International Human Rights in the 21st Century:
The Role of Development, Reconciliation, and Democracy in Securing World Peace
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Introduction: The Building Blocks to Recognition of Human Rights and Democracy: Reconciliation, Rule of Law, and Domestic and International Peace

James D. Wilets

The theme of this 2000 Goodwin Seminar issue, "International Human Rights in the 21st Century: The Role of Development, Reconciliation, and Democracy in Securing World Peace," addresses one of the great ironies of the late twentieth century. While universal recognition of human rights and democracy has made great progress, raging ethnic conflict, war, and a lack of economic development continues to worsen the lives of millions. Traditional concepts of human rights and democracy have also been unable to provide easy answers to the difficult problems of reconciliation haunting countries only recently emerging from decades of terror. The five visiting professors leading the Goodwin Seminar were chosen specifically because of the perspectives they bring in addressing the complexity of creating a democratic society that is respectful of human rights. The Goodwin professors were as follows: President Oscar Arias, President Jean-Bertrand Aristide, Dr. Hanan Ashrawi, Dean Claudio Grossman, and Judge Gabrielle Kirk McDonald.

The human rights community has increasingly recognized that human rights cannot be respected in a vacuum. Acceptance of human rights treaties and formal acceptance of human rights norms is meaningless without the rule of law. The rule of law, however, cannot exist unless society itself comes to terms with the deep divisions resulting from preexisting violations of human rights and a lack of democracy. Thus, reconciliation is an essential prerequisite to the establishment of a rule of law and respect for human rights.

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rights. The Truth and Reconciliation Commission in South Africa\(^1\) and the Guatemalan Commission for Historical Clarification\(^2\) are two examples of the victims' need, and that of society, for acknowledgement of the suffering inflicted upon them. Acknowledgment is necessary for establishing the legitimacy of the legal order. It does not even appear that retribution or punishment need accompany the acknowledgment in order for some degree of reconciliation to occur.

Without reconciliation, there cannot be domestic peace and a country must enjoy some degree of domestic peace in order to enjoy the rule of law. The exigencies of domestic strife too frequently have provided justification for the Pinochets of the world to apply measures against their own people that would violate international law, if applied against captured enemy soldiers. Goodwin visiting professors President Arias\(^3\) and Dr. Ashrawi\(^4\)

1. For more information on the South African Truth and Reconciliation Commission, see http://www.truth.org.za/.
2. For more information on the Guatemala Commission for Historical Clarification, see http://hrdata.aaas.org/ceh/report/english/toc.html.
3. Oscar Arias, former president of Costa Rica and 1987 Nobel Peace laureate, holds international stature as a spokesperson for the Third World. Championing such issues as human development, democracy, and demilitarization, he has traveled the globe spreading a message of peace and applying the lessons garnered from the Central American Peace Process to topics of current global debate. President Arias was born in Heredia, Costa Rica in 1940 and studied Law and Economics at the University of Costa Rica.

In 1974, he received a doctoral degree in Political Science at the University of Essex, England. After serving as Professor of Political Science at the University of Costa Rica, he was appointed Costa Rican Minister of Planning and Economic Policy. In 1986, Oscar Arias was elected President of Costa Rica. In 1987, President Arias drafted a peace plan to end a time of great regional discord in Central America. Widely recognized as the Arias Peace Plan, his initiative culminated in the signing of the Esquipulas II Accords, or the Procedure to Establish a Firm and Lasting Peace in Central America, by all the Central American presidents on August 7, 1987. In that same year he was awarded the Nobel Peace Prize. In 1988, President Arias used the monetary award from the Nobel Peace Prize to establish the Arias Foundation for Peace and Human Progress. From these headquarters, President Arias has continued his pursuit of global peace and human security. President Arias has received honorary doctorates from numerous universities and many honorary prizes, among them the Jackson Ralston Prize, the Prince of Asturias Award, the Martin Luther King, Jr. Peace Award, the Albert Schweitzer Humanitarian Award, the Liberty Medal of Philadelphia, and the Americas Award.

4. Dr. Ashrawi holds a Ph.D. in medieval literature from the University of Virginia and is the founder of the International Human Rights Council, an organization committed to human rights and democracy in a free and independent Palestine. As a feminist, one of Dr. Ashrawi's major goals is to strengthen the political participation of Palestinian women and to achieve equal rights in a new nation based on the foundations of credibility, freedom, and legitimacy. In 1991, she became the Official Spokesperson for the Palestinian Liberation
specifically address the issue of peace and human rights in their discussions of Central America and the Middle East. President Aristide continues to grapple with building a democracy in a society where many of the former agents of oppression are still active. Added to this is the explosive political situation where some of his own supporters have committed human rights violations upon others. Dr. Ashrawi must help her own people in a manner to reconcile themselves to the existence of Israel, while preserving their dignity in the process. She also finds herself in the painful position of criticizing the very leaders of the struggle for independence when they have themselves violated democratic and human rights norms. In this sense, Dr. Ashrawi has played a dual role as spokesperson for the Palestinian cause, but also as an outspoken critic of the current Palestinian leadership for its failure to exhibit transparency in governance. She also voices criticism where the government violates the human rights of the Palestinian people. Her outspokenness is all the more remarkable given her status as a Christian in a largely Islamic political movement and as a woman in a largely male dominated world. Throughout her visit to Nova Southeastern University, Dr. Ashrawi emphasized that peace must be achieved through negotiation among equals and that democracy cannot be achieved, nor human rights fully respected in the region, without peace.

The rule of law also cannot exist unless society itself creates independent civic institutions to monitor observance of human rights and encourage compliance with human rights norms. In this issue, Claudio Grossman, Dean of the Washington College of Law at American University and a current member and former president of the Inter-American Commission on Human Rights, discusses the challenges in achieving full respect for the right of free speech in societies that have only recently emerged from dictatorship and systematic violations of human rights. Citing the Organization ("PLO") and in 1993 was appointed General Commissioner of the Palestine Independent Commission for Citizen's Rights. Dr. Ashrawi was an active participant in the creation of the 1993 Oslo Accords. In 1996, she was elected to the Palestinian Legislative Council and named Minister for Higher Education. She is currently a member of the Legislative Council where she has become an outspoken critic of corruption in government and a leader for the creation of a democratic Palestine committed to human rights and peace. Dr. Ashrawi is married to Emil, a photographer with the United Nations headquarters in Jerusalem, and has two daughters, Amal and Zina.

5. Claudio Grossman was appointed Dean of the Washington College of Law, American University in 1995. Recognizing his achievements in the field of human rights, the Washington College of Law appointed him the Raymond Geraldson Scholar of International and Humanitarian Law. In 1989, Dean Grossman litigated several landmark cases decided by the Inter-American Court on Human Rights that resulted in favorable decisions for the
Argentinean political scientist, Guillermo O'Donnell, Dean Grossman refers to these recent democracies as "delegated democracies." These delegated democracies are the products of relatively free elections but without the civic institutions and other institutions, usually present in a more established democracy, to check the authoritarian tendencies of even democratically elected leaders. In these cases, the existence of a human rights system of the Organization of American States is especially important to the consolidation of democracy.

Social justice must exist in order for the rule of law, domestic peace, democracy, and respect for human rights to thrive. Dr. Ashrawi dealt with this issue in the context of redressing some of the current inequities between the economic privilege enjoyed by the Palestinian political leadership and the economic hardship endured by the great majority of Palestinians. Moreover, until Palestinian citizens of Israel enjoy the full political, social, and economic rights of Jewish citizens of Israel, peace cannot be assured.

It is difficult to ascertain the extent of President Aristide's involvement in the problems in Haiti's transition to democracy, but there can be no question that the enduring lack of social justice in Haitian society after decades of rule by oligarchy and dictatorship has only embittered the body politic, making reconciliation, domestic peace, and full respect for human rights a daunting task.

Finally, the Goodwin visiting professors demonstrate that democracy and human rights can only flourish in an international context in which peace is assured and some form of justice is meted out to those national actors that fail to respect fundamental human rights norms. The pursuit of peace is exemplified by the life work of President Arias, who recognized that
the exemplary democratic history of Costa Rica can only be guaranteed in the future if the region itself is free from military conflict and a debilitating arms race. To that end, President Arias authored and promoted the "Arias Peace Plan," a blueprint for ending decades of conflict in Central America. Despite considerable hostility from the United States, the Arias Peace Plan provided the necessary impetus for ending the decades of civil war ravaging Central America. President Arias, coming from a country that has been a beacon of democracy and one that respects human rights, nonetheless articulated the importance of regional peace for the economic, political, and social development of his own country:

In a poor region like ours, we cannot afford to squander opportunities for development by wasting our energy on violence and repression. Having seen the destruction wrought by internal conflicts in Guatemala, El Salvador and Nicaragua, Costa Ricans have come to understand the true importance of maintaining a culture that respects human rights.  

Indeed, a primary focus of President Arias' writing, and his work in the last decade, has been the appeal for an abandonment of the arms race in Latin America and elsewhere. In doing so, President Arias has not hesitated to condemn the West's complicity in the arms race among the world's poorest countries:

As debt servicing payments and military spending continue to rob the poor of basic health and education services, developed nations continue to profit from this tragic situation. . . . In the 1980s, Western governments and corporations played a significant part in arming Saddam Hussein's despotic regime in Iraq. Earlier in this decade, France provided significant military aid to the genocidal government of Rwanda. Until recently, the Indonesian military used British-made equipment against pro-independence groups in East Timor. . . . It is unconscionable that undemocratic states and governments that abuse human rights can easily acquire sophisticated weaponry on the international market, and it is outrageous that leading democracies such as the United States, France and Great Britain fuel bloody conflicts by supplying warring factions with armaments.

