically factored into the analysis. For instance, the massive and forced military recruitment of indigenous youths. These troops, wrested from the heart of their communities, may have participated in brutal attacks against their own or other indigenous communities.

Nevertheless, the effects of violence are amply explored in both the section on Violations of the Rights to Existence, Integrity, and Cultural Identity of the Indigenous Peoples\textsuperscript{74} and in the fourth volume of the Report that documents the consequences of violence for indigenous communities.\textsuperscript{75} Reference is made to the consequences of the violence for traditional Mayan forms of authority and organization, including religion, community values, and other expressions of cultural identity. Implicitly, these consequences were foreseeable and go far towards explaining what we mean when we say that there is an intent to destroy an ethnic group. However, they do not form part of the specific genocide analysis that concludes that the military, as an agent of the State, was directly responsible for acts of genocide and that the State was also responsible for genocidal acts in failing to investigate and punish those crimes under international and Guatemalan law.

Additionally, a statistical study was performed to determine the percentage of the indigenous population killed in each region. The results indicated that sixteen percent of the Maya-Achi indigenous group in the Rabinal Municipality

\textsuperscript{73} This conclusion is not novel. In July 1996, a trial chamber in the International Criminal Tribunal for the former Yugoslavia gave ample support for this view in its affirmation of the indictments against Karadzic and Mladic for genocide, \textit{supra} note 50. Scholars have echoed this view as well: When all surrounding circumstances point to the conclusion that women (or men) were sexually assaulted with an intent to destroy their particular protected group by physical destruction or mental anguish, a charge of genocidal rape should be sustained. Kelly Dawn Askin, \textit{War Crimes Against Women Prosecution in International War Crimes Tribunals} 276 (1997). \textit{See also} Rhonda Copelon, \textit{Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law}, 5 \textit{Hastings Women's L.J.} 243 (1994). Likewise, the International Criminal Tribunal for Rwanda found defendant Akayesu guilty of genocide based on acts of sexual violence. \textit{See} Akayesu Judgment, September 2, 1998 at <http://www.ictr.org> (visited Feb. 18, 2000.)

\textsuperscript{74} \textit{Guatemala: Memory of Silence}, Vol. III, Ch. II, Sec. XVIII, \$ 2889-2903.

\textsuperscript{75} \textit{Guatemala: Memory of Silence}, Vol. IV, Ch. III, Sec. IV, Rupture of the Social Fabric, \$ 4325-4413.
were killed. In Zacualpa, 8.6% of Maya-K’ichés were killed and in the Ixil region, 14.5% of the Mayan-Ixiles, while in the northern strip of Huehuetenango, 3.6% of the Maya-Chuj and Maya-Q’anjobal peoples residing in that area were assassinated. These statistics do not take into account the members of the group who survived, having suffered from serious physical or mental harm as a result of the violence or who were compelled to live under conditions of life calculated to bring about their destruction.

While the statistics confirm high numbers of deaths, they do not resolve issues that may arise around the definition of the targeted ethnic group. Nor do they clarify what we mean when we refer to “the foundations of the group,” that is, the essential values underlying the concept of a human group that is protected by the Genocide Convention. Nor do they rule out the logical defense to these findings, that the acts were committed with the intent to subjugate and control, but not to destroy.

VI. CONCLUSION

The Commission’s conclusion that the Guatemalan State, through the direct acts of its military and para-military forces committed acts of genocide against the Mayan-indigenous peoples, and that the State was also responsible for those acts by virtue of its failure to investigate and punish them as required under Articles IV and VI of the Genocide Convention, has generated its own polemic. On the date of the celebration of Army Day, June 30th, 1999, President Arzú was reported in the Guatemalan press as making the following statements:

The President denied that there was genocide during the armed conflict, disagreeing for the first time with the Historical Clarification Commission Report that affirms the opposite position. ‘Genocide represents the extermination of an ethnicity and that didn’t happen in Guatemala,’ he said . . . Arzú, gave his personal opinion that he, ‘doesn’t believe that there was genocide because that was not the motive for the brutal conflict that we lived through and that tore apart

---

76. See respective conclusions for each region in Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XXI Genocide, and Vol. XII, Annex III, Methodology Document Elaborated by The American Association for the Advancement of Science (AAAS), Graphs 3 and 4.

77. Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials, or private individuals. Art. IV, Genocide Convention.

78. Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. Art. VI, Genocide Convention.
the social fabric of the country.” 79

In its recommendations, the Clarification Commission had called on the State to vigorously apply the National Reconciliation Law by criminally prosecuting and convicting the perpetrators of genocide, torture, and forced disappearances. 80 The Presidential denial, albeit a “personal” opinion, fails to address the obvious alternative. Whether or not those acts documented by the Commission constitute genocide or not, they are certainly war crimes and crimes against humanity. Once that is conceded, it becomes important to ask the question of whether the extreme barbarity of those acts and their scope preclude any rational interpretation of these coordinated attacks as a means of achieving control.

The inquiry into the subjective intent of the perpetrators must necessarily rely on all the manifestations of intent, whether they are found in the reasonably foreseeable consequences of the acts themselves, statements that reveal the intent with which they were committed, or the overall context in which they occurred. It would be artificial to eliminate from the radar of genocide-prevention those cases where more subtle forms of discrimination translate into acts intended to destroy one of the protected groups, under the pretext of a cold war, civil war, or any other pretense. The classic examples of genocide, represented by the Holocaust and the killings in Rwanda in 1994, do not make less apparent efforts to destroy a social, racial, ethnic, or national group in whole or in part, any less pernicious.

The Guatemalan Historical Clarification Commission’s conclusions are instructive in this regard. In the analytical summary referring to the Ixil region, the Commission stresses that the intent to partially destroy the Maya-Ixil ethnic group emanates from a tactical military decision that was reached, based on particular pre-conceptions:

In the Commission’s judgment, the totality of violent acts perpetrated by the State against the Maya-Ixil population from 1980-1983, 81

79. “... el presidente negó que haya habido genocidio durante el conflicto armado, discrepando por primera vez con el informe de la Comisión para el Esclarecimiento Histórico ... que afirma lo contrario. ‘El genocidio representa el exterminio de una etnia y eso no se dio en Guatemala’, dijo. Arzú opinó ayer, a título personal, que ‘no creo’ que haya habido genocidio porque ‘ese no fue el motivo del brutal conflicto que nos tocó vivir y que desgarró el tejido social del país,’” in Arzú Aboga por Espinoza, Prensa Libre, Wednesday June 30, 1999. Author’s translation.

80. The 1996 NATIONAL RECONCILIATION LAW, Decree 145-96, also makes reference to the possibility of prosecuting crimes that are not capable of being prescribed according to domestic law or international treaties ratified by Guatemala. Genocide is, in any event, a criminal offense under Guatemalan law. See GUATEMALA'S CRIMINAL CODE DECREE 17-73 as reformed (1997) Art. 376.

81. The use of the 1980-83 time period refers to the totality of circumstances that led to the conclusion that acts of genocide have been committed. However, the overall conclusion in this section refers
permits the conclusion that acts of genocide were committed. These acts were inspired by a strategic determination of a genocidal character. The objective of the counter-insurgency military campaign was the partial destruction of the victim group, based on the consideration that this would ensure the enemy’s defeat.82

In the discussion about the definition of the crime of genocide, what continues to be lacking is a dialogue about the characteristics of a human group that give definition to its existence. In the case of Guatemala, there is no doubt that the Mayan-indigenous peoples experienced the attacks against them as an attempt to destroy them and their way of life. This sentiment is repeatedly expressed in the testimonies gathered by the Commission and reproduced in the text of the report. It is equally clear that criminal law focuses on the aggressor’s intent in carrying out these atrocities, especially when culpability for a specific intent crime such as genocide is at issue. As questions begin to be addressed, the overall query that remains is how the collective Guatemalan community, Indigenous and Ladino together, will meet the challenge of forging a peace based on mutual respect and the adherence to fundamental principles of human rights.

Will a Commission be sensitive to the word “truth”? If its interest is linked only to amnesty and compensation, then it will have chosen not truth, but justice. If it sees truth as the widest possible compilation of people’s perceptions, stories, myths and experiences, it will have chosen to restore memory and foster a new humanity, and perhaps that is justice in its deepest sense.83
I. DEVELOPMENT, HUMAN RIGHTS AND ENVIRONMENT

At first blush, development would appear to be the prime vehicle for promoting realization of human rights such as the right to an adequate standard of living; rights of education, food, and housing; the right to work; and the right to social security. Similarly, it would seem that environmental preservation and rehabilitation would figure high on the priorities for development. However, development, as currently practiced in the countries of South Asia, has overtaken poverty as the single-largest course of human rights violations and of environmental degradation. Numerous examples abound. Take for example Bhopal, the world's worst industrial disaster, a typical example of the dumping of hazardous technologies and substances in the name of industrial technology.

The much vaunted "green revolution" in agricultural development has left in its wake departed soul, chemical, and energy intensiveness and dependency. It has had multiple negative impacts on the availability of water, the pollution of groundwater, drought, and desertification. Deforestation and unsustainable use of forest resources has both caused and contributed to such drought and deforestation. Reforestation programs that involve monocropping of eucalyptus trees for timber production have further depleted already scarce water...
resources, and it is hardly a surprise that local communities are ripping out eucalyptus seedlings as fast as they are planted. Fisheries' resources are being over-exploited by trawler fishing, and subsistence fisherfolk in South Asia are facing the destruction of their livelihood. Environmentally unsustainable projects of aquaculture are exacerbating the situation for both subsistence of fisherfolk and subsistence of farmers. Large scale infrastructure projects (such as the Narmada Dam - building project) have displaced thousands of people and, left in their wake, hundreds of internally displaced persons.

Urbanization is taking place at a pace and manner that is creating megaslums; increasing numbers of debt-bonded construction workers; intolerable air pollution and traffic jams; and an insatiable thirst for energy which can only be met through environmentally disastrous projects such as Narmada and Enron, India. Air pollution, water pollution, and noise pollution go unabated and checked in an insatiable race to develop and an unconscionable pursuit of profits at any cost.

Indeed, the situation in many parts of South Asia is best described in a line verse by Shel Silverstein:

Oh if you are bird, be the early bird,
And catch the worm for your breakfast plate,
If you are a worm,
Sleep late.

The development countries in South Asia have become a world of development predators and developmental victims and indeed, as the Bhopal tragedy shows, even the option of "sleeping late" may not prove a viable survival strategy.

As we sit here this morning, amidst oak paneled walls and marble fireplaces, I urge you to transport yourself back in time for a moment to a late night fifteen years ago in December to the city of Bhopal. A young man by the name of Kailash Panwar struggled back to consciousness to find that he was at the bottom of a pile of human bodies being taken in a truck to a mass cremation. An explosion in a storage tank in Union Carbide's pesticide producing plant had released forty tons of methyl-isocyanaide and other lethal gases in the atmosphere. As the poisonous cloud spread over the populous city, it left death and devastation in its wake. The accident occurred in part because as a cost-cutting measure, several of the safety precautions (including spending approximately $50 per day to keep the deadly gas refrigerated as required by the company's own operating manual) had been discontinued. The plant had been running at a loss recently, because, after years of profit from the over application of the pesticide, the pests had now grown immune! Not so, unfortunately for the designs of Bhopal. Young Kailash Panwar spent the next
six years of his life in extreme pain and suffering, shuttled from one hospital bed to another, with doctors unable to even alleviate, leave alone cure, the deadly legacies of his exposure on that fatal night.

II. RESPONDING WITH HUMAN RIGHTS-BASED STRATEGIES

In India, South Asia, and indeed throughout the developing world, Bhopal catalyzed and inspired the search for effective counter strategies and three basic human rights strategies have emerged.

A. The Right to Development

In 1986, the United Nations General Assembly adopted the Declaration on the Right to Development. The United States was the lone Member State casting a negative vote, and a few European countries abstained. Since 1986, the right to development has been reaffirmed by consensus, (with no dissent whatsoever) at several United Nations global conferences as a “universal and inalienable right and an integral part of fundamental human rights.”

The right to development is both an inalienable and collective right, and, like other solidarity rights, seeks to realize Article 28 of the Universal Declaration on Human Rights which states, “[e]veryone is entitled to a social and international order in which ... rights and proceedings ... can be fully realized.” The right to development has several important and unique factors:

1. It redefines development as a “comprehensive economic, social, cultural, and political process which aims at the constant improvement of the well-being of the entire population and of all individuals.”
2. It makes “realization of all human rights” the sole rationale of development.
3. It reiterates the right of “active, free, and meaningful participation,” both individual and collective, in all decisions relating to development.
4. It proscribes exclusion or discrimination from development.
5. It prescribes for distribution of the benefits from development.
6. It mandates that development must be human-centered.
7. It requires “measurable realization of human rights,” an essential criteria for evaluating development.²

---

2. Id.
Thus, the right to development provides a normative basis both for prohibitive unsustainable development and for promoting human development which is environmentally sustainable.

B. Enforcing Human Rights as a Strategy for Protecting the Environment


The Report of the Special Rapporteur analyzes the effects of the environment on the enjoyment of fundamental rights, notably the right to self determination; the right to life; the right to health; the right to food and housing; the right to safe and healthy working conditions; the right to information; and the right to popular participation, freedom of association, and cultural rights.

Thus, the enforcement of human rights, both civil and political, as well as economic, social and cultural, provides a strategy for protecting the environment. In particular, as the Indian courts have shown, the right to life can be interpreted in a manner that proscribed several environmentally sound practices. Other rights of particular importance are the right of self determination (to "freely pursue" development); the right to equal participation of the law, and freedom from discrimination.

C. The Right to Environment and Environmental Human Rights

There are environmentalists who believe that while the strategy of enforcing human rights to protect environment is a useful one, it is not enough. They have been working therefore to get recognition and enforcement of the right to environment and environmental rights.

1. The Right to Environment as a Human Right

Although the right to environment has not yet gained recognition under international law, the constitutions of forty-nine countries do recognize the right to environment. The substantial context of such a right varies from being the right to clean, safe, or healthy living environment. The procedural context of such a right includes one or more of the following components:

---

The right to know and act; the right to participate (and realize the principle of subsidiary as articulated at Rio); and the right to judicial and/or administrative remedies including preventive remedies. At times, the right to participate is accompanied by the requirement of conducting environmental impact assessments.

2. Environmental Human Rights


Part II of the Draft Declaration details the following substantive environmental human rights:

1. The right to freedom from pollution, (Principle 5), as an integral part of the rights to life, health, work, privacy, personal security, and development. Principle 5 makes clear that the right to freedom from pollution applies within, across, or outside national boundaries.4
2. The right to the highest attainable standard of health, free from environmental harm. (Principle 7).5
3. The right to safe and healthy food and water adequate to one's well-being. (Principle 8).6
4. The right to adequate housing, land tenure, and living conditions in a secure, healthy, and ecologically sound environment. (Principle 10).7
5. Freedom from eviction and the right to participate effectively in decisions regarding resettlement. (Principle 11).8
6. The right to timely assistance in the event of natural or other catastrophes. (Principle 12).9
7. The right to benefit equitably from the conservation and sustainable use of natural resources. (Principle 13).10

---

4. Id. at princ. 5.
5. Id. at princ. 7.
6. Id. at princ. 8.
7. Id. at princ. 10.
8. Draft Declaration, supra note 3, at princ. 16.
9. Id. at princ. 12.
10. Id. at princ. 13.
8. The right of indigenous peoples to control their land and natural resources. (Principle 14).\textsuperscript{11}

Part III of the Draft Declaration sets out \textit{procedural} aspects of environmental human rights including:

1. The right to information. (Principle 15).\textsuperscript{12}
2. The right to hold and express opinions and to disseminate ideas and information regarding the environment. (Principle 16).\textsuperscript{13}
3. The right to environment and human rights education. (Principle 17).\textsuperscript{14}
4. The right to active, free, and meaningful participation and the right to prior assessment of the environmental, developmental, and human rights consequences of proposed actions. (Principle 18).\textsuperscript{15}
5. The right to free and peaceful association for the purpose of protecting the environment. (Principle 19).\textsuperscript{16}
6. The right to effective administrative and judicial remedies and redress. (Principle 20).\textsuperscript{17}

Part IV of the Draft Declaration sets out the following correlative duties:

1. Of all persons, individually and collectively to protect and preserve the environment. (Principle 21).\textsuperscript{18}
2. The duties of States to protect the environment in all acts of commission or omission, (Principle 21),\textsuperscript{19} with several correlated duties regarding environmental impact assessment; control; licensing; regulation; and prohibition; public participation; monitoring and management; and reduction of wasteful processes of production and patterns of consumption. The State duties include the duty to "take measures aimed at ensuring that transnational corporations, wherever they operate,\

\textsuperscript{11} Id. at princ. 14.
\textsuperscript{12} Id. at princ. 15.
\textsuperscript{13} Draft Declaration, supra note 3, at princ. 16.
\textsuperscript{14} Id. at princ. 17.
\textsuperscript{15} Id. at princ. 18.
\textsuperscript{16} Id. at princ. 19.
\textsuperscript{17} Id. at princ. 20.
\textsuperscript{18} Draft Declaration, supra note 3, at princ. 25.
\textsuperscript{19} Id.
carry out their duties of environmental protection and respect for human rights.” (Principle 22).20
4. The duty of “all international organizations and agencies” to observe the Declaration. (Principle 24).22

Part V of the Draft Declaration sets out special considerations

1. To pay special attention to vulnerable persons and groups (Principle 25), including women, children, indigenous peoples, refugees, and the disable poor.23
2. The rights in the Declaration may be subject only to restrictions provided by law which are necessary to protect public order, health, and the fundamental rights and freedoms of others. (Principle 26).24
3. All persons are entitled to a social and international order in which the rights in this declaration can be fully realized. (Principle 27).25

The Draft Declaration has a potential to make significant contributions to protecting human rights and environment by advancing a standard-setting process; by raising awareness of the public, national governments, and international organizations; by advancing the process of creation of implementing monitoring and redress mechanisms; and by facilitating the mobilization of public pressure for the protection and promotion of human rights and the environment. After all, environmental human rights, like all human rights, do not function solely through formal international procedures, although such procedures and their national counterparts, are indeed important. The principles in the Draft Declaration do address the key issues implicated in the interrelationships between human rights and the environment. Widespread dissemination, discussion and action on the Draft Declaration, will help promote and protect human rights and the environment through recognition, implementation, and enforcement of environmental human rights.

20. Id. at princ. 22.
21. Id. at princ. 23.
22. Id. at princ. 24.
23. Draft Declaration, supra note 3, at princ. 25.
24. Id. at princ. 26.
25. Id. at princ. 27.
III. LIBERATING OURSELVES, FROM OURSELVES

Environmental activists and human rights activists, at times, tend to be at odds with one and another. The "deep ecologists" are disdainful of the anthropocentric nature of human rights activists as being excessively confrontational and adversarial. Human rights activists are disdainful of concentration strategies that tend to protect the environment from people rather than for people. A common middle ground would appear to be the right to environment and environmental human rights. But until international law does recognize such rights, it would be desirable to use the international human rights treaties and conventions that do exist. After all, as yet, we do not have an international convention on sustainable development. We only have the Rio principles. We need enforceable international law to address the growing environmental problems resulting from practices of economic globalization, the so-called paradigm shift from development through aid to development through trade and investment. Let me close by returning to the story of Kailash Panwar. After six years of intolerable suffering, Kailash Panwar committed suicide by setting fire to himself in his hospital bed.

Milan Kundera, the Czech author reminds us that "the struggle of man over power is the struggle of memory over forgetting."

Let us pledge never to forget Kailash Panwar and to learn from the tragedy of Bhopal and its countless counterparts all over South Asia, and indeed the world.
HUMAN RIGHTS ENVIRONMENT AND DEVELOPMENT IN SOUTH ASIA

Ali M Qazilbash*

I. INTRODUCTION ..................................... 423
II. HUMAN RIGHTS ..................................... 423
   A. Yadana Gas Pipeline Project .................... 426
   B. Unsustainable Development Practices ........... 427
   C. Human Rights and Environmental Impacts ........ 427
   D. The Dabhol Power Project More Commonly Known as the EnronPower Project ......................... 427
   E. Fresh Water ..................................... 428
   F. Contamination of Salt Water: ................... 429
   G. Human Rights Violations: ....................... 429
   H. Indian Laws ..................................... 432
III. CONCLUSION ....................................... 432

I. INTRODUCTION

The fundamental importance of the issue of Human Rights and the environment to any society is deeply appreciated today. Indeed one of the main challenges before mankind today is the preservation of the environment and ensuring the protection of human rights. It assumes critical importance in South Asian countries where the issue is intricately linked to complex socio-political and economic factors. The legal infrastructure for the protection of these rights is still in a developmental phase. There is an urgent need to foster awareness in this area and to formulate and implement policies which are consistent with globally achieved standards while addressing the local realities.

II. HUMAN RIGHTS

The issue of human survival brings a lot of attention to the debate as human life and environment cannot be separated. Technology and human activity have been the biggest donors in bringing about the change in the natural environs and in making some areas unfit for human survival for both present and future generations.

* The author is a lawyer in Pakistan and a S.J.D. candidate at the Notre Dame Law School.
The so-called developmental projects, which should have brought prosperity with them, have in fact brought violations of Human Rights and environmental degradation. The glaring examples of India, Burma, Nigeria, and Guyana have made it indisputable that serious environmental harms impact human rights and that Human Rights violations lead to degradation of Human Rights. There is growing consensus that environmental problems are no longer limited to pollution but envelope. As the Special Rapporteur has noted, "a world wide hazard threatening the planet and the whole of mankind, as well as future generations." There is also consensus that the conservation of the environment serves the common good of mankind.

The area of Human Rights Environment and Development has received a lot of attention by the United Nations and which also has helped in generating a response towards this crucial issue around the planet. It is true that when the United Nations embarked on the glorious journey of Human Rights which can be traced back to 1945, time when the United Nations Charter was drafted, the environment and its preservation was not an issue at all. Neither international nor regional or even at the national level. This is also apparent by the fact that both the United Nations Charter, as well as declaration have not precisely addressed the connection between human rights and environment. It has been, about thirty years or so that the scholars have started addressing the issue. It is, however, true that the time and happenings around the world have stressed upon all to address this issue of environment and its relation with life. It is only since then that the Human Rights norms have been used in addressing the issues pertaining to environment and moving towards a common platform where it could be agreed that the Human Rights and environment are interrelated and safeguarding; one leads to the protection of the other.

In 1968, the United Nations General Assembly recognized the connection between worth of human environment and the enjoyment of basic Human Rights. It is also important to mention here that since 1968, there has been a remarkable increase in declarations and statements in determining the basic link between Human Rights and the environment.

Environment, development, and Human Rights interrelationship has been stipulated by several international legal human rights stipulating that there are legal relationships between the three. The Stockholm Declaration on Environment and Development is perhaps among the pioneering documents that provide the importance of environment and sustainable development. Human Rights, environment and development are now more and more acknowledged as different aspects of the same basic concern. The experiences from all over

the world have shown that development which does not take appropriate measures in its quest and ignores Human Rights and environment incurs huge losses. The international community also has recognized Human Rights as a broad concept that encompasses a range of economic and social rights, including the right to development and the right of all human beings to a healthy and productive environment."

There is a consensus that the conservation of environment serves the common good for mankind. A scholar has written "in reality, the apparent conflict between humanity and intrinsic value of the environment does not exist because it is impossible to separate the interest of mankind from the protection of the environment." She has further added that, "humans are interlinked and interdependent participants with duties to protect and conserve all elements of nature, whether or not they have known benefits or current economic utility. The anthropocentric purpose should be distinguished from utilitarianism." 3

The environmental problems directly impact on human welfare, since the degradation of environment diminishes the quality of life. Globalization has affected all spheres of human life, as pointed out in the Statement of International Peoples Tribunal on Human Rights and Environment, "Inhumane wrongs constituting grave human rights violations and environmental devastation are justified in terms of expediency and necessity for development and the need for business as usual. Life itself has devalued and even more so has the future of our globe." 4

It is important to discuss the land mark judgment given by a Pakistani Supreme Court in Ms. Shela Zia and Others v. Wapda. 5 In this case, four citizens protested to Wapda against the construction of a grid station in the green belt of a residential locality in Islamabad, the capital of Pakistan. In this judgment, which has been cited both nationally and internationally, the Supreme Court held that the right to a clear environment is a fundamental right of all the citizens of Pakistan covered by the "right to life" and the "right to dignity" provided under Articles 9 and 14 of the Constitution of the Islamic Republic of Pakistan of 1973. This landmark judgment prevented the establishment of a high voltage grid station in a residential area of Islamabad on the ground that it might adversely affect the health of the residents of the area and as the Judgement directed:

[W]hile planning and deciding to construct the grid station WAPDA and the Government Department acted in a routine manner without

---

4. supra note 1, at 6.
5. PLD 1994 SC 693. (Also stated in the Case summary prepared by Hassan & Hassan Advocates, Lahore, Pakistan).
taking into consideration the latest research and planning in the field nor any thought seems to have been given to hazards it may cause to human health. In these circumstances, before passing any final order, with the consent of both the parties we appoint NESPAK as Commissioner to examine and study the scheme planning, device, and technique employed by WAPDA and report whether there is any likelihood of any hazard or adverse effect on health of the residents of the locality. NESPAK may also suggest variation in the plan for minimizing the alleged danger... The supreme Court also directed the WAPDA in its pertinent parts as WAPDA is further directed that in future prior to installing or constructing any grid station and/or transmission line, they would issue public notice in newspaper, radio and television inviting objections and to finalize the plan after considering the objections, this procedure shall be adopted and continued by WAPDA till such time the Government constitutes any commission or authority as suggested above.

It is, however, true that environmental problems often spark Human Rights abuses as well, especially where outside forces are give priority over the local communities. The so-called development projects do not bring any economic benefit to the local communities. The amount of wealth involved in these mega-projects have brought the environmental activists under a direct threat, either by the government or by its tacit approval. A famous and a very well known example relates to Chico Mendes, the leading organizer for rubber tappers in Brazil, who was murdered by ranchers with close ties with the government, and his crime was his efforts to gain protection for rubber tapper reserves. In Nigeria, Ken Saro Wiwa and his other activist friends are raising voice against the environmental concerns in their Ogoni lands. In India, Medha Paktar and other environmental activists have been arrested time and again and subjected to beatings. Their crime is to raise voice against the Narmada Dam and efforts to protect their homes for being flooded.6

A. Yadana Gas Pipeline Project

A Yadana Gas Pipe Line Project and off shore drilling project is a joint venture between the State Law and Order Restoration Council (SLORC, the Burmese military regime); several multinationals corporations; and its petroleum company, the Maynamar Oil and Gas Enterprise (MOGE).
B. *Unsustainable Development Practices*

Use of intimidation and coercion and force in implementing the project. Complete lack of transparency and participation in the implementation of the project. Lack of accountability regarding the environmental impacts of the project. Absence of environment impact assessment.

C. *Human Rights and Environmental Impacts*

The project has adverse environmental impacts on local communities and ecosystems both onshore and offshore. Dumping and drilling wastes and toxic muds have polluted water and endangered marine life. Deforestation has affected climate, watersheds, and the livelihood of people dependent on dry rice cultivation. There are water shortages and flooding in the rainy season which affects food production. Gas emissions from offshore drilling is very substantial (equal that from 7,000 cars each driving fifty miles a day). There is the disturbance of animal habitats, and problems with landslides and earthquakes that make the pipeline hazardous.

Coercion, violence, forced labor, confiscation of property, and sexual abuse of women has characterized the implementation of the project. Villagers have lost both homes and jobs. There has been instances of torture and killings associated with the project, and victims have no redress given the absence of a functioning judiciary.\(^7\)

D. *The Dabhol Power Project More Commonly Known as the Enron Power Project*

As a part of the Indian government’s efforts in liberalizing the economy, the Enron Corporation was asked by the Maharashtra state government to build what would be the world’s largest electricity generating plant costing around $3 billion. The operating company would be Dabhol Power Corporation, a joint venture of three United States companies: The Enron Corporation, General Electric, and the Bechtel Corporation.\(^8\)

---

7. Summary profile prepared by the author of Case submitted by Burmese Farmers of the Tenasserim region before the International Peoples Tribunal on Human Rights And Environment, New York (June 22 - 23, 1997).

E. Fresh Water

The project's circulation of water, as per Enron's estimate, will be 8,338 liters of fresh water per minute. As a result of which, and at the expense of the villagers, the water supplies were diverted to the project.

According to an interview mentioned in the Human Rights Watch report on Enron by Professor Pawar he explained:

[W]here there is water, there is prosperity. Farmers desperately need water. Had they [the government] provided water, the entire region would have become prosperous. People are angry about this. For thirty years, people have demanded water without any success. Now people are not amused to see water shipped to Enron.9

In 1996 through 1997, the company arranged for the water supply to the inhabitants be brought in tankers, which by itself shows how intense the problem would be as the scarcity in the fresh water supply was due to the diversion of the fresh water. The DPC, in order to compensate for the water shortage, dug wells in villages. Later, the water supply scheme was announced in Dabhol Samvad. Despite the fact that there was an urgent need for the supply of fresh drinking water to the villages around the project, in the summer of 1996, there was no solid commitment by the company to bring back the water to the original levels; but, the only commitment they had was the supply of water through the tankers and the wells to the villages. It is unfortunate to mention here that the company noted that the water level in the area will have a direct bearing on the success of the program. According to a local leader who was in opposition of the project said that "the villages had 300,000 liters of water daily before the project. Enron's program only provides 40,000 liters of water a day and have been unable to fulfil the request to provide 100,000 liters of water a day. This shows that the condition of the villagers is even worse than in 1994.

It is sad to state here that the situation of villagers in the village Valdur is worse because of the project. The existing problem is combined by the sewage contamination of potable water. The waste from the restrooms built by the company, in 1995, for the site workers was discharged into the water supply of the local villages. According to the villagers, the water supply is far below the requirement of the village and is thus inadequate.

An interview which was recorded by the Human Rights Watch who was studying the issue is mentioned here. He says:

9. Id.
Villagers used to have drinking water twenty-four hours a day. Since the Enron project started, they only have one hour of water every day. In contrast, Enron has its own pipeline and wastes water regularly. For two months in June and July [1997], there was no drinking water. Villagers would have to go to the river, but now untreated sewage is dumped into the river and the water is un-potable.10

F. Contamination of Salt Water:

The other issue related to the water, and particularly to the fishing villages, is the discharge of the hot water into the bodies of water. The water is first used to cool the Dabhol power plant. According to the minutes of the meeting between government officers and Enron dated March 12, Enron pointed out that seawater cooling required. Water requirement for the plant will be around 2,500 gallons per minute (13.5 million liters per day).

It is important to mention here that once the water is circulated through the plant, it will be discharged into the sea, which at that point is higher in temperature. This water, which is expected to increase the water temperature, may cause pollution and it might have toxic effluents which will kill fish and prawns. This would result in absolute destruction of the source of earning of the fisher people.

In an interview of Vithal Padyal conducted by Human Rights Watch, he says that:

The [Dabhol Power] project has benefits and losses. As and when they start discharging hot water into the sea, the whole community will be at a loss. Even today, drinking water tastes different due to contaminants and sewage. The only benefit of the project is that, at the moment, it generates some income opportunity for our sons. But, opposition to the project is justified. So far, all our earlier generations sustained themselves on the sea. When the fisheries are destroyed by hot water discharge, what are next generations going to do for their livelihood.11

G. Human Rights Violations:

The protests against the Dabhol Power project started in 1994, the time the construction began at the site in Ratangiri. The protestors included politicians, fisher people, local farmers, shopkeepers, and other inhabitants of the area. It is, however, pertinent to mention here that the protestors were always peaceful and never advocated violence, whereas the police were abusive.

10. Id.
11. Id.
According to the Human rights Watch Report, “About 1,500-2,000 protestors had marched from Guhagar village to the site of the Dabhol Power Project.” The protests largely consisted of shouting slogans and chants in front of the company gates. The police response was out of all promotion: protesters were beaten during a lathi charge, tear-gassed, and then arrested. Ms. Snehal Vaidya, head of the village council at Anjanvel, described the protest to an AIPRF fact-finding team led by retired Bombay High Court Justice S.M. Daud:

At 9:30 in the morning as we started out in a morcha (protest march), shouting slogans against Enron, MNC’s [multinational corporations], and the Alliance Government, the police tried to surround us and obstruct our progress. However, due to our massive numbers they were unsuccessful and we reached the site of the main demonstrations. Here, however there was a huge police force deployed and even as we were peacefully shouting slogans, they began pushing and obstructing us... Suddenly, without warning, began a brutal lathi charge. Many of the constables were armed with freshly cut branches of trees, others with lathis, with which they indiscriminately beat up all those who had gathered.12

The protests against the project were inclusive of activists, members of organizations, and villagers who have been subjected to short term detentions, time and again, and abuse in the custody of the Police. No wonder those arrested were arrested under the Laws of preventive detention. But the detention in these cases continued for several days and in violation of the law that requires the detainees to be produced before the magistrate within twenty-four hours as per the Indian Law.

According to the interview of Medha Patkar recorded by Human Rights Watch, who participated in this demonstration, she stated, “After an hour, the police told us to go. We knew we were going to be arrested, so we held hands. They pulled me by the hair. The police molested women, so they started yelling at the police which made the police more angry.”13

In these mass arrests, the demonstrators were subject to physical beating by the canes, more commonly known as lathis or assaulted and in several cases inflicting severe injuries. The Police have used the tear gas upon peaceful demonstrators.

The State government of Maharashtra has not only misused the laws of preventive detention, but have also been involved in the suppression of the

13. Id. at 63.
rights of freedom of expression and peaceful demonstration coupled with arbitrary arrests and beatings. The police have also failed to give attention to the complaints filed by the demonstrators against the perpetrators of attack on them and has hence failed to proceed against them. The human rights violated are the right to freedom of expression, peaceful assembly, protection against unjust arrest and detention, and police mistreatment.\(^\text{14}\)

Another incident involved Patkar and some of her colleagues from the National Alliance of Peoples Movements (NAPM), and took place in the town of Mahad, near the Dabhol Power Project. Under the pretense of preventing damage to property and loss of life, police served Paktar with prohibitory orders under Section 144 of the Code of Criminal Procedure on May 29, 1997, and then surveilled, arrested, beat, and detained the activists on the eve of her departing for Raigad and Ratangiri districts with plans to lead a series of protests against the DPC project and other industrial projects. The incident merits detailed treatment. Due to its being subsequently investigated by the Indian governments National Human Rights Commission, it is usually well documented and provides a close look at the process driving the issuance of prohibitory and extermment orders.

The National Human Rights Commission determined, moreover, that the order against Paktar under Section 144 of the Code of Criminal Procedure was "unjustified." The behavior of the government led the commission to comment:

> The case of Ms. Medha Patkar deserves anxious attention, . . . as some basic human rights issues are involved. In a free and democratic set up, the Fundamental Rights of individuals cannot be allowed to be infringed upon without impunity. . . . State machinery should not be misused or ulterior aim and gains of the party in power, out to strangulate the voices of dissent.\(^\text{15}\)

Freedom of expression is protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and India is a party to it. Suppression of the right of peaceful assembly, as well as arbitrary and illegal arrests, as well as detentions, are prohibited under Article 21 of the ICCPR. It is also important to note that Article 9, as well as Article 9 (2), (3), (4), and (5) of the ICCPR were also violated as the demonstrators had the right to know about the reason behind their arrests. They also had the right to be produced before the judicial officer promptly. Victims of unlawful arrests have a right to compensation.

---

14. Id.
Article 3 of the United Nations Code of Conduct of Law Enforcement officials states that "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." The plain reading of this provision from the code makes it clear that the police beating of the demonstrators, protesting against the Dabhol, is in absolute contravention of the code.

H. Indian Laws

The Constitution of India safeguards the rights of freedom of speech, expression, peaceful assembly, association, and movement in its Article 19. The article addresses restrictions and the maintenance of public order, but makes it clear that in applying these restrictions the concept of reasonableness should be kept in mind.

Article 21 of the Indian Constitution provides the safeguards against arbitrary arrests or detention. The arrested person must be told the reasons for his arrest and should also be presented before the magistrate within twenty-four hours of his or her arrest; if not, then the detention is illegal. In a case where the police wants to detain a person for more than twenty-four hours, they need permission for the same by the magistrate.  

Globalization has brought about the realization to the effect that the environmental problems are also global in nature. This idea is further supported by the fact that globalization has brought about the changes on the Earth; and the changes are not for good, but for the worse as it is evident from the majority of cases that it has threatened the existence of human beings and has violated their basic human rights.

III. CONCLUSION

Let me conclude by stating that:

1. Development which degrades the environment also produces violations of human rights.
2. Development projects which condone the violation of human rights in the process of their implementation also tend to condone activities which degrade the environment.
3. Development projects which consciously aim at protection of the environment also end up promoting the realization of human rights.
4. Development projects which consciously seek to protect and promote the human rights of the poor also end up promoting the environment.

16. Enron, supra note 9, at 100-103.
INTERNATIONAL LAW ANTINOMIES AND CONTRADICTIONS OF AN ERA OF HISTORICAL TRANSITION: RETROSPECTIVE ON THE NATO ARMED INTERVENTION IN KOSOVO

Edward McWhinney*

We live today in an era of historical transition. The 20th century really ended with the fall of the Berlin Wall in 1989. This heralded the end of the Bipolar system of World public order that had dominated the post-World War II era in its various phases. From the early, Stalinist, Cold War years of nuclear confrontation, through the pragmatic accommodations of Peaceful Coexistence, and on, finally, to an active East-West cooperation under the rubric of Détente.

The post-Cold War (more accurately, post-post-War) system of World public order is harder to identify in terms of its political Grundnorm or basic premises, to which all the legal ground rules ("rules of the game") must be logically related. Bipolarity has disappeared now into history. Is it now a Unipolar model of World public order, dominated by the single remaining superpower, the United States; or is it, rather, a plural, multipolar system, whether centered in the United Nations or operated, de facto, by a new oligarchy of which the United States, the European Union (or Germany, at least), Japan, China, Russia, and probably India too, must, by virtue of a combination of military and economic and geopolitical factors, become the principal players?

The patterns are not clear, and are frequently quite contradictory, and this is to be expected in a period of fundamental and rapid change in international society. The accidents of personality in political leadership, created by the changing of the guard and generational replacement in the political élites, have their impact today.

For the first time, the dominant political and also military élite in all of the main post-industrial societies is without direct, personal experience of World War II or active military service under combat conditions. A good deal of the "One World" idealism that, in reaction to World War II, inspired the creation of the United Nations and its sophisticated institutions and processes for resolution of international conflict, has gone. A form of atrophy was already there during the Cold War period, as emerging Coexistence and then Détente

* Edward McWhinney, Q.C., LL.M, S.J.D., LL.D., M.P.; Barrister and Solicitor; Professor (Em.) of International Law. Président de l'Institut de Droit International (1999-2001); Member of Parliament (Canada) and sometime Parliamentary Secretary (Foreign Affairs).
produced special, bilateral, inter-bloc, international law-making. This was achieved through Summit Meetings of the two bloc leaders, Soviet and Western, and manifested in a whole series of Soviet-Western pragmatic, empirical, step-by-step, problem-solving exercises, in nuclear and general disarmament, security of territorial frontiers, control of international terrorism, and related subjects.

The first post-Cold War election of a new United Nations Secretary-General in 1991 and the choice in that election of the brilliant International lawyer and reform-minded activist, Boutros Boutros-Ghali, seemed to presage a post-Cold War return to the United Nations in its original, 1945, spirit of the main arena for international law-making. But that promise was lost in the emerging conflicts between the United Nations Secretary-General and the United States State Department in which, in part at least, the political joinder of issues involved major intellectual differences over the new, United Nations-based, multipolar paradigm of World public order which Boutros-Ghali was considered to be projecting. United States President George Bush, though stressing United States primacy in any decisions on maintenance of international peace and security, had felt able, nevertheless, to operate easily enough under the United Nations aegis, and he was able to obtain the necessary prior United Nations legal authority, in the form of the United Nations Security Council umbrella Resolutions, to support and legitimate the allied military operations in the Gulf War crisis in 1990-1. His successor, President Clinton, in contrast, in stated fear of a possible Veto in the Security Council by either Russia or the People’s Republic of China (though the matter was never tested concretely), and putting aside the alternative law-making route through the United Nations General Assembly on the Uniting-for-Peace precedent successfully sponsored by then United States President Harry Truman and United States Secretary of State Dean Acheson in the Korean War crisis in 1950, chose to by-pass the United Nations in the Kosovo situation.

President Clinton’s decision on Kosovo was to operate, instead, through the vestigial Cold War military alliance, North American Treaty Organization (NATO). This left the combined North American-Western European military action against the former Yugoslavia (Serbia-Montenegro) over Kosovo without a positive law, International Law base. It is elementary that the NATO organization could not hoist itself by its own bootstraps into legal powers that it does not have under the United Nations Charter, or, a priori, outside the Charter.

A legal dispensation from the United Nations Charter’s absolute prohibition on the use of force or from the Charter definition and limitation of the collective self-defense exception under § 51 of the Charter, would have to come from the United Nations Security Council or, failing, that, from the United Nations General Assembly. A political and legal tidying-up of the
Kosovo operation, such as it was, thus had to occur ex post facto: at the political level, by bringing in the Russians and placating the Chinese (P.R.C.), and leading on to the final, consensus settlement, at the legal level, by a United Nations Security Council Resolution adopted on June 10, 1999, with the support of Russia and with a Chinese abstention.

Would it not have been politically and legally wiser to have tried such a multilateral approach, based on a multipolar consensus and within and through the United Nations, from the very beginning? In the East Timor situation that followed immediately afterwards, that was the approach that was adopted from the outset: the Security Council was asked to approve armed intervention under Chapters VI and VII of the Charter, and by Resolution adopted by unanimous vote of the Security Council, including all the Permanent Members, gave that legal authorization on September 15, 1999.

The contradictions of an era of historical transition continue, in both substantive-legal and also processual-legal terms. The project to establish an International Criminal Court of universal jurisdiction was finally signed in Rome in July 1998, but it was indicated that four at least of the five Permanent Members of the United Nations Security Council would be unlikely to ratify it, for fear of submitting their own nationals (civil and military) to any new international criminal jurisdiction. Can the new International Criminal Court have any real role without the effective working participation and cooperation of the major powers? Meanwhile, the ad hoc United Nations War crimes tribunal for former Yugoslavia and Rwanda continues, but with its mandate apparently being interpreted so as not to extend to intervening states from outside the region concerned. Will there be no legal opportunity, therefore, for testing the relevance and applicability of the 1977 Protocols Additional to the Geneva Convention of 1949, to the contemporary law of aerial bombardment with particular relevance to civilians and civilian property?

As a municipal, national tribunal, the judicial committee of the British House of Lords, has voted to remove the legal claims to Sovereign Immunity against possible extradition to Spain to face charges of Crimes against Humanity that had been advanced before it by Chilean ex-Head-of-State General Pinochet. The legal initiative before the British tribunal falls wholly within municipal national law and is based on the incorporation into British law of International Law norms (here international treaty norms). It is paralleled by populist participatory democracy action - in default of larger, diplomatic progress on the Non-Proliferation Treaty (including action by the five existing members of the "Nuclear Club" to reduce their own nuclear weapons stockpiles) and in the face of the somewhat restrictive, no-clear-majority holding by the International Court of Justice in the recent Advisory Opinion on the legality of Nuclear Weapons, to spark the recent middle-power initiative for—a Land Mines Treaty, banning the production and sale of these particular, vicious
weapons of modern armed conflicts. Within ten months of its signing by a
record 121 countries, the Land Mines Treaty has been ratified by the minimum
number of forty states necessary for it to enter into legal force. But this has
been done without the United States and other Permanent Members of the
United Nations Security Council who feared a diminishing of their operational
military power under the treaty, and who thus lobbied, in some cases strenu-
ously, against the measure.

The new confidence of non-Permanent Members of the Security Council
and particularly of those who, in the new international economics terms, may
realistically aspire to a recognition of their claims to superpower status and
those same new powers' disaffection with the failure of the World Community
to up-date and reform United Nations basic structures and processes so as to
take more account of contemporary realities in the World Community, may be
expected to produce increasing fractionalism within the United States led,
Western political-military alliance, and in turn, to encourage more local or
regional, direct democracy initiatives in new international law-making, of the
sort seen in the case of the General Pinochet extradition caper and the Land
Mines Treaty initiative.¹

¹ The present study draws on the author's monograph, "The United Nations and a New World
Order for a New Millennium, Self-Determination, State Succession and Humanitarian Intervention" (Kluwer
FIVE THEORETICAL THEMES IN THE WORLD TRADE ORGANIZATION ADJUDICATORY SYSTEM

Raj Bhala*

I. RECOLLECTING EMOTION ........................................ 437
II. THEME #1: THE MORIBUND STATE OF JOHN AUSTIN ........ 438
III. THEME #2: THE COLD WAR BETWEEN DEVELOPED AND DEVELOPING COUNTRIES ........................................ 439
IV. THEME #3: THE STRUGGLE FOR LEGITIMACY, OR THE RESURRECTION OF IMMANUEL KANT ..................... 440
V. THEME #4: DE FACTO STARE DECISIS .......................... 441
VI. THEME #5: THE MISSING MUSES, OR THE DREADFUL QUALITY OF WRITING ............................................. 442
VII. FILLING IN THE LANDSCAPE................................. 443

I. RECOLLECTING EMOTION

I am not sure about the poetic tastes of my distinguished colleagues on the panel. But, I think we could all agree with William Wordsworth’s definition of “poetry” as “emotion recollected in tranquility.”

“Emotion recollected in tranquility.” From lovers of Wordsworth to lovers of E. E. Cummings, I think all of us on the panel would agree that the World Trade Organization (WTO) dispute settlement mechanism, indeed, the WTO system itself, was born amidst a great deal of emotion on January 1, 1995. And, I think that all of us would agree that, perhaps to our surprise, the emotion surrounding the DSU and its operation during the last five years has, if anything, become more heated, dare I say passionate.

Defenders of the system point to the large volume of cases, including high-profile disputes, that the system has handled with a reasonable degree of success in terms of quality decisions and compliance. Detractors call the

system non-transparent, exclusive if not elitist, and insensitive to important environmental, labor, human rights, and even national security concerns.

Our challenge is to reflect on the emotion surrounding the DSU and its operation, and as lawyers, to evaluate the various defenses and detractions that have been made. We are to try to look back, and look ahead, with a somewhat paradoxical, but really quite unifying, mind set familiar to the greatest of poets: a dispassionate one that nevertheless preserves heart-felt sentiments and instincts.

My distinguished colleagues are far more able than I to lead us through in a tranquil manner the particular ups and downs of the last five years with this mind set. Wordsworth’s poetry is famous for its landscapes put into words. My particular challenge is to sketch the outlines of the landscape for the poetry of my colleagues to come. To put it in less metaphorical terms, my task is to discuss some of the grand theoretical themes that have emerged, or are emerging, in and as a result of WTO adjudication.

II. THEME #1: THE MORIBUND STATE OF JOHN AUSTIN

We have all heard it said that “international law is not really ‘law.’” The adage is based on the perception that international rules are unenforceable. It is an adage based on the positivism of John Austin. To Austin, “law” is the command of a sovereign that is habitually obeyed under a threat of punishment.

I think that on our landscape, international trade law, Austinian positivism is in a moribund state. It may have been alive and well in the pre-Uruguay Round era. Cases like Oilseeds were the food for this corpus of jurisprudence. Now, we have arguably the most sophisticated dispute resolution system in all of the international law specialties.

We have a mechanism with real deadlines. We have a mechanism with set procedures. Best of all, we have a mechanism that, to put it in its mildest form, expresses a clear preference for compliance, and failing compliance, ineluctably leads to compensation or retaliation.

The Bananas and Beef Hormones, and possibly Turtle-Shrimp cases notwithstanding, losing WTO Members are implementing reports within the typical 15-month time frame. There, then, is the command of the sovereign that is habitually obeyed under threat of punishment. That “sovereign,” or central authority in a very loose sense, is the DSB. That threat of punishment is retaliation.

To be sure, there is a legitimate debate about whether the DSU actually compels compliance, whether it means to avoid giving the losing Member an option to comply, pay damages, or accept retaliation. How you read the relevant DSU provisions affects your stance here, and I think there are strong points on both sides. Nevertheless, to say that “international law, at least
international trade law is not really law” is now a statement borne more of ignorance than truth.

III. THEME #2: THE COLD WAR BETWEEN DEVELOPED AND DEVELOPING COUNTRIES

Can we identify any schism in the global economy of the new millennium that is any wider, and growing any faster, than that between the First and Third Worlds? Fifty years of trade liberalization has done a lot for a handful of countries, and very little for the bulk of them; or, at least, that is the perception.

The WTO is an elite club dominated by the United States, European Union, Japan, and Canada, all of which are far more interested in gaining market access in, or shutting imports out from, the likes of India, Costa Rica, Brazil, and sub-Saharan Africa; or, at least, that is the perception.

WTO adjudication is a war that the hegemonic trading nations are best able to fight, because they have the armies of international trade lawyers, the forward deployments of fully staffed experts in Geneva, and the backing of multinational corporate interests; or, at least, that is the perception.

WTO adjudication is extraordinarily expensive, and developing countries can neither afford the weaponry needed, in the form of a counsel of choice, nor is it firmly established that they have a right to private-sector attorneys; or, at least, that is the perception.

Now, in this war, perception is reality. If the governments of four to five billion people feel a certain way, then that feeling cannot be dismissed. Maybe it can be assuaged by pointing out that small countries like Costa Rica win cases against big countries like the United States. Then, what do you say to the small countries of the African, Caribbean, and Pacific who feel they are being sent to a guillotine operated by Dole, Chiquita, and Del Monte? How do you rationalize a demand for private party access to WTO panels and the Appellate Body if that access would drive up the legal costs of developing countries because they would be named as respondents in a wave of lawsuits? Indeed, how do you rationalize even the current, sovereign-state-only access system with the pathetically small budget of the WTO dedicated to the legal defense interests of Third World countries? (Overall, the WTO’s budget is pathetically small, roughly $122 million, with a staff of a little over 500. It is said that the total WTO budget is roughly equal to the International Monetary Fund’s annual travel budget.) It will not do to say that the budget will increase, and a center to help these countries will be established, if the new-found resources cannot be used to bring cases against the First World.

What I am saying, at bottom, is that if the WTO adjudicatory mechanism continues to be perceived as an un-level battle ground on which developed
country interests tend to be advanced, then that mechanism will be increasingly suspect, resented, and maybe even ignored.

IV. THEME #3: THE STRUGGLE FOR LEGITIMACY, OR THE RESURRECTION OF IMMANUEL KANT

To put it differently, the legitimacy of that mechanism will be undermined by the gaping schism between the “haves” and “have nots.” Indeed, the struggle for legitimacy, or what we might dub the resurrection of Immanuel Kant, is the third theoretical theme on the landscape that I wish to sketch.

I believe that when the history of international trade law is written half a century or a century from now, scholars will look back and draw parallels between the new-born DSU mechanism and the American Supreme Court of our Great Chief Justice’s days. In a very different context, Justice Marshall struggled mightily to establish the legitimacy of the Court, and so too are the panels, Appellate Body, and DSB, or, at least, they ought to be.

What do we mean by legitimacy? At bottom, it means an acceptance, a respect, that transcends the mere threat of punishment. An acceptance and respect that is based on a sincere belief in the procedures, substantive reasoning, competence, and most importantly, fairness, of the adjudicator. How do the addressees of panel and Appellate Body reports, and other parties affected by these reports, come to see the DSU system as legitimate?

Individuals and businesses have no direct access to that system. Non-Governmental Organizations (NGO) have only the most indirect and tenuous access. Yet, individuals, businesses, and NGO’s can rightly point to the growing body of international relations theory that tells us that a principle tenet of realism, that sovereign states are not the main players in the global economy, is wrong. After all, nations do not trade. People trade. Corporations trade.

It was Immanuel Kant who counseled us in his essay, *Perpetual Peace*, that the center of the international law must be the normative status of the individual, that it is wrong to conceive of international law as concerned only with the rights and duties of states as the fundamental unit of that law without also examining each state’s domestic political system and its treatment of its citizens. To Kant, the business of international law was inextricably linked to the question of domestic justice. To Kant, international law, and we can extend this to international trade law, is legitimate only if its founded on an alliance of separate, free nations united by their moral commitment to individual freedom, not merely by their allegiance to the international rule of law and the mutual benefits of peaceful intercourse. Put bluntly (as many are in connection with the WTO Ministerial Meeting in Seattle), whether the General Agreement Tariffs and Trade (GATT), WTO regime is “legitimate” or “just” depends very
much on whether the WTO Members are committed to domestic justice in the realms of human, labor, and environmental rights.

So, then what is this World Trade Organization? Is it, perhaps, really a Sovereign State Trading Organization? What are we to make of this Sovereign State animal that produces decisions that, however persuasive in terms of GATT Article XX:(b) and (g), horrify environmentally-minded observers. How are we to deal with the fears of labor and human rights activists, who see their interests as the next ones to be sacrificed at the altar of Most Favored Nation (MFN), national treatment, tariff bindings, non-discriminatory application of quotas, or some other trade-liberalizing principle? However noble that principle may be on the black boards of the neo-classical economists, in the equations of the game theorists, or in the theories of the positivist philosophers, obviously it has not been universally persuasive.

In other words, there is a loud, even violent, clash of philosophies and cultures here. On the one side, there are traditionalists who focus on trade liberalization and its merits. On the other side, there are those who see beyond comparative advantage doctrine, who push the trade agenda to include new concepts and concerns.

The pressure to push out the boundaries is exacerbated by the adjudicatory process itself. It is seen by many activists, not unfairly, as non-transparent. An irony indeed, given that the judges of Geneva certainly would embrace GATT Article X, and have in a few decisions, for others! Can anyone sit in on a panel or Appellate Body hearing? Can anyone obtain the briefs in a case? Can we turn on Court TV and watch the proceedings? The answer to these sorts of questions is “no.” What about the routine use of outside experts to inform the judges of Geneva about the issues at stake? Here we see a hesitant, ad hoc approach. How, then, are we to agree the DSU process is “legitimate” if much of that process excludes important voices, if much of that process is hidden from our eyes, if that process does not always call upon the best and brightest specialists to help resolve a dispute?

V. THEME #4: DE FACTO STARE DECISIS

It cannot be denied that the WTO adjudicatory process has produced opinions impressive in number. It cannot be denied that virtually every one of those opinions is replete with citation to previous opinions. It cannot be denied that many of those citations are for more than purposes of guidance or illustrating consistency, but that veer towards and even cross the line, between citation for guidance and continuity, on the one hand, and authority, on the other hand.

Shall we then continue to assert, with Article 38(1)(d) of the Statute of the International Court of Justice and Section 102 of the Restatement on Foreign
Relations Law (Third), that judicial decisions are mere evidence of the law, not the law itself? Shall we continue to believe that there is no body of international common law on trade that is emerging? Shall we hold fast to the pretense that stare decisis does not operate in a de facto sense?

My leading questions suggest my own view. Whether you agree with that view or not, I think you can see the tremendous theoretical challenge posed by the corpus of WTO decisions. Is that corpus illustrative of a re-defining of the way in which Anglo-American and civil law cultures interact? Is it a sort of hybrid between the two cultures? Or, is it an incarnation of a trend in civil, including French, legal culture toward an increasing reliance on precedent, notwithstanding the rhetoric of the civil code? Put in more culturally insensitive terms, is the use of precedent in WTO decisions an illustration of what we know from Coke, McDonalds, Madonna, Steven Spielberg, Nike, and Levi's, namely, that "globalization" means "Americanization?"

I dare say that this issue is likely to become all the more poignant in the coming years. Why? The vast majority of the leading international trade lawyers of the new millennium who are from outside of the United States are, or are seeking, LL.M. degrees in the United States. America is exporting human capital that is being schooled in the ways of common law reasoning. Like Alexandria a few millennia ago, like Oxbridge more recently, the extraterritorial influence of the American academy is unparalleled, indeed, essentially unchallenged. If it is indeed the case that a de facto stare decisis doctrine is operating in WTO adjudication, ought we to consider admitting this openly and, further, amending the DSU and WTO Agreement where necessary to make this doctrine official, that is, a de jure one whereby reports really possess the potency of precedent?

VI. THEME #5: THE MISSING MUSES, OR THE DREADFUL QUALITY OF WRITING

It would be an evil overstatement for me to urge that every panel and Appellate Body report bespeaks the extraordinarily poor writing skills of the panelists and Appellate Body members. For the most part, I do not know personally the panelists and Appellate Body members so I cannot say if their innate writing skills veer more to a Wordsworth or a trashy romance novel in the slush pile of a New York editor.

But, I do think it fair to say that whatever writing assets they do have, these assets are not used as frequently as they ought to be. It does not seem to me that the panels and Appellate Body realize the direct link between their legitimacy in the eyes of the world, on the one hand, and the quality of their written product, on the other hand.
Why are the opinions of Justice Marshall, Justice Holmes, Lord Mansfield, or Lord Diplock so revered? Is it only for their substantive content? Of course not. It is because those opinions were so well composed. For the most part, they were concise, avoiding redundancies. For the most part, they drew on the richness of the English language, using words and phraseologies that excited our imaginations. They used cleverly constructed analogies that inspired our intellects, and, for the most part, they dealt squarely and sternly with the issue at hand, not burying their prose in technicalities, not shrinking from the grand underlying tensions.

I suggest that most panel and Appellate Body reports lack these virtues. In connection with my work on the second edition of my *International Trade Law* casebook, and on various law review articles, I am having the experience of reading a large number of these reports. While I am odd enough to find it pleasurable, most would not.

Why must you read, re-read, and read again passages to ascertain their meaning? Why must you wade through paragraph after paragraph of the arguments of the parties, and of third parties, only to find these arguments summarized later in the discussion? Why must you mentally correct grammatical errors, be they split infinitives or misplaced commas? Are you wrong to demand of our supreme adjudicators of international trade law better writing? I think not. I think it eminently fair to ask these panelists and Appellate Body members to recall their education in not just Wordsworth, but also Homer, Gibbon, and Churchill, and to unleash the spirit of the Greats in an effort to make their contemporary work more appealing, and more worthy of acceptance.

VII. FILLING IN THE LANDSCAPE . . .

I shall stop at this point, in the hope that some of these themes may resonate in you and serve as a sketch of the landscape that my colleagues are now going to discuss in greater practical detail. Let me thank you for your gracious attention, and express my special appreciation to Steve De Luca for this opportunity to recollect, and to forecast, emotion amidst tranquility.
The concept of self-determination presents a useful example of how change comes about in legal norms, particularly in the international arena. Most scholars recognize self-determination as a concept that has already undergone considerable transformation. This paper will try, again, to grasp the evolving nettle of self-determination in light of the recent events in Kosovo and East Timor. Nettles may sting if not handled properly, but they also have a range of restorative properties. Struggles for self-determination tend to inflict injury or loss, but the pain is usually considered worth bearing if it results in larger measures of autonomy for the group initiating the struggle. The progressions in the development of the concept of self-determination have often been noted: the steps proceed from Wilsonian pronouncement, to United Nations Charter inclusion, through the overthrow of colonialism to the development of individual and group human rights generally; they move towards the increasing specificity of the right, first to participate in governance.
and then to participate fully in the life of the nation; they continue through examination of the characteristics of the groups that may claim non-full participation, culminating in a declared right of "full autonomy" or even a right of "secession" for groups not fully experiencing participation in the larger society.

II. THE SUPREME COURT OF CANADA'S REFERENCE OPINION ON QUEBEC'S RIGHT TO SECESSION

A recent opinion from the Supreme Court of Canada\(^2\) presented a rare judicial opinion on the international law surrounding the issue of self-determination and secession. In the summer of 1998, the Court issued a reference opinion answering, among other things, the following question:

Does international law give the National Assembly, legislative or government of Quebec the right to effect secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislative or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?\(^3\)

Though the Court was willing to concede the right of a people to self-determination as a general principle of international law, the Court stated that the right must "be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states."\(^4\) In general then, the right of self-determination, whatever it may mean and whoever may claim it, can usually only be exercised within the framework of the existing state structure. The Court did, however, go on to say that it is only in "exceptional circumstances [that] a right of secession may arise."\(^5\) Before addressing those circumstances, the Court turned its attention to defining the "peoples" who may claim the right to self-determination.

The Court's discussion of the definition of "peoples" never really got off the ground because the Court decided that it was "not necessary to explore this legal characterization"\(^6\) because, regardless of the correct definition, the Court was not willing to find that the Quebec population had a unilaterally right to secession. The Court did not explore the question of whether the population of

---

3. Id. ¶ 2.
4. Id. ¶ 122.
5. Id.
6. Id. ¶ 125.
Quebec was a "people" for the purposes of claiming self-determination because, even if they were, the Court remained convinced that the circumstances necessary to trigger the right of self-determination, in the sense of secession, did not exist in Quebec. The Court did note however that "a people" may include "only a portion of the population of an existing state," thus recognizing that the right of self-determination, including the right of secession in certain circumstances, may attach to certain sectors of the population located within a larger territorial unit of the state.

The Court noted that self-determination will normally be "fulfilled through internal self-determination - a people's pursuit of its political, economic, social, and cultural development within the framework of an existing state" and that the "right to external self-determination (which may take the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances." The Court cited the 1989 concluding document of the Vienna Meeting of the Conference on Security and Co-operation in Europe on the follow-up to the Helsinki Final Act which referred to "peoples having the right to determine their internal and external political status," but noted that the statement of this right is "immediately followed by express recognition that" the state will always act in conformity with the United Nations Charter including those principles relating to territorial integrity of states. The states participating in the Vienna Meeting specifically stated in Principle 5 of the concluding document that any action aimed "at violating the territorial integrity, political independence or unity of a state" will not be recognized as legal by the participating states. Leading scholars have interpreted this to mean that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State." The Court concluded that a:

[S]tate whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determina-

---

7. Secession of Quebec, supra note 2, ¶ 124. The Court also stated that it was not "necessary to examine the position of the aboriginal population within Quebec." Id. ¶ 125.
8. Id. ¶ 126. (Emphasis added).
9. Id. (Emphasis added).
10. Id. ¶ 129. (Emphasis applied).
11. Succession of Quebec, supra note 2, ¶ 129.
12. Id.
tion in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.14

What then are the "extreme cases" in "defined circumstances"15 that may justify piercing the territorial integrity of the state framework? The Court lists three examples of a people's right to secession. It is ready to agree that the "right of colonial peoples to exercise their right to self-determination by breaking away from the 'imperial' power is now undisputed."16 Similarly, where a people "is subject to alien subjugation, domination or exploitation outside a colonial context,"17 there is a right to external self-determination. Lastly the Court gives credence to the proposition that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession,"18 although that proposition may not yet be "an established international law standard."19

The problem for Quebec was that, in the Court's view, the province does not fit within any of the above three "extreme cases." The Court documents the dominant position of Quebecers in national politics, in the legislative, judicial, and executive branches of government and concludes that since Quebecers are in no way in "a disadvantaged position,"20 the "exceptional circumstances [giving rise to a right to secession] are manifestly inapplicable to Quebec."21 The Court is therefore quite clear in its view that Quebec, at the present time, has no right under international law to unilateral secession.

The last part of the Court's opinion addresses what it calls the Recognition of a Factual/Political Reality: The 'Effectivity' Principle.22 Here the Court demonstrates its appreciation that the world does not necessarily arrange, or rearrange, itself according to legal rights. The Court recognizes that "international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation."23 The Court is fully aware that if a clear majority of Quebecers voted, on a clear question, for secession, the federal government of Canada would have to negotiate with the leaders of Quebec and that there might eventually be recognition of an independent Quebec both by Canada and by

14. Id. ¶ 130.
15. See Secession of Quebec, supra note 2, ¶ 126.
16. Id. ¶ 132.
17. Id. ¶ 133.
18. Id. ¶ 134.
19. Id. ¶ 135.
20. Secession of Quebec, supra note 2, ¶ 137.
21. Id. ¶ 138.
22. Id. ¶ 140.
23. Id. ¶ 141.
other countries. The Court, nevertheless, took the view that at present, an act of unilateral secession would be illegal, even though the illegal act of secession might eventually lead to a recognized state within the international framework. The possibility of subsequent legitimacy of the newly created state would not, in the Court’s view, provide a retroactive basis for declaring that a present act of secession would be legal.  

III. NEW PRINCIPLES ENUNCIATED IN THE QUEBEC CASE

A. The Right to Secession

Commentators have been asking whether the Quebec decision breaks new ground for the law of self-determination. I think it does in two ways. First, the Court by recognizing the right to secession when “a people is blocked from the meaningful exercise of self-determination internally” clearly links self-determination to secession. This right of secession arises when there is no meaningful exercise of internal self-determination. The Court, in discussing “internal self-determination,” defines it as “a people’s pursuit of its political, economic, social, and cultural development within the framework of an existing state.” This language comes from the Declaration on Friendly Relations, the Vienna Declaration, and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations. The Court does not, however, expand upon the meaning of political, economic, social, or cultural development. The Vienna Declaration requires that a government represent “the whole people belonging to the territory without distinction of any kind.” This, together with the whole backdrop of the United Nations Charter and human rights law generally, requires equality of representation certainly in the political process and presumably also in the economic, social, and cultural arenas too. This much is clear from the Court’s opinion. The exact nature of what can be claimed by “peoples” beyond the democratic right to equal political representation in the context of self-determination is less clear. We are given no clue to the content of the pursuit of economic, social or cultural development, or the minimum necessary level of the facilitation of their exercise.

24. Id. ¶ 155.
25. Succession of Quebec, supra note 2, ¶ 134.
26. Id. ¶ 126.
B. The Effectivity Principle

The second way in which the Quebec opinion breaks new ground is its wise discussion of the "effectivity" principle in law. The Court does not shy away from recognizing the "after-thought" aspect of legal legitimacy. The law changes in both neat and not-so-tidy ways. A new norm of international law can burst on the scene by a new multilateral treaty signed and rapidly ratified by virtually all states. Such change is neat and clean and satisfies all the legal niceties. But in the area of "rights," change seldom comes about through such means except at the end of a process where it may well be possible to declare the right's existence even before a treaty's confirmation.

Much eighteenth and nineteenth century legal/philosophical debate centered on trying to define rights. When anyone announced a new right, the legal philosophers would boldly denounce the claim because it did not fit the rigid rules laid down by whichever philosophical school was in vogue. The modern rights philosophers are much happier to recognize that rights are often statements of a preference for how the world should be ordered. Such preferences are not to be dismissed as mere whimsy because it is now firmly understood that if the particular "right" catches hold of the public's imagination and enough people, over a long enough time, declare the right to exist, it may eventually come to exist through the convergence of a variety of norm-creating mechanisms. The non-governmental organizations, often predominantly populated with non-lawyers, appreciate this fully — so do political crusaders.29

The development of the concept of self-determination as incorporating a right of secession under certain circumstances follows the same legal route from the "ought" to the "is." Kosovo and East Timor are two examples of a people's "ought" helping to transform a principle into an "is." The Quebec court understood this "legality follows reality" maxim in the context of self-determination and its exposition on the "effectivity principle" broke new ground, not because no one had ever recognized the effectivity principle before, but because the principle was linked to the specific right of secession in the context of self-determination.

IV. The Example of Kosovo Supports the Right to Secession

Alistaire Cooke wrote an enlightening column in March of 1999 where he described in detail the negotiations of the Versailles Treaty at the end of World

29. Take the statement "Americans have a right to health insurance" as lawyers, we know that is not true. Indeed, we know that forty-five million Americans have no such insurance. But we also know that it is really a statement that all Americans ought to have health insurance and, sooner or later, the crusaders believe they will convince the people and the Congress that they should press for and pass legislation to that effect, so that the right will exist.
War I and the redrawing of the map of Europe based in part on Woodrow Wilson's concept of "self-determination." Cooke calls Wilson's fourteen point plan "a sublime example what can be called begging the question — which means taking for granted as having happened what you dearly want to happen." Cooke was convinced that the present break up of Yugoslavia can be traced to its creation in 1919, together with the creation of the concept of self-determination. The Kosovars were a minority guaranteed protection in 1919 in return for Serbia's being granted sovereignty. It is unclear whether the Kosovars of 1919 are the same "people" who inhabit Kosovo today. Certainly, there have been large ethnic shifts in the region since that time. Cooke's observations are, as ever, astute, but he offers us no alternative to a Wilsonian utopia.

How should we view the experience of Kosovo in the context of self-determination? Kosovo certainly was not a colony of Yugoslavia under any common understanding of the term. The Albanians, who make up over ninety per cent of the population of Kosovo, certainly have a claim to be a "people" on the basis of ethnicity, language, religion, and culture. They were, and are, a group distinct from the ruling dominant Serbian group. They inhabit a distinct area of territory. Their lack of representation in the national government and their brutal oppression by Milosovic's regime is well documented. In terms of the Supreme Court of Canada's opinion Kosovo fits the "extreme circumstances" exception to the general rule against secession.

But, of course, the Kosovo example broke new ground because this was the first time that a powerful, regional, military force (NATO) threw its weight in on the side of the oppressed and overrode the rule of no break up of territorial integrity. The NATO forces violated article 2(4) of the Charter and no theory of self-defense under article 51 can be credibly advanced to authorize the invasion. Nor, in my view, can any credible theory of Security Council permission be supported. The fact that the Security Council rejected a vote to condemn the NATO invasion does not constitute authorization, though it

33. See, e.g., Christine Chinkin, Kosovo: A "Good" or "Bad" War, 93 AM. J. INT'L L. 841, 843 (1999).
34. Twelve out of fifteen members of the Security Council voted to reject the Russian resolution of March 26, 1999, condemning the NATO action. The argument has been made that Security Council Resolution 1244 (June 10, 1999), "effectively ratified the NATO action and gave it the Council's support." Louis Henkin, Kosovo and the Law of "Humanitarian Intervention," 93 AM. J. INT'L L. at 826 (1999).
certainly represents the extreme ambivalence of the Council’s attitude towards NATO’s action.

In evaluating NATO’s invasion of Yugoslavia, the international law rule on no use of force absent an armed attack or Security Council authorization and no intervention in the internal affairs of sovereign states came slap up against the great body of human rights law which sets standards for a government’s treatment of its own people and declares violations of those standards to be violations of international law, though it does not provide any external enforcement mechanisms to ensure those rights, absent a state’s consent. This immutable convergence was bound to happen sooner or later and the international community is now busy fashioning the rules of justifiable forceful “humanitarian intervention.”35 Despite the fact that the Rambouillet Accords only speak of “autonomy” for Kosovo, no one doubts that Kosovo will become independent (or possibly merge with Albania) and will not be ruled by Serbia.

What would have happened without NATO? I suspect rather the same scenario as we are witnessing in Chechnya. The Chechens had some sporadic success but will, at least for the time being, be crushed. When there is no credible outside threat from national, regional, or international forces, minority group claims to secession are seldom successful.

Kosovo is an example of those extreme circumstances giving rise to the right to unilateral secession enunciated by the Supreme Court of Canada. The fact that secession will no doubt eventually take place will provide one more case of state practice moving the secession principle towards crystalization of the norm.

V. THE EXAMPLE OF EAST TIMOR SUPPORTS THE RIGHT OF SECESSION

With the fall of President Suharto in Indonesia in 1998, the stage was set for the possibility of reversing the 1975 invasion of East Timor by Indonesia. As a result of an extraordinary amount of international attention and pressure, and through the facilities of the United Nations Secretary-General’s Office, Indonesia and Portugal signed an agreement in New York on May 5, 1999,36 agreeing to allow the Secretary-General to arrange for “popular consultation”37 of the East Timorese people by means of a “direct, secret and universal ballot”38 on whether they wished to become part of a special autonomous unit within the framework of the Republic of Indonesia. In the event that the East Timorese

37. Id. at art. 2.
38. Id. at art. 1.
rejected the special autonomous unit, the Indonesian government was to "terminate its links with East Timor," and there was to be a "peaceful and orderly transfer of authority in East Timor to the United Nations . . . to begin a process of transition towards independence." 

Amazingly, this process has occurred, although with a heavy toll of loss of life. Perhaps the paramount error of the agreement was to provide that the "Government of Indonesia will be responsible for maintaining peace and security in East Timor in order to ensure that the popular consultation is carried out in a fair and peaceful way in an atmosphere free of intimidation, violence or interference from any side." Everyone now knows that the ballot was not free from violence and intimidation, but no one doubts that Indonesia would not have signed the May, 1999 agreement without such a provision, and the people of East Timor refused, often at great personal cost, to be intimidated.

The events in East Timor do not result in much credit for the international community. One-quarter of the population of East Timor is dead and, by all accounts, the country is devastated. Nothing short of massive reconstruction aid will be necessary to help rebuild East Timor. East Timor then is yet another example of the lack of adequate international machinery and political will to prevent patent illegality. There was ample warning of pending disaster and the international law was, for once, relatively clear.

East Timor was recognized by the United Nations as a non-self governing territory and therefore had the right to self-determination in the sense of secession from the colonial power of Portugal. The political reality was, however, that East Timor had been effectively ruled by Indonesia for a quarter of a century. The independence of East Timor will be a great victory for the East Timorese people. It will not set a huge unchartered precedent in international law if viewed as a case of independence from a colonial power. Perhaps, however, it is too easy to say that East Timor was a colony and therefore had the right to self-determination in the sense of independence. After all, Indonesia had been the de facto government of East Timor for twenty-four years. If viewed as wresting independence from Indonesia, then the East Timor example does set a more radical precedent. East Timor would then be a successful example of a people claiming the right to rule themselves because they were not fully represented in the Indonesian government, and indeed suffered gross violations of human rights. The fact that the United Nations was

39. Id. at art. 6.
40. Id.
41. Agreement, supra note 36, at art. 3.
available to broker and, more or less, supervise both the final deal and the vote and will also provide the transitional regime, permitted the current outcome. The cup is both half empty and half full. Viewed as a colony finally moving to independence, the international community must answer first, for not resisting and then, for supporting the government who invaded East Timor. Viewed as a people’s successful bid for independence from a non-representative and repressive government, East Timor moves the norm of self-determination towards secession, at least when the government does not treat its citizens equally and practices widespread violations of human rights.

VI. CONCLUSION: THE NEED FOR A MECHANISM TO DETERMINE THE RIGHT TO SECESSION AND TO IMPLEMENT IT

What the world needs is an international mechanism authorized to determine whether a people has manifested the “extreme circumstances” outlined in the Supreme Court of Canada’s opinion, and if so, we need a body authorized to implement that decision. As long as those mechanisms are not there, it will only be in a haphazard conglomeration of circumstances that the results will follow East Timor or Kosovo and even then with colossal loss of life. There may be a few national courts, such as the Canadian Supreme Court, with the necessary impartiality to render such a decision and a few governments willing to implement decisions in favor of secession, but these will be few and far between. Kosovo and East Timor must spur us on to create the mechanisms for peoples to be able to secede. At the moment, we tend to run around picking up the broken pieces in the hope of salvaging something.

What might these mechanisms look like? First we need an impartial body that can be appealed to in order to determine the right to secede by peoples claiming “extreme circumstances.” Obviously, the definition of “extreme circumstances” will have to become much more concrete than it is at present. Secondly, we need a body with the power to implement any such decision granting the right to secede. This body might have a number of functions ranging from monitoring abuse to supervising plebiscites. These bodies would clearly begin to crack the barrier that sovereignty and territorial integrity present to secession. Sovereignty and territorial integrity would begin to be eclipsed in favor of equality of treatment and the right of self-governance. The international community has yet to make its views clear that this is the direction it wishes to pursue, but the Quebec decision and the examples of Kosovo and East Timor begin to provide the shadow of a useful blueprint.
SELF-DETERMINATION FOR INDIGENOUS PEOPLES AFTER KOSOVO: TRANSLATING SELF-DETERMINATION “INTO PRACTICE” AND “INTO PEACE”

Lorie M. Graham

I. BRIEF HISTORY OF SELF-DETERMINATION ................ 455
   A. Self-Determination as an Evolving Legal Precept .... 455
   B. Self-Determination in Practice .................... 457
II. ASSESSING RECENT EVENTS IN KOSOVO ................ 457
III. INDIGENOUS PEOPLES’ HUMAN RIGHTS STRUGGLE FOR SELF-DETERMINATION ............................. 460
IV. RESPECTING THE UNIVERSALITY OF HUMAN RIGHTS .... 465

I. BRIEF HISTORY OF SELF-DETERMINATION

A. Self-Determination as an Evolving Legal Precept

Numerous scholars have traced the early origins of self-determination from the Marxist precepts of class liberation to the Wilsonian ideals of democracy and freedom. However, from the moment those words were first uttered by Wilson there was an almost immediate retreat (most notably by United State’s Secretary of State Robert Lansing) out of fear that it might be seen as a rallying point for independence movements outside the context of the Austro-Hungarian and Ottoman Empires.¹

In the aftermath of the Second World War, the concept of “self-determination of all peoples” was incorporated as part of international conventional law but within the statist framework of the United Nations Charter.² The push for decolonization in the 1960s, however, elevated self-determination to a right and brought to full light the need to contend with its humanistic components.

This shift in legal doctrine is evidenced in the 1970 Declaration on Principles of International Law Concerning Friendly Relations which condemns "the subjugation, domination, and exploitation" of peoples as contrary to "the promotion of international peace and security." It similarly links self-determination to the idea of full participatory rights without distinction as to race, creed, or color. Equally important are the limitations it imposes on the principles of territorial integrity and sovereignty when a state fails to meet its obligation of a "government representing the whole people." Within the international human rights movement, both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights state that "all peoples have the right of self-determination," which includes the right to "freely determine their political status," to "freely pursue their economic, social, and cultural development," and to "freely dispose of their natural wealth and resources."

Just as international law has evolved from being solely concerned with the rights and duties of sovereigns to include both individual as well as collective rights of human beings, so too has self-determination evolved into a legal precept benefiting "human beings as human beings and not sovereign entities as such." The term "peoples" evidences the collective nature of the right. And while much scholarship has been written on what the right of self-determination encompasses and who are the "peoples" entitled to that right, states themselves have been slow to acknowledge the relevance of this precept beyond the classical colonial context.

---


4. Id.


B. Self-Determination in Practice

Yet if we were to consider for a moment how that right has played itself out in practice, most notably in the last six months, we may once again be evidencing a shift in the conceptual understanding and scope of self-determination sufficient to warrant a re-examination of group claims to that right – in particular indigenous claims. This examination is critical given that the evolution of self-determination as a legal construct is continuously shaped by the realities of practice.

From an analytical standpoint, the application of this principle can be traced back in time to the breakup of the German, Austro-Hungarian and Ottoman empires, followed by the demise of classical colonialism, and more recently to the collapse of the Soviet Union and the disintegration of Yugoslavia. Given the focus of today’s panel, however, I will limit my remarks to the United States - led NATO intervention in Kosovo and it relationship to indigenous rights.

II. Assessing Recent Events in Kosovo

My intent today is not to assess the “correctness” of the intervention as a matter of international law or policy, both of which have been widely debated. Rather it is to consider what that intervention – and the entire Kosovo response - might signal for the future recognition of indigenous peoples’ right of self-determination. I will begin with the United States position on respecting the right of self-determination for the Kosovar people and then attempt to draw some parallels to the aboriginal context.

In a recent address on the Balkan question, Deputy Secretary of State Strobe Talbott noted that “how to translate th[e] phrase [self-determination] into practice – and into peace – was one of the challenges at Versailles eighty years ago, just as it was at Rambouillet six months ago, and just as it is in Pristina today.” While self-determination at Versailles meant “the dismantling of empire[s] and the formation of a whole cluster of new nation-states,” Talbott states that the Balkans of today require “new answers to those old questions about nationhood, statehood, democracy, and self-determination.” He points to the complexity of the Kosovo situation in particular given the external suspension of Belgrade’s power over the province, the ethnic Albanians’ desire for independence, and the United States’ hope for some form


of self-governing autonomy should Serbia free itself from the existing regime of tyranny and oppression.

The provisions of the Rambouillet Agreement are a fairly good representation of where the United States and other NATO allies stood on the right self-determination for the Kosovar people. After paying homage to the "sovereignty and territorial integrity of the Federal Republic of Yugoslavia," the Agreement calls for a substantial transfer of sovereign power from the federation to the people of Kosovo. Among other things, it provides for the adoption of a new constitution as well as the establishment of legislative, executive and judicial branches of government.

Although there were important departures from the Rambouillet Agreement at the end of the conflict – most notably the absence of any referendum after a fixed period of time to decide Kosovo's ultimate status - the immediate goals prevailed. Kosovo is at the moment under the auspices of the international community and with the assistance of various international organizations is moving toward a United Nations Security Council mandate of "substantial autonomy." The United Nations Interim Administration Mission in Kosovo is the most "far-reaching" executive mission ever undertaken by the United Nations and is specifically designed to ensure that the Kosovar people have full participatory rights in the institutions of government under which they live, which in turn will provide them with greater control over their cultural, economic, and social developments.

While noting that the "ultimate status of Kosovo is a question for the future," Talbott also provides some insight into current United States thinking on the future application of the right of self-determination beyond Kosovo. It includes creating an environment in which self-determination can flourish through a "pooling of sovereignty in certain areas of governance, and in other areas granting greater autonomy." He notes that the trend is already away from the "the old system of nation-states - each sovereign in its exercise of supreme, absolute and permanent authority" – to one of regional if not global interdependence. Obvious examples being the European Union and various multinational forces deployed around the world. The counterbalancing trend is the devolution

12. See id., Chap. 1 (Constitution), Chap. 1, Art. II (Assembly); Chap. 1, Art. III (President of Kosovo); Chap. 1, Art. IV (Government and Administrative Organs); Chap. 1, Art. V (Judiciary).
of power as a means of accommodating "communal identities and sensitivities." Two examples include Spain, which has transferred substantial autonomy to culturally distinctive communities such as Catalonia, and the United Kingdom with the establishment of new parliaments in Scotland and Wales.

Recent scholarship has similarly emphasized the contradictions inherent in limiting the concept of self-determination to "mutually exclusive 'sovereign' territories." Professor James Anaya states that such a limited conception of "peoples" as it relates to a contemporary understanding of self-determination "ignores the multiple, overlapping spheres of community, authority, and interdependency" that actually exists in the world today. These concepts of "autonomy" and "enhanced interconnectedness," while gaining new prominence in the conceptual understanding of self-determination, are historically represented in indigenous thought and identities. For instance, the founding political philosophy of the Haudenosaunee or Iroquois Confederacy under the Great Law of Peace is built on the dual principles of unity among nations as well as mutual respect for distinct identities or difference among societies.

This conceptual understanding of self-determination in practice has its critics. For instance, there are those who perceive the goal of autonomy — or "diversity-within-unity" — for culturally cohesive communities as nothing more than a train stop on the way to secession, pointing to the current thinking on the future status of Kosovo. Others continue to equate the scope of self-determination with the process of decolonization and independent statehood.

Indeed, secession may be an appropriate remedy in certain situations where the "substantive aspects" of self-determination are not effectively attainable by other means or where there is a persistent pattern of violence and oppression against a particular group. Examples abound from the East Timorese to the people of Tibet. And it may ultimately be true for the Kosovo Albanians. Yet it is equally true that appeals to territorial integrity and sovereignty — which serve important stabilizing functions in the global community — can no longer be used as a shield against continued violations of

16. Anaya, supra note 7, at 77-79.
18. This interpretation of self-determination is difficult to support given the recent turn of events in Kosovo and elsewhere. See infra notes 40-1 and accompanying text. See also Anaya, supra note 7, at 77-85.
19. See infra notes 38-39 and accompanying text. See also Anaya, supra note 7 at 84-85; Ved Nanda, The Birth of Bangladesh in Retrospect, in SELF-DETERMINATION: NATIONAL REGIONAL, AND GLOBAL DIMENSIONS 193 (Yonah Alexander & Robert A. Friedlander eds, 1980). Professor Anaya reconceptualizes the principle of self-determination into a framework consisting of both substantive elements and remedial prescriptions. For a further discussion of this framework, see infra notes 30-34 and accompanying text.
self-determination and other human rights. As Secretary of State Madeline Albright noted in relation to the Kosovo crisis, a leader of a state "gives up the right to argue sovereignty ... when he decides to ... unilaterally ... exile a part of a community that lives within his borders." \(^{20}\)

Once the substantive aspects of self-determination have been substantially violated, an appropriate remedy -that is not necessarily secessionist in character -must be considered and implemented.\(^{21}\) This is what the Rambouillet negotiations had hope to achieve, what the U.S-led NATO forces believed they had achieved, and what the current United Nations' mission is now attempting to implement. Certainly one can only speculate whether the situation in Kosovo might have taken a different course had international procedures and institutions been in place to address early on alleged violations of a group's claim of self-determination. As Professor Ved Nanda argued some twenty years ago "the absence of guidelines for hearing and evaluating such claims will leave little alternative to violence."\(^{22}\)

Perhaps this is a lesson learned from the Kosovo experience – a lesson that could, along with recent events in places such as East Timor, pave the way for the development of appropriate procedures and institutions. At the very least, the Kosovo experience calls into question any lingering claims by participating States that the right of self-determination is limited in scope by the theoretical construct of territorial sovereignty. More importantly, it appears to signal a change in the conceptual understanding of self-determination, which brings me to the issue of indigenous peoples' rights.

### III. Indigenous Peoples' Human Rights Struggle for Self-Determination

In the past several decades, indigenous peoples have garnered international support for their rights to live and develop as distinct communities whose cultures and traditions are rooted in history and land.\(^{23}\) Their efforts have brought about significant changes in both conventional and customary international law.\(^{24}\) One primary example is ILO Convention No. 169, which recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life, and economic development, and to maintain

---


21. See infra notes 32-36 and accompanying text.

22. See Nanda, supra note 13, at 209.

23. See Anaya, supra note 7 at 45-58.

24. See id. at 47-58.
and develop their identities, languages and religions within the framework of the States in which they live."\textsuperscript{25}

Even more far-reaching than Convention 169, however, is the Draft Declaration on the Rights of Indigenous Peoples.\textsuperscript{26} In 1982, the United Nations Economic and Social Council, along with the United Nations Human Rights Commission authorized the formation of a Working Group on Indigenous Populations, made up of five experts from the Sub-commission on the Prevention of Discrimination and Protection of Minorities.\textsuperscript{27} The Working Group's original mandate was the development of international standards concerning the rights of indigenous populations. In 1993, a Draft Declaration on the Rights of Indigenous Peoples was completed and subsequently adopted by the Sub-commission. That same year, the General Assembly proclaimed the International Decade of the World's Indigenous People beginning December 10, 1994.\textsuperscript{28} These two events are conceptually linked in that the eventual adoption of the Declaration by the General Assembly is a major goal of the International Decade. In 1995, the Commission on Human Rights established an open-ended, inter-sessional working group to consider the various provisions of the draft declaration.\textsuperscript{29}

The declaration specifies all the various freedoms and conditions necessary for a people to be fully in control of its own destiny and affirms, among other things, indigenous peoples' fundamental freedom to nondiscrimination, religion, self-government, control over lands and resources, and protection of their identities and cultures without assimilation.\textsuperscript{30} The draft declaration also recognizes their right of self-determination, stating in Article 3 that "Indigenous 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." Article 31 further articulates that:

\begin{itemize}
  \item Human Rights Commission Res. 1995/32 (March 3, 1995). The meetings mark the first time in United Nations history that organizations without official consultative status at the United Nations have been involved in this level of United Nations policy-making. For indigenous peoples, this was an important step in the recognition of their rights to fully participate in matters affecting their future.
  \item See Draft Declaration, supra note 22. A similar declaration is under consideration by the Organization of American States. See Proposed American Declaration on the Rights of Indigenous Peoples, OEA/Ser/L/V/II.95, Doc.6 (February 26, 1997).
\end{itemize}
Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including, culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members.