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8. Arias, supra note 7, 7 ILSA J. Int'l & Comp. L. at __, 25 NOVA L. REV. at 496 (internal citations omitted).
The pursuit of a particularly legal form of international justice is exemplified by the work of Judge McDonald, recent past president of an international criminal tribunal, and the work of Dean Grossman with the Inter-American Commission. Judge McDonald presided over the creation of one of the most important international legal institutions since the end of the Second World War: the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). As Judge McDonald notes, the creation of this tribunal came at a critical juncture in history when the international tribunal was finally prepared to respond to the kinds of atrocities that had previously been ignored. The Cold War had ended, permitting the international community to focus on issues of international justice with large agreement among the world's nations as to the substantive validity of human rights norms. Perhaps, as Judge McDonald wryly notes, the creation of the ICTY was possible because the atrocities were committed in Europe. Nevertheless, the creation of the ICTY was shortly followed by the

9. In 1993, the United Nations General Assembly elected Gabrielle Kirk McDonald as a Judge of the Tribunal and in 1997, she was re-elected to a second four year term. As President of the Tribunal, she presided over a rapid growth in the Tribunal's activities and effectiveness. She has traveled extensively on behalf of the Tribunal promoting its mandate before the United Nations Security Council, the Council of Foreign Relations, the Peace Implementation Council, numerous universities, and the international media. Judge McDonald increased the visibility of the Tribunal within the former Yugoslavia by creating an Outreach Program designed to inform the peoples of the former Yugoslavia about the work of the Tribunal and combat misinformation.

During the course of her Presidency, the number of detainees held by the Tribunal more than tripled, a third trial chamber was added, and two new courtrooms were constructed. Judge McDonald has also presided over the Appeals Chamber, which receives appeals from both the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"). She served as the presiding judge over the ICTY’s first successful prosecution (the Tadic’ Case, 1995–1997). Judge McDonald has also participated in the proceedings leading to the establishment of the permanent International Criminal Court. After graduating first in her class at Howard University Law School in 1966, Judge McDonald was a highly successful lawyer before becoming the first African-American appointed to a federal court in Texas.

After serving as a federal district judge in Houston for nine years, Judge McDonald became a partner with a major law firm in Texas. She has also worked for the NAACP and taught at the law schools of St. Mary's University, the University of Texas, and Texas Southern University. She has received numerous awards and honors including the CEELI Leadership Award, the National Bar Association's First Equal Justice and Ronald Brown International Law Awards, and the American Society of International Law's Goler Teal Butcher Award for Human Rights. Judge McDonald is the mother of a son attending law school and a daughter working in the film industry. See Gabrielle Kirk McDonald, The International Criminal Tribunals: Crime & Punishment in the International Arena, 7 ILSA J. INT'L & COMP. L. ____ (2001), 25 NOVA L. REV. 463 (2001).
establishment of the International Criminal Tribunal for Rwanda ("ICTR") in November 1994, in response to the atrocities committed in Rwanda. These tribunals have had remarkable successes, and the successes have only increased as peace has slowly returned to the regions affected. The new democratic government of Croatia has turned over a number of indicted war criminals to the ICTY in the Hague and the Yugoslavian government is debating whether Slobodan Milosevic himself should be turned over to the International Tribunal.

Judge McDonald notes in her article that the International Tribunals have not only broken ground in developing new procedures for prosecuting war criminals, they have additionally developed new substantive law. They have defined sexual violence as an international crime in the context of war, a development that has been long overdue. Finally, the courts have also been instrumental in laying the groundwork for the creation of the permanent International Criminal Court:

The Tribunals have demonstrated that international criminal justice is possible. They are positive proof that it is possible to try persons charged with serious violations of international humanitarian law in international courts and that the differences in the civil and common law systems—not to mention the country-by-country differences even within the same type of system—are not insurmountable obstacles.10

In his article, President Arias recognizes the importance of the permanent International Criminal Court, arguing that "its existence alone would serve to deter would-be violators of human rights who might otherwise be able to act with impunity."11 To this end, the court would "help conflict-torn nations on the road to reconciliation and recovery."12

One of the most remarkable aspects of Judge McDonald’s work at the Tribunal was her groundbreaking launch of the Tribunals’ "Outreach Program," which was an effort to make the processes and personalities of the Tribunals’ work known to the larger world community. Judge McDonald recognized that the process of creating, institutionalizing, legitimizing, and enforcing international law requires much more than the will of international lawyers, academics, and politicians. The law must be accessible and clear to the international community at large and must be accepted by the people of

10. McDonald, supra note 9, 7 ILSA J. INT’L & COMP. L. at ___, 25 NOVA L. REV. at 482.
12. Id.
that community as legitimate. As Judge McDonald observes, this is particularly important for the peoples of the conflict from which the international criminal defendants originate. Realizing the goal of broad-based legitimization is an enormous, difficult, but necessary task.

All five speakers have demonstrated through their life work that democracy and respect for human rights require much more than a ritualistic acceptance of elections or the ratification of treaties. Without the building blocks for democracy and human rights such as rule of law, reconciliation, social justice and domestic peace, the goals of a peaceful, democratic, rights-based society will remain elusive.

Douglas Lee Donoho

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I. INTRODUCTION

As the twenty-first century begins, the international human rights system faces a profound anomaly. Despite enormous normative and
institutional achievements,¹ the system seems incapable of delivering its ultimate promise to those who need it most.² A comprehensive, albeit underdeveloped,³ network of lofty norms has been created, theoretically binding governments to follow a universal moral code. An almost bewildering array of institutional mechanisms, although virtually invisible to most of humanity, is set in place to supervise and monitor implementation of these collective aspirations.⁴ Well-financed, nongovernmental organizations, devoted to the enforcement of rights, have gained the ears of international institutions and governments alike, exposing violations and


2. Professors Helfer and Slaughter have perceptively described the “sad paradox” that human rights institutions are “most effective” in the states that “arguably need them the least: those whose officials commit relatively few, minor, and discrete human rights violations.” Lawrence R. Helfer & Anne-Marie Slaughter, Towards a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 329 (1997).

3. Although the international system has developed a comprehensive network of human rights norms, the manifestation of many human rights is still nascent and their specific meaning unsettled. See Douglas Lee Donoho, The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique, 14 MICH. J. INT’L L. 827, 837–43, 847–50 (1993); Henry Steiner, Book Review, 84 AM. J. INT’L L. 603, 604–05 (1990) (reviewing THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (1988)). Thus, the specific meaning of many human rights remains underdeveloped. Reasons for this include the relative newness of the norms and the international system’s limited capacity for rendering authoritative interpretations of rights. Donoho, supra at 866–68.

4. In addition to United Nations Charter based institutions such as the Commission on Human Rights, each of the three existing regional systems and six of the major multilateral human rights treaties have enforcement mechanisms in the form of monitoring institutions and, in some cases, judicial or quasi-judicial procedures. See generally STEINER & ALSTON, supra note 1; THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Phillip Alston ed. 1992).
working tirelessly for change.\textsuperscript{5} Even the politically cynical and formerly stodgy United Nations Security Council has significantly raised the profile of human rights, justifying a series of interventions based upon a perceived connection between human rights and threats to peace.\textsuperscript{6} Perhaps most dramatically, the international community has begun to take leadership accountability more seriously, endorsing the use of criminal sanctions, both domestic and international, to bring human rights violators to justice.\textsuperscript{7} Human rights have, in essence, become a critical part of international relations. More importantly, they have become a dynamic force for change that provides hope for millions of oppressed people around the world.

Yet, despite these advances and so many reasons for hope, the world remains mired in widespread and profound violations of human dignity. Despite the world’s collective mantra “never again,” genocidal episodes have repeatedly marred the consciousness of human kind since World War II.\textsuperscript{8} Floods of refugees, and newly refined forms of oppression such as

\begin{itemize}
  \item \textsuperscript{5} See generally STEINER & ALSTON, supra note 1, at ch. 8.
  \item \textsuperscript{7} See infra text accompanying notes 32–39.
  \item \textsuperscript{8} The persistence of genocidal episodes prompted Michael Scharf’s wry observation that:
\end{itemize}

\[\text{[T]he pledge of “never again” quickly became the reality of “again and again” as the world community failed to take action to bring those responsible to justice when 4 million people were murdered during Stalin’s purges (1937–1953), 5 million were annihilated during China’s Cultural Revolution (1966–1976), 2 million were butchered in Cambodia’s killing fields (1975–1979), 30,000 disappeared during Argentina’s Dirty War (1976–1983), 200,000 were massacred in East Timor (1975–1985), 750,000 were exterminated in Uganda (1971–1987), 100,000 Kurds were gassed in Iraq (1987–1988), and 75,000 peasants were slaughtered by death squads in El Salvador (1980–1992).}\]

Michael P. Scharf, The Prosecutor v. Dusko Tadic: \textit{An Appraisal of the First International War Crimes Trial Since Nuremberg}, 60 ALB. L. REV. 861, 861–62 (1997). Scharf might have also mentioned mass killings in Nigeria (Biafra, 1966–1971), Bangladesh (1970–1971), Burundi, and Sudan. See Robert Melson, \textit{The Holocaust: Remembering for the Future: Paradigms of Genocide: The Holocaust, the Armenian Genocide, and Contemporary Mass Destruction}, 548 ANNALS 156 (1996). The most recent examples, of course, are the tragic events in Bosnia, Kosovo, and Rwanda. The dramatic difference in the international community’s response to these more recent events is cause for optimism. Freed of cold-war constraints, the international community’s reactions to Bosnia, Rwanda, and Kosovo, although flawed and somewhat halting, were ultimately decisive.
“ethnic cleansing,” have challenged the international community’s capacity to respond. Grotesque forms of physical abuse, such as torture and summary execution, continue to haunt many societies and despite a tide of democratic transitions around the world, violations of basic civil liberties remain commonplace.9 Most disheartening of all, the two greatest enemies of human dignity, armed conflict and poverty, persistently plague the vast majority of human kind.10

Responding to these sober realities, while embracing our many reasons for hope, the Law Center chose to focus the 2000 Goodwin Seminar on human rights, peace, and democracy in the twenty-first century. Through the generosity of the Leo Goodwin, Sr. Foundation, the Law Center hosted the following five distinguished visitors over the course of our semester long seminar: Dean Claudio Grossman, Judge Gabrielle Kirk McDonald, Dr. Hanan Ashrawi, President Jean Paul Aristide, and Nobel Peace Laureate President Oscar Arias.11 These distinguished visitors brought to the Law Center a wealth of profound personal and professional experiences in the front line struggle for human rights. For each visitor, the quest for human rights has been a lifelong commitment. The visitors spent several days at the Law Center, teaching, listening, and sometimes debating with students and faculty about the current status of human rights and their potential for realization in the twenty-first century.