Several states involved in the negotiations have expressed reservations against the affirmation of indigenous self-determination on two primary grounds: that indigenous peoples are not “peoples” entitled to the legal right of self-determination and that self-determination as a norm outside the decolonization context is at best debatable. For instance, in its 1995 Statement on Article 3, the United States stated that “there [is] no international practice or international instruments that recognizes indigenous groups as peoples in the sense of having the legal right of self-determination” and that “in the context of colonialism, the term has been interpreted to mean the right to an independent state. As a result, the draft declaration ... [goes] beyond the principle of self-determination as set forth in the Charter and other international instruments."31 In a more recent statement on the issue, the United States articulated its objections in somewhat broader terms contending that “no international practice or instrument recognizes sub-national groups as having the legal right of self-determination” and further that the United States has "concerns about adopting a declaration which suggests that all indigenous groups ... have a right to be sovereign, independent states."32

In an attempt to find common ground, Professor Anaya has suggested an approach to the issue of self-determination that distinguishes between the principle’s substantive and remedial aspects.33 Substantive self-determination includes the right to participate in “the creation of or change in institutions of government” as well as the right “to make meaningful choices in matters touching upon all spheres of life on a continuous basis.”34 “The substance of the norm,” however, “must be distinguished from the remedial prescriptions that may follow from a violation of the norm, such as those developed to undo colonization.”35 He notes that the remedies currently being explored in the

33. See Anaya, supra note 7 at 80-5.
34. Id. at 81-82.
35. Id. at 80.
context of indigenous peoples' rights do not suggest the formation of new states.\textsuperscript{36}

The substantive and remedial aspects of self-determination may in fact take many different forms. One recent example would be the birth of Nunavut, the newest Canadian territory, which provides substantial autonomy for the territory's 27,000 residents, 85% of whom are Inuit. Similar attempts to negotiate substantial autonomy for indigenous populations are being explored throughout the Western Hemisphere.\textsuperscript{37} Regardless of the form, Professor Anaya suggests five international norms that are essential to any substantive-remedial scheme designed to ensure indigenous self-determination: non-discrimination, respect for cultural integrity, control over lands and resources, social welfare and development, and self-government.\textsuperscript{38}

While indigenous groups have expressed support for these various approaches to articulating the content of their right of self-determination, they are equally concerned with any attempts by states to "qualify or define-away " that right -a right which they see as the essence of their survival.\textsuperscript{39} This is not to say that the prevailing indigenous views on self-determination are secessionist in character. Indigenous groups have stated on any number of occasions that they are not looking to dismantle nation-states. However, they do insist on the right to control their own territories, resources, and decision-making institutions, and to maintain their own distinct cultures.\textsuperscript{40} In the case of Quebec mentioned earlier, the Cree People have stated that if the province of Quebec were ever to leave Canada they would "exercise [their] right of self-

\textsuperscript{36} Outside the colonial context, Professor Anaya suggests that the remedy of secession be limited to situations where "substantive self-determination for a particular group cannot otherwise be assured or where there is a net gain in the overall welfare of all concerned." \textit{Id.} at 84-85.

\textsuperscript{37} For instance, the agreement between the Miskito Indians and the government of Nicaragua, which seeks to ensure greater administrative autonomy over their daily lives while at the same time providing for fuller participation in the Nicaraguan government. \textit{See Anaya, supra} note 7, at 78-79, 87-88.

\textsuperscript{38} \textit{See Anaya, supra} note 7, at 97-125. Since Indigenous peoples have suffered both historical as well as contemporary violations of their right of self-determination, they are entitled to an appropriate remedy. \textit{Id.} at 85-86.


determination to choose to remain in Canada." Moreover, it is worth noting that secession is of limited practical value for many indigenous communities given their location, size, resource limitations, and security concerns.

Moreover, it is worth noting that secession is of limited practical value for many indigenous communities given their location, size, resource limitations, and security concerns. With that said, it must be asked why indigenous peoples should be expected to accept restrictions or limitations on their claims of self-determination, even if recognition of that right meant political independence for the small few that would benefit from such an endeavor. The Declaration on Friendly Relations provides for just such a remedy when a state fails to meet its obligation of a government representing the whole people. Moreover, where serious human rights violations persist and no other remedy is available secession may be the only proper course of action. The Canadian Supreme Court in its recent decision on the secession of Quebec reached a similar conclusion, noting that:

[International law . . . generates . . . a right to external self-determination in situations of former colonies; where a people are oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.]

The Quebec situation further highlights the practical importance of recognizing indigenous self-determination. Should the people of Quebec ever vote in favor of secession, recognition of indigenous self-determination ensures that the aboriginal peoples of the province are guaranteed the right to participate fully in any negotiations affecting their future. While the government of Canada appears to be moving toward a broader more inclusive understanding of indigenous self-determination, other states, such as the United States and Australia, appear to be at a standstill after almost five years of negotiations on the draft declaration.

41. Dr. Ted Moses, Grand Council of the Crees, Address at the Australian Reconciliation Convention (May 27, 1997).
43. See Declaration on Friendly Relations, supra note 3.
46. See the following internet site for various statements of participating states (visited Feb. 18, 1999) <http://www.hookele.com/netwarriors/1998.html>. See also U.S. Statements, supra notes 31 & 32.
IV. RESPECTING THE UNIVERSALITY OF HUMAN RIGHTS

Yet, as I stated earlier, the Kosovo response may represent a shift in the conceptual understanding and scope of self-determination sufficient to warrant an honest re-examination of indigenous claims. As Deputy Secretary Talbott noted one of the major challenges for the 21st century is how to translate the phrase "self-determination" into practice and into peace. The Rambouillet Accords and what followed thereafter were an attempt -however imperfect -to articulate and uphold that principle for a "sub-national group" in a non-colonial context. The seriousness of the injustices wrought on the Kosovar people after failed negotiations served as the remedial justification for setting aside the Federal Republic of Yugoslavia’s claims to sovereignty and territorial integrity.

What we have then is recognition by the United States and others that the right of self-determination is a fundamental human right of all “peoples,” the beneficiaries of whom are not limited by adherence to specious appeals to sovereign boundaries. Equally important is the realization that self-determination is not limited in its practical application to the act of secession, but rather embodies in its fullest sense the right to live and develop as culturally distinct groups, in control of their own destinies, and under conditions of equality. These recent events suggest that at minimum Indigenous peoples’ claims of self-determination should be accorded equal consideration, since all human rights -including the right of self-determination -are universal in scope. Unequal application of this principle would impugn the fundamental integrity of those opposing such rights as well as the international legal system itself.

Yet adhering to principles of equal rights and indigenous self-determination will not lead inevitably to the kind of political instability and disruption of territorial unity often alluded to in arguments against such claims. Indeed, just the opposite may be true. Special Rapporteur Erica-Irene Daes notes that “the far more realistic fear” is that the denial of self-determination for Indigenous Peoples will “leave the most marginalized and excluded of all the worlds’ peoples with out a legal, peaceful weapon to press for genuine democracy in the states in which they live.”

Let me just close by saying that in the last six weeks I have heard it twice stated that the defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of borders. In the context of indigenous claims, both the Draft Declaration and the Permanent Forum for Indigenous Peoples currently under discussion at the United Nations offer the best hope for finding just such a compromise -first through the recognition of indigenous peoples’ fundamental rights and second

47. See, e.g., Anaya supra note, at 77-88.
48. See Daes, supra note 35.
through a process of negotiated settlements between states and indigenous communities.
FROM BOSNIA TO KOSOVO AND EAST TIMOR: THE CHANGING ROLE OF THE UNITED NATIONS IN THE ADMINISTRATION OF TERRITORY

Ralph Wilde*

In recent years there has been a resurgence in projects where territorial units are administered by international organizations. In Bosnia and Hercegovina ('Bosnia'), Kosovo and East Timor, international organizations have been given wide powers of administration, covering a broad range of activities. I am currently undertaking a study of this phenomenon, what I term 'International Territorial Administration' (ITA). Today, I would like to make some observations on the role of the United Nations in creating and carrying out the administration projects in these three territories.

With respect to Bosnia, the starting point is the General Framework Agreement of 1995, collectively known as the Dayton Agreement.1 Annex 10 of the Dayton Agreement established the Office of the High Representative (OHR), with responsibility for the implementation of civil administration in Bosnia.2 The civilian role of OHR is complemented by the military role of the NATO-led body, called at first the Implementation Force (IFOR), and later the Stabilization Force (SFOR). Annex 1-A of Dayton invites the Security Council to establish IFOR, effectively granting the force total military control in Bosnia.3

The Dayton Agreement also allocates further aspects of Bosnia's administration to other international actors, from the Organization for Security and Co-operation in Europe (OSCE) being requested to set up and run the electoral system,4 to three members of the Constitutional Court being appointed by the President of the European Court of Human Rights.5

---

* Whewell Scholar, Trinity College, Cambridge CB2 1TQ, UK. This paper was delivered in the "Development of International Law" panel of the International Law Association (American Branch) Annual Conference, New York, November 6, 1999. The author would like to thank Professor James Crawford SC for his helpful comments on an earlier draft and the Trustees of the Trinity College Eddington Fund for their generous support that enabled the author to attend the conference.

2. Dayton Agreement, supra note 1, at 147.
3. Id. at 92.
4. Id. at 115.
5. Id. at 118.
The formal participants in the Dayton Agreement and the Annexes vary between the different instruments, being drawn from Bosnia, Croatia, the Federal Republic of Yugoslavia (FRY), and the two Entities that make up Bosnia. A common theme, however, is that the relationship between these participants, on the one hand, and the subject matter of the Dayton Agreement, on the other, is incongruous. Only a small part of the Dayton Agreement is concerned with the obligations inter se of the formal participants, for example refraining from the use of force. Most of the Dayton Agreement sets out how Bosnia and its two Entities will function internally and the powers of international organizations over this. None of the organizations involved are formal participants, apart from two limited areas. First, Annex 1-B is a series of agreements “between” NATO and Bosnia and Hercegovina, Croatia, and the FRY. It is notable that, unlike the other Annexes, the status of the formal participants, such as being “parties,” is not specified. Annex 1-B is comparatively minor, covering matters ancillary to the main powers outlined in Annex 1-A, to which NATO is not a party. Second, SFOR and OHR, despite not being parties to the Annexes that set out their main powers, are each given final authority in theatre to interpret the provisions of their respective Annex. Sweeping powers, and the final authority in theatre to interpret these powers, are therefore given to international organizations that are not parties to the agreements that give them these powers. A further peculiarity is that one of these organizations, OHR, is not only empowered, but also created by the relevant agreement.

The legal authority for the arrangements in Bosnia and Hercegovina does not stop at the Dayton Agreement. In Resolution 1031 of December 15, 1995, the Security Council, acting under Chapter 7, supports the Dayton Agreement and in particular OHR and SFOR’s prerogatives. It also authorizes the establishment of SFOR. This Resolution thereby realizes the Dayton Agreement’s invitation to authorize a military force and makes certain provisions of the Dayton Agreement binding as a matter of Security Council law, in addition to their status in treaty law.

6. Id. at 92.
8. Id. at 92.
9. Id. at 100, 148.
10. Id. at 147.
12. Id. at 253.
13. Dayton Agreement, supra note 1, at 92.
Turning to the international administration in Kosovo, the starting point is the Peace Plan of June 3, 1999 (Peace Plan). The FRY and the Republic of Serbia agree to the deployment of an international civil and security presence, authorized under Chapter 7. Like most of the Dayton Agreement Annexes, the Peace Plan is a one-sided acceptance of international administration by host country actors, without the participation of those organizations that will carry out this administration. However, a separate agreement was made between KFOR, the FRY and the Republic of Serbia on June 9, 1999, authorizing in some detail the plenary occupation and control of Kosovo by KFOR (KFOR Agreement). Unlike in Bosnia, therefore, the military force is a party to the main agreement delineating its powers.

The terms of both the Peace Plan and the KFOR Agreement make the arrangements they contain dependent on authorization by the Security Council. This came in Resolution 1244, passed on June 10, 1999. The Security Council, acting under Chapter 7, endorses the Peace Plan and welcomes the KFOR Agreement. It also authorizes the establishment of an international security force and elaborates on the powers of this force. Here, as with Bosnia, the Security Council reinforces existing obligations, and creates new obligations regarding a military force. The difference is that in addition to this, it authorizes the Secretary General to establish an international civil presence, now called UNMIK, and sets out in full the powers of this presence.

The role of the United Nations is even more pronounced in the East Timor administration project. In Resolution 1272, passed on October 25, the Security Council, acting under Chapter 7, established the United Nations Transitional Administration in East Timor, (UNTAET). In the words of the resolution,
UNTAET is given “overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority.”

Strikingly, the mission includes its own military component, with a “strength of up to 8,950 troops.”

Taking the three projects together, we can see a shift in the role played by the United Nations. As for creating the projects with Bosnia, the Security Council played a secondary role, essentially giving the Dayton Agreement its seal of approval. With Kosovo, it determined more of the project itself, especially the civil component. With East Timor, Resolution 1272 is the main legal authority for all aspects of the project. Of course, with Bosnia and Kosovo the states who used diplomatic means to trigger the formal legal processes were largely the same. The Contact Group countries who brokered the Dayton Agreement were also instrumental in the adoption of the Kosovo Peace Plan, the KFOR Agreement, and Resolution 1244. The change as between Bosnia and Kosovo was that these states channeled their diplomatic efforts much more through the United Nations legal system than through ad hoc legal processes.

Differences in the legal processes setting up the projects mirror changes in the actors carrying them out. As for the civil component, in Bosnia and Hercegovina the main role is performed by a *sui generis* entity. By contrast, in Kosovo and East Timor it is controlled by the United Nations. As for the military component, in Bosnia and Hercegovina and Kosovo this is conducted by an international force authorized by the Security Council. It is only in East Timor that the United Nations takes on the military component of administration itself.

I would make three observations on this renewed role for the United Nations.

Having such international administration projects authorized through the Security Council may be a positive development. An important objective of international administration is, of course, to assist a particularly weak territorial entity. When this is effected through a treaty signed by the entity concerned, the weakness of this entity renders consent meaningful particularly in a narrow, formal sense. In a more general sense, international administration projects are imposed. Given this, such projects should be legally authorized through a

---

24. *Id.* at art. 1.

25. *Id.* at art. 9.

26. The Contact Group is made up of the European Union, France, Germany, Russia, the United Kingdom and the United States. These countries appear as ‘witnesses’ to the Dayton Agreement, *supra* note 1. The Peace Plan, was negotiated by the President of Finland, Martti Ahtisaari, representing the European Union, and Viktor Chernomyrdin, Special Representative of the President of the Russian Federation, *supra* note 14. NATO, whose members include France, Germany, the United Kingdom and the United States, signed the KFOR Agreement, *supra* note 16.
process with the power of unilateral imposition, namely the Security Council acting under Chapter 7. Furthermore, the changing nature of an administration project requires a regulatory regime that operates flexibly. In this respect, the comparatively quick process of adopting Security Council resolutions compares favorably with the cumbersome process of treaty-making and revision.

However, the fact that the United Nations both authorizes and carries out international administration projects is a mixed blessing. The Security Council scrutinizes keenly those operations that are set up and run by the United Nations. At the same time, concentrating the creation, conduct and regulation of international administration through one actor raises concerns about the efficacy of checks and balances, even given the constitutional and political differences between the Security Council and United Nations missions.

Finally, it is too early to tell whether the United Nations will succeed in carrying out its responsibilities in Kosovo and East Timor. For some, a multilateral institution is the appropriate actor for the conduct of this activity, and the United Nations brings a wealth of experience and expertise. Those with a less favorable view of the United Nations would prefer *sui generis* and/or, regional organizations to carry out international administration projects. It remains to be seen whether the United Nations can fulfill what are two of the most ambitious mandates it has ever been given. The role the United Nations plays in future administration projects, and indeed whether future administrative projects are created, depends largely on what happens in Kosovo and East Timor.
I. INTRODUCTION

I have been asked to speak about the status of the negotiations on the draft agreement on Liability for Damage to the Antarctic Environment, which are being undertaken by the Parties to the Antarctic Treaty, and their prospects for success.

There are some key points I'd like to make at the outset:

(1) The parties to the Antarctic Treaty have a legal obligation to conclude an agreement on Liability. This follows from Article 16 of the Protocol on Environmental Protection to the Antarctic Treaty (which entered into force on 14 January 1998), which provides:

[the Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol. Those rules and procedures shall be included in one or more Annexes.]
While the issues of legal liability for environmental damage are notably complex in whatever context, they are particularly difficult in the Antarctic context. Unlike other liability negotiations, in the case of Antarctica there is no economic or commercial enterprise involved which will ultimately bear the cost of liability (and which can build it into its cost structure). In Antarctic the activity is primarily governmental and science related, and that’s where most of the burden will fall. Moreover the liability regime will cover damage to the environment per se - not to the economic interests of others (although that may be a minor element of it) - and will be extremely difficult to quantify. The Antarctic environment is a unique and fragile one, and impacts are difficult to assess, although we may perhaps be able to draw on American experience in Alaska. Overlying all of this is the complication that in Antarctica we are not dealing with undisputed sovereign territory.

The Antarctic Treaty parties have however shown themselves able in the past to resolve the most complex of issues. The Antarctic Treaty itself reflects a unique capacity for problem-solving.

The United States is key to a successful outcome. The Liability Annex will have to be adopted by consensus by Antarctic Treaty parties, and will have to be ratified by all parties. At the moment many countries are sheltering behind the United States position, and are not declaring themselves. If the United States comes to the party, these other countries will have to as well. The United States also has a huge capacity for “creative lawyering,” of the sort that is required here to try and solve the issues. We need active United States engagement.

We need some lateral thinking to break the current impasse, and as American lawyers you are well placed to provide it.

II. The Current State of the Negotiations

What we have now is a stalemate, polarized around two competing texts and quite different approaches. One is the so-called “Eighth Offering” - a Chairman’s text produced by Professor Rudiger Wolfrum who chaired a “Legal Experts Group” dealing with Antarctic Liability, which was set up by the Antarctic Treaty Consultative Parties and held nine meetings over six years until it was transformed into a fully fledged negotiating group at this year’s Antarctic Treaty Consultative Meeting in Lima, Peru. The other text is the “United States draft,” which was introduced by the United States three and a half years ago at a meeting of the Legal Experts Group in Utrecht, Netherlands.

A. The Eighth Offering

As its name implies, this Chairman’s text is in its eighth revision. It is the Chairman’s personal product, although it does of course reflect considerable
input from delegations. It takes a comprehensive approach to the issue of liability for environmental damage, and is highly complex, reflecting the application of impressive of intellectual capital by the Chairman, but it also leaves many issues unresolved. The basic framework (as yet not entirely agreed) is as follows:

1. Operators conducting activities in the Antarctic incur liability if they cause damage to the Antarctic environment;
2. Damage is defined as any harmful effect of an impact on the Antarctic environment, which is over a particular threshold (to exclude de minimus), with certain exceptions including for impacts identified during an environmental evaluation process;
3. Liability is strict (and also probably joint and several where several operators are involved);
4. An operator is required to take reasonable precautionary measures, and also to take response action where an incident occurs;
5. When an operator does not take response action another State Party, or in certain circumstances another entity or person, may do so;
6. The operator is then liable to reimburse the reasonable costs of the other party for the response action they have taken;
7. Where the damage to the environment cannot be repaired, the operator has to contribute an amount to an “Environmental Protection Fund,” by processes yet to be determined;
8. The Fund would be used to compensate States and other entities for the costs of response action in those situations where liability (and reimbursement) do not attach;
9. There would be financial limits on liability;
10. Non State operators would be required to take out insurance or other financial security to cover liability;
11. States Parties would have residual liability for damage caused by their operators, but only to the extent that they have failed to carry out their own obligations as a State Party; and
12. A dispute settlement regime would be included.

As I have said, this is a comprehensive and complex regime. While the general framework is there, and some provisions have been exhaustively discussed and are close to finality, others are much less so. A great deal remains to be resolved.

B. The United States Proposal

The United States draft is much simpler. It takes a less comprehensive approach than the Eighth Offering, and is designed to cover “environmental
emergencies” only. Article 15 of the Protocol on Environmental Protection to the Antarctic Treaty imposes an obligation on Parties to take response action in the event of emergencies, and under the United States proposal liability would attach only where a Party failed to take such action. An element of the United States Proposal is, however, that a further annex or annexes could be drawn up to cover other aspects of liability for environmental damage.

C. The Different Positions

The United States draft was introduced at a time when the liability discussions had been going through a particularly bleak period, with little progress being made on the Chairman’s current “Offering.” The United States introduced its proposal to try and break the stalemate. Its introduction coincided, however, with a spurt of progress on the Chairman’s “offering,” with the result that many delegations viewed the United States text as an unnecessary distraction from the main game.

Since that time modest progress has continued on the Chairman’s “offerings” although, as noted, a great many issues remain to be resolved. For its part, the United States text has remained on the table, and continues to reflect the United States position (as well as that of some other countries).

Accordingly, the future elaboration of a liability regime is bedeviled by a fundamental difference of approach between delegations. This is over the basic question of whether we should be seeking to elaborate a so-called “comprehensive” (or single) annex, or a so-called “limited” annex (which could be the first in a series of annexes focussing on particular aspects of the liability problem). Until this fundamental issue is resolved there will inevitably be limits as to the further progress that will be possible.

D. The Need for a “Third Way”

The two approaches have been extensively debated in the past, without resolution, and it is fair to say that further debate between these two options per se is unlikely to resolve the matter. With neither side willing to move from its basic position, delegations have increasingly talked of the need for a “Third Way” - that is to say, an approach which is neither the “comprehensive” approach or the “limited” approach, but which bridges the two positions or takes yet another road.

Ideally, too, it should also be designed to make the work more manageable. As the discussion of Antarctic Liability has developed, there has been an increase in the magnitude and number of issues needing to be negotiated, which adds to the complexity of pulling together a package as such. And as the potential time span for producing a concrete outcome has grown commensurately, there is inevitably a danger that the negotiating process will flag.
Moreover, as we shall have to produce an outcome which can be adopted by consensus, and which can then be ratified by all Parties within a reasonable time, size and complexity is unlikely to assist such an outcome.

At the end of the negotiations on liability which I chaired, at the Lima Antarctic Treaty Consultative Meeting earlier this year, that is the challenge which I put to delegations.

While the Lima negotiations had made progress in some areas, it was apparent to me that resolution of these fundamental differences in position was required.

My Personal Report to the Lima ATCM, as Chairman, which is annexed to this paper, canvasses this question. It also identifies one possible “Third Way,” which would comprise the following:

(1) a single annex providing for a comprehensive regime, thus meeting the objectives of many delegations. The annex itself would include all the generic items which would be common to a liability regime of whatever nature, and in respect of which there is already agreement or agreement is foreseeable. It would utilize a great deal of work already done and (without wishing to minimize unduly the complexity of the issues remaining) could, hopefully, be developed reasonably quickly.

(2) It would contain a binding commitment to subsequently develop detailed schedules, by way of measures, on (1) Preventative Measures, (2) Damage from Environmental Emergencies, (3) Response Action and Remedial Action, and (4) Unrepaired and Irreparable damage. (Using measures to build on the Annex would not be an entirely novel concept; all of the other Annexes to the Protocol can be amended or modified by way of measures, which are adopted by consensus).

This approach would also have the advantage of reducing our work to reasonably digestible bites. It would enable a step by step approach while meeting the positions of delegations wanting a single annex and comprehensive coverage.

I stress that this is not the only way through this impasse. And it may not be without its own difficulties. It has been suggested to me, for example, that there might be difficulty getting the United States’ Senate to ratify an Annex which was “open-ended” in this way. My response would be that the Antarctic Treaty, which has been ratified by the United States, is similarly open-ended, in that it allows measures to be adopted subsequently which are “binding” on States. My proposal would be no more open-ended than that. And, as with the adoption of measures under the Antarctic treaty, a consensus would be required.
for their adoption, which would require specific United States agreement in each instance.

E. The Next Steps

What is now needed is some lateral thinking. This is where we need your help. I have the greatest admiration for the creativity of American lawyers, and I don't believe that the current dilemma is insurmountable. We need a "third Way." Would the proposal in my report work, or can you see another "third Way." I'm sure you can come up with an answer to this, unfettered by governmental positions. If you cannot do it today then maybe you or (if you are involved in the academic area) your students, can do it subsequently. It's a great case study. And we would very much welcome your contribution.

III. ANNEX

As indicated in the Report of Working Group I on Item 10, this paper is circulated, on a personal basis, in an endeavor to identify a way forward. It should be viewed purely in that light.

As is also evident from the Report of Working Group I on Item 10, there was useful progress in a number of respects in this first round of negotiations in the Working Group. The Report identifies various areas of convergence, and it is fair to say that other prospective areas of progress can also be seen at this stage. Ultimately, however, what we are talking about is a package, or several packages, and convergence is not likely to develop in some key areas until the overall shape of the package (or packages) is clearer.

Some valuable work was also done in the informal contact groups, which were set up to facilitate discussion on a range of subjects. The coordinators of some of these groups were able to produce texts reflecting the stage reached in their discussions, and as I foreshadowed in Working Group I, these are attached as a matter of record so that this work is not lost. It must be clear, however, that these texts do not reflect agreed positions, either on the part of those participating in the informal contact groups or the meeting as a whole. They are simply to aid further discussion. Indeed, some delegations specifically entered reservations in respect of some of these texts, and on others there was not time for discussion.

On the basis of comments made in the meeting, and to me informally, I think it will be useful in future meetings to continue using informal contact groups to help clarify differences between delegations on particular issues - and hopefully identify solutions - as this is sometimes difficult across the conference floor. It needs to be emphasized that such groups are open ended (that is

---

1. Personal report of the chairman on the liability discussion in WGI.
to say, open to all delegations with an interest in the issue in question), although this of course creates a practical limitation on the number of groups which can be established at any one time, given the pressure on small delegations.

Another very useful development at this meeting, was a much more integrated approach involving SCAR and COMNAP. This helped inform the discussion, even though both organizations were not able to be present for all of the time, and points the way towards an even more integrated approach in the future, including outside of formal meetings. For example, future informal contact groups on some issues are likely to benefit from being multi-disciplined, and having in them scientists and operators as well as lawyers and policy experts. It may also be appropriate to include other representative organizations on occasion, such as IAATO on behalf of tourism operators.

Notwithstanding these positive and encouraging developments, however, the future elaboration of a liability regime remains bedeviled by a fundamental difference of approach between delegations. This is over the basic question of whether we should be seeking to elaborate a so-called "comprehensive" (or single) annex, or a so-called "limited" annex (which could be the first in a series of annexes focussing on particular aspects of the liability problem). Until this fundamental issue is resolved there will inevitably be limits as to the further progress that will be possible.

This issue has been extensively debated in the past, without resolution, and it is fair to say that further debate between these two options per se is unlikely to resolve the matter. On the one hand, it is clear that many delegations are now willing to negotiate on the basis of a so-called "limited" annex, which would involve a fundamental departure from their position. Other delegations, however, are unwilling to negotiate on the basis of the sort of "comprehensive" approach that would follow the approach of the eighth offering, as this would depart from their fundamental position. This in no way derogates from the hugely useful work done in the Group of Legal Experts, and the Chairman's offerings, as acknowledged at the Tromso ATCM. It is entirely due to that work that we are able to identify the issues involved in putting together an Antarctic liability regime, together with a range of possible solutions (it is also worth noting that other bodies outside of the Antarctic Treaty System have found liability issues extraordinarily complex and difficult to solve). We are, however, now in a new phase of our work, that of negotiation in Working Group 1 as mandated by the Tromso ATCM.

That new phase, and the fundamental differences that I have referred to, suggest that we should now be looking for a new approach which bridges the two positions or takes yet another road. Ideally, it should also be designed to make our work more manageable. As the discussion of Antarctic Liability has developed, there has been an increase in the magnitude and number of issues needing to be negotiated, which adds to the complexity of pulling together a
package as such. And as the potential time span for producing a concrete outcome has grown commensurately, there is inevitably a danger that the negotiating process will flag. Moreover, what we shall have to produce is an outcome which can be adopted by consensus, and which can then be ratified by all Parties within a reasonable time. Size and complexity is unlikely to assist such an outcome.

Attached to this document is one possible new approach, which would bridge the fundamental differences I have referred to. There may be others which occur to delegations, but it is in terms of a new approach that I believe we should now be thinking.

The approach attached is a framework for a liability regime as follows:

1) a single annex providing for a comprehensive regime, thus meeting the objectives of many delegations. The annex itself would include all the generic items which would be common to a liability regime of whatever nature, and in respect of which there is already agreement or agreement is foreseeable. It would utilize a great deal of work already done and (without wishing to minimize unduly the complexity of the issues remaining) could, hopefully, be developed reasonably quickly.

2) It would contain a binding commitment to subsequently develop detailed schedules, by way of measures, on 1) Preventative Measures, 2) Damage from Environmental Emergencies, 3) Response Action and Remedial Action, and 4) Unrepaired and Irreparable damage. (Using measures to build on the Annex would not be an entirely novel concept; all of the other Annexes to the Protocol can of course be amended or modified by way of measures, which are adopted by consensus).

This approach would also have the advantage of reducing our work to reasonably digestible bites. It would enable a step by step approach while meeting the positions of delegations wanting a single annex and comprehensive coverage. It would require a decision as to which schedules should be developed first, but this might be guided by COMNAP’s identification of the most pressing area of concern - damage from environmental emergencies - on which we already have a substantial proposal before us. Another possibility might be to consider parallel work on the prevention of damage, which would require closely integrated input from a range of disciplines including scientists and operators. Care would obviously need to be taken to ensure that the schedules did not overlap unduly, and also that the sequential entry into force of the schedules did not create problems for one schedule vis-a-vis another.

I would recommend this to colleagues as a possible way forward. If not, we need to find some other approach to bridge these fundamental differences.
IV. POSSIBLE FRAMEWORK FOR ANNEX VI TO THE PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTIC TREATY LIABILITY FOR DAMAGE TO THE ANTARCTIC ENVIRONMENT

A. Purpose

B. Scope of Application

C. Relationship with Other International Agreements

D. Definitions

For the purposes of this Annex (including the Schedules hereto as appropriate):

"Fund" means...

"Operator" means...

"Person" means...

"Protocol" means...

...[other terms which may be common to the Annex and the Schedules...]

E. Obligations of Parties

F. Establishment of Jurisdiction

G. Schedules

To enable the effective implementation of this Annex, the Parties undertake to adopt measures, in accordance with Article IX(i) of the Antarctic Treaty, comprising the following Schedules to this Annex:

Schedule 1: Preventative Measures
Schedule 2: Damage from Environmental Emergencies
Schedule 3: Response Action and Remedial Action
Schedule 4: Unrepaired and Irreparable Damage

H. Standard of Liability

I. Joint and Several Liability

J. State Liability and Responsibility

K. Financial Limits

Liability under this Annex shall not exceed the amounts set out in the relevant Schedule.
L. *Time Limits of Liability*

Liability under this Annex shall be subject to any limitation periods set out in the relevant Schedule.

M. *Antarctic Environment Protection Fund*

N. *Dispute Settlement*

O. *Amendment or Modification*
V. SCHEDULES TO ANNEX VI

Schedule 1: Preventative Measures
Schedule 2: Damage from Environmental Emergencies
Schedule 3: Response Action and Remedial Action
Schedule 4: Unrepaired and Irreparable Damage
JUDGMENTS RENDERED IN 1999 BY THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND FOR RWANDA: TADIĆ (APP. CH.); ALEKSOVSKI (ICTY); JELISIĆ (ICTY); RUZINDANA & KAYISHEMA (ICTR); SERUSHAGO (ICTR); RUTAGANDA (ICTR)

Kelly D. Askin*

I. THE APPEALS CHAMBER ................................................. 487
II. 1999 APPEALS CHAMBER JUDGMENTS: TADIĆ JUDGEMENT .... 487
   A. Tadić's Appeal Against Judgment ............................... 488
      1. Inequality of Arms ........................................... 488
      2. Appeal of Conviction for the Murder of Two Policemen ..... 489
   B. Cross-Appeals by the OTP ....................................... 490
      1. Grave Breaches and "Protected Persons" .................... 490
      2. Insufficient Evidence as to the Killings in Jaskići .... 491
      3. Crimes Against Humanity - Purely Personal Motives .... 492
      4. Crimes Against Humanity - Discriminatory Intent ....... 492
   C. Summary .................................................................... 494
III. 1999 ICTY Trial Chamber Judgments ............................... 495
   A. Aleksovski Judgement .............................................. 495
   B. The Jelišić Judgement .............................................. 499
IV. 1999 ICTR TRIAL CHAMBER JUDGMENTS ......................... 500
   A. Serushago Sentence ................................................. 500
   B. Kayishema & Ruzindana Judgement .............................. 500
      1. Genocide ............................................................ 501
      2. Crimes Against Humanity ...................................... 502
      3. Violations of Common Article 3 and Additional Protocol II 502
      4. Legal Findings .................................................... 503
   C. Rutaganda Judgement ................................................. 504

* This is an expanded and slightly different version of an article published by the Center for Human Rights and Humanitarian Law, Washington College of Law, American University, in Kelly D. Askin, News From the International Criminal Tribunals, 6(4) HUM. RTS. BRIEF 6 (1999).
The year of 1999 witnessed extensive activity in the two United Nations ad hoc Tribunals established to prosecute serious violations of international humanitarian law committed in the territory of the former Yugoslavia and in Rwanda. By the end of 1999, the three Trial Chambers of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”)¹ had handed down six judgments (five after trials on the merits² and one sentencing judgment after a guilty plea³). Two of these judgments (the Aleksovski Judgement and the Jelisic Judgement) were rendered by an ICTY Trial Chamber in 1999.⁴

The three Trial Chambers of the International Criminal Tribunal for Rwanda (hereinafter “ICTR”)⁵ have handed down five judgments (three after trials on the merits⁶ and two sentencing judgments after guilty pleas).⁷ Three


Please note that this article will use either “Judgment” or “Judgement” consistent with the official usage of the particular decision.


4. An extremely important 1999 achievement of the Yugoslavian Tribunal was the issuance of the Milošević et al. Indictment on May 24, 1999, bringing charges against Slobodan Milošević and four other top Serbian military and political leaders for alleged crimes committed in Kosovo between January and May of 1999. The other Accused are Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, and Vlajko Stojiljković. Charged with personal and superior responsibility under 7(1) and 7(3) of the ICTY Statute (only Šainović is charged exclusively under 7(1)) for violations of Articles 3 (violations of the laws or customs of war, for murder) and 5 (crimes against humanity, for deportation, murder, and persecution) of the Statute, the Accused are alleged to have planned, instigated, ordered, committed or otherwise aided and abetted in a campaign of terror, violence, destruction, and massacres directed at Kosovo Albanian civilians.

Both Tribunals have several cases at various stages of the pretrial process; in addition to the judgments, hundreds of decisions have been rendered in the form of orders or other decisions on motions before the Trial and Appeals Chambers. Similarly, each Tribunal has added public indictments or joined or amended existing indictments during the year. Due to the limited scope of this article, these other indictments, decisions, or events will not be discussed here.


of these, the Kayishema and Ruzindana Judgement, the Rutaganda Judgement, and the Serushago Sentence, were rendered by an ICTR Trial Chamber in 1999. Also in 1999, the purportedly common Appeals Chamber handed down what is apparently the final judgment in the Tadić case. The Appeals Chamber has several cases and motions pending from both Tribunals.

I. THE APPEALS CHAMBER

According to the ICTY and ICTR Statutes, the Appeals Chamber hears decisions appealed by persons convicted by either the ICTY or ICTR Trial Chambers, or from the Prosecutor of an error on a question of law invalidating the decision, or on an error of fact that has occasioned a miscarriage of justice. It is also empowered, under the Rules of Procedure and Evidence, to review a decision at the request of a state directly affected by an interlocutory decision if such decision concerns issues of general importance to the Tribunal. After the Tadić Interlocutory Appeal on Jurisdiction, it could also be said to have established a precedent for hearing other appeals considered of general importance to the Tribunal.

II. 1999 APPEALS CHAMBER JUDGMENTS: TADIĆ JUDGEMENT

On July 15, 1999, the Appeals Chamber rendered its Judgement in the Tadić case, the first such decision discharged by the Appeals Chamber. Because the Appeals Chamber is common to both the Yugoslavian and Rwandan Tribunals, this decision has important implications for both Tribunals. The Trial Chamber Judgment in Tadić had been handed down in the ICTY by Trial Chamber II on May 7, 1997, finding the Accused guilty on nine counts, guilty in part on two counts, and not guilty on twenty counts. Of these twenty not-guilty verdicts, eleven of the counts were acquitted because a majority of the Trial Chamber held that the grave breach charges brought under Article 2 of the Statute were inapplicable because it had not been proven that the victims were protected persons, an element of the offence.

8. “Purportedly” because it has to date been made up exclusively of judges elected to the ICTY.
9. “Apparently” because it is unclear whether Tadić can file or has filed an appeal from the Appeals Chamber's Judgement when it found him guilty on nine counts for which he was previously found not guilty by the Trial Chamber. Such a right to appeal from an Appeals Chamber decision is not provided for under the Statute or Rules.
11. While not explicitly provided for in the Statute or the Rules (since the appeal was lodged by Tadić prior to his trial and conviction), the Appeals Chamber nevertheless determined it had authority to hear an appeal by Tadić challenging the jurisdiction of the Tribunal. See Prosecutor v. Duško Tadić a/k/a “Dule,” Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, Oct. 2, 1995, App. Ch., at ¶ 4-6, (seemingly basing its authority on “common sense,” practicality, and the interests of justice).
In its appeal against the Trial Chamber's Judgment, the Defense argued that Tadić's right to a fair trial was prejudiced because he was denied "equality of arms" between the Prosecution and the Defense, due to the prevailing circumstances in which the trial was conducted. It further asserted that the Trial Chamber erred as to finding him guilty of the murders of two Muslim policemen, Osman Didović and Edin Bešić. Leave to file an appeal concerning conduct of his former counsel had been previously denied by the Appeals Chamber, so these were the only two remaining appeals against the Judgment. In the appeal against the Judgment, the Defense sought to have the guilty verdicts set aside and a re-trial ordered. In the alternative, Tadić sought to have the guilty verdicts, as to the two policemen, reversed and correspondingly, that the sentence be reviewed.

Five cross-appeals were filed by the Office of the Prosecutor (hereinafter "OTP"). Of the eleven not-guilty verdicts relating to grave breaches, seven were appealed by the Prosecution, and in addition, two of the not guilty verdicts were appealed in regards to murder charges alleging Tadić's participation in the killings in Jaskidi. There were thus a total of nine acquittals appealed by the OTP in the first two cross-appeals. The three remaining cross-appeals concerned questions of general importance to the work of the Tribunal: the OTP challenged the Trial Chamber's determination that a crime against humanity cannot be committed for purely personal reasons; it challenged the Trial Chamber's finding that discriminatory intent is a required element of crimes against humanity under Article 5 of the ICTY Statute; and it argued that a majority of the Trial Chamber erred in a November 1996 decision denying a Prosecution motion for production of defense witness statements, creating an untenable precedent.

A. Tadić's Appeal Against Judgment

1. Inequality of Arms

The first ground of appeal by the Defense concerned a complaint that due to circumstances disproportionately impacting the Accused's case (such as the failure of the Republika Srpska to cooperate by securing witnesses) Tadić's right to a fair trial was prejudiced because there was an inequality of arms between the Prosecution and the Defense. Equality of arms - the principle that "each party must have a reasonable opportunity to defend its interests 'under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent'"12 - is guaranteed by the fundamental right to a fair trial, as embodied in human rights instruments and Article 21(4)(b) of the ICTY Statute.

The Appeals Chamber decided that because of the Tribunal's limited enforcement powers and its reliance on state cooperation, this principle must be given a liberal interpretation in the ICTY. Additionally, noting that the Chambers are empowered to issue any necessary orders, summonses, subpoenas, warrants, and transfer orders to aid an investigation or effectuate a trial, the Appeals Chamber determined that a Chamber therefore, "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case." However, the Appeals Chamber noted that the Appellant/Defense was not complaining that the Trial Chamber had not responded adequately to its requests for assistance, and indeed it was uncontested that the Trial Chamber took virtually all measures within its authority to assist the Defense when requested and necessary. The Appellant had remained silent as to certain difficulties encountered in defending its case, and then relied on the equality of arms principle to complain not that the Trial Chamber had failed to assist it when seized of a request to do so, but instead that Tadić did not receive a fair trial because authorities in the Republika Srpska had not cooperated in securing the attendance of certain witnesses. As such, the Appeals Chamber denied Tadić's appeal on this ground, holding that the Appellant failed to establish that he was denied equality of arms by the Trial Chamber.

2. Appeal of Conviction for the Murder of Two Policemen

The remaining ground of appeal by the Defense concerned a complaint that an error of fact lead to a miscarriage of justice, and consequently, Tadić should not have been convicted of the murder of two policemen. It was uncontested that reasonableness is the standard to be used in determining whether the Trial Chamber's factual finding should stand. In the appeal, Tadić complained that he was convicted of these murders solely on the testimony of one unreliable witness. Noting that the Trial Chamber Judges have the task of hearing, assessing, and weighing the evidence presented at trial and must necessarily be given a margin of deference to findings of fact reached by the Trial Chamber, the Appeals Chamber concluded that the Appellant failed to establish that the witness was suspect or that his testimony was inherently implausible. Finding no merit to the claim that the Trial Chamber acted unreasonably in relying on this testimony in finding that the Appellant killed the two policemen, this basis of appeal was also rejected.

13. Id. at ¶ 52.
14. Id.
B. Cross-Appeals by the OTP

Five cross-appeals were filed by the Office of the Prosecutor. The first two concerned acquittals. The three remaining cross-appeals were not alleged to have had a bearing on the verdicts or that an appeal laid under Article 25(1) of the Statute. However, both sides agreed that the issues were matters of general importance affecting the conduct of trials before the Tribunal and therefore were deemed to merit the attention of the Appeals Chamber. Hence, the Appeals Chamber pronounced its opinion in these matters.

1. Grave Breaches and "Protected Persons"

The first ground of cross-appeal by the OTP concerned the Trial Chamber's finding that it had not been proven that the victims were "protected persons" under Article 2 of the Statute (which gives the Tribunal jurisdiction over grave breaches of the 1949 Geneva Conventions). For Article 2 to apply, it must first be established that the nature of the conflict was at all relevant times international in character, and second that the grave breach alleged was perpetrated against persons or property "protected" by one or more of the 1949 Geneva Conventions. The Appeals Chamber noted that an internal armed conflict may in certain situations become international if another state intervenes in the conflict through its troops or if some of the participants in the internal conflict act on behalf of another state. The Appeals Chamber found that international law provides for applying three different tests to determine if individuals or groups may be regarded as de facto organs of the state or agency: 1) a test of "overall control" to determine if the acts of armed groups can be attributable to a state; 2) a test of "specific instructions (or subsequent public approval)" to determine if individuals or militarily unorganized groups act on behalf of states; and 3) a test of "assimilation of individuals to State organs on account of their actual behavior within the structure of a State (and regardless of any possible requirement of State instructions)."

After analyzing the facts, the Appeals Chamber concluded that the armed forces of the Republika Srpska were acting under the overall control of and on behalf of the FRY. Thus, "even after May 19, 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict."

In determining whether the victims were "protected persons," the Appeals Chamber reasoned that the Fourth Geneva Convention was intended to protect

15. Id. at ¶ 84.
16. Id. at ¶ 141.
civilians to the maximum extent possible and to provide protection to civilians who do not have diplomatic protection and who are “not subject to the allegiance and control” of the state in whose hands they may find themselves, and therefore, it is the substance of relations between the parties, not their legal characterization, which is controlling.  

In essence, under this criteria, it does not matter if the victims (Bosnian Muslims and Croats) and perpetrator (Bosnian Serb) are technically from the same nationality. Determining that the victims in this case were “protected persons” who found themselves in the hands of armed forces of a state of which they were not nationals, the Appeals Chamber concluded that the Trial Chamber erred in acquitting Tadić of the grave breach charges on the ground that the grave breaches regime was not applicable. It thus reversed the not guilty verdicts of the seven grave breach counts appealed.

Perhaps the most surprising articulation in this section is the suggestion in footnote 113 that the four conditions set out in Article 4 of Geneva III for determining the legitimacy of combatants “may now be considered to have been replaced by the different conditions set out in Article 44(3) and 43(1) of Additional Protocol I.”

2. Insufficient Evidence as to the Killings in Jaskid

The second ground of cross-appeal by the OTP concerned the Trial Chambers finding that there was insufficient evidence to establish that Tadić had participated in the killings of five men in Jaskid. In this regard, the Prosecution complained that the Trial Chamber misapplied the standard of proof of beyond a reasonable doubt, as the only reasonable conclusion that could be drawn from the facts is that the Accused was guilty as charged. Further, the OTP contended that in determining that the Prosecution did not meet the burden of proof, the Trial Chamber misapplied the common purpose doctrine, which essentially holds that “if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose”  

After reviewing the case law, the Appeals Chamber held that common design as a form of accomplice liability is firmly established in customary international law and is implicit in the Statute. It also determined that case law has demonstrated its applicability to three distinct categories of cases. The actus reus of participation in a common design requires: 1) a plurality of persons; 2) the existence of a common plan, design, or purpose to commit a crime justiciable under the Statute; and 3) participation of the Accused in this common design.

18. Id. at ¶ 168.
19. Id. at ¶ 175.
The *mens rea* differs depending upon the category of common design under consideration. In the *Tadić* case, the Appeals Chamber concluded, based upon the factual findings of the Trial Chamber, that Tadić had actively participated in a common criminal purpose and that he actively took part in a common criminal purpose to attack Jaskići by rounding up and severely beating some of the men from Jaskići. As a result, the Appeals Chamber held that the only possible conclusion the Trial Chamber could have drawn was that Tadić had the intent to participate in the common criminal purpose to commit inhumane acts, and willingly took the foreseeable risk that members of the group being attacked might be killed during this attack. The Appeals Chamber therefore held that the Trial Chamber erred in finding that it had not been proven beyond a reasonable doubt that Tadić had any part in the killing of the five men from Jaskići. Setting aside\(^2\) the Trial Chamber’s not guilty verdict on these charges, the Appeals Chamber found Tadić guilty in the death of these men.

3. **Crimes Against Humanity - Purely Personal Motives**

The third ground of cross-appeal by the OTP involved the Trial Chambers’ finding that crimes against humanity cannot be committed for purely personal reasons. In order to convict an accused of crimes against humanity, the Prosecution must prove the existence of an armed conflict and that there was a sufficient nexus between the armed conflict and the acts alleged. After reviewing Article 5 of the Statute and customary international law, the Appeals Chamber concluded that the motive of the perpetrator does not acquire any relevance for establishing evidence of crimes against humanity. It thus opined that the requirement that an act must not have been carried out for purely personal motives does not form part of the prerequisite elements necessary to prove the commission of the crime.\(^2\)

4. **Crimes Against Humanity - Discriminatory Intent**

The fourth ground of cross-appeal by the OTP concerned the Trial Chamber’s finding that all crimes against humanity require a discriminatory intent. In interpreting the text of Article 5 of the Statute and surveying customary international law, the Appeals Chamber determined that discriminatory intent is not a required element of crimes against humanity. In reviewing the Report of the Secretary-General and statements made by some members of the Security Council concerning Article 5 of the Statute, these

---

20. The Trial Chamber uses the terms "set aside" and "reverse" the verdict/judgment interchangeably.
"interpretive sources" were deemed to be insufficient to establish that all crimes against humanity need be committed with a discriminatory intent. Thus, the Appeals Chamber held that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent.

It is unclear exactly how this part of the decision will affect the Rwanda Tribunal, as the ICTR Statute’s crimes against humanity provision differs in significant terms from the crimes against humanity provision enumerated in the ICTY Statute. Indeed, under the terms of Article 3 of the ICTR Statute, the ICTR has the power to prosecute certain crimes, including murder, inhumane acts, and “persecutions on political, racial and religious grounds,” when these crimes are committed “as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” Yet, this language may be interpreted narrowly as a result of paragraph 284 of the Tadić Judgement of the Appeals Chamber, which states that because the Yugoslavia Statute has a persecution subsection for crimes carried out “on political, racial and religious grounds,” to interpret the Statute and the law as requiring that all crimes against humanity require discriminatory intent would render the persecution subsection “illogical and superfluous” as the presumption is that law-makers enact rules that are meaningful in all their elements. Applying this analysis to Article 3 of the ICTR Statute would make the chapeau of the Article in conflict with the remainder of the Article, which too includes a persecution subsection. The Appeals Chamber notes that supplemental means of interpretation can be resorted to when the text of an instrument is unclear. Consequently, if the text of Article 3 of the ICTR Statute is challenged and determined to be ambiguous due to its duplicative persecutorial requirement which may render one or the other superfluous, then turning to customary international law for guidance, and drawing on the Tadić Judgement in this regard, it could conceivably be determined that Article 3 of the ICTR Statute could be interpreted as not imposing a discriminatory intent for all crimes against humanity.


The fifth ground of cross-appeal by the OTP resulted from an earlier denial of the Prosecution’s motion for disclosure of a prior statement of a defense witness after he had testified. The Prosecution maintained that this decision remained persuasive authority for the proposition that the Defense cannot be

---

22. Id. at ¶ 293.
23. Id. at ¶ 303.
24. Id. at ¶ 292 (stating that customary international law “does not presuppose a discriminatory or persecutory intent for all crimes against humanity.”)
ordered to disclose prior witness statements. Accordingly, the issue concerned the power of a Trial Chamber to carry out its judicial functions while conducting a fair and impartial trial, including the Trial Chamber's duty to ascertain the credibility of witnesses. The Appeals Chamber opined that the lawyer-client privilege does not cover Defense witness statements, and held that, depending on circumstances of each case, a Trial Chamber may order the disclosure of Defense witness statements after examination-in-chief of the witness.

C. Summary

In the Tadić Judgement, the Appeals Chamber denied the two remaining grounds of appeal sought by the Appellant/Defense. It allowed the OTP's cross-appeals, and reversed the Trial Chamber's verdict as to the grave breach charges appealed, and also reversed the Trial Chamber's determination that the Accused had played no part in the killing of five men from the village of Jaskići. The Appeals Chamber further determined that a crime against humanity can be carried out for purely personal motives and that discriminatory intent is not required for all crimes against humanity, only for the persecution crimes covered by Article 5(h) of the Statute. Finally, it held that depending on the facts of each case, a Trial Chamber may order the disclosure of Defense witness statements after examination-in-chief of the witness.

Because the Appeals Chamber denied Tadić's appeal on all counts, and allowed and reversed as to each of the Prosecution's cross-appeals, it resulted in Tadić being found guilty on nine additional charges. This of course means that the Appeals Chamber found the accused, Tadić, guilty on nine counts for which the Trial Chamber had previously found him not guilty. The consequences of such a determination are currently unknown, as the new convictions have apparently not been challenged by appeal. In the ICTY Statute, Article 24 only provides for an appeal "from persons convicted by the Trial Chambers" - it does not explicitly provide for an appeal for a person convicted by the Appeals Chamber. Thus, it is unclear whether there is an absolute denial of any right of appeal from an Appeals Chamber. Yet, because Tadić was found guilty of nine counts for the first time, it could be argued that he has a right to appeal these convictions, despite the fact that they were imposed by the Appeals Chamber. If such a right is asserted and found, the appeal would clearly need to be heard by a differently constituted Appeals Chamber. As noted by the Appeals Chamber in the Tadić Interlocutory Appeal

on Jurisdiction, narrowly interpreting the jurisdiction of the Appeals Chamber “falls foul of a modern vision of the administration of justice.”

In addition to the aforementioned appeals, the Defense also filed an appeal against the Sentencing Judgement imposed by the Trial Chamber. However, because Tadić was convicted on nine additional counts by the Appeals Chamber, this portion of the appeal was deferred until the Appeals Chamber sentences Tadić on the new convictions.

III. 1999 ICTY TRIAL CHAMBER JUDGMENTS

A. Aleksovski Judgement

The Indictment against Zlatko Aleksovski was issued on November 2, 1995, confirmed on November 10, 1995, and he was arrested on June 8, 1996 by the Croatian police acting pursuant to an arrest warrant issued by the Tribunal. He spent ten months and twenty days in detention in the Republic of Croatia before being transferred to the ICTY Detention Center in The Hague on April 28, 1997. The trial began on January 6, 1998 and ended on March 23, 1999. The judgment was pronounced orally on May 7, 1999, and the written decision rendered on June 25, 1999. The oral judgment was announced before the written judgment was completed because Aleksovski’s detention time exceeded the sentence imposed by the Trial Chamber. Aleksovski was sentenced to a mere two and one half years’ imprisonment for the one count on which he was found guilty and as his total detention time amounted to two years, ten months, and twenty-nine days, he was ordered immediately released, notwithstanding any appeal.

The Aleksovski trial was heard by Trial Chamber I. The Indictment charged Aleksovski, commander/warden of Kaonik prison, with three counts: Article 2 of the Statute, grave breaches (inhuman treatment; and wilfully causing great suffering or serious injury to body or health); and Article 3 of the Statute, violations of the laws or customs of war (outrages upon personal dignity.) The Indictment alleged that during a six month period in 1993, hundreds of Bosnian Muslim civilians were detained under Aleksovski’s custody in Kaonik prison. Additionally, during this time the detainees “under his control” were subjected to deplorable conditions in the prison and to various forms of physical and psychological mistreatment within and outside the prison, including physical and psychological abuse leading to death. Aleksovski was charged under 7(1) and 7(3) of the Statute for individual criminal responsibility for his implicit and explicit participation in the offences alleged and for his

responsibility as a superior for the acts committed by military or civilian persons under his authority and control.

In its Judgement, the Trial Chamber noted that Articles 2 and 3 of the Statute apply only when the offences alleged are committed in the context of an armed conflict and with a sufficient nexus between the offence and the armed conflict. The nexus requirement was interpreted to mean that the act was perpetrated against the victim “because” of the conflict. The Trial Chamber noted that it was not disputed that an armed conflict existed. However, because under traditional interpretations of Article 2 (the grave breach provisions) the armed conflict must be international in character, the Trial Chamber was unable to agree on the applicability of Article 2 as to the facts established at trial. The majority concluded that the victims were not “protected persons”, a status which is required to incur criminal liability for violating the grave breach provisions of the Geneva Conventions. As such, Aleksovski was found not guilty on the two grave breach counts, without the Trial Chamber examining whether the offences alleged amounted to grave breaches of the Geneva Conventions. This acquittal could be in jeopardy as a result of the Appeals Chamber holding in the Tadić Judgement, discussed above.

The remaining count, alleging violations of Article 3 of the Statute, charged as a serious violation of Common Article 3 of the Geneva Conventions under the proscription of committing outrages upon personal dignity, was then considered by the Trial Chamber after it reached general conclusions as to the Accused’s behavior, position, authority over, and responsibility for conditions and mistreatment within and outside Kaonik prison.

As to incurring 7(1) liability, an Accused can be held responsible not only for crimes they perpetrate physically, but also for “crimes committed by others which [the Accused] is said to have personally ordered, instigated or otherwise aided and abetted.” Participation may occur before, during, or after the act is committed and need not be manifested through physical assistance, as moral support, encouragement, and sometimes mere presence is sufficient to incur liability if it has a significant effect on the commission of the crime. As to incurring 7(3) liability, the Trial Chamber acknowledged that an Accused can be held criminally responsible for failing to take steps to halt, prevent, or punish crimes committed by subordinates, when there is a means and a legal duty to do so. “Superior responsibility”, used to capture both doctrines of command responsibility (usually attributed to military authorities) and superior authority (usually attributed to political/civilian leaders), may be ascribed to an Accused

28. Id. at ¶ 59.
29. Id. at ¶¶ 62-64.
if (i) there exists a *de facto* or *de jure* superior-subordinate relationship between the Accused and the perpetrator; (ii) the superior knew or had reason to know a crime had been committed or was about to be committed; and (iii) the superior failed to take all the necessary and reasonable measures under the circumstances existing at the time to prevent or halt the crime or to punish the perpetrator.

Under facts established at trial, the Trial Chamber found Aleksovski responsible under both 7(1) and 7(3) theories of responsibility for his participation, through acts or behavior, for crimes committed within the Kaonik prison compound. It also held that he aided and abetted in the use of detainees as human shields or trenchdiggers, incurring 7(1) responsibility. In regards to 7(3) liability, the Trial Chamber found a superior-subordinate relationship over prison guards sufficiently established, but not such relationship over HVO soldiers. It held that the Accused could not be held responsible for crimes committed outside the Kaonik prison compound. It remains unclear whether Aleksovski was, as warden/commander of Kaonik prison, a civilian or military leader.

The Trial Chamber then turned to Aleksovski’s responsibility under 7(1) for crimes committed within Kaonik prison, either physically by the Accused, or by ordering, instigating or otherwise aiding and abetting in the crimes, and under 7(3) for crimes committed by persons under his control and authority. For 7(1) responsibility, the Trial Chamber considered it proven beyond a reasonable doubt that Aleksovski was responsible for the detention conditions in Kaonik prison, and that it was his duty to see to the hygiene, health, and welfare of the detainees. However, the Trial Chamber held that while the conditions were extremely poor and clearly did not meet international human rights standards, it had not been adequately proven that the Accused failed to take measures incumbent upon and available to him or that he deliberately ordered or allowed the conditions to arise.\(^{30}\)

As to the physical and psychological abuse, the Trial Chamber found it sufficiently proved that in some instances the Accused aided and abetted in mistreatment by means of verbal or expressive encouragement or by silence when it was his duty to oppose or repress the acts; at times he physically participated in physical violence; other times he ordered the beating and other mistreatment of detainees.\(^{31}\) Consequently, the Trial Chamber found that the violence inflicted within the Kaonik prison, both individually and by persons under his authority, constituted an outrage upon personal dignity, in particular humiliating and degrading treatment within the meaning of Common Article 3,
as justiciable under Article 3 of the Statute for individual criminal responsibility under Articles 7(1) and 7(3) of the Statute. Further, the use of detainees as human shields or trench-diggers was also held to constitute an outrage upon personal dignity. Aleksovski was held responsible under 7(1) for aiding and abetting in these crimes.

Perhaps the most surprising part of the Aleksovski Judgement is the stunningly low sentence imposed for the conviction. Aleksovski was found guilty of one count for violations of the laws or customs of war under two theories of responsibility, which established the culpability of the Accused for the physical and emotional violence inflicted on detainees in Kaonik prison. As noted above, in pronouncing its sentence, the Trial Chamber imposed two and a half years’ of imprisonment, which exceeded the amount of time Aleksovski had already been in detention, so he was immediately released. While brought under one count, and convicted of only one count, the outrages upon personal dignity charge consisted not of a single crime, but a course of conduct comprising a series of heinous crimes committed by Aleksovski and by persons under his authority against a large number of individuals.

Judge Rodrigues attached a dissenting opinion as to the applicability of the grave breach provisions, determining that the international character of the conflict was indeed established, even though it was his opinion that such characterization of the conflict is not a condition prerequisite before Article 2 of the Statute can be applied. The majority, Judges Vohrah and Nieto-Navia, also attached a joint opinion on the applicability of Article 2 of the Statute, explaining its finding that the victims were not “protected persons” within the meaning of Article 4 of the Fourth Geneva Convention, which enunciates the persons and property protected by the grave breach regime. The majority concluded that to be a protected person, the civilian victim must hold a nationality different from that of the captors/perpetrators. The majority found that the detainees (Bosnian Muslims) held the same nationality as their captors (Bosnian Croats, who may or may not have held a dual nationality as Croatian). However, as discussed above, a contrary determination was made by the Appeals Chamber in the Tadić Judgement. Also note that although not considering the merits of the grave breach charges because the prerequisite elements were deemed not to have been satisfied, the Trial Chamber considered that the violence inflicted on the Muslim detainees of Kaonik prison constituted “a grave violation of the principles of international humanitarian law arising

33. Id. at ¶¶ 32-34.
from the Geneva Conventions”, language which indicates it might constitute a grave breach if an international armed conflict were found.34

B. The Jelisić Judgement

On October 19, 1999, Trial Chamber I rendered its Judgement against Goran Jelisić. This case represents the first genocide trial to be held in the ICTY. Jelisić, who called himself the “Serb Adolf,” was charged in the Indictment with one count of genocide, twelve counts of violations of the laws or customs of war for murder, three counts of violations of the laws or customs of war for cruel treatment, one count of violations of the laws or customs of war for plunder, twelve counts of crimes against humanity for murder, and three counts of crimes against humanity for inhumane acts. The Indictment alleged Jelisić’s participation in crimes committed against Muslims and Croats at the Luka camp in northern Bosnia, where he “held a position.” He was charged exclusively under 7(1). In October 1998, Jelisić pleaded not guilty to the genocide charge, but guilty to the thirty-one remaining charges of crimes against humanity and war crimes. Trial on the one count of genocide, which alleged that the Accused committed or aided and abetted in killing members of the group, ended in acquittal in a Judgement announced on October 19, 1999. According to the press release, the Trial Chamber found that the OTP failed to prove beyond a reasonable doubt that Jelisić acted with the requisite intent to destroy, in whole or in part, the Bosnian Muslim population as a national, ethnic or religious group, or that he had “the clear knowledge that he was participating in genocide, that is to say the destruction, at least in part, of a given group.” Nonetheless, the acquittal appears to based primarily on a finding that the OTP had failed to establish that genocide had been committed in the region, and it therefore had difficulty finding the Accused guilty of genocide. The Trial Chamber also appeared to take into account the fairly low status of Jelisić, and the language of the Judgement indicates there was some hesitation to find a low level actor guilty of genocide, particularly when it was not firmly established that genocide had been committed in the region.

As to the guilty plea on the thirty-one counts of war crimes and crimes against humanity, pursuant to Article 62 bis of the ICTY Rules of Procedure and Evidence, the Trial Chamber must be satisfied that the guilty plea is voluntary, informed, unequivocal, and that “there is a sufficient factual basis for the crime and the accused’s participation in it.” The Trial Chamber determined that the evidence established there was no doubt that Jelisić committed the crimes he admitted, and it agreed with the Prosecutor’s legal qualification of the

34. Id. at ¶ 228.
crimes as constituting crimes against humanity and violations of the laws or customs of war. He was sentenced to 40 years' imprisonment.

IV. 1999 ICTR TRIAL CHAMBER JUDGMENTS

A. Serushago Sentence

On September 24, 1998, the Indictment against Omar Serushago, alleging six counts of violations of Articles 2 and 3 of the ICTR Statute, was filed by the OTP, but only five of these counts were confirmed by Judge Ostrovsky, who dismissed one count of the Indictment. The remaining counts alleged one count of genocide, and four counts of crimes against humanity for murder, extermination, torture, and rape.

On December 14, 1998, Serushago pleaded guilty to four of the five counts of the modified Indictment; he pleaded not guilty to the rape count. Subsequently, the rape charge was withdrawn by the OTP. In reviewing the charges and the acknowledgement of the Accused of his culpability for the crimes, and after considering the case on its merits and general principles regarding the determination of sentences, Trial Chamber I rendered its Judgement on February 5, 1999.

Considering the gravity of the offences, including Serushago’s guilt for genocide, regarded as the “crime of crimes,” and the fact that the Accused personally murdered four Tutsi and that thirty-three other people were killed by militia under his authority, the Trial Chamber noted that he committed these crimes knowingly and with premeditation. In considering mitigating factors, the Trial Chamber noted the youth, family, and social background of the Accused, and particularly stressed that Serushago cooperated with the Office of the Prosecutor, he voluntarily surrendered, he entered a guilty plea, and had expressed remorse and contrition. It concluded that exceptional mitigating circumstances afforded him some clemency. As such, Serushago was sentenced to a single term of fifteen years’ imprisonment.

B. Kayishema & Ruzindana Judgement

On May 21, 1999, after the joint trial of Clement Kayishema and Obed Ruzindana, Trial Chamber II of the ICTR rendered the Rwanda Tribunal’s second judgment after a trial on the merits. The trial against Kayishema, the Prefect of Kibuye Prefecture, and Ruzindana, a commercial businessman in Kigali, began on April 11, 1997 and adjourned on November 17, 1998. The

Accused, both Hutu, were charged under Articles 2-4 of the Statute with genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II. These charges were also brought pursuant to Articles 6(1) and 6(3) of the ICTR Statute, which grants the Tribunal jurisdiction to prosecute persons responsible for individual and superior criminal responsibility.

Kayishema alone was charged under counts one through six with genocide (genocide, without specificity as regards to acts of Art.2(2)(a)-(e) of the Statute), crimes against humanity (murder, extermination, and other inhumane acts), and violations of Common Article 3 and Additional Protocol II (violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment) for a massacre at a Catholic Church and Home in St. Jean. He was charged identically under counts seven through twelve for a massacre at a Stadium in Kibuye Town. Kayishema was again charged with these same crimes and acts under counts thirteen through eighteen for a massacre at a Church in Mubuga. Counts nineteen through twenty-four charge both Kayishema and Ruzindana with these identical crimes and acts, for alleged massacres committed in the area of Bisesero.

1. Genocide

The Trial Chamber noted that before an Accused can be held responsible for genocide, it must be proven that the Accused had the intent to destroy, in whole or in part, a racial, ethnic, religious, or national group by committing one of the specified prohibited acts. The Trial Chamber focused primarily upon the prohibited acts of killing and/or causing serious bodily harm to members of a group, and determined that both Kayishema and Ruzindana, did intend to destroy the Tutsi group by means of killing or seriously injuring them. As to the massacres at the Complex and Stadium, Kayishema was held to have instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, and execution of genocide by killing and causing serious bodily harm to Tutsis; as to the massacre at the Church, Kayishema was held to have intended to have aided and abetted the preparation and execution of the massacres. Both Kayishema and Ruzindana were held to have instigated, ordered, committed, and otherwise aided and abetted in the preparation and execution of the massacre of Tutsis in the Bisesero area.
2. Crimes Against Humanity

Enunciating the elements of murder, the Trial Chamber held that an Accused can be held accountable if, when engaging in unlawful conduct, s/he (i) causes the death of another; (ii) by a premeditated act or omission; (iii) intending to kill any person or intending to cause grievous bodily harm to any person. Articulating the elements of extermination, the Trial Chamber held that an Accused can be held accountable for participating in the mass killing of others or in creating conditions of life that lead to the mass killing of others through acts or omissions, for having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and, for being aware that their acts or omissions form part of a mass killing event, if the acts or omissions form part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds. Elements of other inhumane acts as a crime against humanity were stipulated as follows: the Accused must (i) commit an act of similar gravity and seriousness to the other acts enumerated in the Statute; (ii) with the intention to cause the other inhumane act (whether against a victim or witness); and (iii) with knowledge that the act is perpetrated within the overall context of the attack.

3. Violations of Common Article 3 and Additional Protocol II

In order for an act to breach Common Article 3 and Protocol II, the Trial Chamber stated that the following elements must be established: (i) that the armed conflict in Rwanda during this period was of a non-international character; (ii) there is a link between the Accused and the armed forces; (iii) the crimes must be committed ratione loci and ratione personae; and (iv) there must be a nexus between the crime and the armed conflict. This Trial Chamber thus concurs with the Akayesu Trial Chamber’s restrictive interpretation that serious violations of Common Article 3 are only justiciable when committed by persons acting in furtherance of the war effort.
4. Legal Findings

As to the first three massacre sites, of which solely Kayishema is charged, the evidence established that thousands of Tutsis seeking refuge from various communes fled to each of these sites, historically regarded as safe havens, to escape atrocities perpetrated by the Hutus throughout Kibuye Prefecture. At each of these sites, gendarmes under Kayishema’s authority and control guarded the entrances and prevented Tutsis from leaving. Conditions inside the sites became desperate, as food, water, and other supplies were neither provided nor allowed. During a five day period, the tens of thousands of Tutsi imprisoned at these sites were systematically slaughtered; only a handful survived. It was not disputed that the massacres occurred. The issue was whether Kayishema incurred criminal liability by means of his presence, acts, omissions, words, or authority. The Trial Chamber deemed it proved beyond a reasonable doubt that Kayishema was present at each of the massacres, and participated in the attacks by such means as encouraging, ordering, instigating, inciting, or otherwise aiding and abetting in the attacks.

As to the charges against Kayishema and Ruzindana for massacres in the area of Bisesero, the evidence established a series of massive, organized attacks by Hutu against Tutsi during which thousands of Tutsi civilians were systematically slaughtered. The Trial Chamber was satisfied that Ruzindana and Kayishema, acting on some occasions in concert and on other occasions separately, personally attacked Tutsis seeking refuge in Bisesero, and by their words or acts, further aided in the “mass murder” of these victims. Indeed, the Trial Chamber held that both Accused orchestrated and directed many of the massacres in Bisesero.

In reaching its verdict, the Trial Chamber found both Accused guilty of each genocide count charged against them. However, they were found not guilty as to each crimes against humanity, Common Article 3, and Additional Protocol II charge. A majority of the Trial Chamber held that as to counts charging the Accused with crimes against humanity by means of extermination and murder, these crimes were, under the facts of this case, “fully subsumed” by the genocide crimes. It is important to emphasize that the judgment did not hold that crimes against humanity are always subsumed within genocide. It was the particular facts of this case - the same acts (murder, extermination) committed against the same victims - that caused a majority of the Trial Chamber to reach this conclusion. Judge Kahn however dissented on this point, pointing out that in the practice of the Tribunals this issue is dealt with in the sentencing phase (by imposing concurrent sentences when found guilty of the same act under different Articles of the Statute), not in the guilt phase.

The Trial Chamber unanimously held that the Accused were not guilty of committing inhumane acts as a crime against humanity. While the Trial
Chamber noted that the Accused did indeed commit inhumane acts as a crime against humanity, it rejected the use of "inhumane acts" as a "catch all" category of crimes, and determined that because the OTP, while generally alleging and referring to widespread violence, mutilation, and abuse, did not specifically identify precisely which inhumane acts were being prosecuted and did not adequately particularize which pieces of evidence supported these charges, it found the Accused not guilty on these counts. The not guilty verdicts as to the Common Article 3 and Additional Protocol II counts were made based on determinations that the Prosecution did not prove that the Accused, both civilians, were supporting the Government efforts against the RPF (the standard seemingly erroneously adopted in Akayesu), and that therefore the Accused did not incur criminal liability for their crimes under Article 4 of the Statute.

In conclusion, four guilty verdicts were rendered against Kayishema on the genocide counts, although he was then held to be not guilty on four crimes against humanity counts, four violations of Common Article 3 counts, and four violation of Protocol II counts. One guilty verdict was rendered against Ruzindana on the genocide count, and he was similarly acquitted on one count each alleging crimes against humanity, violations of Common Article 3, and violations of Additional Protocol II. Kayishema was sentenced to life imprisonment, and Ruzindana was sentenced to twenty-five years’ imprisonment.

C. Rutaganda Judgement

On December 6, 1999, Trial Chamber I rendered its Judgement against Georges Rutaganda, a prominent businessman and second vice-president of the Interahamwe on the national level, for crimes committed during April 1994 at the outbreak of the genocide. Rutaganda was deemed to have ordered, incited, and carried out murders and to have caused serious bodily or mental harm to members of the Tutsi ethnic group, by such means as distributing firearms and other weapons to Interahamwe members and by taking part in attacks in Kicukiro and Nyanza, during which hundreds of Tutsis were massacred.

---

42. Id. at ¶ 618, 624.
43. Please note that because this judgment was rendered after this article was written, it is not given extensive treatment here.
Rutaganda was convicted of one count of genocide\textsuperscript{44} and two counts of crimes against humanity for extermination and murder. The Indictment had charged Rutaganda with one count of genocide, four counts of crimes against humanity (one count for extermination, three counts for murder), and three counts of violations of Common Article 3 of the Geneva Conventions (all brought as murder charges). Thus, while convicted on three counts, he was found not guilty on five counts, with the two counts of crimes against humanity considered subsumed within the genocide conviction, and the three Article 4 charges (for violations of Common Article 3) deemed to have been insufficiently proven.

The reasoning for the not-guilty verdicts for two of the crime against humanity charges for murder are explained as being a lesser included offence of extermination as a crime against humanity, and therefore an Accused cannot be held criminally responsible for both extermination and murder on the basis of the same act.\textsuperscript{45} However, he was also convicted on one count of murder as a crime against humanity for the slaying of a specifically named individual whom Rutaganda killed with a machete. In regards to the acquittals for all Common Article 3 charges, even though the Trial Chamber found the existence of an internal armed conflict and a nexus between the armed conflict and the crimes committed by the \textit{Interahamwe} militia, it nevertheless unconvincingly determined that it had not been adequately established that a nexus existed between the criminal culpability of the Accused and the armed conflict.\textsuperscript{46}

Rutaganda was sentenced concurrently to life imprisonment for the genocide conviction, life imprisonment for the crime against humanity (extermination) conviction, and fifteen years' imprisonment for the crime against humanity (murder) conviction.

As of December 31, 1999, not a single person has been convicted in the ICTR of war crimes (the charges brought under Common Article 3 and Additional Protocol II for crimes committed in internal armed conflicts).

\textsuperscript{44} In this judgment, it is also interesting to note that crimes of sexual violence appear to be subsumed within the genocide verdict, even though sexual violence was not specifically charged in the indictment. For instance, in the section on Legal Findings for genocide, the Trial Chamber held: “Some young girls were singled out, taken aside and raped before being killed. Many of the women who were killed were stripped of their clothing. The soldiers then ordered the \textit{Interahamwe} to check for survivors and to finish them off. The Accused directed the \textit{Interahamwe} ... The Chamber finds that is has been established beyond any reasonable doubt that the Accused was present and participated in the Nyanza attack. Furthermore, it holds that by his presence, the Accused abetted in the perpetration of the crimes.” Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement, ICTR-96-3-T, ¶ 417, Dec. 6, 1999.

\textsuperscript{45} Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement, ICTR-96-3-T, §§ 5.3-5.4, Dec. 6, 1999.

\textsuperscript{46} See \textit{id}. at §5.6.
ACCOUNTABILITY BECKONS DURING A YEAR OF WORRIES FOR THE KHMER ROUGE LEADERSHIP

Craig Etcheson*

The year 1999 saw a series of extraordinary developments in the search for justice in the case of Cambodia's Khmer Rouge. After twenty years during which there was little or no official movement to bring the Khmer Rouge to justice, international and domestic Cambodian momentum for genocide justice accelerated dramatically.

A suitable point of departure for a discussion of these developments would be a report delivered to United Nations Secretary-General, Kofi Annan on February 18, 1999.¹ Some twenty months earlier, on June 21, 1997, the Co-Prime Ministers of Cambodia, First Prime Minister Prince Norodom Ranariddh and Second Prime Minister Hun Sen dispatched a letter to the United Nations Secretary-General (UNSG) requesting international assistance in the matter of bringing the Khmer Rouge to justice.² Due in part to the very deliberate nature of United Nations processes and in part to political instability in Cambodia, the arrival of a team of United Nations experts in Cambodia to prepare recommendations pursuant to the letter of the Co-Prime Ministers was delayed more than a year. During this intervening period, the Khmer Rouge political and military organization collapsed, and most of the Khmer Rouge leadership surrendered and applied to the government for various forms of mercy. Feeling thus emboldened by his own successes in dealing with the Khmer Rouge, Hun Sen (by now the sole Prime Minister) rejected the recommendations from the United Nations.


² Letter from Cambodian Co-Prime Ministers Norodom Ranariddh and Hun Sen to UN Secretary General Kofi Annan (June 21, 1997) (distributed on the Internet via the Camnews news group, June 25, 1997).
Nations Group of Experts that the United Nations establish an ad hoc international tribunal drawing on the International Criminal Tribunals for the former Yugoslavia and Rwanda. This decision effectively rendered the Report of the United Nations Experts dead on arrival. It is nonetheless useful to consider the main recommendations of that report:

**SUMMARY OF PRINCIPAL RECOMMENDATIONS**

The above discussion contains, we hope, an exhaustive treatment of the issues assigned to the Group of Experts by the Secretary-General. Without attempting to restate all of our recommendations, we reiterate those of most importance. We recommend that:

2. That as a matter of prosecutorial policy, the independent prosecutor appointed by the United Nations limit his or her investigations to those persons responsible for the most serious violations of international human rights law and exercise his or her discretion regarding investigations, indictments, and trials so as to fully take into account the twin goals of individual accountability and national reconciliation in Cambodia.
3. That the Security Council establish this tribunal or, should it not do so, that the General Assembly establish it.
4. That the tribunal comprise two trial chambers and an appellate chamber, and that the United Nations actively seek to include on the tribunal a Cambodian national whom it believes is qualified, impartial, and appropriate.
5. That the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda serve as the Prosecutor of the new tribunal, with a Deputy Prosecutor specifically charged with responsibility for this tribunal.
6. That the tribunal, including the office of the Deputy Prosecutor, be established in a state in the Asia-Pacific region but not in Cambodia; that the Prosecutor establish an investigations office in Cambodia; and that the United Nations, in cooperation with the government of Cambodia, arrange for the unfettered dissemination of the proceedings in Cambodia by radio and television.
7. That the full panel of judges appointed by the United Nations not commence full-time service until at least some indictees have been arrested.
8. That the United Nations undertake special measures for the protection of physical evidence and of witnesses as necessary, and
that states with evidence and witnesses on their territory make them available to the Prosecutor.

9. That the tribunal established provide for the possibility of reparations by defendants to victims, through a Trust Fund or some other special fund, and that states holding such assets arrange for their transfer to the tribunal as required to meet the defendants’ obligations in this regard.

10. That the United Nations, in cooperation with the Cambodian government and non-governmental sector, encourage a process of reflection among Cambodians to determine the desirability and, if appropriate, the modalities of a truth-telling mechanism to provide a fuller picture of the atrocities of the period of Democratic Kampuchea.

In asking for United Nations assistance, the government of Cambodia has responded to what we sense is the desire of the Cambodian people for justice and their knowledge that it is impossible to simply ignore the past. Rather, it is necessary to understand the past and move beyond it by seeing justice done for those responsible for it. This process has been too long delayed for Cambodia and the time for action is here. If these and our other recommendations are pursued by the United Nations now with the support of the government of Cambodia, we believe they will lead to a process that will truly enable Cambodia to move away from its incalculably tragic past and create a genuine form of national reconciliation for the future.\(^3\)

Thus, to summarize the thrust of the Report, the Experts recommended that the United Nations, through either the Security Council or the General Assembly, clone the existing ad hoc international tribunals to create chambers for Cambodia; that the tribunal be seated near but not in Cambodia; that personal jurisdiction be limited to those “most responsible” for serious violations of international humanitarian law; and that the temporal jurisdiction of the tribunal extend from April 17, 1975 to January 7, 1979, the period of the Khmer Rouge regime. Other significant aspects of the recommendations included establishing a trust fund for reparations to victims of the Khmer Rouge, that the United Nations should arrange broadcasts of the tribunal sessions to the Cambodian people, and that Cambodia should consider establishing some form of truth-telling mechanism or truth commission as an adjunct to the judicial process.

But politics has a way of trumping justice. A senior official of the Royal Cambodian Government said that the decision to reject the recommendations of the United Nations Group of Experts was taken within days after the Group

of Experts had completed their mission to Cambodia in November 1998, before those recommendations had even been formulated. Only later, after the capture of the last hardline Khmer Rouge holdout, General Ta Mok, did the Cambodian government decide to establish its own tribunal for the Khmer Rouge.

Even so, the United Nations was not prepared to take "no" for an answer, at least not yet. With prodding from the Secretary General's Special Representative for Human Rights in Cambodia, Thomas Hammarberg, the Cambodian government agreed to entertain a new initiative from the United Nations. At the United Nations, the Office of Legal Affairs labored through the summer to define a new model of "international" justice, a "mixed" tribunal which would be established under Cambodian domestic law and be seated in Phnom Penh, but which would still be dominated by international personnel in order to ensure that impartial justice would be done.

On August 25, 1999, a United Nations delegation headed by Assistant Secretary General Ralph Zacklin arrived in Phnom Penh to negotiate with the Cambodian government about possible United Nations participation in a tribunal for the Khmer Rouge leadership. The Cambodian government promptly presented the United Nations delegation with a draft charter for a tribunal which would judge the Khmer Rouge leadership on charges of genocide and crimes against humanity. The Cambodian plan proposed what is fundamentally a national, rather than an international tribunal. Under the Cambodian draft charter, the court of first instance for prosecution of the Khmer Rouge would be the existing Phnom Penh Municipal Court (which is not known for its judicial independence). There would be two levels of appeals, also within existing Cambodian judicial structures. A majority of personnel at all levels of the judicial process would be Cambodians, and all legal personnel involved in the Khmer Rouge trials, international as well as domestic, would be appointed by the Cambodian Supreme Council of the Magistracy (which has also been accused of political taint).

In addition to the proposed institutional structures, the Cambodian draft also contains what is essentially domestic implementing legislation for the Genocide Convention. This implementing legislation crafts a new definition of genocide, one which is obviously designed to fit precisely the crimes of the Khmer Rouge and remove any legal ambiguity which may exist concerning

whether or not what the Khmer Rouge did was "genocide." In and of itself, it is a progressive definition of genocide, adding political, economic, and other groups to the list of "protected groups" for purposes of enforcement. However, the Cambodian draft also specifies that this new definition will be "retroactive." Temporal jurisdiction of the "tribunal" would be 1975 to 1979. The contours of personal jurisdiction remain slightly ambiguous in the Cambodian draft.

The United Nations delegation responded to the Cambodian proposal by saying the Secretary General's requirement that any Khmer Rouge tribunal should be "international in character"7 could not be met simply by arbitrarily grafting a few foreign lawyers onto existing Cambodian judicial institutions. Zacklin also pointed out that a new definition of genocide could not be made retroactive, if the Cambodians desired that the Khmer Rouge tribunal comply with "international standards" of justice. The Assistant Secretary argued that, in any event, there was no need for a novel definition of genocide, because any Khmer Rouge perpetrators who might evade conviction on charges of genocide, due to the restrictive wording of the Convention, could certainly be convicted of crimes against humanity for those very same acts.8

The United Nations subsequently presented its own draft charter for a Khmer Rouge tribunal, one which would involve going outside existing Cambodian legal institutions to create a special forum uniquely designed for the purposes of trying the Khmer Rouge leadership.9 The new United Nations plan called for a tribunal with one trial chamber and one appeals chamber, and, like the Cambodian plan, it would prosecute genocide and crimes against humanity. This tribunal would function under the jurisdiction of Cambodian law, with appropriate implementing legislation to be promulgated prior to the convening of the court. There would be a majority of international personnel, working alongside a minority of Cambodian colleagues. The Cambodians would be welcomed to nominate their own candidates for these positions, subject to appropriate professional qualifications, and all tribunal personnel, international and domestic, would be appointed by the Secretary General. As with the Cambodian plan, temporal jurisdiction of the tribunal under the United Nations plan would be from 1975 to 1979. Personal jurisdiction would encompass

7. Identical Letters, supra note 1, at 3.
8. These comments were made both in writing (Comments on the Draft Law Concerning the Punishment of the Crime of Genocide and Crimes Against Humanity, August 27, 1999, annex to a letter from Assistant Secretary-General Ralph Zacklin to H.E. Sok An, Minister of State, Royal Government of Cambodia) and verbally (Aide Memoire: Second Meeting Between the Cambodian Task Force on the Khmer Rouge Tribunal and the Visiting UN Delegation, Council of Ministers, Phnom Penh, Cambodia, August 28, 1999).
those "most responsible for the most serious violations" of international humanitarian law. Funding would be through a Trust Fund designed for this special purpose.

The two proposed plans were literally a world apart, and little progress was made in bridging the gap during the week that the United Nations delegation spent in Cambodia. At the conclusion of the final negotiating session, the Cambodian team proposed another meeting with the United Nations team in New York around September 17th in conjunction with the annual opening of the General Assembly. The Cambodian side committed to prepare a second draft of their charter for the tribunal, taking into account comments on the first Cambodian draft by the United Nations side. That was agreed, but that was just about the only thing which would be agreed.

When the two sides met again in New York in the middle of September, this second Cambodian draft had not yet materialized. The negotiators achieved no progress in narrowing their differences in New York. Indeed, it appears that the gap actually got a bit wider, with the Cambodians hardening their stance on grounds of "sovereignty."

On September 16th, Cambodian Prime Minister Hun Sen met with UNSG Kofi Annan, and delivered an aide memoire outlining his government’s position on the tribunal issue. It has to be said that it was a rather uncompromising presentation. Senior members of the ruling Cambodian People’s Party have long said they simply do not “trust” the United Nations. If any evidence of that were needed, we have it here.

In his note to the Secretary General, the Prime Minister complained about support for the Khmer Rouge through the 1980s from the international community and the

United Nations which allowed [the Khmer Rouge] to sit at the United Nations while they committed genocide from 1975-1979. This group continued to occupy the seat until 1982 and from 1982 to 1993 was part of a tripartite coalition government and legal party of the Supreme Council of Cambodia under the Paris Peace Accord.¹⁰

Turning to the substance of the tribunal negotiations between Cambodia and the United Nations, Hun Sen wrote

We must also recognize that both parties remain divided on the mechanism for the functioning of the trial. In compliance with its sovereignty, Cambodia must proceed with Cambodia’s existing

national court and introduce additional legislation to allow foreign judges and prosecutors to take part in the trial. As for the United Nations legal experts, their intention to create a special tribunal, to implement special laws in Cambodia, which in reality is outside the umbrella of the Cambodian constitution and laws, will not be applicable.\footnote{Id.}

This amounted to a formal rejection of the proposal put forward by the United Nations team in August.

The Prime Minister then listed three “options of participation or non-participation” for the United Nations in a Cambodian tribunal on the Khmer Rouge:

1. The United Nations participates by providing legal expertise to help draft appropriate legislation, and by providing judges and prosecutors to take part in a trial conducted within the framework of Cambodia’s existing judiciary;
2. The United Nations provides legal expertise in helping to draft appropriate laws, but does not play a direct role in the trial, i.e., the United Nations would not supply judges, prosecutors or other officials for the tribunal;
3. The United Nations ends its involvement in the process of trying Khmer Rouge leaders, and Cambodia goes on with the process as it desires.

In closing his memo, Hun Sen wrote, “Cambodia will utilize this opportunity not just to find justice for the Cambodian people, but also to make a major practical step in its efforts to end the culture of impunity, which has received no attention from anyone for more than 20 years.”\footnote{Id.} The final clause of that sentence, one last jab at the United Nations and the international community, demonstrated considerable chutzpah on Hun Sen’s part; he has led the nation for the last fifteen years, and he is often accused of being prominent among those who have given little attention to the problem of impunity. It would be an unprecedented development if Hun Sen’s government were to take this opportunity and actually strike an effective blow against impunity in Cambodia. Generally speaking, Cambodian courts have been one of the central pillars of impunity in Cambodia.