The discourse prompted by our distinguished guests covered a wide array of current human rights issues ranging from the Middle East peace process, international criminal law, transitions to democracy and reconciliation, the future of the Inter-American system, disarmament, and debt relief. Despite the breadth of the subjects discussed, and the diversity of opinions expressed, a clear set of central themes emerged. These interrelated themes focused steadily on the future of human rights and the various ways in which politics, economics, power, and oppression are entangled in the struggle to achieve basic human dignity for all. While some of these themes are clearly expressed in the essays prepared by our guests for publication in this volume, others emerged only in classrooms, offices, and over dinner tables. They involve both insights regarding the causes of continuing human rights violations and speculations regarding the next phase in a movement that has bettered the lives of millions, yet fallen frustratingly short of its objectives. What follows is a brief description of the four most significant themes that emerged from the seminar and some observations regarding each one.

II. THEMES FROM THE 2000 GOODWIN SEMINAR

A. There Is a Profound Relationship Between Peace, Democracy, and Human Rights

The notion that human rights, democracy, and peace are profoundly interrelated was a consistent theme of each Goodwin visitor. For each, this central belief is one founded on personal experience. President Arias, for example, was awarded the 1987 Nobel Peace Prize for his work nurturing this relationship into concrete results during the Central American Peace Process. For both President Aristide and Dr. Ashrawi, the complex dynamics of armed conflict, violence, oppression, and the hope for human rights and democracy pose a continuing daily struggle. Dean Grossman


spoke poignantly of his bitter experience watching from forced exile as General Pinochet dismantled a proud Chilean tradition of democracy and systematically violated the basic rights of all those who opposed him. Judge McDonald presided over the creation and development of the War Crimes Tribunal for the former Yugoslavia, an institution whose very existence was founded on the premise that human rights violations may constitute a threat to international peace.14

The idea that peace, democracy, and human rights are interdependent is not a novel idea. Indeed, Immanuel Kant suggested such a connection in 1795, when he argued international peace is tied to democracy.15 In recent years, international institutions increasingly sounded this message, often justifying international initiatives on this basis. The United Nations, for example, engaged considerable resources in the promotion of democracy, including extensive election monitoring.16 The United Nations Security Council increasingly relied on human rights concerns in finding threats to peace, justifying interventionist activities believed unthinkable just a decade earlier.17 The Security Council’s unprecedented decision to authorize the use of force to restore democracy in Haiti is perhaps the clearest example of this promising new trend.18 Most recently, the North Atlantic Treaty


Organization ("NATO") justified its forceful interventions in Bosnia and Kosovo on essentially this rationale.\(^{19}\)

Although widely articulated, the actual relationship between human rights, peace, and democracy is rarely examined critically.\(^{20}\) One certainty is that armed conflict is perhaps the greatest single source of human rights violations. It also seems plausible that genuine democracy lessens the potential for egregious human rights violations, violent internal conflict, and the aggressive use of armed force.\(^{21}\) The available empirical evidence to assist in the inquiry is, however, limited and controversial, making it difficult to assess the implications of this perceived relationship with any degree of certainty.

Often, even the most basic questions are never asked. Do violations of human rights cause breaches of peace, or are such violations merely symptomatic of deeper economic and social conflicts? Do we mean that respect for human rights is an important precondition for peace, or only that peace itself is a prerequisite to the effective protection of rights? Does democratic governance actually reduce the potential for international armed conflict?\(^{22}\) Does democracy, often itself promoted as a basic human right,\(^{23}\) serve as an important precondition to the ultimate realization of human rights and, in turn, peace? If so, would not the absence of democracy justify forceful intervention or other drastic measures aimed at nondemocratic United Nations members, including the Peoples Republic of China?

While all seem to agree that the relationship between peace, human rights, and democracy is vital, the precise nature of this relationship and its implications remain somewhat elusive and dependent upon the speaker's perspective and agenda. One of the clearest lessons that emerged over the course of the Goodwin Seminar is that the relationship between peace, democracy, and human rights is far more complex than the lofty platitudes

\(^{19}\) See generally Richard B. Bilder, Kosovo and the "New Interventionism": Promise or Peril?, 9 J. TRANSNAT'L L. & POL. 153 (1999).

\(^{20}\) See Valerie Epps, Peace and Democracy: The Link and the Policy Implications, 4 ILSA J. INT'L & COMP. L. 347, 350 (1998) (discussing some of the empirical studies of the Kantian thesis and pointing out some of the difficult uncertainties).

\(^{21}\) Id. at 348.

\(^{22}\) Even studies that have suggested that liberal democracies do not fight each other have acknowledged that many democratic states commonly employ armed forces internationally. See id. The most obvious example of this phenomenon is, of course, the United States.

that typically emerge from such discussions. Beleaguered on all sides by class violence, rampant poverty, and economic disparity, President Aristide must continually wrestle with the complex realities of nurturing an infant democracy in the context of oppressive social and economic conditions. President Aristide’s frustrated efforts to build Haiti’s fledgling democracy under these oppressive conditions demonstrate that genuine democracy cannot exist and will not contribute to the protection of basic rights, absent the material conditions necessary for its development.24

Similarly, Dr. Ashrawi has witnessed her aspirations for meaningful democratic self-governance for Palestinians sacrificed in the quest for “security” and peace with the oppressor. While Dr. Ashrawi steadfastly argued that peace is impossible without full respect for human rights, she readily acknowledged that the struggle for independence has itself caused the Palestinian people some self-inflicted wounds. Moreover, fundamental lingering conflicts over scarce land, power, and security raise unanswered questions regarding which rights and whose rights must be protected and under what conditions. Palestinians and Israelis, alike, find themselves locked in circular political rhetoric over human rights. There can be no peace without security, no security without peace, no human rights without peace, and no peace without human rights. The rhetoric of conflict has thus obscured the underlying premise that respect for human rights on all sides is a prerequisite for meaningful negotiations and the compromises necessary to peaceful coexistence.

In this regard, Presidents Aristide and Arias both astutely argued that economic justice was an essential prerequisite for peace, human rights, and the development of real democracy. Yet, even this appealing insight arguably holds human rights hostage to the political realities of scarce resources and global concentrations of economic power. It gives rise to the reasonable suspicion that the most significant factor in the relationship between human rights, peace, and democracy has yet to be clearly identified. Perhaps the clearest message of all is that economic justice and development must figure more prominently in our thinking about peace, democracy, and human rights.

24. See Williams, supra note 13; Cody, supra note 13; Prusher, supra note 13; Associated Press, supra note 13; Berry, supra note 13.
B. The International Community Must Identify and Address Systemic Causes of Human Rights Violations Such as Poverty, Economic Disparity, Debt Burden, and Militarization

A recurring concern raised during the symposium was that the international community has failed to adequately identify and respond to systemic causes of human rights violations. Ironically, the dramatic rise in human rights consciousness among governments has not been accompanied by similarly dramatic improvements in the lives of most people. The World Bank estimates that four billion people live on less than two dollars per day.25 United Nations Children’s Fund (“UNICEF”) estimates that three billion people live in abject poverty without basic sanitation, health care, shelter, potable water, education, or adequate food—including two million children who die each year from diarrhea.26 According to the United Nations High Commissioner for Refugees, there are currently over twenty-two million displaced persons and refugees around the world, living in desperate conditions.27 Recognizing this painful reality, the Goodwin visitors challenged us to think broadly and critically about the primary causes of human suffering when considering the future of human rights.

These leaders encouraged us to look beyond our Western preoccupation with individual liberties and take into account the physical and material conditions that fundamentally inhibit the realization of human dignity for most of the world’s population. Our visitors’ experiences in the struggle for human rights and peace convincingly demonstrate that economics and development must play a fundamental role in the achievement of human dignity for all. Extreme poverty, economic disparity, and lack of basic development are undisputedly the most fundamental sources of suffering on the planet. They are also, perhaps, the greatest existing obstacles to the ultimate realization of fundamental human rights for all.

As witnessed by President Aristide’s struggles in Haiti, economic disparity and deprivation undermine the foundations for genuine democracy and inhibit the social conditions that make respect and enjoyment of basic civil liberties possible. It seems equally clear that the material conditions

25. WORLD BANK POVERTY NET, supra note 10.


within societies frequently serve as the catalyst for abusive exercises of authoritarian power and misguided governmental priorities that commit poor nations’ scarce resources to ever increasing militarization. Armed conflict and internal civil strife, rooted in social and political power struggles over the material aspects of life, are undeniably powerful catalysts for human rights violations.

Thus, while human rights are linked to peace and democracy, attaining meaningful peace and democracy depends, in turn, on addressing economic disparity and lack of development. President Aristide’s entire life, from priest to politician, has been premised on this conception of the role of economic justice in the realization of human rights and dignity. His experiences in Haiti demonstrate the complex and stubborn nature of the problem. President Arias has similarly taken these insights seriously, campaigning for a fundamental shift in governmental priorities in developed and underdeveloped countries alike. Recognizing the significance of economic development to human rights, he has championed the idea that demilitarization and serious debt relief are necessary for critical economic development and ultimately the realization of fundamental human rights.2

Despite noble beginnings and recent advances,29 the profound connection between economic deprivation and human rights has not figured prominently in Western human rights agendas.30 Rather, Western
governments and nongovernmental organizations have focused their resources on protection of civil liberties, largely ignoring or discounting the underlying material causes of human rights deprivations. It is tragically ironic that the Western human rights movement has seemingly failed to recognize persistent and widespread poverty, which denies vast segments of the world's population the material needs essential to human dignity, thus making the meaningful enjoyment of our treasured civil liberties virtually impossible.

C. The Effective Protection of Human Rights Requires the Development of Stable, Independent Domestic Civic Institutions and a Culture of Democracy

Born from personal, sometimes painful and bitter experience, our Goodwin visitors repeatedly emphasized the significance of a strong civic infrastructure to the creation of lasting democracy and respect for human rights. As a member of Salvadore Allende's administration in Chile, Dean Grossman watched Pinochet's bloody regime systematically dismantled the Chilean judicial system and other institutions of democracy. Dr. Ashrawi spoke of the dilemmas of institution building in the context of oppression, under which Palestinians face both internal and external threats to their basic dignity. Perhaps most dramatically, President Aristide has witnessed firsthand, from coup to current turmoil, how fragile democracy is in the absence of strong civic institutions and the material conditions that nurture their growth.