The prospects for United Nations involvement in a Khmer Rouge tribunal thus appeared increasingly remote. When the United Nations team visited Cambodia in August, they pointed out to the Cambodian side the United Nations view that (a) the Cambodian legal code does not presently contain the laws necessary to prosecute the Khmer Rouge on charges of genocide and crimes against humanity; (b) the new legislation proposed by the Cambodian
side to remedy this problem does not comply with international legal standards; and (c) that in any event, simply adding a few foreign legal specialists to existing Cambodian judicial institutions would not satisfy the Secretary-General’s requirement that the tribunal should be “international in character.” Assuming that the United Nations holds to the views expressed in those negotiations, then, the first of Hun Sen’s options would not be acceptable to the United Nations. The second option might still be possible, insofar as it is widely recognized that Cambodia’s reservoir of legal expertise on matters of international humanitarian law is quite shallow, and they do need help. But given the apparent determination of the Cambodian government to assert their sovereignty and independence in this matter, and to proceed in defiance of the best advice the United Nations can offer, the third option, withdrawal by the United Nations — might be the only possible choice for the world body.

After Hun Sen’s meeting with the Secretary General, a United Nations spokesman observed that “the discussion was frank.” Disappointment at the United Nations with the Cambodian position was palpable, and at least some United Nations officials felt the negotiating process had reached a dead end. There has been no other public comment on this matter from the United Nations Secretariat, as they continued to await the long-promised second draft of the Cambodian charter for the tribunal.

Hun Sen is on firm legal ground in arguing that while the United Nations does not have an affirmative legal obligation to prosecute genocide, under the Genocide Convention, Cambodia does indeed have the primary duty to prosecute acts of genocide committed on its territory. By taking refuge in such legalisms, however, Cambodia exposes itself to three risks: first, having twice rejected United Nations proposals to form a tribunal for the Khmer Rouge, Cambodia opens itself to the risk that the United Nations will walk away, unwilling to thrice suffer rejection of its views; second, without the assistance of the United Nations, which has developed a deep reservoir of expertise in prosecuting the most complex crime of genocide, Cambodia risks finding itself unable, from a technical perspective to properly manage such a difficult undertaking in a way that conforms to international standards of justice; and third, the reputation of Cambodia’s judicial institutions in the world is such that, even if Cambodia succeeds against the odds in carrying out a credible tribunal to judge the crimes of the Khmer Rouge, Cambodia risks finding in the end that the international community will not believe that impartial justice has been done. This would be a tragic conclusion to the search for genocide justice in Cambodia.

13. United Nations, Read-out of the Secretary-General’s Meeting with Hun Sen, the Prime Minister of Cambodia, September 16, 1999.
After his meeting with the Secretary General, Hun Sen addressed the United Nations General Assembly. In that September 20th speech, Hun Sen declared,

We are firmly resolved to do whatever is needed to provide an open trial of those responsible for genocidal crimes in the country in the past. In holding this trial we will carefully balance, on the one hand, the need for providing justice to our people who were victims of this genocidal regime and to finally put behind us the dark chapter of our national history with, on the other hand, the paramount need for continued national reconciliation and safeguarding the hard-won peace, as well as national independence and sovereignty, which we value the most.  

Hun Sen was quite right, of course, when he observed in this speech that there is a tough balancing act to be done between the conflicting imperatives of justice and national reconciliation. And in a nation which has been as gravely wounded as Cambodia, the Prime Minister’s consistent appeals to themes of nationalism may be precisely calibrated to reforge the tattered bonds of national unity.

Thus, it began to dawn on interested observers that the Cambodian government intends to proceed with a genocide tribunal for the Khmer Rouge, and that Cambodia is not particularly interested in cooperating with the United Nations on the issue. This was underlined on September 29th, as Hun Sen told reporters in Cambodia, “It would be best if the United Nations should not involve itself with the trial and allow Cambodia to proceed within the framework of the country’s sovereignty.” Anticipating international rejection of a tribunal held in Cambodian courts, he added, “When a Cambodian court tries the Khmer Rouge and if the United Nations refuses to recognize the verdict, this will mean the United Nations recognizes the Khmer Rouge for its entire existence . . . . I am not asking anyone to recognize the court’s verdicts.”

The Cambodian government continues to show signs that it intends to proceed on an independent path toward a Khmer Rouge tribunal. Among these signs has been a search for independent international legal talent, which might provide some expertise without the strings which would be attached to


assistance from the United Nations or Western governments. Some of the names being bandied about in the Phnom Penh press include John Quigley, an American academic who assisted in Cambodia's 1979 People's Revolutionary Tribunal (which found Pol Pot and Ieng Sary guilty of genocide, and sentenced them to death in absentia), and who, coincidentally, is on the verge of publishing what will be a very handy compilation of documents from that trial. Another purported prospect is French professor of public law, Claude Gour, of the University of Social Sciences in Toulouse. Gour is said to have assisted in preparing the draft Cambodian charter for a domestic tribunal presented to the United Nations delegation in August; he also assisted in drafting the new Cambodian Constitution in 1993. Another American, former United States Attorney General Ramsey Clark, has also been mentioned. Clark has distinguished himself in recent years by his vigorous denunciations of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). He has been active in the defense of a Rwandan man who has been indicted by the ICTR, attempting to prevent his extradition from Texas to the tribunal in Arusha, Tanzania. The apparently irrepressible Clark also delivered a brief to the Cambodian government some months ago, arguing that the government should not cooperate with the United Nations on a Khmer Rouge tribunal. But for now, the names of the prospective international experts approached by the Cambodian government remain shrouded in official secrecy. Cabinet Minister Sok An, who chairs the government's task force for the tribunal, recently said that a complete list of "prominent experts from several countries" would be released by the government.

Meanwhile, in the "former" Khmer Rouge zones of Cambodia, senior Khmer Rouge officials were working to stay ahead of the game. On September 2nd, Ieng Sary released a statement from his quasi-autonomous zone in western Cambodia, declaring that he "supports resolutely the [Royal Government's] idea and stance on defending national sovereignty by taking for priority the existing national tribunal in collaboration with foreign judges and prosecutors whose number is lesser than those from Cambodia." Ieng Sary was Pol Pot's Deputy Prime Minister and Foreign Minister, and significant evidence has been amassed suggesting that he fed victims into the Khmer Rouge killing machine. Thus, he would be a prime target of any independent genocide prosecutor.

18. "Statement of the Democratic National Union Movement on the so-called 'UN Plan,'" September 2, 1999, Pailin, Cambodia; signed by Ieng Sary.
When such a figure endorses the government plan for a genocide tribunal, the red flags go up. Has some kind of deal been cut between Ieng Sary and Hun Sen? Perhaps this is what Hun Sen means when he speaks of the importance of national reconciliation. Has the Premier calculated that the residual power of Khmer Rouge leaders such as Ieng Sary remains too powerful to challenge? Has Hun Sen converted to a philosophy of forgiveness for genocidal leaders? Is it, as one member of the ruling party told me recently, a matter of "cash flow?" Or is Hun Sen preparing to double-cross Ieng Sary? Perhaps we will not have long to wait to find answers to these questions.

One observer described the current situation as a "lose-lose" scenario for Cambodia. On the one hand, after having taken such a "strong stand" in asserting Cambodia's sovereignty and arguing that Cambodian courts are capable of carrying out a genocide tribunal which would meet "international standards," for the Cambodian government to climb down from that position now would constitute a serious loss of face, especially in terms of domestic politics, where the opposition has been arguing that an internationally-controlled tribunal is the only way to achieve justice for the Khmer Rouge. On the other hand, if the Cambodian government continues along the current path and proceeds with a national tribunal for the Khmer Rouge, it is likely that little bi-lateral or multi-lateral assistance for such an undertaking would be forthcoming, making it all the more likely that the conduct of such a trial would fail to pass muster with legal analysts. Moreover, any verdicts resulting from a purely domestic tribunal would most likely be criticized by much of the international community, insofar as Cambodia's judicial underdevelopment has created a general presumption that fair trials on such a politically-loaded issue would be impossible. So either way, whether the government compromises or not, Cambodia loses. It is a rather bleak assessment, but perhaps not far from the truth.

After the talks between Cambodia and the United Nations became moribund in September 1999, the United States engaged in a flurry of diplomatic activity, attempting to bridge the gap between the Cambodian and United Nations positions. This diplomacy was pursued with an unusually high level of secrecy. But sources close to the talks claimed to be hopeful that a compromise could be found which would permit the international community to endorse Cambodia's plans for the tribunal.

The new talks appeared to find some middle ground between the two sides: a special tribunal would be established outside of existing Cambodian judicial institutions, including a court of first instance and an appeals chamber; Cambodian jurists will compose a majority of the personnel at all levels of the court, but at least one international jurist would have to concur with the decision of the majority for any decision to stand, a concept being called a "supermajority." The prosecution would be structured as a combination of the
civil and common law systems, with both an investigating magistrate, as in the
French system, and a prosecutor, as in the United States system. How that
amalgam might work in practice is not immediately obvious.

Still, that was progress, though some important details remained unclear:
the United Nations has demanded some kind of commitment from the
Cambodian government that all those indicted by the tribunal will be remanded
into the custody of the court by Cambodian officials. Whether this commitment
will be undertaken by the Cambodian government is not clear. In their first
draft of the charter, the Cambodians proposed a unique new definition of
genocide, which poses obvious problems since they intend to apply it
retroactively; whether Cambodians have been dissuaded from this course is
unclear. The two Khmer Rouge suspects currently in custody — military chief
of staff General “Ta Mok,” and the head of the Khmer Rouge secret police,
“Duch” — are being held under a 1979 instrument known as “Decree Law
Number One,” a law whose probity is suspect since it was promulgated by a
revolutionary regime not recognized by the United Nations. Whether the
government intends to go forward charging suspects under revolutionary
decrees is unclear, as is whether this would be acceptable to the United Nations.

Such details may be potential deal-killers from the United Nations
perspective. Thus we are not there yet. But we should not be in suspense for
very much longer, because Cambodian Prime Minister Hun Sen has declared
that he will submit the new draft to the United Nations before the end of
November 1999, and regardless of whether or not the United Nations approves
and agrees to participate, that he intends to seek approval of the charter in the
Cambodian National Assembly in December — approval which is all but
certain — and proceed with the tribunal early next year. So it appears we will
have a Khmer Rouge tribunal; precisely what kind of tribunal it will be, and
whether it will produce credible justice, remains to be seen. But one thing
seems certain: the genocide tribunal for the Khmer Rouge, whether there is
United Nations involvement or not, will be quite different from the other
international trials we have seen in recent years.
PROCEDURAL LIMITATIONS ON CAPITAL PUNISHMENT: 
THE CASE OF FOREIGN NATIONALS

John Quigley*

I. CONSULAR ACCESS AS AN INDIVIDUAL RIGHT .......... 521
II. ASCERTAINING A DETAINEE’S IDENTITY ................. 522
III. TIMING OF THE COMMUNICATION ...................... 523
IV. THE QUESTION OF REMEDY .......................... 524

A factor that has focused international attention on capital punishment in the United States is the infliction of this punishment on foreign nationals. Because of the decline in the use of capital punishment in many states of the world in recent decades, most foreigners who are subjected to capital punishment in the United States are nationals of an abolitionist jurisdiction. These foreign states typically adopt a negative position towards the imposition of capital punishment on their national, even if the offense is quite serious and the proof of guilt is strong.

The legal issue most frequently raised by a foreign state in this situation has been consular notification. In many instances of the imposition of capital punishment on foreigners, the state of nationality has objected to such punishment on the ground that the individual had not been informed at the time of arrest of the right of access to the protective services of its consuls. Under the Vienna Convention on Consular Relations, a treaty to which 163 states are parties, detaining authorities must inform a foreigner, upon detention, of the right to contact the home state consulate for assistance in preparation of a defense. Police in the United States rarely comply with this obligation, however, resulting in the situation that most foreigners presently under death sentences in the United States were not informed of their right of consular access.

The issue has been raised in courts in the United States, although to date most challenges to imposition of a death sentence have failed on the ground of having been raised too late in the process, after appeals had been exhausted. Both state and federal courts have refused to entertain claims of a failure of

* Professor of Law, Ohio State University. LL.B., M.A., Harvard University. The author has served as counsel to the Government of Mexico in its appearance as amicus curiae in cases in United States courts involving issues raised in this article.
notification about consular access. The courts have invoked the doctrine of procedural default, which requires that most legal issues be raised early in the criminal process, and in any event prior to the post-conviction or habeas corpus stage.\(^1\) The American Branch of the International Law Association has filed *amicus curiae* briefs in a number of these cases, urging strict compliance with Article 36.

Many of the foreigners sentenced to death in the United States are Mexican nationals, and Mexico has been active in seeking to challenge convictions and death sentences where it has appeared that its national was not informed of the right of consular access. In 1997, Mexico asked the Inter-American Court of Human Rights to issue an advisory opinion on the consular access issue. The Court, an organ of the Organization of American States (OAS), is empowered to issue advisory opinions at the request of a state member of the OAS, on the meaning of provisions in human rights treaties to which American states are parties, even if states in other regions are parties as well.\(^2\)

The function of consular assistance is to enable foreign nationals to defend themselves properly and thus to ensure that trials are fairly conducted. In its request to the Inter-American Court of Human Rights, Mexico asked not only for interpretation of the right of consular access as found in the Vienna Convention on Consular Relations, but as well for elucidation of the question of whether a failure to inform a detained foreign national of the right of consular access results in a due process defect that, in a capital case, requires reversal of the conviction and death sentence.\(^3\)

In response to Mexico's request, the Inter-American Court of Human Rights in 1999 issued an advisory opinion that called for strict compliance with the right of consular access as codified in the Vienna Convention on Consular Relations and that determined that a failure to inform a detained foreign national of that right constituted a due process violation. Focusing on application of the right of consular access in capital cases, the Court found that, consistent with due process, a death sentence rendered in a case in which a foreign national has not been informed of the right of consular access cannot stand. The Court's analysis is that consular assistance is an element of due process since it allows the foreign national to present a proper defense.\(^4\)

---

3. Solicitud de opinión consultiva presentada por el Gobierno de los Estados Unidos Mexicanos, Nov. 17, 1997 (distributed by Inter-American Court of Human Rights, no document number).
4. Inter-American Court of Human Rights, *El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal*, Opinión consultiva OC-16/99 de 1 de Octubre de 1999, solicitada por los Estados Unidos Mexicanos [hereinafter Advisory Opinion].
I. CONSULAR ACCESS AS AN INDIVIDUAL RIGHT

In the course of its opinion, the Inter-American Court gave its views on a number of issues that have proven controversial in the application of the right of consular access in United States courts. The Court concluded that Article 36 provides a right directly to the individual, a right that the individual therefore may invoke before a domestic court. It referred to language in the preamble to the Vienna Convention on Consular Relations that states that the purpose of the privileges and immunities mentioned in the Convention "is not to benefit individuals, but to ensure the efficient performance of functions by consular posts on behalf of their respective States."5 The United States had, to support its argument against enforceable rights on the part of the detained foreign national, stated in its brief to the Inter-American Court that this language shows that there was no intent in the treaty to give a detained foreign national any rights that she or he could enforce judicially.6

The Court concluded, however, that the term "individual" in the preamble refers only to consular officers.7 In the context in which the term "individual" appears in the preamble, the Court is correct in its interpretation. The Convention is one whose main purpose is to define the role and functions of consuls, and this preambular language is an obvious reference to consuls.

The Court makes one other point in arriving at its conclusion that Article 36 creates a right that may be invoked by the individual.8 It notes that in the Teheran Hostages Case, the United States referred to the right of foreign nationals to consular access as a right of the individual.9 It cites, in that regard, the memorial filed by the United States in the Teheran Hostages Case.10 In the Teheran Hostages Case, the United States invoked the compromissory protocol to the Vienna Convention on Consular Affairs as a basis for jurisdiction over Iran and, in arguing the relevance of the Vienna Convention to the hostage-taking situation, said that Article 36 provides a right to consular officers to fulfill their functions and to foreign nationals to avail themselves of consular services.11

6. Written Observations of the United States of America, Request for Advisory Opinion OC-16 (on file at Inter-American Court of Human Rights) at 27.
7. Advisory Opinion, supra note 4, at ¶ 74.
8. Id. at ¶¶ 80, 84.
9. Id. at ¶ 75.
The Court also addressed the question, raised specifically by Mexico, whether the right of the individual existed apart from whether the sending state protests the failure of the receiving state to fulfill its obligations. Elaborating on its conclusion that the right is personal to the individual detained foreign national, the Court concluded that such a protest is not required. The right, said the Court, is provided by Article 36 itself as a right adhering to the individual, and therefore it exists irrespective of whether the sending state takes any action in the particular case. This conclusion is in line with the general rule regarding rights of individuals specified in a treaty. It is the treaty that provides the right, hence it is unnecessary for the sending state to protest before the receiving state is under the obligation imposed by the treaty.

While this conclusion may appear so obvious as not to require discussion, the matter has been one of some controversy with regard to Article 36, because the receiving state is under simultaneous and related obligations to the sending state and to the detained national of the sending state. It had been suggested, therefore, that if the receiving state failed to inform the national of the right of consular access, but if the sending state did not protest the failure, then there was no breach by the receiving state. The Court, however, finds no need for action by the sending state before there is a breach by the receiving state.

II. ASCERTAINING A DETAINEE'S IDENTITY

The Court also addresses a matter raised by the United States as a justification for not implementing the right of consular access in certain cases. The United States indicated in its brief to the Inter-American Court that not infrequently the detaining authorities are unaware that the detained person is a foreign national. The Court notes that there may even be cases in which the foreign national seeks to hide the fact of being a foreign national, either out of fear of being deported, or out of concern that the sending state may act against him in some fashion.

The Court states that each case may turn on the particular facts, but it finds the receiving state under an obligation to ascertain the identity of persons it detains. In the Court's view, a receiving state may not refrain from taking action to ascertain the individual's nationality and then justify its failure to

12. Advisory Opinion, supra note 4, at ¶ 90.
13. Id. at ¶ 97.
15. Written Observations of the United States of America, supra note 6, at 13.
16. Advisory Opinion, supra note 4, at ¶ 95.
17. Id. at ¶ 96.
inform the individual of the right to consular access on the grounds of a lack of knowledge of an individual's nationality.\textsuperscript{18}

The Court notes that, given the difficulty in some cases of establishing immediately the person's nationality, a receiving state should, to ensure compliance with Article 36, routinely inform all detainees at the time of arrest of the rights that detainees enjoy if they happen to be foreigners.\textsuperscript{19}

III. TIMING OF THE COMMUNICATION

Mexico had also asked the question of how soon the detaining authorities must inform a foreign national of the right of consular access. Article 36 uses the phrase "without delay." Mexico raised the question with reference to capital cases only, but the Court said in its reply that it could not distinguish the meaning of "without delay" in a capital case from its meaning in a non-capital case.\textsuperscript{20}

Responding to the question, the Court first explained the purpose of informing the foreign national of the right of consular access, describing it as being to allow the detainee to prepare an effective defense.\textsuperscript{21} Working from that premise, the Court concluded that the information must be communicated at the time the person is first deprived of liberty, and in any event before the person provides her or his first statement to the authorities.\textsuperscript{22}

Although the Court does not go into detail regarding the background for Mexico's question about the time at which the information must be communicated, in a number of cases in the United States a foreigner has been detained and interrogated without being informed of the right of consular access. The detainee then seeks in court to challenge the admissibility of an incriminating statement made during the interrogation, on grounds of non-compliance with the obligation to inform of the right of consular access. At this point the question arises of whether the authorities were required to provide that information before taking a statement.

One United States district court has said that the information must be communicated immediately upon arrest.\textsuperscript{23} A panel of the Ninth Circuit, addressing the question of the admissibility of a foreign national's incriminating statement made after arrest but before information about the right of consular access was communicated, said that the statement is not admissible as evidence.

\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. \textsect 100-01.
\textsuperscript{21} Advisory Opinion, supra note 4, at \textsect 106.
\textsuperscript{22} Id.
at least so long as some prejudice appears to have resulted from the failure to provide this information.\textsuperscript{24}

The Inter-American Court's approach seems to be in line with the intent of the framers of the Vienna Convention. A detainee makes decisions immediately upon arrest that may significantly affect the case, such as whether to make a statement, and whether to retain counsel.

IV. THE QUESTION OF REMEDY

The cases concerning incriminating statements also raise the issue of the required remedy for an Article 36 violation. The question of remedy arises as well when a foreign national is convicted of a crime without being advised of the right of consular access. In a number of cases in United States courts, the convicted person has argued for a reversal of the conviction.

In its Advisory Opinion, the Inter-American Court of Human Rights does not deal in detail with remedies. It took an approach that had been suggested to it in oral argument by Hector Gros-Espiell, a former judge of the court, namely to state the general principles regarding remedies but not to address each procedural posture in which a consular access claim might be made. The Court did, however, make clear that a judicial remedy is required.

Due process, said the Court, requires that an accused that is in a situation of disadvantage be placed on a par with others. Thus, the Court said, an accused who does not know the language in which the proceedings are being conducted must be provided a translator, and an accused who is a foreign national must be informed of the right of consular access.\textsuperscript{25} The Court said that, for an accused person, "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."\textsuperscript{26} The Court said that the right to be informed of the right of consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights."\textsuperscript{27}

The Court addressed the question of remedies in the specific situation of the imposition of a death penalty, since that was how Mexico formulated the question to the Court. The Court said that the imposition of a death sentence without compliance with the obligation to inform of the right of consular access constituted arbitrary deprivation of life, in violation of the International

\textsuperscript{24} U.S. v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999). This opinion, however, was withdrawn when the Court of Appeals decided to hear the case \textit{en banc}, 188 F.2d 1177 (9th Cir. 1999).
\textsuperscript{25} \textit{Advisory Opinion}, supra note 4, at \textsection 120.
\textsuperscript{26} \textit{Id.} \textsection 121.
\textsuperscript{27} \textit{Id.} \textsection 123.
Covenant on Civil and Political Rights, and of the American Convention on Human Rights.\textsuperscript{28}

On this point Judge Jackman dissented, taking the view that while a failure to inform a foreign detainee of the right of consular access "may have an adverse, and even a determining, effect on the judicial process to which such a person may be subjected, with result that might amount to a violation of that person's right to a fair trial," this is not necessarily so in each instance of a failure to provide the required information.\textsuperscript{29} Judge Jackman wrote that:

It is difficult to see how a provision such as that of Article 36.1(b) of the Convention, which is essentially a right on the part of an alien accused in a criminal matter to be informed of a right to take advantage of the possible availability of consular assistance, can be elevated to the status of a fundamental guarantee, universally eligible as a \textit{conditio sine qua non} for meeting the internationally accepted standards of due process. This is not to gainsay its undoubted utility and importance in the relatively specialized context of the protection of the rights of aliens, nor to relieve states' parties to the Convention from their duty to comply with their treaty obligation.\textsuperscript{30}

Judge Jackman's reference to "the possible availability of consular assistance" is stressed to the Court by the United States in its submissions, that a consul has no obligation actually to provide services to a particular co-national, and thus that access to a consul may not in every instance result in consular assistance. The majority, however, was not troubled by this circumstance. The majority's view evidently is that the right of access is so fundamental that one need not inquire whether consular service, or any particular type of consular service, would have been forthcoming in the particular case.

Making that finding, to be sure, may be so difficult as to undermine protection of the right when it is violated. One can, moreover, infer from the inclusion of the right that the states parties considered it a right of fundamental significance to a detained foreign national. A consul's functions are so varied that a court cannot realistically inquire what a particular consul might have done. One may not be able to determine after the fact whether, and at what level, the particular foreign state would have provided service to the detainee. Such findings would of course involve considerable speculation. Thus, the majority is on more solid ground in concluding that non-compliance \textit{per se} with Article 36 requires reversal of a conviction.

\textsuperscript{28} Id. \textsection 137.

\textsuperscript{29} Advisory Opinion, JACKMAN, supra note 4 (dissenting).

\textsuperscript{30} Id.
THE IMPRINT OF KOSOVO ON THE LAW OF HUMANITARIAN INTERVENTION

Julie Mertus*

For nearly ten years, human rights advocates have tried to focus public attention on Kosovo. They issued report after report of gross and systemic human rights abuses in the troubled region. International policy makers' had overwhelming evidence that the pressure in Kosovo was mounting and that an even greater human rights disaster loomed near, yet, they treated the warnings as that of the boy who cried "wolf" too many times without a wolf being present. Without the "wolf" of all-out war, international leaders failed to treat Kosovo seriously.

Flash ahead to March 23, 1999: NATO war planes commence military air operations and missile strikes in Yugoslavia. Suddenly, Kosovo becomes a lead story in every media outlet. Kosovo finally comes into focus, but the optic is blurred. In a rush to "do the right thing" or just "do anything," many human rights advocates, like the diplomats they criticize, start to get sloppy. They accept a false slate of diametrically, opposed choices – intervention or no intervention; protection of Serbian sovereignty or denial of Serbian

* Assistant Professor of Law, Ohio Northern University, author of KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR (1999). See also Julie Mertus, The Imprint of Kosovo on the Law of Humanitarian Intervention, ___ WM. & MARY L. REV. ___ (2000) (forthcoming expanding version of article). The author acknowledges the support of the Ohio Northern University faculty summer research stipend and the research assistance of Katherine Guernsey and Barbara Wilson in the preparation of this article. In addition, the author would like to thank John Norton Moore, Paul Szasz and Jeff Walker for their insightful comments; the opinions expressed are those of the author alone.


sovereignty – without questioning what each choice actually means under international law.

Czech President Vaclav Havel, among many others, claims that the NATO alliance “acted out of respect for human rights” and that the war was probably the first one that had been waged “in the name of principle and values.” If only this were true, the legitimacy of actions in Kosovo would be much clearer. But NATO did not act only in the name of human rights. Instead, leaders of NATO countries offered a cafeteria of justifications for their actions. The Clinton Administration considered but refused to base its actions in Kosovo solely on humanitarian rights grounds. Instead, the Administration offered an array of justifications. Humanitarian concerns were rolled together with other factors: the need for regional stabilization, the stemming of refugee flows, and the need to protect NATO’s reputation.

Dr. Javier Solana, Secretary General of NATO, also bundled together humanitarian and non-humanitarian concerns. At one point, he said that NATO’s “objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo.” In another breath, he characterized NATO’s efforts as “support[ing] international efforts to secure Yugoslav agreement with an interim political settlement.” In other words – bombing to get a deal. This latter justification – use of force to coerce a political leader to sign an agreement – was clearly extra-legal. Under the 1969 Vienna Convention on the Law of Treaties, “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of principles of international law embodied in the Charter of the United Nations.” Legal justifications for the use of force in Kosovo should have been offered apart from the mere desire to force a political leader to sign a “take it or leave it” agreement.

5. The author spoke with members of Clinton’s staff who said that they considered and rejected the doctrine of humanitarian intervention as the sole grounds for intervention in Kosovo. Instead, they deliberately decided to come up with a laundry list of factors supporting intervention. Washington D.C. (June 1999).
8. Id.
10. Serbia did offer a counterproposal. While the proposal would have rejected the presence of
By failing to specify clearly the legal parameters of their actions, NATO allies opened themselves up to the criticism that they were not operating under any legal grounds at all. At the same time, by failing to provide clear legal justifications for intervention on human rights grounds, human rights advocates opened themselves up to criticism that they were outside the law.

Human rights advocates bought into the notion that the legal debate over humanitarian intervention consists of a tension between two competing principles: respect for the "territorial integrity" and "political independence" of states and the guarantees of "human rights" and "self-determination." This framing of the issue hides the real questions at hand. The principles of "territorial integrity" and "human rights" need not conflict. On the contrary, they complement one another. In sum, territorial integrity cannot be had without human rights and the realization that human rights can support the integrity of a territory.

Today, I will explain why "territorial sovereignty" should not be the focus when it comes to cases like Kosovo. Instead, more attention should be paid to the parameters set for the "use of force" by international law. In my brief remarks, I will outline the legal analysis of NATO actions under two sets of basic international law documents: the United Nations Charter and the Geneva Conventions. In doing so, I will examine two questions: 1) whether international law supports the decision to use force in Kosovo; and 2) whether international law supports the means chosen for the use of force in Kosovo. The short answer is yes and no.

At face value, the words of the United Nations Charter appear to favor anti-interventionists who are rightly concerned that intervention is susceptible to misuse. Anti-interventionists point to the first part of Article 2(4) of the

NATO troops in Kosovo, it would have permitted the presence of other (unarmed) internationals. For the text of the proposal, (visited Feb. 5, 2000) <http://www.jurist.law.pitt.edu/ramb.htm>.


12. See, e.g., Paul Szasz, "The Irresistible Force of Self-Determination meets the Impregnable Fortress of Territorial Integrity: A cautionary fairy tale about the clash in Kosovo and elsewhere," Address at the University of Georgia School of Law, Georgia Society of International and Comparative Law, Banquet (April 8, 1999) (Speech on file with author).

13. The main opponent to this view, Louis Henkin, counters: "[c]learly it was the original intent of the Charter to forbid the use of force even to promote human rights . . . Human rights are indeed violated in every country . . . But the use of force remains itself a most serious - the most serious - violation of human rights." Louis Henkin, Use of Force: Law and U.S. Policy, in RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 61 (1989).

14. Domingo E. Acevedo, panelist at the American Society of International Law Proceedings, Collective Self-Defense and the Use of Regional or Subregional Authority as Justification for the Use of Force Address at the American Society of International Law Proceedings (April 12, 1984) in 78 AM. SOC'Y INT'L L. PROC. 1984, at 68, 73 (on the possible misuse of intervention); But see Barry M. Benjamin, Note, Unilateral Humanitarian Intervention: Legalizing the Use of Force To Prevent Human Rights Atrocities,
Charter, which declares that states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . ."15 They also rely heavily on Article 2(7), which states that "[n]othing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . ." The general prohibition on the use of force in Article 2(4) is supported by language in subsequent General Assembly resolutions.16

Only three explicit Charter exceptions exist to the general prohibition on the use of force. None of these appear to apply to Kosovo. First, states may act in self-defense under Article 51 of the Charter. Even a broad reading of self-defense is not particularly instructive with respect to Kosovo. The concept of self-defense applies only to states; it does not protect individuals against their

16 FORDHAM INT'L L.J. 120, 147-48 (1992/1993) (stating that "[a]ny individual state action which is permitted, such as self-defense, may result in potential abuse, but this potential abuse applies to almost every legal rule. Obviously, not all states that invoke the doctrine of self-defense, a legal right, to justify their use of force, do so truthfully. The benefits of self-defense, however, legitimize the doctrine despite the potential abuse of its invocation. The same should be said for humanitarian intervention."). Id.; See also MYRES McDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 416 (1961); Oscar Schachter, The Right of States to Use Armed Force, 82 MICH. L. REV. 1620 (1984).

15. This provision is self-executing because it does not require a state to do anything; it simply prohibits the commission of certain acts.

16. The 1966 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Their Independent and Sovereignty provides that:

No State has the right to intervene, directly or indirectly, for whatever reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements are condemned . . .[T]he practice of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten international peace and security.

own states. The self-proclaimed Albanian Kosova has never been recognized as a state and the NATO countries undertaking the intervention were never attacked or threatened with attack. Thus, the self-defense exception would require an extremely expansive interpretation in order to apply to Kosovo.

A second exception to the general ban on the use of force is Security Council enforcement actions under Chapter VII of the Charter. Security Council enforcement actions are limited by the requirement that that the Security Council Act. The United Nations Security Council did adopt three main resolutions concerning Kosovo prior to the NATO bombing. First, in March 1998, the Council issued Resolution 1160, which imposed an arms embargo on both parties and called upon the FRY and the leadership of Kosovo Albanians to enter into meaningful dialogue for a peaceful settlement of internal strife. In September 1998, the Security Council adopted Resolution 1199, which found the existence of "a threat to the peace and security in the region" and enjoined the FRY to certain actions, including "ceasing all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression." The Security Council warned that "should the concrete measures demanded in this resolution not be taken, [it would] consider further action and additional measures to maintain or restore peace and stability in the region." In the third main Security Council Resolution, Resolution 1203, adopted on October 24, 1998, the Council endorsed the OSCE and NATO agreements with FRY, and demanded once more that FRY comply with the conditions set forth in Resolution 1199. It would be a strain to contend that under any Security Council resolution the use of force was authorized or approved. On the contrary, as it was clear that China and Russia would veto the use of force, the Security Council failed to include

---

17. SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 139 (1996).
18. See U.N. CHARTER, Article 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ... but this principle shall not prejudice the application of enforcement mechanisms under Chapter VII.").
21. Id. ¶ 4(a).
22. Id. ¶ 16.
24. Bruno Simma, NATO, the U.N. and the Use of Force: Legal Aspects, 10 EJIL 1 (1999) (visited Feb. 6, 2000) reprinted at <http://www.ejil.org/journal/Vol10/No1/ab1.html>. As Paul Szasz has pointed out, the fact that the Security Council failed to act here cannot be interpreted as a rejection of any particular course of action. "In a sense, by failing to act it rejected all alternative courses of action, including full support for Milosevic." Paul Szasz, letter to Julie Mertus, dated July 25, 1999 (on file with author).
in these resolutions the magic use of force language – authorization of the use of "all necessary means." 25

After the NATO bombing commenced, the Security Council had at least two opportunities to approve of the NATO intervention ex post. At the height of the NATO bombing, on May 14, 1999, it issued Resolution 1239. 26 This resolution neither supported nor condemned the NATO bombing. The resolution merely "not[ed] with interest the intention of the Secretary-General to send a humanitarian needs assessment mission to Kosovo and other parts of the Federal Republic of Yugoslavia" and "[r]eaffirm[ed] the territorial integrity and sovereignty of all states in the region." 27 At the conclusion of the NATO campaign, the Council issued Resolution 1244. 28 While this resolution "decid[ed] on the deployment in Kosovo, under United Nations auspices, of international civil and security presence, with appropriate equipment and personnel as required," 29 it was wholly prospective in nature. The resolution declined to comment on previous international intervention in Kosovo. These and other Council statements fall short of offering ex post approval of the NATO bombing and, thus, the Chapter VII exception to the use of force cannot be said to apply to Kosovo.

The third explicit exception to the general prohibition on the use of force, found in Chapter VIII of the Charter, permits actions undertaken by "regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security." 30 Regional arrangements may undertake any action in this regard that is "consistent with the Purposes of the United Nations." 31 Even if NATO is seen as a regional arrangement under Chapter VIII, regional actions also require Security Council authorization, none of which was granted with respect to Kosovo. 32


27. Id.


29. Id. § 5.

30. U.N. CHARTER, Article 52, § 1.

31. Id.

Thus, the explicit exceptions in the United Nations Charter do not apply to Kosovo. Is this the end of the story? No. Other provisions of the United Nations Charter implicitly permit the use of force under certain limited circumstances. This implicit grant of authority can be said to apply to Kosovo.

By its very terms the Charter does not prohibit all threats or uses of force. Article 2(4) prohibits force against the "territorial integrity or political independence of any state . . . " We need to look closely at these words. As interpreted in treaties and diplomatic history, "territorial integrity" refers not to the "territory of a state" but to the "integrity of the territory." An essential condition of this integrity is the maintenance of certain standards of administration on the territory, including the protection of fundamental human rights norms. Forfeiture of that duty of maintenance opens the door for intervention.

Humanitarian intervention in such a case falls below the threshold set in Article 2(4) since the intervenors do not seek to deprive the state of its integrity but, rather, to enhance it. Alternatively, intervention in such cases could be justified on a "waiver" theory. Under this theory, governments that commit violations of human rights forfeit any claims against intervention by others for the protections normally offered by sovereignty.

These arguments are in line with modern conceptions of sovereignty. The doctrine of human rights restricts the ability of states to do what it will with their own citizens. Also, sovereignty refers not only to state borders, but also to political sovereignty, that is, the ability of people within those borders to effect choices regarding how they should be governed and by whom. Those who threaten that ability (be they internal or external in origin) violate the


34. A somewhat more extreme view is that governments who abuse the human rights of their citizens are in fact criminal in nature. Just as criminals lose their right to participate in the self-determination of their state, so does a government. Consequently, if a government can be viewed as criminal, it then becomes permissible for other states to take on the role of "policemen" and act to end the violations of human rights. Michael J. Smith, Humanitarian Intervention: An Overview of the Ethical Issues, in Ethics and International Affairs, 271-295, 286 (Joel H. Rosenthal, ed. 2nd. ed. 1999), drawing heavily upon Michael Waltzer, Just and Unjust Wars (New York, 1977).


sovereignty of the people. Accordingly, when another state intervenes to protect human rights in such circumstances, it is not violating a principle of sovereignty, but instead bolstering it.

A more complete reading of the United Nations Charter further supports the use of humanitarian intervention in Kosovo-like situations. Here, I will suggest four points. First, the United Nations Charter advances central principles that could not be protected in Kosovo without intervention. The most central purpose of the organization is the maintenance of international peace and security. International peace and security means more than the absence of war, there is a human rights element that must be remembered. Human rights violations short of all-out war also constitute major breaches of peace and security. In situations such as Kosovo, peace and security cannot be said to exist so long as the state is free to commit gross and systemic human rights abuses against its own people.

Second, Article 1 of the United Nations Charter includes, as a central purpose, development of "respect for the principle of equal rights and self-determination of peoples..." Also included as a central purpose is "encouraging respect for human rights and for fundamental freedoms without distinction as to race, sex, language, or religion..." Self-determination does not mean the ability of all groups of people to make their own state, but rather the ability to participate in one's government and enjoy basic human rights.

40. U.N. Charter, Article 1, ¶ 1.
The prohibition on the use of force in Article 2(4) does not rule out the use of force designed to the central goals of the United Nations. Where, as in Kosovo, a government flouts respect for the principles of equal rights and self-determination and violates the most basic human rights and fundamental freedoms of individuals, the use of force may be the only way to see the goals of the United Nations upheld.

Third, humanitarian intervention may be required or permitted under the human rights provisions of the United Nations Charter. Specifically, Articles 55 and 56 of the United Nations Charter implore "all Members [to] pledge themselves to take joint action in cooperation with the Organization for the achievement of... universal respect for, and observance of, human rights and fundamental freedoms for all..." The international community has an interest in the protection of human rights of all people, regardless of state borders. Where, as in Kosovo, a state is incapable of protecting human rights or is itself the perpetrator, the use of force on human rights grounds, that is, humanitarian intervention, may be the only solution. The grounds for intervention are particularly strong where the case at hand concerns allegations


46. Paul Szasz argues that the provision “in cooperation with the organization” can only refer to actions that the United Nations undertakes itself, not actions that certain Members undertake where the United Nations is not taking any action. (Private correspondence with author, July 1999). The author is in agreement, however she would read both “taking action” and “in cooperation” broadly to include acts undertaken by states which are consistent with overall goals of the United Nations.

of genocide, crimes against humanity, and certain war crimes subject to universal jurisdiction and responsibility.

The final argument supporting NATO action in Kosovo rests on the United Nation's own failure to act. If the United Nations were functioning as it was intended, unilateral intervention would not be needed. Yet, because the United Nations system has failed to function properly as a collective body addressing human rights and other security concerns, states retain the right to act unilaterally. Article 43 of the Charter envisioned the creation of a system


[A]cts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Id. at Art. II. See also LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY (1981).

49. Crimes against humanity are defined as:

"[C]rimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated ... "


50. See the Geneva Convention, Articles 1, 3, 13-16 and 23-24 (applying to attacks on and treatment of both internationals and co-nationals) and Articles 146-147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.


whereby states would make available to the Security Council, "on its call and
in accordance with a special agreement or agreement, armed forces, assistance
and facilities . . . necessary for the purpose of maintaining international peace
and security." These agreements were to be "negotiated as soon as possible
by the Security Council." To this date, no such agreements have been
negotiated. Article 106 of the Charter envisioned the creation of "transitional
security arrangements" whereby signatories to the Charter could undertake joint
action to maintain peace and security as stop-gap measures until the signing of
Article 43 agreements. The NATO action could be seen as one such stop-gap
measure. All of the arguments, taken together, provide an international legal
basis for the decision to use force in Kosovo. The next problem is whether the
means of intervention in Kosovo was appropriate. Did the intervention itself violate international humanitarian norms?

The most fundamental principle of the law of war is that combatants must
be distinguished from noncombatants and military objectives from protected
property or protected places (i.e. civilian, cultural, and religious property and places). To this end, the 1977 Geneva Protocol I Additional to the Geneva
Conventions of 1949 (Protocol I) protects civilians from "indiscriminate
attacks." Attacks are considered indiscriminate when they are "not directed

there is a substantial body of opinion and of practice in support of the view that there are limits to that
discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in
such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the
interest of humanity is legally permissible." with H. Lautherpacht, The Grotian Tradition in International
Law, 23 BRIT. Y.B. INT’L L. 46 (1946) ("The doctrine of humanitarian intervention has never become a fully
acknowledged part of positive international law.").

54. U.N. CHARTER, Art. 43, ¶ 3.
55. The argument for intervention by states due to the failures of the United Nations is not without
precedent. Enforcement actions by the Security Council have almost always been impossible owing to
permanent member veto power. To circumvent this problem during the Korean crisis in 1950, the General
Assembly exercised its own powers reserved under Articles 10-11 and 14 to address "general problems in the
maintenance of peace and security" and to "recommend measures for peaceful adjustment of any situation.”
Specifically, the General Assembly adopted the Charter by the Uniting for Peace Resolution, which provides
that:

[...] if the Security Council, because of lack of unanimity of the permanent members,
fails to exercise its primary responsibility for maintenance of international peace and
security in any case where there appears to be a threat to the peace, breach of the
peace, or act of aggression, the General Assembly shall consider the matter
immediately with a view to making appropriate recommendations to Members for
collective measures, including in the case of breach of the peace of act of aggression
the use of armed force when necessary to maintain or restore international peace and
security.

57. Protocol I, Article 51(4).
against a specific military objective,\textsuperscript{58} "employ a method and means of combat the effects of which cannot be directed at a specific military objective,"\textsuperscript{59} or "employ a method or means of combat the effects of which cannot be limited as required" by the protocol (e.g., attacks that may cause the "release of dangerous forces"\textsuperscript{60} or collateral damage "excessive in relation to the concrete and direct military advantage anticipated.").\textsuperscript{61}

Whether NATO can justify its actions in accordance with these requirements remains to be seen. Grave concerns are raised by the number of accidental attacks on non-military targets due to the planes flying at high altitudes where verification of targets was impossible.\textsuperscript{62} Clearly, the bombing was designed in order to avoid any allied casualties. To do so entailed a greater risk that civilians would be hit. It is not within the spirit of the Geneva Convention IV and Protocol I to increase disproportionately the risk to civilians to avoid casualties of your own military.\textsuperscript{63} Collateral damage to civilians is permitted. But should all the damage to civilians be considered "collateral"?

Particularly troubling is the choice of targets in the NATO campaign and the adequacy of its efforts to limit civilian casualties.\textsuperscript{64} United States Secretary of Defense, William S. Cohen, stated at the outset of the NATO campaign, "We are attacking the military infrastructure that President Milosevic and his forces are using to repress and kill people. NATO forces are not attacking the people of Yugoslavia."\textsuperscript{65} Nonetheless, in the third week of the bombing, NATO forces began to target electrical facilities in Serbia power, depriving much the civilian population of electricity.\textsuperscript{66} NATO also targeted the factories and other property belonging to supporters of Yugoslav President Slobodan Milosevic, Yugoslav television and radio stations, bridges, and civilian cars.\textsuperscript{67} All of these targets

\begin{itemize}
  \item \textsuperscript{58} Id. ¶ (a).
  \item \textsuperscript{59} Id. ¶ (b).
  \item \textsuperscript{60} Protocol I, Article 56.
  \item \textsuperscript{61} Protocol I, Article 51(5)(b).
  \item \textsuperscript{62} For example, on April 12, NATO bombed a civilian passenger train that was crossing a bridge and on April 14, NATO attacked civilian refugee vehicles in Kosovo. See Michael Dobbs, Karl Vick, Scores of Refugees Killed on Road; NATO Says Jets Aimed at Military, WASHINGTON POST FOREIGN SERVICE, April 15, 1999, at A01.
  \item \textsuperscript{63} One could not kill 1,000 Serbian or Albanian civilians in order to save one allied pilot. This would violate the principle of proportionality. The author is in debt to Paul Szasz for this point.
  \item \textsuperscript{66} Philip Bennett and Steve Coll, NATO Warplanes Jolt Yugoslav Power Grid, WASHINGTON POST, May 25, 1999 at A1.
  \item \textsuperscript{67} Human Rights Watch identified these incidents in a letter stating its concerns under international law to United Nations Secretary General Javier Solana. The text of the letter is available on the Web at (visited Feb. 6, 2000) <http://www.hrw.org/hrw/campaigns/kosovo98/solana.shtml>.
\end{itemize}
may be considered a "dual-use" object, that is, the military as well as civilians may use them. Under Protocol I, these may be legitimately targeted only if, by their nature, location, purpose, and use, they make an "effective contribution to military action" and their capture, neutralization, or destruction, "in the circumstances ruling at the time, offers a definitive military advantage."\(^{68}\) Whether all of the targets fulfill these criteria is open to question.\(^ {69}\)

It is unclear whether the targets chosen all made an effective contribution to Serbia's military action. The media targets, to take one difficult example, were instrumental in spreading propaganda throughout Serbia and, by making Serbs feel like victims, the media made it easier for them to justify being perpetrators.\(^ {70}\) However, unlike the case of Rwanda, where the media disseminated directions for committing the genocide, the media in Serbia did not disseminate military instructions. The Serb media was not as clearly related to Serbia's military actions.\(^ {71}\)

Some targets appear to have been chosen because of their impact on civilians. Protocol I prohibit targets intended to "spread terror among the civilian population."\(^ {72}\) If the main purpose of targeting the media, one of the most visible pillars of Serb society, was to spread terror among civilians, the targeting of the media was against international law. Similarly, if the purpose of targeting the electrical grid was to demoralize and terrorize the civilian population and not to achieve a concrete military objective, that target was impermissible. Statements made by allied forces during the air campaign seem to support the notion that these and other targets were chosen and deemed effective because of their psychological impact on civilians.

A word on the electrical grid: NATO's attacks on Serbia's electrical grid was likely to have had a severe impact on civilians in exchange for limited military utility. NATO knew this. Modern military such as Yugoslavia's have back-up generators.\(^ {73}\) Thus, the attacks on civilian electrical transformers was likely to have little impact on the country's ability to wage war. The targeting of the electrical transformers was also suspect under Article 54 of Protocol I,

\(^{68}\) Protocol I, Article 52(2).

\(^ {69}\) See Raju G.C. Thomas, NATO and International Law, (and in particular part (6)) (visited Feb. 6, 2000) <http://www.jurist.law.pitt.edu/thomas.htm>.

\(^ {70}\) This thesis is developed in JULIE MERTUS, KOSOVO; How MYTHS AND TRUTHS STARTED A WAR (1999).


\(^ {72}\) See Protocol I, Article 51(2).

which prohibits the destruction of objects that are indispensable to the survival of the civilian population. Electrical transformers are an indispensable object for modern societies such as Serbia.

Aside from pointing to specific bombing targets, the overall course of the NATO bombing and specific actions undertaken should be examined under the principle of proportionality.\textsuperscript{74} The concept of proportionality requires an ends-oriented assessment. "The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained."\textsuperscript{75} Should military planners be able to realize their goals without loss of civilian life, they should change their course of action accordingly. Throughout the bombing campaign, the principle of proportionality required NATO to undertake action designed to elicit some permissible objective. To the extent that the bombing campaign was viewed as necessary for ending human rights abuses and returning deported civilians, the action was within the scope of international law. Unavoidable and unplanned damage to civilian targets incurred while attacking legitimate military targets could be termed permissible "collateral damage." Yet, the action became questionable when it became apparent that the bombing was not effectively advancing military objectives and the impact of the bombing was one felt mainly by Serb civilians. NATO refused even to threaten the use of ground troops, which potentially meant an indefinite continuation of the bombing. When it became clear that the chosen military means were poorly related to the desired ends, the means should have been changed, that is, either ground troops should have been introduced along with the bombing or the bombing should have been halted and other means employed.

In summary, a close reading of the United Nations Charter supports the decision to intervene in cases like Kosovo. While the explicit Charter provisions permitting force do not appear to be applicable to the intervention in Kosovo, the Charter may be read as implicitly permitting such actions. The strongest justifications for humanitarian intervention in Kosovo are linked to affirmative human rights concerns, subject to substantive and procedural limitations. While the intervention in Kosovo was initially within the limits of international law, it also appears that the bombing campaign eventually strayed outside those limits.

\textsuperscript{74} See generally J. Gardam, Proportionality and Force in International Law, 87 AM. J. INT’L L. 391 (1993).

\textsuperscript{75} OPERATIONAL LAW HANDBOOK, supra note 58, at 5-4. (emphasis in original). See also McDougal & Feliciano, Conditions and the Expectation of Necessity, in LAW AND MINIMUM WORLD PUBLIC ORDER 240 (1961). See also Article 57 of Protocol I Additional to the 1949 Geneva Conventions (Protocol I).
THE IMPRINT OF KOSOVO ON INTERNATIONAL LAW

Diane F. Orentlicher*

In several respects, international responses to recent developments in Kosovo have had a significant—in some respects, profound—impact on international law. While that impact has been especially notable with respect to the law governing humanitarian intervention, responses to the Kosovo crisis have important implications for other areas of international law as well.

But, if recent developments vis-à-vis Kosovo have had a significant impact on international law, their implications remain unclear and can be assessed only in highly tentative terms. This is notably the case with respect to the law governing self-determination. Not until the final status of Kosovo is resolved will it be possible to even characterize the precedent established. Even so, responses to Kosovars' claim for independence bring into sharp relief a potentially profound, if subtle, evolution in the law governing separatist claims.

Contemporary challenges to bedrock principles of international law are reflected in the Security Council resolution establishing the terms of Kosovo’s post-war governance, SC Resolution 1244 (1999).1 That resolution includes a talismanic nod to time-honored principles of territorial sovereignty—and proceeds to eviscerate them. While reaffirming “the commitment of all [UN] Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia . . .,” the resolution provides for an “interim [United Nations] administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia,” pending a final political settlement of Kosovo’s status.2

At the risk of oversimplification, developments in the immediate aftermath of the military intervention by the North Atlantic Treaty Organization (“NATO”), as reflected in SC Resolution 1244, seem to signal an emerging norm: A state that severely, systematically, and persistently represses the rights of a segment of its citizens may thereby forfeit the right to exercise full sovereign authority over that population. But (and here is a crucial qualification), it does not necessarily follow that the oppressed population is entitled to secede—at least not immediately. Even so, responses to developments in Kosovo have moved external actors further down the road toward recognizing

---

* Professor of Law, Washington College of Law, American University.
2. Id.
that a presumptive legitimacy may attach to certain types of secessionist claims, particularly when the population in question has endured persistent, systematic, and severe repression at the hands of its de jure sovereign.

Before I elaborate, it may be helpful briefly to recall, as a baseline, widely accepted interpretations of the right of self-determination under international law. In brief, when the "principle of self-determination," formerly associated with the redrawing of Europe's borders following World War I, metamorphosed into a "right," the accepted meaning of "self-determination" also was transformed. It became a right of colonized territories to determine their political status. The "peoples" who enjoyed a right to secede were defined in territorial terms, and the territories whose populations could exercise the right of self-determination were colonies. Beyond this generally accepted interpretation, certain developments originating in the inter war period and continuing into the period of decolonization suggested that groups that were systematically repressed on a continuing basis: at least groups that were excluded from full political participation based upon their race and creed: might be entitled to secede. For reasons that need no elaboration, the latter possibility may have obvious relevance for Kosovars.

In recent years, scholarly views have begun to coalesce around another additional meaning for the right of self-determination, emphasizing its internal dimension. In multi-ethnic democracies, the right has often and increasingly been invoked to support greater autonomy for defined minorities within established states.

In an article published last year, I argued that these established interpretations may need to make room for a somewhat broader approach to the right of self-determination, one that reflects contemporary developments in international law first heralded seven years ago in an important article by Thomas Franck. "Democracy," he wrote, "is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes." Although Professor Franck's article did not examine


6. Franck, supra note 3, at 46.
the significance of this nascent law for separatist movements, I believe that principles underlying the "democratic entitlement" have substantial implications for the legitimacy of their claims.

To put the case succinctly: Since the core idea of democracy is government by consent of the governed, it cannot be irrelevant to the legitimacy of a government that a defined portion of its population persistently rejects its authority to govern them. This much seemed plain to John Stuart Mill. Affirming that "the question of government ought to be decided by the governed," Mill continued: "One hardly knows what any division of the human race should be free to do, if not to determine with which of the various collective bodies of human beings they choose to associate themselves." 7

This does not mean that the boundaries of states are perennially open to challenge. The continuing consent of the state's citizens can generally be assumed; indeed, this assumption is essential to the daily practice of democracy. But if consent is manifestly and irrevocably absent on the part of a significant portion of a state's citizens, the legitimacy of that state's sovereignty over the rebel population is surely placed in doubt.

This point becomes apparent when considered in light of a cardinal rule of international law: Alien states may not lawfully impose their rule upon non-consenting peoples. Put differently, international law no longer abides colonization or forcible annexation. If these forms of non-consensual rule are incompatible with accepted principles of self-determination, surely those same principles are at least challenged by a state's continued assertion of sovereignty over a defined population that has unambiguously and irrevocably rejected its sovereignty.

This basic point was acknowledged by the Supreme Court of Canada in an important decision rendered last year. Asked to advise on whether the province of Quebec could unilaterally secede from Canada, the Court concluded that, because Canada's political institutions "are premised on the democratic principle," an expression of the democratic will of Quebecois to secede would confer legitimacy on their quest: although not a right to secede unilaterally. 8 Instead, Canada's other provinces would be obliged to enter into good faith negotiations over Quebec's status. What is noteworthy about this decision is the Court's concession that a region's democratically expressed will to secede obliges its national partners to take the claim seriously.

Turning to Kosovo, at the proverbial first blush it is difficult to discern a similar approach in the responses of states that attempted to broker a solution to the Kosovo crisis, including the United States. Throughout its failed efforts to secure a negotiated resolution of the crisis in the months preceding NATO’s intervention, the United States made clear its unwillingness to endorse the claims of Kosovar separatists.

In even stronger terms, the Administration of then-United States President George Bush opposed in the early 1990s the secessionist claims of Slovenia and Croatia, the first of the former Yugoslavia’s republics to proclaim independence. Some eight months after Slovenia made its first formal move toward secession, the United States as well as European states voiced strong support for Yugoslav unity. During a visit to Belgrade in mid-1991, then Secretary of State James Baker warned that the breakup of Yugoslavia “could have some very tragic consequences.” Nor, he added, would the United States recognize the independence of Slovenia and Croatia “under any circumstances.”

9.

Against this background, little-noted remarks of President Clinton during a visit to the capital of Slovenia in the immediate aftermath of NATO’s victory take on special significance. Remarkably in light of United States policy at the time Slovenia sought to secede from the former Yugoslavia, President Clinton hailed the success of Slovenia’s brief war of independence. “Eight years ago,” he said, “Mr. Milošević triggered a military assault on your nation. But you resisted. You secured your freedom, and you proclaimed that it would never be the same again. Now, all the people, all the people of every part of Europe must be able to do the same thing.”

10.

Although ostensibly addressing Slovenia rather than Kosovo, President Clinton’s remarks in Ljubljana, coming a scant week and a half after NATO’s victory in its war against Yugoslavia over Serbia’s conduct in Kosovo, has to be seen as a statement of the principles thought to have been defended by NATO’s intervention. But what principles, precisely, did President Clinton have in mind?

Here, again, we are thrown back upon the ambiguities of developments whose final outcome is not yet known. Yet it is difficult to avoid the conclusion that President Clinton’s remarks expressed an implied claim—that Slovenia’s secession from a non-democratic state was supported by internationally-recognized principles of democracy and personal liberty.


11. I do not believe that this is the sole implication of President Clinton’s remarks to the Slovenians assembled to greet him in Ljubljana. Other aspects of his brief speech seemed to emphasize the nature of the democracy that Slovenia had established (as distinguished from the independence it had secured). For
Recalling “how many armies have marched through this square, how many flags have been raised over your city,” President Clinton continued, “Now, at last, the flag flying in this capital stands for independence and democracy and the better life you are building. Congratulations, and God bless you.” By implicitly linking Slovenia’s quest for independence to democratic principles, President Clinton’s remarks in Ljubljana seem to partake of the same spirit as the position sketched out by Canada’s Supreme Court one year ago.

It remains to be noted that these signposts of an emerging approach toward separatist claims—an approach that recognizes the relevance of democratic principles in legitimizing at least some of those claims—raise a raft of vexing questions. If democratic principles are relevant to the claims of breakaway republics, what precisely are their implications? Would President Clinton have hailed Slovenia’s successful bid for independence in terms of democratic principles if the rump Yugoslavia had not been associated with campaigns of “ethnic cleansing” and military force?

Returning to the jurisprudence of the Canadian Supreme Court does the legitimacy of a separatist movement turn upon whether its claim is expressed through democratic processes? To the extent that the Court’s views rested upon what it saw as a duty on the part of all relevant actors to negotiate with each other in good faith, what would that Court counsel if one party refused to negotiate in good faith—or at all?

CONCLUSION

The complexity of these issues and the profound dilemmas they present once again highlight the importance of early intervention in addressing crises that might lead toward separation, perhaps violently, if not addressed in a timely and effective fashion. The implications of the emerging norms I have sketched in this essay are sobering indeed. Surely, we must be deeply unsettled by the specter that aspiring statelets such as Kosovo, and perhaps Montenegro next, may effectively be compelled to withdraw from their former sovereign in order to secure fundamental rights.

---

example, immediately following the remarks quoted infra at text accompanying note 2, President Clinton said: “All over the world, people seek the same kind of freedom and justice and peace that you have brought here—from Northern Ireland to the Middle East, to southern Africa, and in central and southeastern Europe.” In a similar vein, after congratulating Slovenians for “resist[ing]... Mr. Milošević [‘s]... military assault on [their] nation,” President Clinton continued: “Democracy, tolerance, and human rights must prevail everywhere.” The focus on the nature of Slovenia’s democracy reflected in these remarks does not, however, detract from the inference that the statements quoted in the text express support—if only retrospectively—for Slovenia’s quest for independence from the former Yugoslavia.

I have been observing events in Kosovo as someone interested not only in international tribunals, but also in German history, and especially in the way in which Germany has dealt with the legacies of World War II and the Holocaust. A significant outcome of the Kosovo war has been the spotlight suddenly trained on the International Criminal Tribunal for the former Yugoslavia (ICTY), which became virtually a household word following the indictment of Slobodan Milosevic. This event underscored the increasing tendency to look to an international court to provide justice in the aftermath of brutal conflicts. Looked at in light of the German experience, however the only example we have to date of the long-term effects of post-conflict international prosecution on a society the issue becomes more complicated. The question that particularly interests me involves the extent to which an international court can exercise an influence within the country whose case it is considering be it Germany, former Yugoslavia, Rwanda or any other. I would like to highlight what I believe are some of the limitations on the domestic impact of an international court, using Germany’s experience as a basis, and why our expectations should therefore perhaps be lowered or made more realistic with regard to such tribunals. I will also suggest ways in which the modern international criminal tribunals are behaving differently from the Nuremberg tribunal, as well as ways in which they should behave in order to increase their impact. Finally, I will briefly mention what I think international criminal courts can accomplish why they remain important regardless of their domestic effect.

Perhaps because the criminal tribunals for the former Yugoslavia and Rwanda were in part responses to the failure of the world community to prevent violence in those countries, and also perhaps because human rights activists had been working so long and hard to make them a reality, the tribunals have become something of a repository for the hopes disappointed by the international political system. In speaking and writing about the tribunals, commentators have suggested they can prevent collective resentments by individualizing guilt. By revealing irrefutable facts and truths, they can prevent the development of new myths about conflicts and thus, contribute to breaking the cycle of...
violence. Additionally, they can contribute to reconciliation by ensuring justice to victims, and ultimately can help establish peace. This view of their functions does not appear to have abated with the Kosovo war. If anything, even more hopes attach to the tribunal now that its credibility seems strengthened and it commands greater respect and more resources. A further factor in this development may be the chastening realization that even when the international community does at last intervene, it cannot resolve all problems which again turns attention toward the international tribunal as a source of hope.

But I believe we ask too much of the international tribunals if we expect them to have an impact of this magnitude within the country for which they are created. While it is true that today's courts are different from the Nuremberg tribunal, some of the fundamental issues remain the same, as do the limitations on the court. This is not to suggest that tribunals serve no purpose, but that their purpose is not domestic. They do not exist to cure internal problems of transition or to rehabilitate a country, though every case is different and they may, in fortunate cases, play some such role. Attempting to ascribe broad curative powers to international courts misunderstands their function and carries with it the danger that, should they fail to accomplish the lofty purposes imagined for them, they may become targets of frustration generated by renewed disappointment. Additionally, requiring too much of these judicial organs risks abdicating political responsibility.

This is not the place for a lengthy discussion of the Nuremberg tribunals, about which so much has been written. However, a brief listing of some of its flaws is merited, in order to better understand some of the reasons it was not accepted in Germany, and to allow discussion of what the present-day international tribunals have done and can do to avoid similar pitfalls. Nuremberg was looked upon as victors' justice by many because of the composition of the bench, made up of Allied judges alone. It was considered hypocritical due to the presence of the Soviet Union among the judges, despite its own documented war crimes and crimes against humanity. Crimes like the Katyn massacre, known to have been perpetrated by the Soviets, were purposely ignored by the tribunal. Germans, in particular, also objected to what they saw as the ex poste facto nature of the laws the tribunal applied.

In part because of these problems, the Tribunal’s effect within Germany was limited. It did not, as has sometimes been asserted in its favor, force most Germans to confront the crimes committed in their name, if not by them. While

1. The attempted prosecution of Augusto Pinochet of Chile by a Spanish court has had a significant effect within Chile, triggering national soul-searching and prosecutions within the country. Although it does not involve an international tribunal, this is an example of the positive effect international prosecutions might also have, given the right context.

the Tribunal did serve to establish irrefutable truths as a legacy for later generations, these truths were frequently rejected by average Germans after the war; or if accepted, they were not considered to possess personal significance. There was little internalization of remorse. The first trial at Nuremberg, the International Military Tribunal, did bring a measure of justice, at least in regard to a small number of top perpetrators. However, the political choice of the defendants somewhat tarnished this record, as did some of the sentencing decisions. Furthermore, most of the defendants convicted at the twelve American follow-up trials were released by the mid-1950s, largely for political reasons, as the United States courted West Germany as a Cold War ally. Germany’s leaders in fact insisted on their release as a condition for alliance.\(^3\) Scholars have shown that German courts expressly refused to acknowledge the validity of any of the Nuremberg convictions.\(^4\)

While new concepts of law began to enter German jurisprudence following the war, in part as a result of Nuremberg, it would take time for them to make significant inroads. In the meantime, though trials were held in Germany in the immediate post-war period, they did not often result in true justice. The judicial system was staffed mainly by holdovers from the old regime, essentially judging themselves; and their unwillingness to condemn their own backgrounds, along with their concept of positive law, led to much judicial reinterpretation and manipulation of both laws and facts to prevent criminals from suffering severe penalties.\(^5\) The attitude was summed up in the words of one post-war German politician who, defending his actions as a judge under the Nazis, argued, “What was legal then cannot be illegal now.”

Thus the impact of Nuremberg on the post-war German legal system, though not non-existent, was limited and this despite Germany’s unique situation, subject to occupation by the Allies and their attempts to reeducate in the early post-war years. It was not until much later, in the course of Germany’s development over the years, that German law would embrace the Nuremberg approach to law and justice as, for example, in its methods of dealing legally with members of the East German leadership and border guards responsible for the killings at the East German border.\(^6\)

---

5. For detailed discussions of a number of such cases, see, e.g., JÖRG FRIEDRICH, *Die kalte Amnestie: NS-Täter in der Bundesrepublik* (1994).
6. In a number of cases, border guards and higher officials of the East German government have been convicted of human rights violations despite the fact that their actions did not technically violate East German law at the time; the courts have used arguments that incorporate international humanitarian law.
In addition to these legal obstacles, Germany in the 1950s and 1960s also faced social obstacles to a full reckoning with the Nazi past. Postwar Allied attempts at denazification essentially came to an end with the onset of the Cold War, and many former Nazis retained their positions in government and at all levels of society. There was thus little incentive for them to confront their complicity with the Nazi regime; the legal and medical professions, for example, took years to begin this process. Though Germany has paid millions of dollars in reparations to many victims, there was (and in fact continues to be) a great deal of resistance to these payments. They were originally instituted at the insistence of the Western allies, whose ranks Germany hoped to join. 

The Tribunal did not reconcile Germans with their victims or their victims with them, though Germany differed from some of the more modern conflicts for which reconciliation is often discussed: most of the victims were either dead or had left the country. (In this way, it perhaps most closely resembled “ethnically cleansed” regions such as parts of the former Yugoslavia). The few Jews who remained were physically protected, but because of the general failure of postwar German society to acknowledge guilt or responsibility, there could be little in the way of psychological or social reconciliation. Other victims of Nazism (Gypsies, homosexuals, Communists) were marginalized or not acknowledged at all.

Germany today is admittedly a very different place than it was in the first Cold War decades. It has become one of the most introspective of nations, undergoing an almost obsessive process of self-examination that is exemplary and probably unique. But this change happened for reasons largely independent of the international prosecutions. Domestic legal proceedings against concentration camp guards in the late 1950s had some effect; but a society-wide process of questioning began in earnest only with the student upheavals of the late 1960s, during which young people confronted their parents’ silence about the past. This process was largely a function of changes in social and political institutions, education, and most importantly, the change in generations that permitted greater distance, and thus a greater ability to deal honestly with the past.

It must also be remembered that we are speaking here only of the perpetrators (and their descendants), and the attempts they have made to come to terms with their own past. Over fifty years after the events, the feelings of the victims and their descendents, within and outside of Germany, remain complicated, and their relationship with the perpetrator society is far from resolved.

---

7. [sources on reparations].
8. For a skeptical view of the usefulness of international tribunals for victims, see Julie Mertus, *Only a War Crimes Tribunal: Triumph of the International Community, Pain of the Survivors*, in *War*
This history leads me to believe that we must be more realistic about the probable effects of today's tribunals. These tribunals are simply not created, at least in the short run, for the sake of the societies whose crimes they are dealing with. They may well provide victims with a degree of vindication and empowerment; but they are unlikely to have much effect on the immediate situation the relationship between victims and victimizers, or the way the victimizers deal with their complicity. Convicting those responsible for atrocities in Kosovo will not make Yugoslans more willing to face unpleasant truths.

Of course, there are differences between the Nuremberg tribunal and the current tribunals, and the context, too, is different. The fact that the current tribunals are truly international, and not composed solely of representatives of victorious or stronger powers, gives them greater hope of legitimacy in the eyes of those at whom they are directed. Also, at least in the Yugoslavia case, the fact that indictees have come from all sides in the conflict increases the tribunal's chances of acceptance. The tribunal's willingness to at least look at NATO's activities during the Kosovo war, even though this is unlikely to lead to any indictments, also tends to make it more credible. The Rwanda tribunal, which has indicted only Hutu thus far, lags in this respect.

Less resistance exists today to the law being implemented by the tribunals. It was relatively easy for Germans, with their positivist legal tradition, to deny the legitimacy of the apparently retroactive laws under which they were being prosecuted. But developments over the past fifty years, including the large number of concrete international instruments, have made it difficult to deny the reality of international humanitarian law; most countries are party to one or another treaty or convention.

Nuremberg might have had a greater immediate impact in Germany at least to the extent of keeping former Nazis out of public office had the political situation of the day been different. However, exigencies of the Cold War required that Germany be wooed as an ally against the Soviet Union, preventing a consistent policy against members of the old regime and those complicit in its policies. But the problem of politics persists today. The political community did avoid repeating the post-Nuremberg situation by excluding indicted war criminals at Dayton, but the lack of will to arrest current indictees is a new political hurdle. Also, the indictment of Milosevic could not help leaving an impression of political manipulation, however unjustified, coming as it did at the height of the NATO campaign against him. The failure to indict Croatian leader, Franjo Tudjman, for his role in the wars in the former Yugoslavia may have left a similar impression. Lack of consistency that can be interpreted as political makes it even less likely that a tribunal will have an impact in the

country upon which its investigations are focused. Here tribunals could utilize public relations and educational tools to increase the chance of influencing, or at least being heard by, the populations of these countries.

There is an additional point, though, that is more difficult to remedy and which should be mentioned in connection with both Nuremberg and the current tribunals. This is the issue of individualizing guilt, which is the main point of a criminal tribunal concerned with accountability and an end to impunity. A tribunal fixes guilt on individuals, particularly those at the top; but crimes such as those committed in Germany, Rwanda, and to some extent the former Yugoslavia are often mass crimes, abetted and/or condoned by a majority in the country. Pinning guilt on individual leaders may have two effects. It may allow transference of guilt by those who were complicit: it wasn’t me, they can say, it was those at the top, and now that they’ve been dealt with, I have no need to worry about the past or consider its connection to me. Or, it can lead to denial and to identification with those on trial, a sense of wrongful persecution. Germans responded to Nuremberg and its successor trials in both these ways. Obviously, neither response is constructive to the kind of domestic processes truth-finding, ensuring justice, or beginning reconciliation that are generally considered desirable after a period of conflict. Mass crimes thus cannot be dealt with exclusively through individualized legal proceedings. By concentrating on individual top perpetrators, such proceedings can even be counterproductive to a goal within the country of confronting and dealing with the past, by giving the majority a way to keep from facing its own complicity. Here, once again, tribunals cannot be looked upon as a major part of the domestic healing process.

None of this makes international tribunals any less important. Tribunals sanction the behavior of leaders, establish their accountability for their actions, and make it clear that internationally recognized crimes cannot be committed with impunity. Assuming that enforcement can be ensured, it is to be hoped they will act as a deterrent against future crimes. And they serve to develop a system of internationally agreed upon values and legal norms, with all the social, psychological, and political impact these can have. All of these are highly desirable goals that need not be developed at length here. My point is that we should not imagine a court to be more than a court. It may, but will not necessarily, contribute to healing damaged societies. But it cannot provide national psychotherapy and it may not even be widely accepted. A country’s “rehabilitation,” in the sense of internalized comprehension of and remorse for wrongs committed, is less likely to come about as a result of the external pressure of court decisions than to develop gradually from within. As in Germany, I believe, outcomes within a country that will permit it to move forward true confrontation with the past, admission of complicity, and some form of reconciliation, whatever that may mean or require demand quite
different approaches from those of a tribunal. In the wake of Kosovo, as the international tribunal takes a greater hand in post-conflict developments, we should simply remain aware that at least as history has so far shown a tribunal can only do so much, and should only be expected to do so much.
THE RIGHTS OF THE ACCUSED IN A GLOBAL ENFORCEMENT ARENA

Diane Marie Amann*

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

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

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

---


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

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

* Acting Professor of Law, University of California, Davis, School of Law; B.S., 1979, University of Illinois; M.A., 1981, University of California, Los Angeles; J.D., 1986, Northwestern University. I wish to thank Angel K. Leung for research assistance.

---
of all possible worlds, even as he suffers the worst calamities.\textsuperscript{5} He is the quintessential optimist.

I am afraid that I am more skeptical.

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

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

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

\textsuperscript{5} See \textsc{Voltaire}, \textit{Candide} (Pierre Malandain ed., 1989) (orig. pub. 1759).


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

\textsuperscript{10} See, e.g., Edward M. Wise, \textit{Foreword: The International Association of Penal Law and the Problem of Organized Crime}, 44 WAYNE L. REV. 1281, 1300-01 (1998) (stating that the association had made organized crime the theme of its September 1999 international congress “mainly in order to sound alarm bells about the extent to which the world-wide legislative reaction to organized crime, in large part inspired by developments in the United States, stands in contradiction to the emphasis on proportionality and restraint, on respect for the rule of law and the rights of the accused, which lies at the heart of ‘classical’ criminal law”); Zagaris, \textit{supra} note 2, at 1464 (“The area of most concern has been in the application of
International criminal cooperation – what United States courts recently have called "cooperative internationalism"11 – has led to the greater use of electronic surveillance and undercover operations, techniques familiar in the United States, but once anathema to the rest of the world.12 The insistence on uniform laws has led to the abolition of bank secrecy, not long ago considered an aspect of personal privacy.13 Fears of further governmental encroachment into individual privacy are at the heart of the current encryption debate.14

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

---

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

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


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


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

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

International criminal tribunals and regional judiciaries are exceptions to this general state of anarchy. These novel institutions\textsuperscript{19} adjudicate crimes that cross borders, either in actual fact or because the crimes outrage the international community. They do so with some consistency because they must adhere to founding statutes or conventions.\textsuperscript{20} Nevertheless, there is room for concern. The laws governing the regional bodies were designed to regulate domestic criminal justice systems and are not always easily converted to the transnational context.\textsuperscript{21} In the \textit{ad hoc} international criminal tribunals, procedural and evidentiary rules have undergone more than a dozen revisions.\textsuperscript{22} States have yet

\begin{itemize}
\item\textsuperscript{17} \textit{Wang I}, 837 F. Supp. at 1551-56 (discussing “clear indications” of coercion of Wang's testimony, including: discrepancies in Wang's statements to Chinese police; background knowledge of the role coerced confessions played in the Chinese criminal justice system; the “staged” nature of Wang's discussions with United States investigators; and Wang's “peculiar posture,” suggesting injuries to his hidden left side, in a videotape of his Chinese confession).
\item\textsuperscript{18} See Van den Wyngaert, \textit{supra} note 10, at 489 (“While it is often difficult to achieve this balance within a ‘domestic’ criminal justice system, it is all the more difficult in transnational criminal cases . . . “).
\item\textsuperscript{19} The \textit{ad hoc} International Criminal Tribunals for Rwanda and the former Yugoslavia have yet to mark their tenth anniversary, while the proposed permanent International Criminal Court is likely years away from operation. Even the oldest such institution, the half-century-old European Court of Human Rights, has just undergone a radical transformation into a full-time judiciary with compulsory jurisdiction. See Peter Leuprecht, \textit{Innovations in the European System of Human Rights Protections: Is Enlargement Compatible with Reinforcement?}, \textit{8 Transnat'l L. \\& Contemp. Probs.} 313, 319-20 (1998).
\item\textsuperscript{21} See Van den Wyngaert, \textit{supra} note 10, at 491.
\item\textsuperscript{22} See \textit{Basic Legal Documents}, (visited Nov. 8, 1999), <http://www.un.org/icty/basic.htm> (indicating that as of July 1999, the Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia had been revised sixteen times).
to agree on similar rules to govern the proposed International Criminal Court. Ad hoc tribunal interpretations of statutory provisions, moreover, have drawn criticism. The furor over a ruling allowing the prosecution to withhold from the defense identities of certain witnesses provides one example. Also troubling is the rejection of the defense claim that it had been denied equality of arms because one state had rebuffed orders to produce witnesses.

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

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


25. See *Prosecutor v. Tadi*, Case No. IT-94-1-T, Appeals Chamber Judgment (ICTY July 15, 1999), (visited Mar. 31, 2000), <http://www.un.org/icty/tadic/appeal/judgement/main.htm>. The Appeals Chamber ruled that the Trial Chamber had not caused Serbia’s noncooperation; in fact, it had tried to help the defendant as best it could. Although it could “conceive of situations where a fair trial is not possible because witnesses central to the defense case do not appear due to the obstructionist efforts of a State,” the Appeals Chamber ruled that such a situation had not occurred, at least in part because the defendant had not requested a stay to secure Serbia’s cooperation. *Id.* § 55. The ICTY’s ruling is understandable, given its inability to force compliance from such a key state. The result, however, creates a risk of unfairness to the defendant. See *Representing the General*, CAL. LAW., Nov. 1999, at 17 (reporting complaint of the Los Angeles-based attorney for ICTY defendant Gen. Tihomir Blaski that “the brand of justice that’s practiced at the ICTY puts the defense at a distinct disadvantage,” in part because of noncooperation). Cf. Zagaris, *supra* note 2, at 1448 (criticizing transnational cooperation agreements that grant certain rights to governments but not to private persons).

26. Indeed, persons accused of crimes that outrage the international community may be tried in national courts, as exemplified by Spain’s effort to prosecute former Chilean dictator Augusto Pinochet. See Regina v. Bartle (H.L. Mar. 24, 1999). reprinted in 38 I.L.M. 581 (1999) (ruling 6-1 that Pinochet is not immune from extradition to Spain for crimes after 1988, when English law first proscribed extraterritorial torture). See also Clifford Krauss, *Pinochet at Home in Chile: A Real Nowhere Man*, N.Y. TIMES, Mar. 5, 2000, at §1, p. 12 (reporting that although England released Pinochet for medical reasons, he still may face prosecution in Chile).
individuals with no common cause until they are in custody, are unlikely to band together.

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

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

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


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

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

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

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

35. See Swart, supra note 7, at 531-34.
37. See Amann, Harmonic Convergence, supra note 7, at 49-55 (analyzing developments in Chinese criminal justice system).
norms as a "New Isolationism," the United States long has resisted pressure from outside. Indeed, in the area of law enforcement, the Executive Branch, by the positions it has taken in transnational criminal litigation, has fostered isolationism.

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

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


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

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


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


46. The Chief Justice and four colleagues rejected the contention that "every constitutional provision applies wherever the United States Government exercises its power." Id. at 269. Lower courts also have limited the extent to which the Fourth Amendment protects United States nationals. See United States v. Peterson, 812 F.2d 486, 490 (9th Cir. 1987) (Kennedy, J.) (United States-foreign search overseas need comply only with the law of the foreign country, and not with United States law); See also United States v.
Machain, the Court, over the objection of the Mexican government, interpreted the United States-Mexico extradition treaty to allow the kidnaping of a defendant, at the behest of United States agents, in order to procure the defendant's presence in a United States court. Finally, in United States v. Balsys, the Court held that a witness in a United States court may not invoke the Fifth Amendment privilege against self-incrimination if she fears that her compelled testimony would be used against her in a foreign, rather than a domestic, criminal proceeding.

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

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

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

52. See Zagaris, supra note 2, at 1464 (attributing such rulings to judicial disapproval of the "United States Executive's unwillingness to provide for due process for defendants and third parties in evidence gathering.")
53. See Amann, Harmonic Convergence, supra note 7, at 19-23 (discussing Court); Van den Wyngaert, supra note 10, at 490 (stating that European human rights regime has "penetrate[d] into the day-to-day 'legal culture' of both practitioners and academics in the member states").
How can we guarantee that the rights of those accused of transnational crimes are honored?

We need to give dignitary interests their due, to ensure that even in cross-border criminal cases individuals do not suffer unfair or arbitrary governmental intrusion. The balance between the needs for public safety and private autonomy must be restored.\(^5\) The International Association of Penal Law recently suggested principles that may guide this process: maintaining the rule of law; adhering to the legality principle; using the least invasive investigative techniques; interposing judicial supervision of investigations; prosecuting only when \textit{mens rea} and individual culpability can be securely established; making punishment proportional to the crime; and assuring the presumption of innocence.\(^6\)

We need to establish a defense lobby. There is a need for an organization, along the lines of the NACDL, that will both advocate for the interests of the internationally accused and train its members to represent defendants in transnational cases with skill.\(^7\) The fledgling International Criminal Defence Attorneys Association, founded in Montréal in 1997, has made a good start.\(^8\) The association concentrates on redressing one of the great failings of the

---

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

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

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

58. See International Criminal Defence Attorneys Association (ICDAA) website (visited Feb. 15, 2000), <http://www.hr.i.ca/partners/aiad-icdaa/> [hereinafter "ICDAA website"]. The association's membership includes 120 individuals, and several nongovernmental organizations and bar associations, from twenty-three countries. Telephone interview between author and Élise Groulx, ICDAA president, Feb. 8, 2000 [hereinafter Groulx interview].
international criminal tribunals: the absence of any defense organ. It has wide-ranging plans to improve the lot of defendants.

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

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

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

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

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

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

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

63. Cf. Lawyers Committee for Human Rights, supra note 23, at 4 (predicting that rules established by the ICC “will have a significant impact on domestic criminal procedure . . . because it will be legally and political difficult to justify a two-tiered system of rights, one for ICC and another for purely domestic purposes.”)
COLLECTIVE HARMS UNDER THE ALIEN TORT STATUTE: A CAUTIONARY NOTE ON CLASS ACTIONS

Catharine A. MacKinnon*

A small but increasing number of class actions for mass human rights violations are being brought under the Alien Tort Statute, 28 U.S.C. § 1350. Class actions are representative actions; the one stands for the many. The mass accidents for which they are often used, such as large plane crashes, or slowly-unfolding corporate catastrophes, such as illnesses from asbestos exposure, involve discrete torts from a single physical cause in particular etiological scenarios. The injuries are not group-based in the human rights sense. That is, many people are injured because of where they were (on a plane) or what they did (work with asbestos), but not because of who they are. Human rights violations like genocide and crimes against humanity, by contrast, are not mass accidents. They involve every imaginable tort to a human being and are done because of who the victims are, based on their race, ethnicity, religion, nationality, and sex. People are also politically tortured on the basis of their politics and ethnicity, and war crimes are increasingly concerted acts against groups. When war is an instrument of genocide, war crimes, too, can be group-based acts in the political sense.

The question here is whether United States class action instruments under Rule 23 are well suited to redressing international human rights injuries that take a collective form. Focusing in particular on the Karadzic cases, and to some extent the Marcos cases and the more recent Holocaust Victim Assets cases, my concern here is with the fit between domestic class action techniques, particularly the "limited fund class action" device, under Fed. R. Civ. P. 23(b)(1)(B), and international human rights goals for group-based injuries to groups.

Class actions under Rule 23 are brought for injuries to large groups of people when common questions of fact and law are raised in situations where too many parties, plaintiffs or defendants, exist to make joining them all


* Elizabeth A. Long Professor of Law, University of Michigan Law School; long-term Visiting Professor, University of Chicago Law School; counsel for plaintiffs in Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996). Particular thanks for our work together on these issues to Natalie Nenadic, Asja Armanda, Aida Daidzic, Liza Velazquez, and Maria T. Vullo.
practical. Some of the devices are mandatory; everyone who was hurt is deemed included. Some permit people to opt out of the class to voluntarily exclude themselves.

Class actions in the 60's and 70's, to speak very generally, could be called the darlings of the Left. They made it possible to recognize and redress through law collective injuries, including to groups, on a scale something as vast as the injures were done. Many of these class actions produced civil rights initiatives that resulted in social change, including prominently in education, employment, housing, and prisons. The civil rights class action was assumed to be in the interest of the whole class it represented. Without it, its members had nothing. In this vision, dissenting class members were cast as greedy spoilers, self-seeking outliers, troublemakers. Individuals who sought to opt out of these actions, actions assumed to be in the interest of every member of the group as a group including them, were considered self-seeking contrarians, free riders, denying and obstructing the group's welfare. They were also a huge pain in the neck for litigators, who imagined themselves on the way to the greatest good for the group, doing justice.

In the 80's and 90's, to again draw a bit of a caricature, class action devices became the darlings of the Right. Corporations, even whole industries, found that class actions were made in heaven for controlling their legal exposure to victims of the widespread harms they did. The utility of class actions emerged as limiting the liability of mass tortfeasors. Some corporations, it was alleged, and some industry groups, or so plaintiffs asserted, went so far as to initiate their own collusive class actions against themselves, bringing together all the possible victims in one case that they in effect controlled, in order to settle low. With mandatory classes, the result was that everyone's liability was limited to whatever those who represented the plaintiffs—who could be real plaintiffs or not—settled for. The class representatives were permitted to settle everyone's claims in a way that bound class members whether they consented to be bound or not, then or later—with res judicata effect. In massive and unpredictable cases like the asbestos litigation (in some jurisdictions, around a fifth of all civil cases were asbestos cases) mandatory class actions took place with the grateful acquiescence of the courts in their ever-persistent pursuit of docket control.

The tension between these two images of the class action came to a head of sorts last summer in the Ortiz case, producing a United States Supreme Court decision that shows this shift from the earlier presumption that class plaintiffs had the interest of the class at heart, to the later suspicion that something else may be afoot. More specifically, it revealed the change from assuming that it is best to get something as opposed to nothing for everyone to questioning

---

whether it is valid to bind all to a group resolution whether they wanted it or not. One view sees some relief as opposed to none for a group of disenfranchised people whom no one will otherwise represent. The other sees an overly-hasty presumptive, even overreaching, potentially collusive (whether in fact or in intent) resolution of varied claims cutting off better possible relief later in a form that is susceptible to being run by agendas that are very far removed from full relief—far less justice—for the victims. These agendas can include, to mention a few, politics, media attention and public speaking opportunities, career and turf-building, development of expertise or its appearance, credentialing and training, fundraising, and attorney’s fees. When the interests of hurt people are not entirely driving the litigation, class actions can become more in the interest of perpetrators, and vehicles for the advancement of others, than engines of vindication and reparations for the survivors.

The class action chameleon that was the particular concern in *Ortiz* was the “limited fund class” arising under Federal Rules of Civil Procedure 23(b)(1)(B). The classical limited fund class action arises, for instance, when an insured ship sinks. The fund for everyone’s recovery is limited because the ship is only insured for so much. A fixed number of people has a stake in the ship, and the policy limits total recovery, so the thought is that all claims should be litigated together. Such classes are mandatory in the sense that no opting-out is permitted except rarely by judicial discretion. No notice is required to 23(b)(1)(B) classes. People can be bound by the adjudication without ever having heard that it happened. And the results bind all class members whether they took part in the litigation or not or even knew about it.

The Court in *Ortiz*, which concerned a settlement class in asbestos litigation, held that certification of a mandatory settlement class under b(1)(B) required a showing that the fund is limited independent of the agreement of the parties. You can not just get the lawyers for the class together with the lawyers for the companies, agree to stipulate that “this is all there is,” and divide up the pie. This invites abuse, such as exchanging avoidance of bankruptcy for the companies for large attorney’s fees to the class lawyers. So, the Court held, the fund had to be shown to be limited in an external way, interclass conflicts had to be addressed, and class members had to be equitably treated.

II

How do these concerns and safeguards map onto human rights concerns, particularly with large victim and survivor classes with collective injuries such as those increasingly occurring on the international stage? Given a plaintiff class action, how do you know whether it is beneficial and progressive on the one hand, or complicitous and exploitive on the other?
Most Alien Tort cases have not been class cases. They have been brought on behalf of harmed individuals whose human rights were violated, sometimes on or implicating group grounds, sometimes not. In the spring of 1993, two actions were brought against Radovan Karadzic, the leader of a group of Bosnian Serb fascists who carried out a genocide through war to exterminate and eliminate non-Serbs in Bosnia-Herzegovina. The two Karadzic cases were brought under the Alien Tort Act and the Torture Victim Protection Act for genocide, torture and war crimes in the Southern District of New York by Bosniac Muslim and Croat survivors, seeking relief for torts of ethnic cleansing committed against them. One case, Kadic, emphasized claims for rape as genocide, rape as torture, and rape as a war crime. We sought relief specifically for injuries of genocidal sexual atrocities perpetrated as a result of Karadzic’s policy of ethnic cleansing in collaboration with Slobodan Milosovic’s administration in Belgrade, Serbia. Damages were sought for the named individuals and groups, with an injunction that Karadzic order the genocide to stop. This is a representative action in the sense that the injuries had a group basis and the injunctive relief would have a group impact. If you stop a genocide, you stop it for everyone—but the moving parties claimed to represent only those who brought the case. The plaintiffs were one rather large survivor group, a smaller group, and the named individuals. The second case, Doe, seeking damages, was brought on behalf of two unnamed young girls claiming to represent a class of “all people who suffered injury as a result of rape, genocide, summary execution, arbitrary detention, disappearance, torture or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb Forces under the command and control of defendant between April 1992 and the present.”