The importance of institution building has not been lost on the United Nations or in academic literature.31 The personal experiences of our Goodwin visitors, however, brought the complexity of this mission into clear focus. If strong civic institutions provide a bulwark against human rights violations, then economic progress, a culture of democracy, respect for the rule of law, and the development of "rights consciousness," provide the

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31. Helfer and Slaughter, for example, cite the existence of strong, independent domestic institutions, committed to the rule of law and responsive to individual claimants, as a "strongly favorable precondition for effective supranational adjudication." Helfer & Slaughter, supra note 2, at 333-34; see also Linda Reif, Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection, 13 Harv. Hum. Rts. J. 1 (2000).
foundation upon which such institutions are built. The effectiveness of such institutions is tied to the dynamics of economic and power relations within society.

The bitter experiences of our distinguished guests dramatically demonstrate that civic institutions and frameworks for rights protections are the first to be sacrificed under the yoke of oppression. In Haiti, for example, recent events show that much more effort and work is necessary for the establishment of meaningful democracy and respect for human rights than United States sponsored elections. The struggle for basic human dignity continues in Haiti with little improvement, because the primary economic and power dynamics of oppression have remained largely unaltered. Economic development and justice have proven no more than empty promises, and a fundamental absence of adequate civic institutions remains unremedied. How to create and maintain effective institutions in the face of oppressive conditions and lingering internal conflict remains a mystery despite its importance. Moreover, it seems clear that institution building, while a necessary ingredient for the effective protection of human rights, is wholly inadequate in the absence of critical economic and political reforms addressing the underlying sources of conflict.

D. A Meaningful Commitment to Leadership Accountability is Essential to Elimination of Human Rights Atrocities

A fourth recurring theme raised by the Goodwin visitors involved the significance of leadership accountability for human rights violations. Perhaps one of the most significant human rights developments at the close of this century has been the increasing willingness of governments to abandon outdated notions of immunity that have for too long served as the refuge of oppression. When discussing the vital issue of human rights enforcement, our guests inevitably referenced three recent developments—the creation of ad hoc war crimes tribunals in Yugoslavia and Rwanda, the movement to create a permanent international criminal court, and the extradition case against General Pinochet. These three developments arguably signal a profound shift in the traditional paradigm of anemic international human rights enforcement limited to toothless monitoring and supervision. More importantly, they may also signal a change in the attitude of states regarding the personal accountability of political leadership for egregious violations of human rights.
The United Nations Security Council’s creation of ad hoc war crimes tribunals in Yugoslavia and Rwanda under Chapter VII, and its endorsement of their wide mandate, may represent the first wave in this shifting paradigm of human rights enforcement. Indeed, the creation of the tribunal for the former Yugoslavia, presided over in its infancy by Judge McDonald, and the subsequent creation of the tribunal for Rwanda, are perhaps the most profound developments in human rights enforcement since Nuremberg. The very existence of these tribunals is premised upon the importance of imposing criminal accountability on impugned leadership. Each tribunal has sought to indict and bring to justice, not only rogue actors in the field, but more importantly, the leadership that directed and nurtured human terror in those tortured lands. Thanks to pioneers like Judge McDonald, the tribunals have broken new ground in the development of international criminal law, generating not only a sophisticated jurisprudence regarding criminal liability for human rights violations, but also establishing rational rules of procedure and important substantive expansions of basic humanitarian norms. Most importantly, the tribunals’ work has enormously increased public awareness and established a new vision of what is possible in human rights enforcement. The international community did not, for once, simply sit by and watch with horror as thousands were murdered, enslaved, tortured, and systematically raped. Whatever their flaws, the work of these tribunals


34. The proceedings were clearly hampered by the apparent lack of political will on the part of NATO to undertake the politically sensitive and dangerous work of arresting those accused of war crimes and a host of practical problems in implementation of their mandates.
have begun to dismantle outdated attitudes regarding the accountability of leadership and set important new limits on what will be tolerated.

The ultimate significance of the tribunals in Yugoslavia and Rwanda is, however, somewhat constrained by their ad hoc nature and limited geographic and temporal jurisdiction. As eloquently argued by Judge McDonald, the momentum gained through the tribunals' work must be carried to full fruition by the implementation of the permanent International Criminal Court proposed in the Treaty of Rome. The creation of this court may signal that the international community, some fifty years after Nuremberg and the birth of the modern human rights system, has finally developed the resolve necessary to make human rights enforcement meaningful.

The extradition case against General Pinochet, the significance of which has yet to be fully realized, reflects a potential third wave in this shifting paradigm. Although ultimately frustrating, the British court's courageous decision denying Pinochet traditional immunity potentially represents an enormously positive development. Among other things, this decision may reflect an increasing willingness by states to recognize the applicability of domestic criminal processes and universal jurisdiction to human rights violators. Although potentially a vital development, the

See, e.g., Arbour, supra note 33. They were also hampered by an initial lack of financial support that has subsequently been remedied. Lengthy trials and alleged inefficiencies have caused a recent review of the Tribunal's practices by a panel of United Nations appointed experts. See Daryl A. Mundis, Improving the Operation and Functioning of the International Criminal Tribunals, 94 AM. J. INT'L L. 759 (2000).

35. ICTY Statute, supra note 33, at art. 1.


38. A distinct but important parallel development has been ongoing in the United States on the civil side since the landmark case of Filartiga v. Pena-Irala. 630 F.2d 876 (2d Cir. 1980). An important recent example of this approach, which focuses on civil compensation for "external" human rights violations in domestic courts, is the case of Kadic v. Karadžić, involving human rights claims against Bosnian Serb leader Radovan Karadžić. 70 F.3d 232 (2d Cir. 1995). See generally Beth Stephens, Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Conceptualizing the Violence Under International Law: Do Tort Remedies Fit the Crime?, 60 ALB. L. REV. 579 (1997)
ultimate significance of the Pinochet case depends on the political will of individual governments to employ their domestic processes. One can only hope it signals the repudiation of an era of impunity and gives fresh life to the admonition that barbaric violators of human rights are "hostis humani generis," enemies of all human kind.

Taken together, these developments hopefully reflect a wise shift away from immunity toward individual accountability for human rights violations. Carried to their full implications, they may signal a final assault of the citadel of immunity and, eliminating safe havens for the oppressor, send a clear message that justice will be served.

III. CONCLUSION

The 2000 Goodwin visitors brought to the Law Center profound insights regarding the future of human rights in the twenty-first century. Their willingness to explore these complex and fundamental issues, and to share their collective wisdom borne of experience, brightened all of our horizons and helped rekindle our commitment to effective realization of human rights for all people everywhere.

(discussing parallels and differences between civil and criminal remedies for international human rights violations).

39. After Pinochet's release and return to Chile for health reasons, a Chilean magistrate issued an indictment against the former dictator alleging human rights crimes. This indictment was later overturned on procedural grounds but the effort to bring Pinochet to justice under Chilean law has continued. See Sebastian Rotella, Court Throws Out Pinochet Indictment, L.A. TIMES, Dec. 21, 2000, at A15. In February 2000, human rights advocates celebrated as Senegal appeared to follow the Pinochet paradigm by indicting Hissene Habre, former dictator from Chad, and placing him under house arrest on charges of torture and "barbarity." See Karl Vick, African Eyes Opened By Ex-Leader's Indictment: Where Impunity Prevails, Chadian's Case Is a First, WASH. POST, Feb. 5, 2000, at A13. Unfortunately, the case was subsequently dismissed through the apparent intervention of the new Senegalese President. The initial success in Senegal, however, has apparently prompted the filing of more than 50 cases against Habre and his henchmen in Chad. See Douglas Farah, Chad's Torture Victims Pursue Habre in Court: Pinochet Leaves Ex-Dictator Vulnerable, WASH. POST, Nov. 27, 2000, at A12; see also Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Stephens, supra note 38.

Freedom of Expression in the Inter-American System for the Protection of Human Rights*

Claudio Grossman

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* This article is a translation, the original was written in Spanish.

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II. INTRODUCTION

Freedom of expression is one of democracy's fundamental values. Its importance takes on special connotations in nations where the separation of powers is fragile. This is particularly true in many Western Hemisphere nations—in transition from long years of dictatorships—that have political systems characterized by weak judicial and legislative branches which fail to provide effective counterweights to an all-powerful executive branch.

Argentine social scientist Guillermo O'Donnell has characterized such systems as "delegative democracies," where a charismatic figure assumes the presidency after relatively free elections, and then governs without the traditional counterweights normally associated with a representative democracy. Inherent in such "delegative democracies" is a risk of backsliding into authoritarianism. Faced with serious problems with no easy

solutions, the popular enthusiasm that leads to the election of such charismatic leaders is tempered by subsequent disillusion.

Since judicial and legislative powers in these nations are so weak, freedom of expression—essential to every society—functions as the fundamental counterweight. It allows information to be gathered and disseminated, strengthens civil society, and facilitates individual participation in the democratic process.

The importance of this right is diminished, however, if it is inadequately protected under domestic law, or if the rules designed to protect it are not respected. Prior censorship, contempt laws, and excessive subsequent liability for defamation, libel, and slander are examples of measures that seriously infringe upon the right to freedom of expression.

Through the exercise of prior censorship, bureaucracies decide what individuals can see, read, write, and produce by invoking such justifications as “national security,” “public order,” “national morals,” “truth in information,” and “personal honor.” Since the possibility for abusing prior censorship is so great, enduring the exaggeration of free debate seems better than risking censorship’s “protective” suffocation.

Contempt laws currently in force in seventeen countries in the region penalize “offensive” expression directed at public officials. Punishing critics of authority was a logical corollary that affirmed the superior power of those who exercised it both in absolute monarchies (based on divine right) and in dictatorships (that repressed alternative views). In a democracy, however, criticism free from fear of punishment—especially when directed at authority—reaffirms egalitarian principles and ensures that public


3. The phrase “contempt laws” is used to refer to what are known as leyes de desacato in Spanish. Generally speaking leyes de desacato punish offensive expressions directed at public officials. Id. at ch. IV, sec. A.


officials carry out their duties with transparency and responsibility. Conversely, the threat or imposition of penal sanctions suffocates democracy and responds to an authoritarian logic that is incompatible with democratic tenets.

Rather than resort to prior censorship, some nations allow the subsequent imposition of liability in cases of defamation, libel, and slander. If such liability—under the guise of defense of honor—is exorbitant, however, its interference with the free expression of ideas is comparable to that of prior censorship.