By court practice, these two cases proceeded in tandem under a single caption. Jurisdiction was established over Karadzic by beating back varieties of immunity claims, some known, some previously unknown; a civil claim was permitted under the Alien Tort Act for rape as an act of genocide. Then the Doe lawyers moved to certify the class, which of course subsumed the Kadic plaintiffs’ case. After some months, this motion was amended to seek, in the alternative, limited fund class certification because Karadzic’s assets were claimed to be limited. This claim was based on a letter Karadzic had sent to the

5. Kadic, n. 3 supra.
6. All the other panelists worked on the Doe case, at one time or another. The class certification motion was filed when Beth Stephens, original lead counsel, was no longer actively associated with the case, and after Harold Hongju Koh, who contributed at a prior crucial period, had withdrawn to assume his position with the State Department.
judge contending, inter alia, that he did "not have the financial resources to bring witnesses for my defense to the United States for either depositions, or trial." The Kadic plaintiffs sought to opt out of the class, and the class supported them. The judge, however, certified the class on the limited fund theory and denied the Kadic motion to opt out—over not only the support of the class but over the lack of opposition from the defendant as well. The Kadic plaintiffs then moved to decertify the class. The issues under domestic law will be resolved as procedural and due process matters under Ortiz and prior precedents.

Two other recent cases have raised similar issues—or potentially so. Marcos was a limited fund case for torture that received a verdict of $2 billion at trial. The Holocaust Victim Assets cases were brought beginning during 1997 for claims under the Alien Tort Act for human rights violations, and violations of contract, conversion, breach of fiduciary duty, and other rights. One claimed a class of all those persecuted and targeted for persecution by the Nazis, divided into three subclasses, those deprived of their assets by banks, subjected to slave labor, and forced to become refugees. The settlement proposal would permit opting out, even though a fixed amount of total recovery is agreed to between certain Swiss bank defendants and the plaintiffs.

III

This small cluster of critical cases raises two related issues for class actions: adequacy of relief and adequacy of representation. The issue of adequacy of relief is illustrated in both the Marcos and Karadzic cases. To us, limiting the relief of all the survivors of the Bosnian genocide because Karadzic says he cannot afford to come to New York seems both wrong and small. In the Marcos case this last summer, a Philippine court disapproved a proposed settlement that would reduce the $2 billion verdict to $1.5 million based on a Marcos Swiss bank account, noting in particular that a quarter of this amount was slated to go to the lawyers. That court also pointedly noted that it was principally in the interest of the Marcos estate, not the victims, to reduce the very large amount they had won to the much smaller amount of the settlement

---

8. Doe, n. 4 supra.
9. In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994).
11. See, Philippines v. Marcos, Civil Case Nos. 0141 and 0185, slip op. at 17 (Republic of Philippines, Sandiganbayan July 27, 1999) (Consolidated Resolution, Garchitorena, PJ). That court notes that one lawyer, Robert Swift, who also participated as counsel in making the limited fund claims in the Doe case, was claiming $34,585,000.00 of the $40 million sought by the lawyers in the Marcos settlement.
proposal "consequences which are extremely beneficial to the Marcoses and of minimal benefits for the human rights victims."

The Philippine court, noting that Philippine procedural law is heavily based on United States law, citing United States authorities on class suits, observed that the settlement it disapproved would likely preclude future additional relief.

Whether [the plaintiffs] will initiate a new action against new defendants over the same cause is open to question. Whether they can even legally do so at this time is speculative ... Whether human rights victims for the period 1972 to 1986 can still initiate separate suit against anyone else anywhere else is ... doubtful (emphasis added).

The court also noted that the Hawaii decision in Marcos was "binding under res judicata principles upon all members of the class, whether or not they were before the court." The res judicata effect of discrimination class actions have also precluded class members from suing subordinate tortfeasors for the discrimination. While this result should be resisted, it threatens to preclude future relief, for example, for individuals who run into their individual rapists on the streets of the United States, because Karadzic's liability to the class in Doe is predicated on all the acts of all the people who carried out his orders and policies. The complaint attributes all of it to him and the class definition seeks relief for all of it from him. If relief from him is then limited by the limited fund, but his responsibility for the genocide is total, a vast amount of injury was just reduced, on the defendant's "say-so", to less than the price of a few tickets to New York. And actual relief for the survivors' injuries, in this or any other proceeding, is thus, if not undone, rendered speculative to nil.

12. Id. at 20.
13. Id. at 15-16
14. Id.
15. In adjudicating claim preclusion questions in claims brought by individual class members following even unsuccessful class actions, several circuits have found that a vicarious liability or principal/agent relationship provides enough privity to preclude their later claims. See, e.g., Pelletier v. Zweifel, 921 F.2d 1465, 1502 (11th Cir. 1991), cert. denied, 502 U.S. 855 (1991); Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279, 1288 (5th Cir. 1988); Cahill v. Arthur Andersen & Co., 822 F.2d 14 (2d Cir. 1987); Lambert v. Conrad, 536 F.2d 1183 (7th Cir. 1976). While a subsequent suit by a survivor absent class member against a lower-level perpetrator might not be precluded from seeking relief by a successful resolution of Doe, it might—a successful case backed up by the limited fund theory having a potentially more powerful preclusive effect.
16. The proceedings in the Holocaust Victims Asset litigation are multiple and on-going. Robert Swift is also involved in them.
The issue of adequacy of representation raises the dangers of asserting a class in human rights litigation when the members have, and can have, no real contact with their purported representatives. The survivors are far away and speak another language; they may number in the thousands or, as in the Bosnian situation, in the hundreds of thousands. In on-going policy development, one claims to represent huge numbers of people with whom one has no contact, speaking for them in public or policy settings, taking positions on issues that deeply and directly affect their lives, on which they have diverse and nuanced opinions. The structure of the limited fund class claims in particular seems actually to discourage contact, even discourages telling members of the class that one is representing them. Their involvement would make things cumbersome, complex, create cross-currents, become time-consuming, take resources. Actually representing badly hurt people is a lot of work. As some of the affiants in our motion supporting the de-certification motion noted, the Doe class usurps many of the functions of elected representatives, which is undemocratic.17 It could even be termed colonizing.

Unsought and unwanted representation in a class raises the possibility that some of the intangible and expressive gains from human rights litigation, especially for group-based injuries like rape in genocide, may be undermined. Human rights litigation offers people their humanity back. What is stolen from them when they are violated can be partially or potentially returned to them through a process that does not reduce them to the ciphers of group membership the way their perpetrators did. It treats them as more than the sum of the injuries done to them. It gives them back a voice in their fate, and the dignity of a place at the table. For this to work, the process must be accountable, personal, and responsive. Being forcibly lumped into a group-based class, thereby deprived of direct or actual representation, being represented in name (or no name) only, survivors of group-based atrocities can experience the process as furthering the deprivation of humanity that human rights law promises to restore.

**POSTSCRIPT**

On March 27, 2000, the Kadic plaintiffs won their motion to decertify the Doe class under Ortiz. Judge Peter K. Leisure cited, among other grounds, the Kadic plaintiff’s insistence that the Doe plaintiff’s “have been unresponsive to their attempts to secure adequate representation” and “perhaps their most serious accusation . . . the Doe plaintiffs’ willingness to accept defendant’s

17. See, e.g., Exhibit H. Decl. of Haris Silajdzic, Co-Chairman of the Council of Ministers of Bosnia-Herzegovina, Doe v. Karadzic, No. 93 Civ. 878 (S.D.N.Y. 1997); Exhibit E, Decl. of Mediha Filipovic, Parliament Member of Bosnia-Herzegovina, id.
'profession of poverty' in order to obtain mandatory class treatment. On August 10, 2000, a New York jury awarded the Kadic plaintiffs a total of $745 million in compensatory and punitive damages and a permanent injunction.

A CRITICAL ANALYSIS OF THE INTERNATIONAL CHILD SUPPORT ENFORCEMENT PROVISIONS OF THE SOCIAL SECURITY ACT: THE (IN)ABILITY OF STATES TO ENTER INTO AGREEMENTS WITH FOREIGN NATIONS

Chelsea P. Ferrette*

I. A STATUTORY ANALYSIS OF THE ICSE PROVISIONS .......... 577
   A. The Statutory Language of the ICSE Provisions .......... 581
   B. Legislative History of the ICSE Provisions .......... 586
   C. Statutory Analysis of the ICSE Provisions .......... 587

II. CONSTITUTIONAL ANALYSIS OF THE ICSE PROVISIONS .. 588
   A. Treaty Making and State Treaty Prohibiting Clauses .. 589
   B. Compact Clause .............................................. 594
   C. Foreign Commerce Clause .................................... 597

III. UNITED STATES V. LOPEZ: IT'S EFFECT ON THE
     INTERNATIONAL CHILD SUPPORT ENFORCEMENT DEBATE .. 601

IV. CAN THE ICSE PROVISIONS STAND AS AN EFFECTIVE TOOL
     IN INTERNATIONAL CHILD SUPPORT ENFORCEMENT? .... 604
   A. The ICSE Provisions Create Legal Quagmires ........... 604
   B. The ICSE Provisions Delegation of Power to States
      Should be Challenged ....................... 609
   C. Suggested Remedies ........................................ 611

VI. CONCLUSION ......................................................... 612

A man and a woman get married. After a number of years they have kids. A few years later, they get a divorce. The divorce decree is issued in Israel, where the wife resides, yet the ex-husband resides in Chicago. The wife obtains a claim for child support in Israel, and the husband, located in the

* Juris Doctorate Candidate, Columbus School of Law, The Catholic University of America, 2000; Candidate for Masters in International Affairs, Department of Politics, The Catholic University of America, 2000; A.B., Bowdoin College, 1994. The author wishes to thank Prof. George E. Garvey, Professor at the Columbus School of Law for his guidance and David Warner, Attorney at the Department of Justice, Criminal Division, Office of International Affairs for his insight on this issue. Above all, the author thanks Betty P. Atkins, for her patience, care, and love, and especially use of her dining room table. Prior to publication, this paper was submitted in partial satisfaction of degree requirements at The Catholic University of America.

1. These are the facts of Nardi v. Segal, 234 N.E.2d 805 (Ill. 1968).
United States, defaults on his child support payments. Can Illinois enforce the claim for arrears based on the Israeli divorce decree through a reciprocal agreement with Israel? Or for that matter, can Chicago deal directly with Haifa? Will an agreement between Illinois and Israel (or Chicago and Haifa) hamper the United States’ foreign relations with Israel on other issues?

This case and these issues illustrate the existence of a wide gap between the need by the states to enforce international cases of child support violations and the federal government’s desire to have continued comity amongst fellow nations. This gap has resulted in a federal statute allowing individual states to enter into agreements with foreign nations. Although critics have argued that some areas of international law have been promoted by state legislation, the International Child Support Enforcement provision of the Social Security Act is merely a band-aid to an increasingly pervasive problem. The crevice in which international child support cases exist, between the precipice of state’s control over family law issues on one side and the federal government’s authority over foreign affairs on the other, has become wider as more cases have fallen through the cracks and discussion has expanded on the issue.

In examining the issue of international child support enforcement, it is necessary to notice the thin line between what is state and what is federal in nature. Although enacted laws are presumed to be constitutional, when the democratic process produces a law, which goes against the Constitution, the Constitution as the supreme law of the land must prevail.

This paper examines the constitutionally of the recently promulgated statutes addressing the issue of international child support enforcement. It provides an analysis of the various questions raised by the application of the provisions upon the scope of the state or local government’s ability to enter in the realm of foreign affairs. Section (I) briefly examines the articulated purposes of the ICSE provisions and demonstrates that they are not consistent


3. See 42 U.S.C.A. §§ 654 ¶ 32(A), 659a (d) (West 1998). Throughout this paper I will collectively refer to these two separate statutes as the ICSE provisions.


5. See Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883); see infra discussion section II.

6. U.S. CONST., art. VI, cl. 2., “This Constitution, . . . shall be the supreme Law of the Land.”

with the actual language of the statute. Section (II) analyzes the constitutionality of the ICSE provisions' grant of extra-constitutional powers to the states. It will consider those clauses in the constitution which may give Congress the authority to pass the ICSE provisions. Section (III) analyzes Congress' ability to regulate family law. Finally, this paper proposes two things. First, if the statute is valid, then international child support enforcement should be placed on a completely federal level without local interference by the states into the federal government's foreign policy. Furthermore, if Congress has Commerce Clause authority to regulate here, the provisions can become constitutional without losing the desired effect by removing the language directed toward the states from its content. Second, if Congress is aggrandizing their power to regulate under the commerce clause then the life span of the ICSE provisions is in serious jeopardy.

I. A STATUTORY ANALYSIS OF THE ICSE PROVISIONS

At common law, the only legal duty for a father to pay child support not stipulated by contract, was a moral one. In addition, if a minor child made a contract with a third party, a father could not be held liable unless he explicitly or implicitly consented to the contract. Current state statutes extend the duty of support to stepparents. Some states have extended the duty of support to stepparents. See generally Logan v. Logan, 424 A.2d 403 (N.H. 1980). Note however, in the absence of statutory imposed duty, in common law stepparents have no duty of support for their stepchildren unless the stepparent assumes such a duty. See Chapin v. Superior Court In and For Kern County, 239 Cal. App.2d 851 (1966); Ladd v. Welfare Commissioner, 217 A.2d 490 (1965); Fussell v. Douberly, 206 So.2d 231 (Fla. Dist. Ct. App. 1968); Zeller v. Zeller, 407 P.2d 478 (Kan. 1965); In re Besondy, 20 N.W. 366 (Minn. 1884); Falzo v. Falzo, 202 A.2d 192 (N.J. Super 1964); In re Estate of Turer, 133 N.W.2d 765 (Wis. 1965); In re Fowler, 288 A.2d 463 (Vt. 1972).

Thus, a stepparent can relinquish their duty at any time without an imposition of liability. See Franklin v. Franklin, 253 P.2d 337 (1953); Clevenger v. Clevenger 189 Cal. App.2d 658 (1961); Remkiewicz v. Remkiewicz, 429 A.2d 833 (Conn. 1980); Brown v. Brown, 412 A.2d 396 (Md. 1980); Chestnut v. Chestnut,
decisions have placed a duty on both parents to be responsible for the support of their children.

When this duty is breached, children and custodial guardians often look to the courts for relief. Remedies which are available to children for the enforcement of the duty of support include bringing a civil suit against the offending parent, encouraging the state to bring a criminal suit, or bringing a suit in equity for the purchase of essential items for the child’s maintenance. Judgment by the court is often times the awarding of specific performance of child support payments. If it is determined that the parent intentionally refused to pay, and payment was economically feasible, penalties for non-compliance include civil contempt, criminal sanctions, and if the non-custodial parent is a federal employee, the garnishment of wages.

Child support enforcement has traditionally been the domain of the state government. However, when the problem of interstate enforcement of child support orders became too pervasive to be ignored, National Conference of Commission on Uniform Laws approved a series of uniform acts.


13. The Equal Protection Clause of the United States Constitution, U.S. CONST. amend XIV, § 1, also requires both parents to share the responsibility of child support. See generally Orr v. Orr, 440 U.S. 268 (1979) holding that a statute authorizing alimony only to wives and not husbands violated the Equal Protection Clause.


18. See Day v. State, 481 P.2d 807 (Okl. Crim. App. 1971) (non-support of child is a continuing criminal offense); see generally THE MODEL PENAL CODE § 207.14 (Tent. Draft No. 9, 1959) (misdemeanor to fail to support a child, when defendant is capable of payment).


20. Kolby supra note 4, at 77. See also Gloria F. DeHart, Getting Support Over There, 9 FAM. ADVOC. 34 (1987).

Uniform Reciprocal Enforcement of Support Act (URES A) and the Uniform Interstate Family Support Act (UIFSA), for the states to adopt, and which currently have been enacted in some form in all states. Under these laws, interstate child support enforcement decrees are treated like any other sister-state court orders, thus making enforcement possible under the Full Faith and Credit Clause of the Constitution.


A few states have enacted the UIFSA, but have not repealed their Uniform Reciprocal Enforcement of Support Act statutes: Georgia: GA. CODE ANN. §§ 19-11-40 to 19-11-81 (1998); Iowa: IOWA CODE ANN. §§ 252A.1 to 252A.25 (West 1998); and Michigan: MICH. COMP. LAWS ANN. §§ 780.151 to 780.183 (West 1998). Kentucky's adoption statute of the UIFSA, and repeal of the RURESA, would be deemed effective when the United States Congress requires the UIFSA be adopted by the several states. See KY. REV. STAT. ANN. §§ 407.5101 to 407.5902 (Michie 1998).

New Jersey is the only state which has not adopted the Uniform Family Support Act, but kept their URESA statute. N.J. STAT. ANN. §§ 2A:4-30.24 to 2A:4-30.64 (West 1998).

25. U.S. CONST. art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." All United States' states must give the same effect
A problem arises when discussing the enforcement of foreign child support decrees. Unlike in the interstate model of child support enforcement, full faith and credit does not apply to foreign judgments, states are not allowed to make treaties with foreign nations, and enforcement of foreign court orders is by the discretion of the state court or through a reciprocal arrangement between the

to a judgment of a court of a sister-state as if the judgment was rendered in the requesting state’s court, as long as the judgment was final and the court who entered the order had valid jurisdiction over the case.

26. See U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause does not imply that the state court must recognize decisions from foreign nations just sister-states of the United States.

In Nardi v. Segal, 234 N.E.2d 805 (Ill. 1968), an ex-wife brought a suit for arrearages of child support against her ex-husband. Id. at 806. The child support enforcement decree was based on an Israeli divorce decree. Id. At the time the complaint was filed, the wife was living in Israel, the ex-husband in Chicago, and the ex-husband had not paid nine months of child support. Id. The court stated that the doctrine of comity did not require it to enforce a decree from a foreign country, nor did the Full-Faith and Credit Clause of the United States Constitution require the court to recognize or enforce a decree from a foreign country. But see Wolff v. Wolff, 389 A.2d 413, (Md. Ct. Spec. App. 1978), where the Maryland Court of Special Appeals held that the Uniform Foreign Money-Judgments Recognition Act did not preclude the state court from recognizing or enforcing an alimony decree obtained in England. Thus recognition of the foreign order by the state court is not based on whether the court had jurisdiction but on the doctrine of comity.

Recognition of a foreign judgment does not imply enforcement of the judgment. The Uniform Foreign-Money Judgment Recognition Act (UFMJRA) excludes judgments for “support in matrimonial or family matters” from its definition of “foreign judgments.” Uniform Foreign-Money Judgment Recognition Act §1(2); See also 100 A.L.R.3d 792 (explaining the construction and application of the Uniform Foreign-Money Judgment Recognition Act).


By adopting the UFMJRA, state courts are precluded from recognizing and enforcing child support decrees from foreign countries. See generally Nardi, 234 N.E.2d at 805; Zaldueno v. Zaldueno, 360 N.E.2d 386 (Ill. 1977).


28. See Hilton v. Guyot, 159 U.S. 113 (1895) (stating that it is the state’s courts discretion whether to recognize a foreign nation’s court judgment since under the principle of comity of nations the state court was under no obligation).
states and the foreign government. It is the validity of the last category where the main thrust of this paper will be focused.

A. The Statutory Language of the ICSE Provisions

Legislation is presumed constitutional, unless sufficient evidence is presented to rebut the presumption. The Supreme Court has held that when a statute contains patent inconsistencies against the expressed provisions of the federal constitution, it is facially invalid. There is case law in which a facially neutral statute, when applied, posed latent inconsistencies with federal law. Such statutes are also invalid. If a statute contains possible inconsistencies, the legislature should ensure that the language of the statute clearly reflects a valid legislative intent. If the statute is invalid when applied, the legislature should repeal such an ineffective statute.

The International Child Support Enforcement (ICSE) provisions are comprised of two statutory acts. The first one, under 42 U.S.C.A. §659a, is entitled International Support Enforcement. The second provision, also

29. Pfund, at 674-75; Kolby, at 78; Cavers, at 1037 (stating that in absence of federal exercising any power in enforcing international child support decrees, the states have in increasing number entered into reciprocity arrangement with foreign nations).

Any future reference to foreign governments or foreign states means government of nation states and not the government of the states of the United States.

30. See Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883); Sloan v. Baker, 10 P.2d 362, 364 (Or. 1932). This presumption is asserted to prevent the courts from rewriting the Constitution to adapt the document to present life. Instead, the presumption gives force to newly enacted laws, at the same time not disrupting the actual language of the Constitution. Rhode Island v. Palmer, 253 U.S. 350, 410 (1920)(J. Clarke, dissenting).

But see Oliver W. Holmes, The Path of Law, 10 HARV. L. REV. 457, 469 "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the ground upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Id.

31. Gibbons v. Ogden, 22 U.S. 1 (1824); McCulloch v. Maryland, 17 U.S. 316 (1819). The Supremacy Clause dictates that no other law shall be above the federal Constitution. "This Constitution ... shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. State laws and state constitutions can give a broader interpretation of a constitutional right, but not a narrower one.


33. See id.

34. In United States v. Lopez, 115 S.Ct. 1624 (1995), prior to the Supreme Court deciding the matter, Congress had adopted an amendment to the statute at issue in order, so that it may reflect a legislative history which included an explanation on the connection between the impact of the regulation of gun possession on school grounds and interstate commerce.


36. "(a) Authority for declarations

(1) Declarations

The Secretary of State, with the concurrence of the Secretary of Health and Human Services, is authorized to declare any foreign country (or a political subdivision
incorporated under the federal Social Security Act, regulates state plans for child and spousal support, under 42 U.S.C.A. §654.\textsuperscript{37}

The current practice among state governments has been to enter into agreements with foreign nations to address the issue of international child support enforcement.\textsuperscript{38} The ICSE provisions\textsuperscript{39} of the federal Social Security Act makes reference to the current arrangement between states and foreign nations,\textsuperscript{40} while simultaneously granting authority to the State Department and thereof) to be a foreign reciprocating country if the foreign country has established, or undertakes to establish, procedures for the establishment and enforcement of duties of support owed to obligees who are residents of the United States, and such procedures are substantially in conformity with the standards prescribed under section (b) of this section.

\( \text{(3) Form of declaration} \)

A declaration under paragraph (1) may be made in the form of an international agreement, in connection with an international agreement or corresponding foreign declaration, or on a unilateral basis.

\( \text{(b) Standards for foreign support enforcement procedures} \)

\( \text{(2) Additional elements} \)

The Secretary of Health and Human Services and the Secretary of State, in consultation with the States, may establish such additional standards as may be considered necessary to further the process of this section.

\( \text{(d) Effects on other states} \)

States may enter into reciprocal arrangements for the establishment and enforcement of support obligations with foreign countries that are not the subject of a declaration pursuant to subsection (a) of this section, to the extent consistent with Federal law.”

\textsuperscript{37} “A State plan for child and spousal support must—

\( \text{§ 32 (A) provide that any request for services under this part by a foreign reciprocating country or a foreign country with which the States has an arrangement described in section [42 U.S.C.S. §659a(d)] shall be treated as a request by a state;} \)

(B) provide, at State option, notwithstanding . . . any other provision of this [act], for services under the plan for enforcement of a spousal support order not described in paragraph (4)(B) entered by such a country (or subdivision); and

(C) provide that no application will be required from, and no costs will assessed for such services against, the foreign reciprocating country or foreign obligee (but costs may at State option be assessed against the obligor).”

\textsuperscript{38} See supra note 3.

\textsuperscript{39} See 42 U.S.C.A. §§ 654 §32(A), 659a (d) (West 1998).

\textsuperscript{40} See id. The language in subsection (d), entitled “Effect on other laws” gives the states the authority to enter into reciprocal enforcement agreements with foreign nations as long as the country is not one already declared by the State Department to be a reciprocating nation under subsection (a) or inconsistent with federal law. Id. at (d).

The current practice of international child support enforcement has been through Parallel Unilateral Policy Declarations (PUPDs). Under the PUPDs, and the principle of comity, the state, through its courts would agree to recognize foreign child support decrees if the foreign nation would reciprocate and afford the
the Department of Health and Human Services to designate foreign nations as reciprocating countries who will honor the United States child support decree. It also creates an imposition upon the state courts to recognize and treat foreign judgments for child support as if it originated from a sister-state. In enacting the ICSE provisions, Congress sought to federalize the issue of international child support enforcement by encouraging the federal government to take a more active role in enforcement. The ICSE provisions, in various incarnations, were debated and dissected in Congress for over two years before being signed into law.

State citizens the same opportunity for enforcement of United States child support decrees. Some have argued that with the passage of the ICSE provisions the federal government will be more inclined to begin negotiations with foreign countries, both past participants in the PUPDs and other nations, regarding child support enforcement. See DeHart, at 89.


2. See 42 U.S.C.A. at § 654. Section 654 entitled, "State plan for child and spousal support" requires that any state plan for child support enforcement must treat international child support claims as if there are interstate child support claims. See id at § 32(A).

Child support enforcement has traditionally been the domain of the state government. See Kolby, at 77. See also Gloria F. DeHart, Getting Support Over There, 9 FAM. ADVOC. 34 (1987). However, when the problem of interstate enforcement of child support orders became too pervasive to be ignored, the National Conference of Commission on Uniform Laws passed a series of uniform acts, Revised Uniform Reciprocal Enforcement of Support Act (URESA), 9 U.L.A. 381 § 2(m) (1998), and the Uniform Interstate Family Support Act (UIFSA), 9 U.L.A. 15 § 1(19) (1998), for the states to adopt, and which currently have been enacted in some form in 49 states and the District of Columbia. See discussion following note 24.

Under state laws interstate child support enforcement decrees are treated like any other sister-state court decrees, thus enforcement is possible under the principles of Full Faith and Credit Clause of the Constitution. See U.S. CONST. art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." All United States' state courts must give the same effect to a judgment of a court of a sister-state as if the judgment was rendered in the requesting state's court, as long as the judgment was final and the court that entered the order had valid jurisdiction over the case.

Under the principles of full faith and credit, and comity of nations, state courts are allowed to recognize foreign court judgments at their discretion. See Hilton v. Guyot, 159 U.S. 113 (1895). However, recognition does not imply that the judgment is considered conclusive evidence of an obligation to pay, just prima facie evidence that a debt exists. Id.

43. See P.L. 104-193 § 39. "The U.S. and selected foreign nations maybe able to help each other deal with the problem of parents and former spouses crossing boundaries to avoid support payments." Id.


44. See P.L. 104-193 § 39 International Child Support Enforcement. The provisions were to "allow and encourage the Secretary of State to pursue reciprocal support agreements with other nations." Id.

45. Representative Kennelly introduced legislation of January 4, 1995, designed to improve
Congress expressed four specific reasons for passing the ICSE provisions: (1) to provide a remedy to U.S. parents in the enforcement of child support abroad,\(^{46}\) (2) to address the fact that states do not have the power to enter into treaties, (3) to encourage the Department of State to take a more active role in pursuing agreements with foreign nations on this issue, and (4) to place on a federal level the issue of international child support enforcement in order to cultivate solutions to the problem via foreign policy.\(^{47}\)

Whether the statute provides an adequate remedy to U.S. parents trying to enforce child support claims abroad remains a pressing issue since its enactment.\(^{48}\) The statute fails to provide any expressed jurisdictional predicate, stating which forum or choice of law the parents will utilize.\(^{49}\) The statute does declare that a request by a reciprocating foreign nation should be treated as if it were a request by a sister state.\(^{50}\) Yet, unlike international requests, interstate requests have the protection of both state and federal law.

Each state has adopted into their laws provisions allowing for recognition of outside state claims, thus ensuring interstate requests receive the same treatment as intrastate requests for assistance. Additionally, the Full Faith and Credit Clause of the Constitution precludes the courts of one state from discriminating against and not recognizing judgments from another state. Comparatively, international child support embodies two distinct principles of interstate enforcement by urging Congress to ratify the U.N. treaties on international child support enforcement and thus treat international support claims as if they were interstate support claims. See H.R. 95, 104th Cong. § 424 (1995). Senator Bradley introduced similar legislation on February 16, 1995. See S. 456, 104th Cong. §172 (1995); see also S. 442, 104th Cong. § 172 (1995)

Also on January 4, 1995, the clauses pertaining to state authority to enter into agreements with other nations were introduced as part of the proposed Balance Budget Act, HR 2491, 104th Cong. §12370 (1995), and the proposed Personal Responsibility and Work Opportunity Act of 1995, HR 4, 104th Cong. §371 (1995). It was not until October 23, 1995, did the Senate propose similar legislation, but only pertaining to the power of the State Department to designate foreign nations. S. 1357, 104th Cong. § 7371 (1995). The legislation was re-introduced by Senator Daniel P. Moynihan, in its entirety on June 5, 1996. See S. 1841, 104th Cong. § 271 (1996).

46. Currently, the United States is not a signatory to any major treaty or international convention regarding international child support. The current reciprocal agreements by the states with foreign countries were done pursuant to the model established in the URESA.


48. See Pfund at 665, 675 (citing the ICSE provision, 42 U.S.C. §659a, as a new remedy for the problem of international enforcement.); Dehart, at 93-4 (explaining the system between the state and foreign governments in enforcing international orders under the URESA system); See also Cavers, at 997-1000 (addressing the issue of enforcing claims in the United States and abroad prior to the passage of the ICSE provisions).


law: family law and international affairs. Family law has traditionally been the
domain of state government and state courts. Early on, the Supreme Court
found federal courts lack the necessary judicial expertise in domestic issues and
state courts were the best forum to handle such delicate matters. Additionally,
recognition of foreign court judgments are not automatic, but instead are based
solely on the discretion of the court to recognize the claim of an international
court judgment. Unlike Full Faith and Credit recognition, the recognition by
the court is not conclusive evidence that child support is due, but merely
evidence that a debt is owed to the complaining party. Therefore, international
claims can not be treated similar to interstate claims because of the broad judicial
discretion by the state courts to accept or deny recognition of a foreign judgments.

The language of the statute is not directed towards state courts, but to state
governments. The statute expresses that "states may enter into reciprocal
arrangements for the establishment and enforcement of support obligations with
foreign countries." Identifying the constitutional basis for how a federal
statute may effect interstate commerce may aid in interpreting the legislative
intent if the law is on questionable grounds. A state court can hear a case
arising under federal law unless Congress says otherwise. State courts have
inherent authority and are presumably competent to adjudicate claims arising
under the laws of the United States. This presumption of concurrent
jurisdiction can be rebutted by explicit statutory language or unmistakable
implication from legislative history or clear incompatibility between state court
jurisdiction and federal interest. Federal question jurisdiction in district
courts dictates that federal courts have original jurisdiction of all civil actions

51. Barber v. Barber, 62 U.S. 582, 590-92 (1858)(holding that matters dealing with domestic
relations are to be handled by the state courts, not the federal courts, since there exist no history of family law
on the federal level).

52. Id.

53. supra the discussion following note 46.

54. Id.

55. Although URESA was enacted to facilitate interstate child support enforcement, only about 41% of


57. Id.


60. Id. See also U.S. Const. art. I, §10; id. at art. II, §2; id. at amend. X. See generally Printz v.
549 (1995)(Kennedy's concurrence); N.Y. v. U.S., 505 U.S. 144 (1992)(holding that Congress' efforts to
mandate state toxic waste clean up violated the Tenth Amendment); Missouri v. Holland, 40 S. Ct. 382
arising under the Constitution,\textsuperscript{61} federal laws or treaties of the United States.\textsuperscript{62} The ICSE provisions are silent as to the jurisdictional predicate to be employed in bringing claims under this statute. Therefore, the statute does not explicitly rebut the presumption of concurrent jurisdiction.

B. Legislative History of the ICSE Provisions

The legislative history of the ICSE provision gives jurisdiction by implication to the federal court over the issue of international child support enforcement.\textsuperscript{63} By claiming to provide a remedy to United States parents in the enforcement of child support abroad, the language in the ICSE provisions is designed to allow the states to continue making arrangements with foreign nations.\textsuperscript{64} If the statute had vested jurisdiction in both state and federal courts, the legislative history would not have mentioned that states can not enter into treaties with foreign nations.\textsuperscript{65} In addition, allowing states to enter into these agreements does not provide a direct remedy to parents who want to enforce international claims for child support. Even if such agreements are legal, by not providing a jurisdictional predicate within the statute itself, parents are not afforded adequate remedies to enforce child support claims abroad.

The congressional record and debates indicate that the legislature envisioned a more efficient enforcement of international child support claims.\textsuperscript{66} The legislative history of ICSE provisions acknowledges that states can not make treaties.\textsuperscript{67} In addition, one purpose of the statute was to authorize and motivate the federal government to take action in the area of child support since the United States has not signed any treaties regarding this issue.\textsuperscript{68} Further-

\textsuperscript{61} See 28 U.S.C. §1331 (1998). Original jurisdiction in this context means non-appellate jurisdiction. \textit{See also} 28 U.S.C. § 1251(b) (1998) (stating that “[t]he Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; ... (3) All actions or proceedings by a State against the citizens of another States or against aliens”).


\textsuperscript{63} See Pfund, at 674-675; \textit{See also} DeHart, at 110 (calling for Federal government involvement in international child support cases).

\textsuperscript{64} 42 U.S.C.A. §659a (d) (West 1998).

\textsuperscript{65} \textit{See infra} the discussion regarding the prohibition on states forming treaties with foreign nations.


\textsuperscript{68} P.L. 104-193, Title III, §39.
more, the legislative history articulates that international child support enforcement claims should be treated like inter-state claims.\textsuperscript{69}

C. Statutory Analysis of the ICSE Provisions

Nothing in the statutory language or history intimates that the legislature contemplated a non-custodial parent ever bringing a claim against the execution of the order, under the provisions, as being unconstitutional or outside the scope of the state's authority.\textsuperscript{70} The specific language of the ICSE provisions, create three functions. First, the provisions can be interpreted as an enabling statute, giving the federal government the right to act on the states behalf.\textsuperscript{71} Second, it is a supplementary statute, giving the states the right to make arrangements with foreign nations in the absence of the federal government action.\textsuperscript{72} Finally, the provisions act as a regulatory statute, requiring the states to give similar treatment to international child support claims as they would to inter-state claims.\textsuperscript{73} Allowing states to contract with foreign nations contradicts the grant of jurisdiction to federal, rather than state courts.

The legislative history does not explicitly illustrate whether it was the intention of the legislature to give both the federal and state governments concurrent jurisdiction in the field of international child support enforcement.\textsuperscript{74}

\textsuperscript{69} See supra the discussion following notes 44-48.


\textsuperscript{71} See 42 U.S.C.A. §659a(a) (West 1998).

\textsuperscript{72} Id. at §659a(d).


\textsuperscript{74} See supra discussion following notes 44-48.
Yet, the statutory history, by implication, gives federal question jurisdiction over international child support enforcement to the federal courts.\(^\text{75}\) Although child support is best settled in state courts, the international nature of the statute indicates that Congress envisioned the federal government and its courts controlling the issue.

**II. CONSTITUTIONAL ANALYSIS OF THE ICSE PROVISIONS**

The structure of the Constitution creates a dual sovereignty, where by the federal and state governments are both vested with and limited by certain powers.\(^\text{76}\) The federal government is one of enumerated powers whose authority is defined by the Constitution.\(^\text{77}\) All residual power, not expressly denied by the Constitution, is vested in the state government and the people.\(^\text{78}\) Analyzing the federal government’s authority possesses within the Constitution has been twofold, formalistic and functionalistic. A formalistic view of the United States Constitution asserts that if the constitution does not expressly grant the federal government the authority to act, it implicitly forbids.\(^\text{79}\) A functionalistic view of the Constitution states that what the Constitution does not expressly prohibit or limit, it implicitly permits.\(^\text{80}\) There are many articles which suggest that international child support enforcement should be viewed under a functionalistic test.\(^\text{81}\) Although the court seems to apply both approaches,\(^\text{82}\) more recent Supreme Court decisions have indicated a trend towards utilizing a formalistic analysis to federalism questions.\(^\text{83}\) Following the modern trend of the court, the paper analyzes Congress’ authority to enact the ICSE provisions under a formalistic microscope.

Under the Constitution, full authority over foreign affairs is given to the federal government.\(^\text{84}\) The Constitution expressly prohibits those activities by

75. \textit{Id.}

76. \textit{U.S. CONST. et. seq.}

77. \textit{Id.} at art. I, et. seq.

78. \textit{Id.} at amend. X.


80. \textit{Id.}


84. Holmes v. Jennison, 39 U.S. 649, 665-66 (1840); \textit{See also} Bilder, at 821-3 (presenting the current trend of state and local governments entering in the arena of foreign policy from “sister-city” programs to direct economic agreements to declarations of being nuclear-free zones). Bilder laments that despite the apparent intrusion of states and local governments into foreign policy making ventures, neither
state and local governments which invade the realm of expressed powers given to the federal government, including negotiating with foreign nations on matters of foreign affairs. Congress may have the power to authorize state and local governments to participate in activities which would ordinarily invade in the realm of the federal government's control of foreign affairs, however a grant of such power is inconsistent with the Constitution's delegation of exclusive power of foreign policy to the President and Congress. Thus the express language of the Constitution answers the question of what limits the constitution places on the state government and who has the ultimate power in matters of foreign affairs. Therefore, "any judgments as to what constitutes appropriate state or local involvement in foreign affairs ought to be made primarily by the political branches, in which the federal foreign relations power is lodged."91

A. Treaty Making and State Treaty Prohibiting Clauses

Every word within the Constitution is significant and has meaning. The Supreme Court has defined a treaty as "an instrument written and executed with the formalities customary among nations." Under the Constitution, the President, with the advice and consent of the Senate, holds the exclusive power to make treaties. The Constitution neither grants a similar concurrent power in the legislative, nor in the judicial branch of the federal government. In addition, the Constitution explicitly prohibits the state governments from

Congress nor the Executive branch has hastened to react to the current situation. Id. See generally United States v. Pink, 315 U.S. 203, 233 (1942); Hines v. Davidowitz, 312 U.S. 52, 63 (1941); United States v. Belmont, 301 U.S. 324, 331 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

87. Bilder, at 826.
88. U.S. CONST. art. II, §2, cl. 2; id. at Art. I, §8, cl. 2. See also Bilder, at 827-8.
89. U.S. CONST. art. I, §10. et seq. (cl. 1: bars the state governments from making treaties with foreign nations, clause three bars states, without Congressional consent, from entering into compacts with foreign nations).
90. U.S. CONST. art. II, § 2 et seq., id. at Art. I, §8, cl. 2.; See also Bilder, at 829.
91. Bilder, at 830. This statement can be interpreted one of two ways. If states have any foreign affairs power, such power must be granted by the political branches of the federal government. However, if it can be legitimately argued, as presented infra through out this paper, that there exist an absolute exclusion of state and local government in foreign affairs, a grant to the states of such power creates an interference by the states into the federal government's ability to negotiate in foreign affairs.
92. Gibbons v. Ogden, 9 Wheat 1 (1824); Jennison, 39 U.S. at 570-71.
93. Jennison, 39 U.S. at 571.
94. U.S. CONST. art. II, §2, cl. 2.
95. Id. at art. I et seq.
96. Id. at art. III et seq.
entering into agreements with foreign nations. Congress has no authority, under the Constitution, to grant states treating making power. Furthermore, there exist no implied authority by the federal government to allow states to enter into agreements with foreign nations. Interpreting the text of Constitution, courts have held that the President, along with the executive branch, hold exclusive power to make treaties and to conduct the foreign affairs of the United States. Accordingly, the court’s definition of a treaty, implies that only sovereign nations, not sovereign states of nations, can enter into such agreements.

The structure of the Constitution supports the contention that states do not possess any powers within the realm of foreign affairs. Although the Constitution creates a dual sovereignty, the states have ceded their power to the federal government in interstate and international matters, so that the country is able to act with a unified voice. Thus all powers to act in the area of foreign relations is vested in the federal government.

Despite the explicit Constitutional language and the structure of the Constitution, prohibiting treaties between states and foreign nations, early Supreme Court cases addressed the issue of whether certain state actions triggered the constitutional prohibitions. In Holmes v. Jennison, the Court addressed the issue whether the Governor of Vermont could assist Canada by detaining and extraditing Holmes, a Canadian resident, who had committed a

---

97. *Id.* at art. I, §10, cl. 1.
99. Sloan v. Baker, 10 P.2d 362, 363 (Or. 1932). Although the Constitution provides that states, with the consent of Congress, can enter into agreements with foreign nations, U.S. CONST. art. I, §10, cl. 3, the courts have narrowly interpreted the Compact Clause. The courts have frowned upon the states’ ability to maintain continuous relations with foreign nations because such agreements would interfere with the supremacy of the federal government. *See discussion infra* regarding the courts’ interpretation of the Compact Clause.
104. U.S. CONST. art. I, §10, cl. 1 (absolutely prohibiting the states to enter into treaties with foreign nations); *id.* at art. I, §10, cl. 3 (requiring states to obtain Congressional consent to enter into compacts with foreign countries).
106. Jennison, 39 U.S. at 570.
108. 39 U.S. 540 (1840).
crime in Canada and had escaped to Vermont. The Court found that by extraditing Holmes from Vermont to Canada, the governor was neither protecting his citizens nor exercising a valid police power. The court stated that Vermont, by assisting Canada under the principles of comity of nations, intruded upon the domain of the federal government's foreign affairs powers. Thus, the Court held that the agreement between Vermont and Canada was prohibited within the context of the federal government's control over foreign affairs, and therefore unconstitutional. Although this case was decided prior to the enactment of any federal statutes or treaties relating to extradition, it elucidates the premise that the authority to interact with foreign nations is vested in the federal government, and not the states.

In *Sloan v. Baker*, the Mayor of Portland visited Europe in order to establish diplomatic contacts with European municipalities. The Supreme Court of Oregon opined that cities do no possess any characteristics of a sovereign and thus can not aggrandize themselves with authority not given to them. The court, citing the federal Constitution's prohibition of state governments in establishing relations with foreign nations, declared that neither an expressed nor an implied authority existed "on the part of a municipality of a state to assume ambassadorial relations either with municipalities of other states or with foreign governments." Therefore, states do not possess any foreign affairs powers.