Any of these measures can seriously affect or even destroy freedom of expression. They are promulgated within a juridical context that provides norms under which their application is authorized in certain circumstances. But such a context is clearly absent when crimes committed against journalists—including assassination—go unpunished. This brutal method of "silencing" journalists—one hundred fifty have been assassinated in the region during the last ten years—also intimidates nations as a whole by demonstrating the possible tragic consequences that can result from the free expression of ideas.

Freedom of expression is also seriously diminished by such de facto measures as threats, economic measures that punish or reward the press for its ideas, and public and private monopolies in information media. In addition, the serious inadequacies of legal protection for freedom of expression within domestic legal systems reaffirm the need for international—in this case hemispheric—safeguarding of this fundamental freedom.

International protection of human rights has developed since World War II as a consequence of the tragic failure of an international order based on the principle of absolute sovereignty. As the international protection of human rights developed, international rules and international institutions were created to provide a layer of supervision above the domestic realm. The purpose of this article is to analyze freedom of expression from the perspective of the rules and institutions that have been created to

7. Id.
8. Id. at ch. IV, sec. C.
9. Id.
11. 1998 Report of the Special Rapporteur, supra note 2, at ch. III.
supervise human rights in the Western Hemisphere, known as the Inter-American System for the Protection of Human Rights ("Inter-American System"). In view of this purpose, this article will discuss the regulatory framework that applies to freedom of expression in the Inter-American System by systematizing relevant jurisprudence which, due to its recency, has not been sufficiently studied and disseminated. The rules that regulate the right to freedom of expression in the Inter-American System will also be examined with reference to how the rules have been interpreted by the organs created to supervise compliance. Finally, this article will outline a series of measures adopted to achieve full application of the relevant norms.

II. THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

A. Organs

The Inter-American System is a combination of norms and institutions that apply to Western Hemisphere nations. The applicable rules consist principally of the American Convention on Human Rights12 ("American Convention") and the American Declaration on Rights and Duties of Man13 ("American Declaration"). The institutions involved are the organs responsible for supervising compliance with the established rules: the Inter-American Commission on Human Rights14 ("the Commission") and the Inter-American Court for Human Rights15 ("the Court"). In addition to these supervisory organs, the political organs of the Organization of American States ("OAS")—consisting of the Permanent Council and the General Assembly—also share in the responsibility of guaranteeing compliance with the rules designed to protect human rights, including the right to freedom of expression.16 The task of guaranteeing protection of human rights, including compliance with decisions of the Court and the Commission, falls to the

political organs, especially the General Assembly. As a result, the Court and the Commission submit their reports to the General Assembly for approval.

To assist in guaranteeing compliance with the rules relative to freedom of expression, the Commission created a special office dedicated to the protection of the right to freedom of expression in 1998, called the Special Rapporteur for Freedom of Expression ("Special Rapporteur").

B. The Juridical Regime

The right to freedom of expression in the Inter-American System is established in Articles 13 and 14 of the American Convention and in Article 4 of the American Declaration. Article 13 of the American Convention expressly states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

   a. respect for the rights or reputations of others; or

17. It should be noted that the performance of these organizations relative to fortifying freedom of expression has been inadequate. See El Sistema Interamericano y los Derechos Humanos en la Region [The Inter-American System and Human Rights Law in the Region], in LA LUCHA CONTRA LA POBREZA EN AMERICA LATINA [THE WAR AGAINST THE POOR IN LATIN AMERICA] (Bernardo Kligsberg ed., 2000).

18. American Convention, supra note 12, at arts. 41, 65. Article 41 provides at section (g) that the Commission "submit[s] an annual report to the General Assembly of the Organization of American States." Id. at art. 41. Likewise, Article 65 establishes that in each regular session "the Court shall submit, for the Assembly's consideration, a report on its work during the previous year." Id. at art. 65.

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law. 20

Article 14 adds:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges. 21


21. Id. at art. 14.
Finally, Article 4 of the American Declaration provides that "[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." 22

The American Convention applies to the countries in the Western Hemisphere that have ratified it. Those countries are Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Chile, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. 23 In contrast, the American Declaration is used in the United States, Canada, and the following Caribbean countries: Antigua and Barbuda, the Bahamas, Belize, Cuba, Guyana, Saint Kitts, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago. 24 This article will focus on the protections of the right to freedom of expression found in the American Convention. Although freedom of expression is also a right under the American Declaration, its formulation therein is more general. As a result, only the American Convention provides the type of specificity that permits its content and scope to be established as a fundamental norm of this important right.

The Commission supervises compliance with the rules through its case system, 25 country visits, 26 recommendations to member States, 27 and through

22. American Declaration, supra note 13, at art. 4.
24. Id. at 188 n.9.
25. American Convention, supra note 12, at arts. 44–51. The Commission opens cases either on its own initiative or in response to petitions filed by individuals affected by the violation of any right covered by the American Convention. Grossman, supra note 23, at 188. Once the Commission analyzes a case, it publishes an opinion with respect to the existence of the alleged violation and offers recommendations to the responsible member State. Id. If the State does not comply with the recommendation, the Commission may also prepare a second report and offer the State a second opportunity to comply. Id. If the State still does not comply, the Commission may publicly reveal the result of the report and its recommendations. Id. This is the only possibility that exists relative to those States that have not ratified the American Convention. Id. For States that have ratified the American Convention, the Commission may opt to either publish the report or present it to the Court within three months after the first report is approved. Grossman, supra note 23, at 188. When it appears before the Court, the role of the Commission changes from that of judge to that of complainant. Id. It acts in the name and in representation of the victim (generally designating the original complainants as its legal advisers). Id. This case mechanism is one of the most efficient means available to the Commission to review individual human rights violations. Id.; see also Thomas Buergenthal et al., PROTECTING HUMAN RIGHTS IN THE AMERICAS 97 (1982).
the activities of the rapporteurs.\textsuperscript{28} The Court reviews cases presented to it by the Commission and by member States that have recognized its competency.\textsuperscript{29} At present, thirty-eight contentious cases have been brought by the Commission, and one case has been brought by the government of Costa Rica.\textsuperscript{30} The Court, like the Commission, can adopt preventative measures in cases where the risk is "grave and imminent."\textsuperscript{31} To date the Court has adopted such measures in twenty cases.\textsuperscript{32} 

The Court also prepares "advisory opinions" to interpret human rights treaties in the Western Hemisphere and to review the compatibility of such treaties with the domestic laws of member States.\textsuperscript{33} Fifteen advisory
opinions have been adopted to date. The advisory opinions that have been most important in the area of the right to freedom of expression are Advisory Opinion OC-05/85, "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism" ("Advisory Opinion OC-05/85") and Advisory Opinion OC-07/86, "Enforceability of the Right to Reply or Correction" ("Advisory Opinion OC-07/86").

The office of the Special Rapporteur was created by the Commission in 1998 to protect and promote freedom of expression in the Americas. In October 2000, the Commission—interpreting the American Convention—adopted the Declaration of Principles on Freedom of Expression to guide the activities of the Special Rapporteur. The Special Rapporteur’s principal activities include: 1) the preparation of general and specific thematic reports; 2) the creation of a hemispheric network for the protection of freedom of expression; 3) visits to OAS member States to observe the freedom of expression climate; and 4) the promotion of the right to freedom of expression among OAS members. Underscoring the importance that the Commission places on freedom of expression, its Special Rapporteur works on a full-time basis. Moreover, since the Special Rapporteur is not one of the seven commissioners who are responsible for the overall supervision of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Id.

rights protected under the American Convention, the office is dedicated exclusively to the protection and promotion of freedom of expression.\textsuperscript{41} 

As the following sections of this article illustrate, these organs have interpreted the scope of the American Convention’s rules on freedom of expression as prohibiting prior censorship and authorizing only subsequent imposition of liability. In the process, they have established the scope of permissible restrictions on this right that may apply in emergency situations, as well as the existence of a right to correction or reply. They have also repeatedly affirmed that in the Inter-American System there is a strong connection between the right to freedom of expression and the development of democracy.\textsuperscript{42}

1. The Scope of Freedom of Expression

Subsection one of Article 13 of the American Convention establishes the right of individuals to think and express themselves freely.\textsuperscript{43} It also explains exactly what freedom of expression means—“to seek, receive, and impart information and ideas of all kinds, regardless of frontiers”—and emphasizes that the medium used is irrelevant, since expression can be communicated “either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”\textsuperscript{44}

Both the Court and the Commission have interpreted this provision of the American Convention. In Advisory Opinion OC-5/85, for example, the Court considered “whether there is a conflict or contradiction between compulsory membership in a professional association as a necessary requirement to practice journalism . . . and the international norms.”\textsuperscript{45}

The Commission, for its part, has interpreted the scope of the right to freedom of expression in the following cases: Jehovah’s Witnesses v. Argentina Republic,\textsuperscript{46} Francisco Martorell v. Chile,\textsuperscript{47} Hector Felix Miranda

\textsuperscript{41} Id.
\textsuperscript{42} See generally 1998 Report of the Special Rapporteur, supra note 2.
\textsuperscript{43} American Convention, supra note 12, at art. 13(1).
\textsuperscript{44} Id.
\textsuperscript{45} Advisory Opinion OC-05/85, supra note 35, at para. 11 (referring to Articles 13 and 29 of the American Convention on Human Rights.)
v. Jordan, 48 Juan Pablo Olmedo v. Chile, 49 Horacio Verbitsky v. Argentina Republic, 50 Victor Manuel Oropeza v. Mexico, 51 and Baruch Ivcher Bronstein v. Peru. 52 On February 6, 2001, the Inter-American Court of Human Rights (to which the Ivcher Bronstein case had been referred by the Commission) confirmed the Commission’s finding that Peru was responsible for violating Mr. Ivcher’s right to freedom of expression. 53 The interpretative work of the Commission and the Court has resulted in the following characteristics of the scope of freedom of expression in the context of the Inter-American System.

a. Special Dual Character

The Court has found that freedom of expression possesses a special dual character, in that it not only involves the right of individuals to express themselves, but also the right of everyone to receive information and ideas. 54 As such, a violation of the right to freedom of expression not only violates an individual right, but also “a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.” 55

The Commission has also had several opportunities to discuss the dual character of freedom of expression. In Martorell, where censorship of the book Impunidad diplomatica [Diplomatic Impunity] was at issue, the Commission asserted that:

Article 13 establishes a dual right: the right to express thoughts and ideas, and the right to receive them. Therefore, arbitrary

55. Id.
interference that infringes this right affects not just the individual right to express information and ideas but also the right of the community as a whole to receive information and ideas of all kinds.\textsuperscript{56}

\textit{Ivcher Bronstein} involved an Israeli-born Peruvian citizen-owner of a television station, whose Peruvian nationality was arbitrarily rescinded in order to deprive him ownership of the station that had regularly criticized governmental abuses. The Commission asserted it was clear that the social character of the right of freedom of expression has both an individual perspective as well as a much broader one, protecting and covering all those who seek out and receive information or opinions emitted by journalists.\textsuperscript{57} As such, all of society is the victim in the case of a violation of freedom of expression.\textsuperscript{58}

The dual character of freedom of expression was reiterated by the Commission in the \textit{Oropeza} case, where a Mexican journalist was assassinated for allegedly criticizing government authorities in his newspaper column, which included references to links between the police and drug trafficking.\textsuperscript{59} The Commission affirmed that freedom of expression is a universal legal concept that ensures individuals and the community are able to express, transmit, receive or disseminate thoughts, and, in parallel and correlative form, that freedom to inform oneself is universal and involves the collective right to receive information communicated by others without interference or distortion.\textsuperscript{60}

b. \textit{Indivisibility of Expression and Dissemination}

In Advisory Opinion OC-05/85, the Court affirmed the following:

\begin{quote}
Expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. The importance of the legal
\end{quote}

\textsuperscript{56} \textit{Martorell}, Case 11.230, Inter-Am. C.H.R., at para. 53.
\textsuperscript{58} \textit{See generally} Ivcher Bronstein Sentence, \textit{supra} note 53.
rules applicable to the press and to the status of those who dedicate themselves professionally to it derives from this concept.\textsuperscript{61}

It added that "[f]or the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions."\textsuperscript{62}

In Martorell, the Commission determined:

[T]he decision to ban the entry, circulation and distribution of the book \textit{Impunidad diplomática} in Chile violates the right to impart "information and ideas of all kinds," a right that Chile is bound to respect as a State party to the American Convention. In other words, the decision is an unlawful restriction of the right to freedom of expression, in the form of an act of prior censorship disallowed by Article 13 of the Convention.\textsuperscript{63}

In Miranda, the co-director of a Mexican weekly publication was assassinated for authoring and publishing opinions critical of the government.\textsuperscript{64} The Commission declared that freedom of thought and of expression under Inter-American jurisprudence involves the freedom to voice and disseminate ideas, as well as the complimentary freedom that every citizen has to receive such information without illegal or unjustified interference.\textsuperscript{65}

c. \textit{Irrelevance of Medium Employed}

The American Convention provides that freedom of thought and of expression includes the right to disseminate information and ideas by any means.\textsuperscript{66} In Advisory Opinion OC-05/85, the Court affirmed that "freedom of expression . . . cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible."\textsuperscript{67} For its part, the Commission asserted in the complaint it filed in the \textit{Ivcher Bronstein} case that the American Convention

\begin{enumerate}
\item Advisory Opinion OC-05/85, supra note 35, at para. 31.
\item \textit{Id.} at para. 32.
\item Martorell, Case 11.230, Inter-Am. C.H.R., at para. 59.
\item Miranda, Case 11.739, Inter-Am. C.H.R., at para. 3.
\item \textit{Id.} at para. 48.
\item American Convention, supra note 12, at art. 13(1).
\item Advisory Opinion OC-05/85, supra note 35, at para. 31.
\end{enumerate}
consecrates the right to disseminate information and ideas in artistic form or by any other means.\textsuperscript{68}

d. Protection of Individual Ideas and Those of Others

In protecting freedom of expression, no distinction is made between protecting an individual's ideas and those of third parties. Protection is afforded to the expression of opinions, thoughts, and ideas of all kinds, without distinguishing whether they are one's own thoughts or those of others. The Commission explained its position with respect to this point in its complaint before the Inter-American Court of Human Rights in the Ivcher Bronstein case. It asserted that Article 13 reflects a broad interpretation of freedom of expression and personal autonomy, the object of which is to protect and foment access to information, ideas, and expressions of all types, in order to fortify the democratic process.\textsuperscript{69} Respect for these freedoms is not limited to allowing the circulation of "acceptable" opinions and ideas.\textsuperscript{70} The duty not to interfere with the voicing of opinions and the dissemination of information, as well as the enjoyment of the right to access information of all types, extends to the circulation of information and opinions, and does not require the personal approval of whomever represents the authority of the state in a given moment.\textsuperscript{71}

e. Multiplicity of Forms of Expression

The right to freedom of expression is not limited to verbal expression; all types of expression are protected, including silence.\textsuperscript{72} An example of the juridically established scope of the protection is found in the case of Jehovah's Witnesses.\textsuperscript{73} In 1976, the Argentine military dictatorship promulgated Decree No. 1867/76, which prohibited the public exercise of the Jehovah's Witness religion in Argentina.\textsuperscript{74} The government alleged the religion was based on principles contrary to the Argentine nationality and

\textsuperscript{69. Id.}
\textsuperscript{70. Id.}
\textsuperscript{71. Id.}
\textsuperscript{72. American Convention, supra note 12, at art. 13(1).}
\textsuperscript{73. Jehovah's Witnesses, Case 2137, Inter-Am. C.H.R. (1978).}
\textsuperscript{74. Id.}
basic state institutions. As a result of the decree, followers of the religion were persecuted. More than three hundred children were expelled from school after being accused of refusing to swear allegiance to the country or to sing the Argentine national anthem, opting instead for silence because their religion prohibited them from engaging in such veneration of national symbols. Pursuant to Resolution No. 02/79, the Commission condemned the action of the Argentine government, which it considered to be responsible for the alleged violations.

f. Exclusion of Direct and Indirect Restrictions

Subsection three of Article 13 of the American Convention prohibits restrictions on freedom of expression that are carried out by indirect means designed to impede communication. The Ivcher Bronstein case provides an example of an indirect restriction on freedom of expression. As discussed above, this important case was initiated based on a decision of the Peruvian government that deprived the majority shareholder and director of Peruvian television channel Frecuencia Latina-Canal 2 (Latin Frequency-Channel 2) of his Peruvian nationality because the channel broadcast various reports of human rights violations by the Fujimori government. Because foreigners could not own television or radio stations in Peru, the revocation of Ivcher Bronstein’s Peruvian citizenship resulted in his forced withdrawal from the directorship of the channel. The new owners fired the journalists who had produced critical programs and ceased the broadcast of negative news about the Peruvian government. The Commission decided the case on December 9, 1998, finding that the right to freedom of expression was violated and recommended that Peru immediately reinstate Bronstein’s Peruvian citizenship. In the face of the government’s refusal to comply, the case was presented to the Court on March 31, 1999 and, as stated above, the Court confirmed the Commission’s decision that Peru was responsible for violating Bronstein’s rights.

75. Id.
76. Id.
77. Id.
78. Jehovah’s Witnesses, Case 2137, Inter-Am. C.H.R.
79. American Convention, supra note 12, at art. 13(3).
80. See generally Ivcher Bronstein Complaint, supra note 68.
81. Id.
82. Id.
83. See generally Ivcher Bronstein Sentence, supra note 53.
g. **Incompatibility of Public and Private Monopolies in Information Media with Freedom of Expression**

The existence of public and private monopolies impedes the dissemination of individual ideas as well as the reception of the opinions of others. As a result, the existence of monopolies in the communications industry is inconsistent with freedom of expression. Both the Court and the Commission have affirmed this. In Advisory Opinion OC-05/85, the Court stated the following:

> If freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists. 84

In **Ivcher Bronstein** the Commission affirmed the free circulation of ideas is only conceivable where there are multiple sources of information as well as respect for the communications media. 85 It explained it is not enough to guarantee the right to found or direct organs dedicated to public opinion; it is also necessary that journalists and all those professionals working in the communications media be able to do so with the protections that the free and independent exercise of this work require. 86

2. **Prohibition of Prior Censorship**

One of the principal characteristics of the protection of freedom of expression in the Inter-American System is that it does not allow prior censorship. Subsection two of Article 13 of the Convention provides that

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85. Ivcher Bronstein Complaint, supra note 68, at 28.
86. *Id.*
freedom of expression cannot be restricted \textit{a priori} by any means or under any excuse without being subject to the subsequent imposition of liability.\textsuperscript{87}

This prohibition on prior censorship implies an acknowledgment that there is a danger in creating "filters" to decide what individuals can hear, see, or read. Such a danger does not simply disappear when specific rules that permit prior censorship in certain cases are adopted, and justifications like "national security," "morality," or "good habits" are easily used as pretexts to eliminate or seriously limit the free expression of ideas.

Certainly, this danger is even greater when the domestic agencies are in charge of prior censorship. In an attempt to limit this danger, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") was adopted in 1953 shortly after the end of World War II. The European Convention allowed prior censorship but established an organ charged with supervising the validity of freedom of expression and the application of prior censorship in certain enumerated situations.\textsuperscript{88} In practice, European organizations have been reluctant to apply prior censorship norms, signaling a broad interpretation of freedom of expression which minimizes the censorship option.\textsuperscript{89}

\begin{footnotesize}
\begin{enumerate}
\item American Convention, \textit{supra} note 12, at art. 13(2).
\item Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention]. Article 10 states:
\begin{enumerate}
\item Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
\item The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
\end{enumerate}
\textit{Id.} at art. 10.
\item See, e.g., 1998 Report of the Special Rapporteur, \textit{supra} note 2, at ch. II, sec. B(3) (citing \textit{Sunday Times Case}, Eur. Ct. H.R., (ser. A) (1979) and discussing how, in interpreting Article 10 of the European Convention, the European Court for Human Rights "concluded that 'necessary,' while not synonymous with 'indispensable,' implied 'the existence of a 'pressing social need' and that for a restriction to be 'necessary' it is not enough to show that it is 'useful,' 'reasonable' or 'desirable'."
\end{enumerate}
\end{footnotesize}
In the Western Hemisphere, both the Court and the Commission have had the opportunity to interpret matters involving the prohibition on prior censorship, from which the following characteristics are evident.