---

110. Id. at 568, 569.
111. Id. at 569; Comity is not a discretion afforded the state courts, but one possessed by the nation-states. Bank v. Earle, 13 Pet. 519, 589 (1839). Because comity is discretionary, it is not obligatory, and a nation-state can choose not to exercise their discretion. Hilton v. Guyot, 159 U.S. 113, 166 (1895).
112. Jennison, 39 U.S. at 568.
113. 10 P.2d 362 (1932). In Sloan v. Baker, the issue on appeal was whether the Mayor of Portland, Oregon, was entitled to payment of his salary for the sixty days that we was in Europe, and not in Portland. Id. at 363. Although this case is on the state court level, it exemplifies the doctrine of foreign relations preemption, the doctrine that neither a city nor a state has a mandate to exercise authority in the field of foreign affairs, a power directly vested in the federal government by the Constitution. See generally Koh, at 1824. But see Bilder, at 821, which argues that although the foreign affairs power is vested in the federal government, various states and municipalities have initiated relations with foreign nations and it is up to "Congress and the President to decide whether to preempt it." Id. at 830.
114. Sloan, 10 P.2d at 364.
116. Sloan, 10 P.2d at 364.
117. In practice, the states prohibition into the realm of foreign affairs is not considered absolute. In Clark v. Allen, 331 U.S. 503 (1947), the Supreme Court held that test was whether the intrusion by the states had "some incidental or indirect effect in foreign countries." Id. at 517. In Clark, the court declared valid on its face a California probate reciprocity statute, which excluded non-resident alien legatees from taking a decedent's property, by either testamentary disposition or intestate succession, unless, similar procedures existed to afford United States citizens the same benefit in the foreign nation.
The Supreme Court’s stance on the Doctrine of Dormant Foreign Relations Preemption is represented in Zschernig v. Miller. In Zschernig, the court held that Oregon’s “Iron Curtain” statute was “an intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and the Congress.” The statute at issue allowed for property, which would have vested in German nationals by intestate succession, to escheat to the state before vesting unless the foreign nationals could prove, inter alia, that there existed a reciprocal right of inheritance in Germany. Justice Douglas stated that although states traditionally regulated intestate succession, if the state legislature “impair[s] the effective exercise of the Nation’s foreign policy” it must be invalidated.

In comparison, the ICSE provisions authorize states to enter agreements with foreign nations. Yet, the Constitution bars the states from enter into treaties with foreign nations. Furthermore, foreign relations power is directly

However, twenty years later, the Supreme Court’s decision in Zschernig v. Miller, 389 U.S. 429 (1968) again established that any intrusion, regardless how indirect or incidental, by the state government in foreign affairs, have a direct effect on the federal government’s ability to effectively administer their foreign relations power. Justice Douglas enunciated that although matters of property is an area of law traditionally reserved to the states by the tenth amendment, international property law is a matter for the Federal government, not the state probate courts to decide. Justice Stewart, in concurrence stating the same premise. Id. at 443.

118. 389 U.S. 249 (1968). See also Koh, at 1847; Bilder, at 824-25.
120. Id. at 431.
121. Id. at 440.
122. Id. Justice Stewart, in concurrence, articulated that allowing states to act in matters of foreign affairs would be an invasion by the state where the Constitution only permitted the federal government to trespass. Id. at 442.

In contrast, Justice Harlan, concurring for other reasons, id. at 681-82, asserted that Oregon’s “Iron Curtain” statute was not unconstitutional on its face and interprets the Court’s decision as a call to find the statute unconstitutional when applied. Id. at 459. Harlan oversimplifies the majority’s opinion when he stated that the opinion rests on the premise that the statute’s requirement of reciprocity and the fact that a foreign heir could inherit Oregon property would “involve the state courts in evaluation of foreign laws and governmental policies, and that this is likely to result in offense to foreign government.” Id. at 459-60. Prior to any state court exercising their discretion, the statute’s requirement of reciprocity frustrates the federal government’s ability to negotiate with another country, in this case Germany, on matters of recognition of legatee rights.

Second, Harlan contends that the statute would not cause significant interference in foreign relations since the Court did not mention, nor did the record show that “any instance in which such an occurrence has been the occasion for a diplomatic protest, or, indeed, has had any foreign relations consequence whatsoever.” Id. at 460. Harlan cites the fact that the government did not contend that the Oregon statute would interfere with the federal government’s foreign relations. Id. Additionally, Harlan looks to the fact that the State Department has stated that such a State statute would have a minute effect on foreign relations and foreign policy. Id.

given to the executive branch for general purposes, and the legislative branch for economic purposes. Nor do state governments possess a right of passage into foreign affairs within their residual constitutional grant of power. Although states are sovereignties, similar to the decision in Sloan, states can not aggrandize themselves with authority implicitly denied to them by the federal Constitution. In early cases, such as Holmes, and later cases, such as Zschernig, the Supreme Court has articulated that the Framers did not intend for the states to have a foreign affairs power. Additionally, there exist no aperture within the Constitution’s state prohibition clauses to imply that states even have a residual authority to enter into agreements with foreign nations. Comparatively, the ICSE provisions creation of a grant of power to the state government to negotiate child support agreements with foreign nations goes against the Constitutional text and the framer’s intent of what constituted proper realms of state authority.

“No power under the [federal] government can make [any treaty entered into by a state] valid or dispense with the constitutional prohibition.” The Court’s interpretation of the constitutional limitations on state governments in Holmes and Zschernig, in addition to the similar treatment by a state supreme court in Sloan, illustrates that state governments can neither circumvent the limitations nor initiate agreements which would create an interference into United States foreign affairs.

B. Compact Clause

A second issue which arises from the enactment of the ICSE provisions is whether the arrangements by the states with foreign nations goes so far beyond the scope of the Constitution’s Compact Clause as to actually interfere with the nature of the federal structure of government. The current arrangements

125. Id. art. II et seq; id. at art. II, § 2, cl. 2.
126. Id. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations”).
127. U.S. CONST. amend. X.
128. States can provide, within state constitutions, more protection to its citizens than are given to United States citizens within the federal constitution. Yet, states can not afford themselves more authority which is not enumerated within the federal constitution.
129. Holmes v. Jennison, 39 U.S. at 569; See also Hilton v. Guyot, 159 U.S. 113 (1895) (explaining that comity of nations can only exist between a federal government towards another nation’s federal government, and is not a state court between a foreign nation.) Id. at 163-66; Bank v. Earle, 13 Pet. 519, 589 (1839) (“It is not the comity of the courts, but the comity of the nation.”).
130. Cf. U.S. CONST. art. I, §10, cls. 1, 3 with id. at amend. X.
132. Id.
133. The Supreme Court in Virginia v. Tennessee, 148 U.S. 503, 520 (1893), defines the terms “compact” and “agreement.” The term compact usually applies to formalistic contractual arrangements, while
between states and foreign nations regarding international child support enforcement are parallel unilateral policy declarations, for example, agreements. The ICSE provisions represent congressional consent of these agreements. Yet, the contention lies in nature of these agreements as being beyond the framers' intent as permissible compacts, regardless of congressional consent.

The form of an agreement does not dictate whether it is a compact. The question rests on the impact of the arrangement on the federal government. The general test regarding what constitutes a compact between two sovereign entities and whether it needs congressional consent was established at the close of the nineteenth century in Virginia v. Tennessee, which was substantially modified in United States Steel Corp. v. Multistate Tax Commission. The standard of review as to whether a compact falls under the Compact Clause of the constitution is (1) whether the agreement has an impact on the federal structure, and (2) whether the agreement tends to increase the political power of the state or interfere with areas of governance whose subject matters are under the exclusive control of the federal government.

The first inquiry is whether the agreement has an impact on the federal structure. Not every agreement between two or more states is a "compact" requiring congressional consent. Agreements that are solely concerned with intrastate affairs or the health and safety of the state citizens would not pierce the federal government's domain. Few cases address the issue of a state entering into an agreement with a foreign nation. One early Supreme Court case which interprets the Compact Clause's application to such arrangements is Barron v. Baltimore. In that case, Barron, the owner of a wharf in

---

136. Sovereign entities can be either states or foreign nations.
138. Multistate Tax Comm'n, 434 U.S. at 452.
139. Id. at 471.
140. Virginia, 148 U.S. at 518.
141. Multistate Tax Comm'n, 434 U.S. at 471.
142. Virginia, 148 U.S. at 518. The Supreme Court lists illustrations of agreements between states where congressional consent would not be required to validate the agreement. Id. In addition, the court opines that "the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another." Id.
143. Virginia, 148 U.S. at 518. (noting various intrastate concerns which do not interfere with the federal structure).
145. 32 U.S. at 243.
Baltimore’s eastern harbor sued the city of Baltimore for damages caused when the city diverted waterways, which interfered with the operation of the docks. In dicta, Justice Marshall asserted that the Constitution expressly placed limits on the state government in certain subject matters, as listed in Article I, Section 10 of the Constitution. He elucidated the issue regarding a state’s ability to compact with foreign countries by declaring that such arrangements interfere with the exclusive power of the federal government to enter into treaties. Yet, Marshal acknowledged that compacts amongst the several states do not conflict with the framers’ intent and purpose for the clause. The premise of Marshall’s stance lies in the fact that if a state government acted, on the local level, in the making of arrangements with foreign nations, then such action would interfere with the federal government’s authority of coordinating efforts, on a national level, for the common good of all citizens. Since the limitation are expressively stated in the Constitution, the court found there was no room for interpretation as to any other meaning. Thus, the court stated that there did not exist any convincing evidence to ignore the expressed limits the Constitution has placed on the state legislature.

Similarly, in Virginia v. Tennessee, Virginia wanted the court to set aside a compact entered into by Virginia and Tennessee to establish their respective borders for lack of congressional consent. The case dealt with determining what types of compacts need congressional consent. Justice Field, citing Justice Story, expressed that where treaties are political in nature, compacts apply to subjects which “might be deemed mere private rights of sovereignty.” Furthermore, just as Congress can give consent to validate a compact, Congress can also bar states from entering into compacts. Certain

146. See id. The issue centered around whether the actions of the municipality constituted a taking under the fifth amendment of the United States Constitution. Although, The case was dismissed for lack of jurisdiction, the court did address the issue of the application of the Compact Clause to state agreements with foreign nations. Id. at 249, 251.

147. See id. at 249. The purpose of Article I, §10 of the Constitution was to "restrain state legislation on subjects entrusted to the government of the union, in which the citizens of all the states are interested." Id.

148. Barron, 32 U.S. at 249.
149. Id.
150. Id.
151. Id.
152. Id.
154. Id. at 517.
155. See id. at 518-519.
158. Id. at 519-520.
subject matters belong to the federal government as a general right of federal sovereignty. In addition, these rights also belong to the state governments, unless the right has been ceded to the federal government by the federal constitution.

If the scope of the Compact Clause encompasses those agreements which tend to increase the political power of the states, thus “encroach[ing] upon or interfere[ing] with the just supremacy of the United States,” then agreements regarding the enforcement of international child support would fall under the clause. Even if the ICSE provisions operate as congressional consent, the legislative history of the ICSE provisions acknowledges the fact that states do not have the power to enter into treaties. Likewise, the United States Constitution prohibits states from entering into any treaty, and requires states to gain congressional consent to enter into any agreement or compact with another state or foreign power.

The permissive language within the ICSE provision would imply that the statute’s intent is to consent to the agreements between states and foreign nations regarding international child support enforcement. If the ICSE provision constitutes congressional consent, the provision would make any arrangements made by a state with a foreign nation a matter of federal law. Similarly, provisions of a treaty have equal footing with acts of Congress. When a federal law and a provision of the United States Constitution, in this case the Compact Clause, are in conflict with one another, the Constitution, as the supreme law of the land will always prevail. Therefore, the ICSE provision as federal law can not permit states to enter into agreements with foreign nations. The courts in Barron and Virginia expressed that the framers’

---

159. Id. at 525.

160. Id.


164. U.S. CONST. art. I, § 10, cl. 3 (compact clause).

165. 42 U.S.C.A. § 659a(d) (West 1998). “States may enter into reciprocal arrangements for the establishment and enforcement of support obligations with foreign countries that are not the subject of a declaration [by the State Department], to the extent consistent with Federal law.” Id.

166. Cuyler, 449 U.S. at 439 n. 7. Under the “Law of the Union” Doctrine, if an interstate agreement has congressional approval it becomes federal law. See also Delaware River Joint Toll Bridge Comm’n v. Colburn, 310 U.S. 419, 427-28 (1940); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13. How.) 518, 566 (1852).


intent did not allow for continuous on-going agreements between the states and any foreign nations. Such agreements would interfere with the delicate nature of the federal system of government. Thus, Congress’ grant to the states of the authority to negotiate agreements with foreign nations concerning child support enforcement goes against the constitutional limitations placed upon and residual powers vested in the government of the several states.

C. Foreign Commerce Clause

Article I, Section 8 of the United States Constitution states that “Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.” Since 1937, when the Supreme Court decided NLRB v. Jones & Laughlin Steel Corp., the court has broadened its recognition of Congress’ plenary powers under the Commerce Clause. NLRB marked the commencement of a period of extreme judicial deference to the legislature. It was not until the Supreme Court’s decision in United States v. Lopez, that the judiciary began to reevaluate Congress’ assertions of authority under the Commerce Clause.

Although foreign affairs power is vested primarily in the executive branch, only Congress has the power to regulate foreign commerce. In Hodel v. Virginia Surface Mining & Reclamation Ass’n, the Supreme Court developed a two-prong test in determining whether Congress has exceeded its authority under the Commerce Clause. To evaluate the constitutionality of Congress’ consent to states to enter into agreements with foreign nations, the Court would first have to determine whether a rational basis exists to conclude that the

169. U.S. CONST. art. I, § 8, cl. 3.
170. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In NLRB, the court upheld the National Labor Relations Act against a Commerce Clause challenge. Id. at 36-8. In doing so, the court held that Congress may regulate intrastate commerce activities which have a substantial effect on interstate commerce as a prophylactic against burdens on interstate commerce. Id. at 37.
171. See United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (upholding the Agricultural Adjustment Act of 1938). In Wickard, the application of the Commerce Clause was stretched to its limits. The court, by upholding the act, permitted Congress to regulate local production and local consumption of wheat by a farmer because the aggregate effects of taking the wheat out of commercial circulation would substantially effect interstate commerce.

See also United States v. Lewis, 936 F. Supp. 1093, 1096 (D. R.I. 1996) (noting that “the Supreme Court had not invalidated a federal statute as exceeding Congress’ authority under the Commerce Clause for over fifty years” until the Lopez decision).
172. Lopez, 115 S. Ct. at 1624.
175. See id. at 276.
regulated activity substantially effects interstate or foreign commerce.\textsuperscript{176} If a rational basis exist, the court would then look to see whether the specific regulation is reasonably adapted to the goals permitted by the Constitution.\textsuperscript{177}

In \textit{Lopez}, the Supreme Court established three broad categories of activity which Congress can regulate under the Commerce Clause: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those activities having a substantial relation to interstate commerce.\textsuperscript{178} Chief Justice Rehnquist declared "that the proper test requires an analysis of whether the regulated activity 'substantially effects' interstate commerce."\textsuperscript{179} The \textit{Lopez} decision has been used as the judicial standard in determining the outer limits of the Commerce Clause.\textsuperscript{180} Given the language in the ICSE provisions, test two and test three seem to address the issue of whether the designation to the state government of a right to enter into an agreement with a foreign nation is with in Congress' Commerce Clause power.

Goods which enter into the stream of commerce are immune from state or local taxation, so long as, the goods remain in the stream of commerce.\textsuperscript{181} Currently, the federal courts are spilt as to whether payment of child support orders are considered "goods" and thus can be regulated by Congress under the Commerce Clause.\textsuperscript{182} The standard for regulation of commerce is whether the activity substantially affects interstate commerce.\textsuperscript{183} Any economic activity by the states which substantially effects or places a direct burden on Congress' enumerated power to regulate foreign commerce can be regulated by Congress under the Commerce Clause.\textsuperscript{184}

The economic or commercial impact of the activity on interstate commerce dictates whether Congressional regulation is permissible, not the nature of the

\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} United States v. Lopez, 115 S. Ct. at 1629-30.
\textsuperscript{179} Id. at 1630.
\textsuperscript{182} Compare Lewis, 936 F. Supp. at 1096 (asserting that regulation by Congress of interstate child support payments is a regulation of channels of interstate commerce) with United States v. Parker, 911 F. Supp. 830 (E.D. Pa. 1995), (arguing that Congress lacked the authority to regulate failure to pay child support orders because unpaid money in such cases did not constitute a "good"). \textit{See also} United States v. Ganaposki, 930 F. Supp. 1076, 1082 (M.D. Pa. 1996) (noting that the Third Circuit, in United States v. Bishop, 66 F.3d 569 (3rd Cir. 1996), defines "commerce" under the Commerce Clause quite expansively).
\textsuperscript{183} See Ganaposki, 930 F. Supp. at 1082.
activity. The majority of the courts hold that regulation of child support enforcement is a constitutional exercise of Congress’ Commerce Clause power. Payment of child support constitutes commerce because the parent who does not fulfill his or her obligation to pay receives an economic gain by withholding such funds, at the same time there exist an economic loss to the child who does not receive the needed money. Under the analysis that Congress has the authority to regulate all channels of interstate commerce, payment of child support payments is an economic activity which has a substantial effect on interstate commerce. Thus by analogy, international child support payments would have an equivalent effect on foreign commerce. Therefore, if payment of child support is considered a “good,” then any agreement by the states with a foreign nation could impair a “good” traveling with in the stream of foreign commerce. Congress has plenary powers over foreign commerce. Yet, the taxing harm caused by the state agreements with foreign nations would be left entirely to the whim of state government and its legislature.

In Lopez, the Supreme Court struck down a federal statute which regulated the possession of a gun on school property. After presenting a history of judicial treatment of the Commerce Clause, Justice Rehnquist, writing the opinion for the court, stated that possession of a hand gun on school property did not constitute an economic activity that might substantially effect interstate commerce. The court noted that the invalid statute lacked two things. First, the statute failed to provide a jurisdictional element, connecting the regulated activity with interstate commerce. Second, the statute lacked any mention, in its text or legislative history, of its substantial impact on interstate commerce.

---

186. Currently nine district courts and the Second Circuit have upheld a federal statute which criminalizes the non-payment of child support as constitutional. Only four district courts have found that the statute is beyond Congress’ Commerce Clause power.
188. See United States v. Nichols, 928 F. Supp. 302, 314 (S.D.N.Y. 1996). Since payment often occurs by mail, wire, or electronic transfer of funds, these instrumentalities are all included in Congress’ broad definition of interstate commerce. Id.
189. Lopez, 115 S. Ct. at 1634. See discussion infra p. 1634 (providing a more detail analysis of the case).
191. See id. at 1634.
192. See id. If these two elements were included, the court could have found that the inclusion was merely a pretext to validating the law under the Commerce Clause. Yet, the pretext argument is difficult to prove.

The Lopez case merely adds to the pile of uncertainty regarding what Congress can regulate. Unlike the historical test of direct or indirect effects on interstate commerce, the substantial effects test acknowledges
Similar to the statute in *Lopez*, the ICSE provisions lack the necessary legislative history to create a nexus between international child support enforcement and foreign commerce.\(^{193}\) It can be asserted that Congress has the authority to regulate payment of international child support orders.\(^ {194}\) However, what is being challenged is the statute's grant of authority to the state governments to regulate an activity that has a substantial effect on foreign commerce. Subsection (d) of the first ICSE provision\(^ {195}\) says that "states may entered into reciprocal arrangements for the establishment and enforcement of support obligations with foreign countries."\(^ {196}\) Neither the statute nor the legislative history indicates why granting the states government authority to enter into such agreements has a diminishing effect on foreign commerce.\(^ {197}\) The patent effect of subsection (d) is a grant by Congress to the state government to do indirectly what Congress can not do directly, enter into treaties with foreign nations.\(^ {198}\) The latent effect of subsection (d) is permission given to the states to regulate foreign commerce. Enforcement of international child support claims does substantially effect foreign commerce. The abdication of authority by Congress to the states contradicts the plenary power of Congress to regulate under the Commerce Clause. Congress can not regulate all aspects of human life.\(^ {199}\) Yet, in those areas of activity where Congress can regulate, Congress should not be able to haphazardly relinquish its authority to the state government if such an action would allow states to set foreign policy and regulate foreign commerce.

It was not the intention of the framers to give any constitutional recognition to the state government as having a "reserved power" in the area of foreign commerce. Congress' control over foreign commerce has a tremendous impact on foreign policy. It can be inferred that any dissemination of this control to the state government would permit the states and local governments to also construct United States foreign policy. Congress has a right, under the foreign

\(^{193}\) See discussion following *supra* notes 44-48.

\(^{194}\) But see United States v. Parker, 911 F. Supp. 830 (E.D. Pa. 1995), (arguing that Congress lacks the authority to regulate failure to pay child support orders because unpaid money in such cases did not constitute a "good").

\(^{195}\) 42 U.S.C.A. § 659a(d) (West 1998).

\(^{196}\) See id.

\(^{197}\) If Congress regulates, they must show that the regulated activity has a substantial effect on interstate commerce. Conversely, if the state regulates, it must show that the effect on interstate commerce was so minute enough to not require Congressional regulation of the activity. But see *Wickard* v. Filburn, were the court upheld a federal regulatory statute because the aggregate effects of the regulated activity had a substantial effect on interstate commerce. 317 U.S. at 111.

\(^{198}\) See discussion *supra* note 197.

\(^{199}\) See *Lopez*, 115 S. Ct. at 1632.
commerce clause, to regulate international child support enforcement. However, the statute's appointment to state governments, of an equivalent right to enter into agreements with foreign nations on the issue of international child support enforcement, goes against the foreign commerce clause relations to the state.

III. *UNITED STATES v. LOPEZ: IT'S EFFECT ON THE INTERNATIONAL CHILD SUPPORT ENFORCEMENT DEBATE*

One of the main purposes of this paper is to elevate the discussion in whole or in part of the possible invalidity of the ICSE provisions. One way to go about this mission is to not only present an argument that Congress has the authority to act but also to assert that Congress lacks the authority to regulate international child support enforcement. Before *United States v. Lopez*, Congress' regulatory power under the Commerce Clause was nearly omnipotent for over fifty years. During that time period, Congress passed laws dealing with problems on a national scope, which were morally based and Commerce Clause authorized.200 Since *Lopez*, the Supreme Court's deference to Congress has waned, replaced instead with a demand that Congress justify its use of the Commerce Clause to regulate state activity. Utilizing the analysis by the Supreme Court in *Lopez*, it can be argued that Congress has no actual or inherent authority to regulate international child support enforcement claims.

In *Lopez*, a 12th grader was arrested and charged under the Gun-Free School Zones Act of 1990,201 for possession of a gun while on school property. The Supreme Court held that the statute exceeded Congress power under the Commerce Clause.202 The court, affirming the Fifth Circuit's decision, declared the federal statute lacked two key components.203 First, the statute failed to state whether the regulated activity substantially effected interstate commerce.204 In the alternative, if the regulated activity had been an essential part of a larger regulatory scheme where by without congressional regulation the scheme would severely burden interstate commerce then the statute may have been saved.205 However, the court concluded that this was not the case.206 The court found that the statute's regulation of gun possession on or near school

---


203. See id. at 1630-1631.

204. See id.

205. See id. at 1631.

206. See id.
grounds had nothing to do with commerce.\textsuperscript{207} Furthermore, the regulation had no aggregate effect on interstate commerce.\textsuperscript{208}

In \textit{Wickard v. Filburn},\textsuperscript{209} the court looked to what could be considered the outer limits of Congress' ability to control interstate commerce to support its finding. In \textit{Wickard}, a farmer who had used his land to grow wheat for his personal consumption was fined for violating the Agricultural Adjustment Act of 1938.\textsuperscript{210} The government argued that because the goal of the legislature was to increase the market price of wheat, the aggregate effects of "home-consumed wheat would have a substantial influence on price and market conditions."\textsuperscript{211} Even though Filburn's wheat was never sold on the grain market, the court upheld the federal statute because by growing his own wheat, Filburn would have no need to buy wheat.\textsuperscript{212} The aggregate effect of farmers similarly situated as Filburn would cause demand for wheat to decrease, thus directly effecting wheat prices.\textsuperscript{213}

International child support claims have a substantial effect on foreign commerce. Payment or failure to pay international claims effect foreign commerce. If commerce is intercourse,\textsuperscript{214} then an economic activity that effects international borders is foreign commerce. When a foreign parent pays child support, it allows for the child to purchase various sustainable items. In contrast, when a parent does not pay child support, it creates an economic loss to both the child and the effected economy. Yet, Justice Thomas, in his concurrence, averred that "the power to regulate 'commerce' can by no means . . . empower the Federal government to regulate marriage . . . throughout the 50 states."\textsuperscript{215} Thus, what is still left undecided is whether Congress can regulate international child support.\textsuperscript{216}

Next, the court expressed that the statute should state a jurisdictional element demarcating the nexus between interstate commerce and the regulated

\begin{flushright}
\textsuperscript{207} Lopez, 115 S. Ct. at 1630-31.  
\textsuperscript{208} See id. at 1631.  
\textsuperscript{209} Wickard v. Filburn, 317 U.S. 111 (1942).  
\textsuperscript{210} Id. at 128.  
\textsuperscript{211} Id.  
\textsuperscript{212} See id.  
\textsuperscript{213} See id. If the farmer grows his own wheat, then he has no need to buy wheat, thus decreasing the demand for wheat on the open market. When the farmer decides not to sell his wheat but use it for personal consumption, it results in a decrease in supply of wheat in the open market.  
\textsuperscript{214} See Gibbons v. Ogden, 22 U.S. 1 (1824). "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." \textit{Id}.  
\textsuperscript{215} Lopez, 115 S. Ct. at 1642 (Thomas, J., concurring).  
\textsuperscript{216} But see id. (Thomas, J., concurring) ("Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.").
\end{flushright}
activity. In *United States v. Bass*, such a connection was established. In *Bass*, the court upheld a federal statute that criminalized the receiving, possessing, or transporting of any firearm in commerce or affecting commerce. "The Court interpreted the possession component of [the statute] to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-balance." Thus, to be successful, the defender of the statute must demonstrate not only that the regulated activity occurred but also that there exist a nexus between the regulated activity and interstate commerce. Such expressed jurisdictional element might limit Congress' reach to a finite set of person or things that have an explicit connection with or effect on interstate commerce.

Courts have looked to the expressed legislative history and committee notes for clarification. Even though legislative findings are not necessary, they enable the court to interpret the legislative intent of the statute. Yet, in the case of the ICSE provisions such legislative findings are essential because, similar to the statute in *Lopez*, the ICSE provisions addresses a never before promulgated issue. Thus, the "prior federal enactments or Congressional findings [do not] speak to the subject matter . . . or its relationship to interstate commerce." However, the legislative history and the committee notes of the ICSE provisions do not state the requisite nexus with interstate commerce. Under the *Bass* model, a clear congressional intent must be shown. In the ICSE provisions it was not.

In *Lopez*, the court determined that if the government's argument was to be accepted, it would hamper the court's ability to limit Congress' regulatory authority of subjects traditionally under the state's police power.
police power does not exist in the Constitution. 228 "The Constitution mandates this uncertainty [of which government controls which subject matters] by withholding from Congress a plenary police power that would authorize enactments of every type of legislation." 229 Since the ICSE provision deals with family law, one of the areas under a state's police power, it can be averred that Congress lacks the requisite power to regulate international child support enforcement under the Commerce Clause.

IV. CAN THE ICSE PROVISIONS STAND AS AN EFFECTIVE TOOL IN INTERNATIONAL CHILD SUPPORT ENFORCEMENT?

All legislation is presumed constitutional. Yet, "[i]f [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard . . . They would declare it void." 230

A. The ICSE Provisions Create Legal Quagmires

The Constitution absolutely prohibits states from entering into treaties with foreign nations. 231 The significance of such a limitation on state government was to prevent local interference into foreign affairs. As mentioned, traditionally the Supreme Court has held that any action by a state with a foreign nation would invoke this constitutional prohibition. 232 Yet, recently the court had been of two differing positions. First, if the subject matter has a high probability of becoming a subject of international dispute then the federal government has paramount authority in and power over the subject matter. 233 In United States v. California, 234 the conflict centered around whether California could control oil reserves located within the boundary of the State's three mile territorial waters. 235 The court held that such authority over petroleum commerce would severely affect the nation's ability to engage in commerce with other nations and the stability of global peace. 236 The court

---

228. See id. at 1633.
229. See id.
230. The Federalist No. 3, at 553 (John Marshall); See also Lopez 115 S.Ct. at 1650 n. 9 (Thomas, J., concurring).
232. Jennison, 39 U.S. at 540 (holding that New York had no right to capture and relinquish a fugitive to Canada).
234. Id.
235. See id. at 28-29.
236. See id.
ruled that control of the oil reserves was the exclusive jurisdiction of the federal government and not that of the California State government.237

On the other hand, the court has found the treaty prohibiting clause did not prevent a state from regulating its citizens' fishing activity outside the state's territorial waters.238 In Skiriotes v. Florida,239 the court held that if Florida's action did not directly conflict with federal legislation, then Florida could exercise its police power to regulate its citizens' behavior on the high seas.

Comparatively, the agreements by the states do have a potential for international conflict. Early agreements between states and foreign nations were not binding on both parties.240 Furthermore, it can be inferred from Gloria DeHart's article241 that the arrangements between the states and the foreign nations were wrought with problems because of lack of reciprocity on the part of the state and the inability or unwillingness of foreign courts to enforce state judgments.242 Besides Canada, Great Britain no longer recognized an extended definition of state to include individual states, thus requiring a nation to nation reciprocity of recognizing of child support orders.243 In West Germany, a semi-private agency, and not the federal government,244 established an arrangement with California regarding enforcement of child support orders.245 Although the individual states established a de facto reciprocity246 system with Germany and the other nations, the ICSE provision would still require both the reciprocating nation and the United States to establish reciprocity by governmental declaration.247 The notion of de facto reciprocity presupposes that de jure reciprocity would be an agreement established by treaty between the initiating country and the responding country. Despite the fact that within several foreign countries legislation has been passed to recognize agreements with individual states and to establish reciprocity with the state,248 with the United States such legislature,
as embodied in the ICSE provisions, may not be legally invalid against our Constitution.

Similar to California, the individual arrangements by the state and the foreign governments on international child support enforcement lay the foundation for potential international disputes. Unlike Skiriotes, arrangements between states and foreign nations do affect the sovereign authority of the United States to negotiate with other nations on this subject matter. If the United States had been a signatory to any of the United Nations treaties on the subject of international child support enforcement, the states participation and the ICSE provisions would be considered “necessary and proper” implementation in the enforcement process. However, the United States is neither a signatory to or has never negotiated with any nation in the area of international child support enforcement. The negotiation by the state governments and the resultant de facto reciprocity between the state and foreign nations can infer a treaty like relationship between the two parties.

How the courts have interpreted the Compact Clause creates a second argument as to why agreements between state and foreign nations run afoul of the Constitution. Aside from the necessity of Congressional consent, the original inherent right of states to make compacts was not relinquished under the Constitution. The formation of compacts by states was to be equivalent to sovereign nations forming treaties. The significance of the distinction between the treaty prohibiting clause and the compact clause was stated by the Supreme Court in Holmes v. Jennison.

[T]he use of all of these terms, “treaty,” “agreement,” and “compact” show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word “agreement” its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.

249. Under the Federal Constitution’s Necessary and Proper Clause, U.S. CONST, art. I, § 8, cl. 18, federal statutes enacted in accordance with treaties or conventions the United States is signatory to are considered “necessary and proper” toward the execution of the treaty.
250. Poole v. Fleeger, 36 U.S. 185, 209 (1837).
252. Poole, 39 U.S. at 540.
253. See id. at 570-572.
Yet, the court later established the test for congressional consent as any agreement that had a tendency to increase the political power of the state government or to encroach upon the just supremacy of the United States.\textsuperscript{254} Agreements between the states and the foreign nations may not necessarily increase the political power of the state government, but it does interfere with the just supremacy of the United States' ability to act in the international affairs.\textsuperscript{255} Even if the ICSE provision constituted congressional consent, if challenged, it is possible to argue that the authority granted to the states is of such a nature that it would so severely hamper American foreign diplomacy as to cause conflict of interest between the state government and the federal government. This conflict of interest between the dual sovereigns, similar to \textit{California}, could eventually lead to conflict on an international level. It can be inferred that agreements between the state and foreign nations should be within the jurisdiction of the federal government in order to avoid any potential problems in the international community. Comity is defined as:

\begin{quote}
the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and to the rights of its own citizens or of other person who are under the protection of its laws.\textsuperscript{256}
\end{quote}

Comity is not a discretion afforded to state courts, but one possessed by nation-states.\textsuperscript{257} Because comity is discretionary, it is not obligatory, and nation-states can choose to exercise it at their discretion.\textsuperscript{258} Since 1840, when \textit{Holmes} was decided, the more recent court decisions regarding comity have referred back to the \textit{Holmes}' definition of the nature of the doctrine.\textsuperscript{259} Comity is more likely to be considered non-obligatory in nature on the federal court level as seen in the \textit{Holmes}\textsuperscript{260} and limited to the parties who are signatories of the compact, as in \textit{Virginia v. Tennessee}.\textsuperscript{261} Under the ICSE provisions, agreements between the state government and foreign nations places a burden on states that are not party to the agreement to assist in requests by foreign nations.\textsuperscript{262} The statute

\textsuperscript{254} See \textit{Virginia}, 148 U.S. at 518; \textit{Multistate Tax Comm'n}, 434 U.S. at 452.

\textsuperscript{255} See \textit{Hooker}, 607 F.2d at 289 (proclaiming that the state and federal governments have no precedence of intergovernmental cooperation in international relations and states have no authority to conduct the international affairs of the United States).

\textsuperscript{256} See \textit{DeHart}, supra note 134, at 92; See also \textit{Hilton}, 159 U.S. at 166. The duty that exists is an international duty to respond, not a domestic duty.

\textsuperscript{257} Bank v. Earle, 38 U.S. 519, 589 (1839).

\textsuperscript{258} \textit{Hilton}, 159 U.S. at 166.

\textsuperscript{259} See id.

\textsuperscript{260} \textit{Holmes}, 39 U.S. at 569.

\textsuperscript{261} \textit{Virginia v. Tennessee}, 148 U.S. 503 (1893).

\textsuperscript{262} See 42 U.S.C. § 654 ¶ 32(A).
specifically states that request "by a foreign reciprocating country . . . which the States has an arrangement . . . shall be treated as a request by a state."\textsuperscript{263} Such a statement can be construed as use of the Full Faith and Credit Clause to implement foreign support orders in non-party states.

From this analysis, the statute can be challenged as creating an obligatory nature to the principle of comity by forcing the state executive branch to implement federal policy.\textsuperscript{264} In addition, a non-custodial parent can contend that the statutes require non-contracting states to be party to reciprocal agreements whose terms they were not able to negotiate.\textsuperscript{265} Both the doctrine of comity and recognition of foreign judgments by the courts are discretionary in nature. If that is the case, then the statute's imposition of a duty on state courts to accept international foreign judgments goes against the legal premise of foreign judgments being merely prima facie evidence that a debt exists. The legal effect of the statute would be to create a recognition and obligation to pay in states who have adopted the UFMJRA,\textsuperscript{266} and thus making those states party to another state's reciprocal agreement with a foreign nation. In total, the statute creates a lack of accountability in the federal government\textsuperscript{267} by impressing upon and creating in the states a duty of care they would not naturally posses.\textsuperscript{268}

B. The ICSE Provisions Delegation of Power to States Should be Challenged

Although an early court case may have stated an absolute concept that "legislative power can not be delegated,"\textsuperscript{269} the court has on many occasions sustained congressional delegation of power to federal agencies.\textsuperscript{270} There exists a de facto recognition by the court of Congress' ability to delegate its authority in order to resolve specific problems. "Delegation by Congress has long been

\textsuperscript{263} See id.
\textsuperscript{264} See Printz v. United States, 117 S. Ct. 2365, 2383 (1997) (finding that Congress has no authority in forcing state officials to implement federal policy).
\textsuperscript{265} Rhode Island v. Massachusetts, 37 U.S. at 748 (stating that states should be made party to any compact or agreement which effects their territory or citizens).
\textsuperscript{266} By adopting the UFMJRA, states are not allowed to recognize foreign judgments pertaining to marital situations.
\textsuperscript{267} See Printz, 117 S. Ct. at 2382.
\textsuperscript{268} Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) ("The State has no legitimate interest in protecting nonresident[s]").
recognized as necessary in order that the exertion of legislative power does not become a futility."271 The delicate balance of interpreting the Constitution either through a functionalist versus formalist viewpoint has diffused the exact boundary of Congress' ability to delegate authority to such an extent that the Supreme Court, from early on, has been reluctant to decide on the matter unnecessarily.272 The court is more willing to sustain delegations whenever Congress provided an "intelligible principle" to which the federal agency or office could conform.273 Therefore, the Supreme Court has been very deferential to and recognizes the broad scope of Congress' ability in delegation of authority to federal agencies.274 Yet, when it comes to foreign affairs and the delegation of power to the states the court has had a more conservative approach.275

Congress has promulgated statutes delegating state officials and agencies to implement and execute federal laws.276 Although the court expressed doubts as to Congress' ability to delegate authority to the state governments, it has been more consistent in ruling that Congress can give the state government the option to enforce federal law.277 In Selective Draft Law Cases,278 the court rejected the argument that a federal statute was invalid because it delegated duties to state officers.279 Currently, the Court has reversed its position and has held in numerous occasions that state officers, by virtue of not being appointed by the President, are not federal officers possessed with the inherent power of executing federal laws.280

In Printz v. United States,281 local sheriffs sought to enjoin the enforcement of provisions of the Brady Handgun Violence Prevent Act (hereinafter "Brady

---

271. See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940); See also Minstretta, 488 U.S. at 372.
272. See Wayman v. Southard, 23 U.S. 1, 42 (1825).
273. See J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (legislative standards test). Since after the depression, the Supreme Court has never found a permissible Congressional delegation of power to a federal agency.
275. See United States v. Curtis-Wright Corp, 299 U.S. 304, 312 (1936) (sustaining a joint resolution of Congress prohibiting the sale of weapons to selected countries, upon designation by the President); Selective Draft Law Cases, 245 U.S. 366, 389 (1918). The standard practice has been to interpret narrowly the delegation so as to avoid constitutional problems.
278. Selective Draft Cases, 245 U.S. at 389.
279. See id.
280. In Printz, the Brady Gun Bill case, the court denied application of a section of the statute which delegated to local sheriffs law enforcement branches, in the interim period prior to a federal system being implemented, to enforce the federal law. 117 S.Ct. at 2383.
281. Id. at 2365.
Act”). The court, reaffirming New York v. United States,282 found that Congress could not compel states to “enact or administer a federal regulatory program.”283 Provisions in the Brady Act required, inter alia, the chief law enforcement officer of a state conduct background checks in the interim period between the inception of the statute and the time the federal government scheme became operative.284 In finding the interim provisions unconstitutional, the court first addressed the government’s contention that early congressional enactment supported the validity of the provisions.285 The court stated that early federal statutes did not impose an obligation to act on the state governments, instead the state authorized its courts to consent to the statute,286 or the states themselves consented to the statute.287 In addition, the court looked to the text of the Constitution288 and concluded that “the early statutes imposing obligations on state courts [did not] imply a power of Congress to impress the state executive into its service.”289 The court eluded to the fact that the early statutes held no evidence of an explicit or implicit grant to the federal government to “command the states’ executive power in the absence of a particularized constitutional authorization.”290

Similarly, the ICSE provisions by requesting that state plans for child support “must . . . provide that any request for services . . . by a foreign reciprocating country or a foreign country with which the state has an arrangement described in [the other ICSE provision] shall be treated as a request by the state.”291 The Constitution in its text292 and by its structure creates a dual sovereignty, with enumerated powers vested in the federal

283. Printz, 117 S.Ct. at 2383.
284. See id. at 2369.
286. Holgren v. United States, 217 U.S. 509, 516-17 (1910) (refusing to address the issue of “whether the states can be required to enforce [provisions of the Act of March 26, 1790] against the state’s consent”).
287. Printz, 117 S.Ct. at 2370; In United States v. Jones, 109 U.S. 513, 519-520 (1883), the court asserted that a federal statute “could not be enforced against the consent of the state.” Therefore, any obligations to comply with the statute must be with the state’s consent. Id.
288. U.S. CONST. art. III, § 1; U.S. CONST. art. IV, cl.2 (Supremacy Clause); U.S. CONST. art. IV, § 1 (Full Faith and Credit).
289. Printz, 117 S.Ct. at 2371.
290. See id. at 2372.
292. Lane County v. Oregon, 74 U.S. 71, 76 (1869).
government on the one hand, and imposed limitations upon and residual power vested in the state government on the other.

More recently, in Condon v. Reno, the Court of Appeals for the Fourth Circuit held that the federal Driver's Privacy Protection Act was unconstitutional because it was a law which applied only to the states and not to private parties, thus was not a law of general applicability.

ICSE provisions give authority to the executive branch to enter into reciprocal agreements with foreign nations, permits the states to enter into reciprocal agreements with foreign nations, if the federal government has not, and requires the states to treat foreign judgments for child support as if they originated in a sister-state. Thus, the effect of the statute creates a delegation to states the power to enter into agreements with foreign nations.

C. Suggested Remedies

The ICSE provisions can be saved by placing the issue of international child support enforcement on a completely federal level without local interference by the states in the federal government's foreign policy. By doing this, a true demarcation of authority will be defined in such a way that both sovereign powers, i.e. the state and federal governments, will not be in conflict with each other. Furthermore, the ICSE provisions can be saved without losing the desired effect by removing subsection (d) from §659a and ¶32 from §654. These sections, which pertain to the role of the state governments in the international child support arena, as argued, weaken the statute and provides targets for non-custodial parents to challenge the statute on constitutional grounds. By enforcing the provisions and allowing Congress to do indirectly what it could not do directly, make treaties with foreign nations via the state government, Congress should consider amending the statute to include clearer legislative history illustrating what role was intended for both the federal and state governments. Finally, it is for the judiciary to decide whether to follow the Lopez precedent by finding a point to re-define that which is federal from that which is local in order to preserve the balance of federalism. On the other hand, the court may declare that those areas which are not strictly addressed by

294. See id. at art. I, § 10.
295. See id. at amend. X.
298. Id. at 456.
300. Id.
301. Id. at § 654 ¶ 32.
the Constitution, such as international child support enforcement, should be resolved by the democratic process of the Congressional and/or state legislature.\footnote{302}

VI. CONCLUSION

As this analysis suggests, there exists sound constitutional grounds for a non-custodial parent to challenge the international child support provisions. Although federal legislature, by passing the ICSE provisions, has decided to assume a more active role in this area, they did not proceed far enough to safeguard against dismissal of claims purely on procedural grounds. If the court is expected to interpret and defer to acts of legislation, those acts should conform to the legislative intent while following the proper course of legal precedence.

The ICSE provisions reflect the federal government's enterprise in imposing extra-constitutional power upon the state governments; thus, creating an incongruity between the articulated purposes of the law and the actual content of the law itself. Furthermore, under various constitutional clauses, Congress lacks the power to delegate to states a right to enter into agreements with foreign nations. Under the Supreme Court's decision in \textit{Lopez},\footnote{303} Congress has no power under the Commerce Clause to regulate family law. The content and statutory history of the ICSE provisions do not demonstrate that regulation of international child support claims substantially effect foreign commerce. Additionally, the provisions do not contain a jurisdictional element linking regulation of international child support with foreign commerce.

By granting a right to the state government to enter into agreements with foreign nations, the legislature has created a federalism problem, obscured the delicate balance between the federal and state government, and introduced ambiguity to the process of child support enforcement. By exercising control over family law, the legislature obfuscated the Supreme Court's decision in \textit{Lopez}, avoiding to conservatively interpret the decision, which could have eliminated any challenge presented by unwarranted congressional abrogation of the Commerce Clause.

\footnote{302} See ROBERT P. GEORGE, \textit{Justice, Legitimacy and Allegiance: The End of Democracy?}, 44 LOY. L. REV. 103, 105 (1998). Justice Scalia articulated this very premise in his concurrence in \textit{Webster v. Reproduction Health Services}, 492 U.S. 490, 523-37 (1989) (Scalia, J. concurring). Justice Scalia stated that on the issue of abortion the federal government could be neither pro-life or pro-choice since abortion, like many other things, is political in nature and not a constitutional issue. \textit{Id}.

\footnote{303} \textit{Lopez}, 115 S. Ct. at 1624.