a. **Defense of Honor is Excluded as a Basis for Prior Censorship**

In *Martorell*, the Commission affirmed that subsequent imposition of liability was the only restriction authorized by the American Convention to protect society from offensive opinions, as well as limiting the abusive exercise of this right.90 The Commission reiterated its interpretation of Article 13 in the *Olmendo* case, also brought against Chile. The case involves prior censorship of the movie *The Last Temptation of Christ*, and a decision in the case is pending.91 Also awaiting judgment before the Commission is a third Chilean case in which the book *The Black Book of Chilean Justice* by Alejandra Matus was confiscated and its distribution banned.92

According to the Special Rapporteur’s 1998 report:

> When legislating the protection of honor and dignity referred to in Article 11 of the American Convention—and when applying the relevant provisions of domestic law on this subject—States Parties have an obligation to respect the right of freedom of expression. Prior censorship, regardless of its form, is contrary to the system that Article 13 of the Convention guarantees.93

In *Martorell*, the Commission also expressed its opinion on the duty to protect the right to honor and dignity and its possible conflict with the right to freedom of expression. The government of Chile and the Chilean judiciary maintained that in the event of a conflict between Articles 11 and 13 of the American Convention, the former must prevail.94 The Commission rejected this theory, and advanced its interpretation that the rights included in those two articles of the American Convention do not present a conflict of different principles from which one would have to choose.95 Accordingly, the Commission quoted the European Court which, in a similar case, considered “it was faced not with a choice between conflicting principles, one of which is freedom of expression, but with a principle of freedom of

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92. *Id.* at ch. III.
93. *Id.* at ch. II, sec. B(5).
95. *Id.*
expression that is subject to a number of exceptions which must be narrowly interpreted." 96

b. Authorized Exceptions

Without prejudicing its overall prohibition on prior censorship, the American Convention permits the following exceptions: 1) censorship of public entertainment for the exclusive purpose of regulating access to such events to protect the morals of children and adolescents; 97 and 2) prohibition of propaganda promoting war or advocating racial, moral, or religious hatred which incites violence toward individuals or groups. 98 These exceptions, however, are only permitted within the framework of the Inter-American System if they conform to the requirements of legality, necessity, reality or imminence, or valid purpose.

In order to conform to the legality requirement, the exception must be authorized by law, in the event that decrees or other administrative measures prove insufficient. The requirement of necessity implies an evaluation of the pertinence of the measure on a case-by-case basis in order to exclude improperly motivated prohibitions. If a State can give the required protection through the police force or if there is no imminent danger, the restriction on freedom of expression will not satisfy the requirement of necessity. The reality or imminence requirement refers to measures that are adopted in light of actually existing conditions or conditions that are certain to occur, not mere hypothetical situations which might affect the morals of children or adolescents (in public entertainments) or which incite violence in terms of Article 13. The valid purpose exception corresponds to cases involving children where protection of morals is at issue, while in the case of advocacy of war or racial or religious hatred the protection at issue is that of individuals or groups at whom the violence is directed.

96. Id. at para. 71, n.5 (quoting Sunday Times Case, Eur. Ct. H.R., (ser. A) (1979)).
97. American Convention, supra note 12, at art. 13(4) (providing that "[n]otwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence").
98. Id. at art. 13(5) (providing that "[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law").
3. The Impact of Situations of Emergency on Freedom of Expression

The regulation of emergency situations is of great importance to the protection of rights in general, and to the protection of freedom of expression in particular. Emergency situations—where it is argued that a threat exists against the life of the nation itself—permit certain restrictions on rights, including the right of freedom of expression.

In the Western Hemisphere—for many reasons, among them political instability—emergency situations have been abused. As a result, the American Convention has regulated the exception extensively. Article 27 of this Convention establishes the conditions that must exist in order for an emergency to be declared, the rights that can never be suspended in such a situation, and the requirements that must be met to suspend other rights.99 The enumerated conditions under which such an emergency can be declared are strict, specifically: the declaration must be preceded by an event of

99. American Convention, supra note 12, at art. 27. Article 27 provides as follows:
1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

Id.
exceptional seriousness that affects in a real or imminent way the continued existence of the State as a whole.\textsuperscript{100}

Article 27 also specifies that certain rights cannot be temporarily removed in any event, and others that can only be limited as authorized by the American Convention, provided that certain conditions listed in the treaty are met.\textsuperscript{101} The requirements prescribed by the American Convention for the temporary suspension of rights—including freedom of expression—are: 1) necessity (there must be absolutely no other possible alternatives in the case at hand); 2) temporariness (suspensions of rights are valid strictly for the amount of time required); 3) proportionality (measures cannot constitute an excessive reaction on the part of the authorities in light of the existing emergency); 4) compatibility (with other duties imposed by international law); 5) non-discrimination; and 6) compliance with the law by the authorities (since the temporary suspension of rights supposes actions by authorities consistent with the law declared for reasons of general interest and for the purpose for which they were established).\textsuperscript{102} In this setting, the invocation of an emergency to limit freedom of expression requires a case-by-case analysis to ensure compliance with the legal requirements which authorize the limitation.

4. Subsequent Liability

The Inter-American system’s prohibition on prior censorship does not exclude the subsequent imposition of liability. But when subsequent liability is of an exaggerated degree, it effectively “gags” individuals who are faced with the threat of serious “retaliation” for expressing their opinions. Consequently, the American Convention establishes specific requirements tied to the validity of subsequent liability. These requirements are: 1) legality; 2) democratic legitimacy; 3) necessity; 4) proportionality; 5) subjective content; 6) differentiation between opinions based on facts and value judgments; 7) preclusion of liability for reproduction of information; and 8) incompatibility with contempt laws.


\textsuperscript{101} American Convention, supra note 12, at art. 27; see also Claudio Grossman, \textit{El Regimen Hemisferico Sobre Situaciones de Emergencia}, 1993 \textit{SERVICIO EDITORIAL DEL INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS} 155.

\textsuperscript{102} Id.
a. **Legality**

Article 13 of the American Convention provides that the subsequent imposition of liability should be "expressly established by law." This is confirmed in Article 30 which provides the restrictions that "may be placed on the enjoyment or exercise of the rights or freedoms recognized [in the American Convention] may not be applied except in accordance with the purpose for which such restrictions have been established." In its Advisory Opinion OC-6/86, "The Word "Laws" in Article 30 of the American Convention on Human Rights," the Court held that the criteria of Article 30 are applicable in all cases in which the word "law" or a similar phrase is used by the American Convention for the purpose of the restrictions which the Court itself authorizes with respect to each one of the protected rights.

Different consequences arise from this concept of legality. First, the norm that prohibits a given action cannot have a hierarchy inferior to that of the norm that recognizes the right, for example, a decree or an ordinance cannot narrow a constitutional protection. Second, there is a prohibition on retroactive application, based on the notion that no one can be responsible for conduct that, when undertaken, was not illegal.

b. **Democratic Legitimacy**

Article 13 requires that in order for the imposition of subsequent liability to be valid under the Convention, the ends sought to be achieved must be legitimate. In Advisory Opinion-05/85, the Court affirmed that this principle should be understood as one requiring public authorities to conduct themselves in strict conformity with the constitutional and legal requirements. Moreover, the principle of legality is inseparably linked to that of legitimacy. In the Western Hemisphere, legitimacy requires the

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103. American Convention, supra note 12, at art. 13.
106. American Convention, supra note 12, at art. 13.
107. Advisory Opinion OC-06/86, supra note 104.
effective exercise of representative democracy, including, inter alia, respect for divergent views.  

**c. Necessity**

Article 10 of the European Convention for the Protection of Rights and Fundamental Freedoms uses the expression "necessary in a democratic society," while Article 13 of the American Convention omits those specific terms. In Advisory Opinion OC-05/85, the Court sustained that this difference in terminology is not relevant since the European Convention does not contain any provision comparable with Article 29 of the American Convention. As a consequence, the "necessity" of subsequent liability will depend upon whether it is oriented towards satisfying a compelling public interest within the framework of representative democracy. Among the options that may be used to meet this objective, the most closely tailored one should be chosen. Finally, whether "public order," "public morals," "national security," "public health," or some other concept is invoked to establish subsequent liability, such expressions should be subject to an interpretation strictly tied to the "just demands" of "a democratic society," that of course include freedom of expression.

**d. Proportionality**

Subsequent liability should be in proportion to the end sought, whether the end is to assure respect for individual rights or the reputation of third parties, protection of national security, public order, or public health or morals. This requirement has great importance, since excessive fines, detention, and imprisonment can have the same chilling effect as prior

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108. *Id.*
109. *Id.* at para. 45.
110. *Id.* at para. 44. Clauses c) and d) of Article 29 the American Convention provide as follows:

No provision of this Convention shall be interpreted as:

- c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

*Id.* at art. 29(c), (d).

censorship. What can be gathered from this is that respect for freedom of expression is not only assured by prohibitions on prior censorship and the adoption of subsequent liability, but also that the imposition of these sanctions must be coherent and proportional to the punished conduct.

e. **Subjective Content**

The subsequent imposition of liability requires the existence of “actual malice,” which implies acting with intent (positive intention to violate the facts) or with serious negligence (having been able to foresee the falsity of the facts). In its report on contempt, the Commission indirectly established the requirement for the existence of “actual malice” when it noted the exception that truth (exceptio veritatis) when used as a defense is insufficient to protect freedom of expression. This exception requires the journalist involved to prove the defense, thus effectively placing the burden of proof on the defendant, when, in the opinion of the Commission, the burden of proof should be placed on the plaintiff, not on the defendant.

f. **Differentiation Between Opinions of Fact and Value Judgments**

If there were liability for expressing value judgments, freedom of expression would be seriously curtailed. In effect, value judgments imply that each individual has a right to express opinions and interpretations that he or she believes. This type of expression is protected in broad terms by Article 13, which asserts that freedom of expression involves “the freedom to seek, receive, and impart information and ideas of all kinds.”

Value judgments, since they are subjective, do not create liability because they do not assert facts. They are simply subjective opinions which individuals can freely determine to be valid or invalid. In the system created by the American Convention, there is an explicit right not only to “receive” information but also to “disseminate” opinions. If subsequent imposition of liability were permitted in the case of the dissemination of value judgments, it would not only inhibit the person who expresses the opinion,

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113. *Id.*
114. *Id.*
115. *See id.*
117. *Id.* at art. 13(1), (2).
but also debate that allows different opinions to be expressed, a form of expression that enhances society.

g. **Exclusion of Liability for Reproduction of Information**

The need to exclude liability for the reproduction of the opinions of third parties is undeniable. To hold those who reproduce the opinions of third parties liable would seriously limit freedom of expression, since it would force those who reproduce the opinions of others to set up verification systems to assure the veracity of each opinion. These verification systems would prove to be notoriously onerous for a complex and diverse society where a vast influx of information proceeds from divergent sources. It should be noted, however, that within the framework of the American Convention, the exclusion of liability for reproducing the opinions of third parties does not, of course, imply curtailing the liability of the individual who made such statements in the first place.

h. **Incompatibility of Contempt Laws with the American Convention**

Seventeen OAS member states still have contempt laws that provide punishment for offensive expressions directed at public officials in the fulfillment of their duties. The Commission has emphatically decreed that such laws are incompatible with freedom of expression, both through its case system as well as in its *Report on the Compatibility of “Desacato” [Contempt] Laws with the American Convention on Human Rights* (“Report on Contempt Laws”).

In the *Verbitsky* case, an Argentine journalist was sentenced to one month in prison after being found guilty of contempt when he published an article in the newspaper *Página 12* [Page 12] in which he referred to an Argentine Supreme Court justice as “disgusting.” Subsequent to the rejection of his appeal, Verbitsky brought a complaint before the

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118. 1998 Report of the Special Rapporteur, *supra* note 2, at ch. IV, sec. A (noting that the countries that have contempt laws are Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, the Dominican Republic, Uruguay, and Venezuela).


120. *Verbitsky*, Case 11.012, Inter-Am. C.H.R., at para. 1. The English version of the case points out that the Spanish word used in Verbitsky's article was “asqueroso” and explains that the term can mean either disgusting or disgusted. *Id.*
After several meetings, the parties arrived at a common proposal for friendly settlement, which was successfully fulfilled when the sentence against Verbitsky was revoked and all its effects were annulled, and when the contempt statute was abolished. The Commission accepted this friendly settlement since it met the Commission’s requirement that such agreements protect human rights in conformity with the American Convention.

In its Report on Contempt Laws, the Commission stated that contempt laws contradict the principle that a properly functioning democracy is the best guarantee of social harmony and the rule of law, and contempt laws, when applied, directly affect the type of open debate guaranteed by Article 13 that is essential to the existence of a democratic society. Moreover, invoking the concept of social harmony to justify contempt laws goes directly against the logic that sustains freedom of expression and thought. The Commission emphasized critical expressions not related to an official’s position may be subject to civil liability for slander and defamation, just as is the case with other citizens.

For his part, the Special Rapporteur stated in his 1998 report that “[t]he contempt laws seek to avoid debate as well as the scrutiny or criticism of state officials,” and that “contempt laws, instead of protecting freedom of expression or [sic] civil servants limit freedom of expression and weaken the democratic system.”

121. Id. at para. 3.
122. Id. at paras. 18–20.
123. Id. at para. 20.
125. Id.
126. Id.
127. 1998 Report of the Special Rapporteur, supra note 2, at ch. IV, sec. A. In a press release, the Special Rapporteur stated his opposition to a court decision in Argentina that sentenced the journalist Eduardo Kimmel to one year in jail and a fine. Office of the Special Reporter for Freedom of Expression, Inter-Am. C.H.R., Press Release, PREN/8/99, available at www.cidh.oas.org/Relatoria/Spanish/ComPrensa8.htm. He reminded that the Court has stated that in a democratic society, political and public figures should be more open to public scrutiny and criticism, and that open debate, which is crucial to a democratic society, must necessarily include those persons who participate in the creation or the application of public policy. Id. Since these individuals are at the center of public debate and are knowingly exposed to public scrutiny, they must display greater tolerance toward criticism. Id.

The United Nations Rapporteurs for Freedom of Expression for the Organization for Security and Cooperation in Europe, and the OAS Special Rapporteur stated in a joint resolution that laws exist in many countries, such as contempt laws, that unduly limit the right to freedom of expression, and they prevailed upon the States to amend those laws in order to
5. The Right to Access Information

The right to access information is fundamental to the ongoing development of democracy. This right is found in subsection one of Article 13 of the American Convention, which provides that the right to freedom of expression includes the freedom to seek out and receive information of all kinds.\textsuperscript{128}

With respect to this issue, the Court has noted that "a society that is not well informed is not a society that is truly free."\textsuperscript{129} Restrictions on access to information held by public or private institutions (e.g., credit institutions) must be "judged by reference to the legitimate needs of democratic societies and institutions."\textsuperscript{130} This implies that the existence of an absolute prohibition on access to information is incompatible with the American Convention. Although limited restrictions are possible (e.g., national security), as with other exceptions, they should be narrowly constructed and subject to judicial review in all cases.

To guarantee the right of access to information, the Special Rapporteur has proposed as a remedy the writ of \textit{habeas data}.\textsuperscript{131} Although neither the Commission nor the Court has yet interpreted what form the proposed remedy will take, this fact does not in any way prevent the actual exercise of the right to access information in the hands of government or private entities.

6. The Right of Correction and Reply

Having established freedom of expression and thought in Article 13, the American Convention provides for a right of correction and reply in Article 14.\textsuperscript{132} In Advisory Opinion OC-07/86 the Court asserted:

The inescapable relationship between these articles can be deduced from the nature of the rights recognized therein since, in regulating the application of the right of reply or correction, the States Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom

\begin{footnotesize}
\begin{enumerate}
\item[128.] American Convention, \textit{supra} note 12, at art. 13(1).
\item[129.] Advisory Opinion OC-05/85, \textit{supra} note 35, at para. 70.
\item[130.] \textit{Id.} at para. 42.
\item[132.] American Convention, \textit{supra} note 12, at art. 14.
\end{enumerate}
\end{footnotesize}
of expression so broadly as to negate the right of reply proclaimed by Article 14(1).\textsuperscript{133}

The Court added that the right to reply guarantees respect for freedom of expression in both its individual and shared dimensions:

In the individual dimension, the right of reply or correction guarantees that a party injured by inaccurate or offensive statements has the opportunity to express his views and thoughts about the injurious statements. In the social dimension, the right of reply or correction gives every person in the community the benefit of new information that contradicts or disagrees with the previous inaccurate or offensive statements. In this manner, the right of reply or correction permits the re-establishment of a balance of information, an element which is necessary to the formation of a true and correct public opinion. The formation of public opinion based on true information is indispensable to the existence of a vital democratic society.\textsuperscript{134}

While the Court has not had the opportunity to apply the law of correction to a contentious case, its Advisory Opinion OC-07/86 confirms certain elements of this right. It is important to reiterate that the right of correction cannot legitimately include value judgments. It should also be noted that there are many ways of expressing opinions, so assuring correction by the same means (e.g., location, size, format) inadequately protects freedom of expression.

7. The Link Between Freedom of Expression and Democracy

Both the Court and the Commission have established that there is an inherent link between freedom of expression and democracy.\textsuperscript{135} In Advisory Opinion OC-05/85, the Court affirmed:

\textsuperscript{133} Advisory Opinion OC-07/86, supra note 36, at para. 25.

\textsuperscript{134} Id. at Separate Opinion of Judge Hector Gros Espiell, at para. 5.

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.\footnote{136}

In his 1998 Annual Report, the Special Rapporteur stated:

Freedom of expression certainly holds a prominent position among the different requirements for a participatory and stable democracy. If it does not exist, it becomes impossible to develop the other elements needed to deepen democracy. Thus, freedom of expression has often been said to be the fundamental freedom underlying the very existence of democratic society.\footnote{137}

In concluding the report, the Special Rapporteur asserted, “[c]onsolidation of democracy in the hemisphere is closely related to freedom of expression. When freedom of expression is limited, the development of democracy is interrupted, since the free debate of ideas and opinion among citizens is impeded.\footnote{138}

The link between freedom of expression and democracy has been part of a development process, within the context of the OAS, that membership in the Organization is only open to democratic states. An important milestone in this process was reached when OAS Resolution 1080 was adopted in Santiago, Chile in 1991.\footnote{139} This resolution allows a series of measures to be adopted in cases where the constitutional process of a country breaks down.\footnote{140}

\footnote{136. Advisory Opinion OC-05/85, supra note 35, at para. 70.}
\footnote{137. 1998 Report of the Special Rapporteur, supra note 2, at Introduction.}
\footnote{138. \textit{Id.} at ch. V.}
\footnote{140. \textit{Id.}}
The interpretation of the American Convention by both the Court and the Commission confirms the existence of a legal framework in the Inter-American System designed to protect freedom of expression. The application of the regional framework to specific cases, illustrates the scope of this important freedom as a cornerstone of democracy. Achieving complete freedom of expression in the Western Hemisphere requires that States fully comply with existing regional norms and that they integrate them into domestic law. Such compliance and integration constitutes adherence to the obligations that member States freely contracted to meet through ratification of the American Convention. To fully meet their obligations, States should implement the following policies.

First, slander, libel, and defamation should be decriminalized. Within the framework of a participatory society, the interchange of ideas in political debate is a fundamental mechanism by which full exercise of freedom of expression can be attained. Slander, libel, and defamation laws have been used to chill this mechanism, arguing, in the case of “offended” authorities, that they exercise a public function. This stance is contrary to the principles established in Article 13 of the American Convention. Moreover, civil action is an alternative that provides sufficient protection to those who are subjected to intentional attacks on their honor or reputation, and limits disproportionate subsequent liability.

Second, Article 13 of the American Convention establishes that prior censorship is incompatible with full freedom of expression, and strictly enumerates the circumstances in which it can be applied. Strict compliance with permissible exceptions is fundamental to prevent the conversion of the exception into the general rule, taking into account that the exceptions exist only for use in specific cases, since the general principle is full freedom of expression.

Third, public and private monopolies in information media should not be permitted. As this article illustrates, the existence of public and private monopolies works against the creation of an atmosphere that allows for the interchange of diverse opinions. To achieve this objective, anti-monopolistic laws should be developed and strictly enforced.

Fourth, access to information should be guaranteed. The creation of domestic laws that guarantee free access to information in the hands of government and private organizations is fundamental to achieving full protection of freedom of expression. Since the initial phase of creating rules and establishing their normative context has already been achieved, the
challenge now is the full application of those rules and norms. In this new phase of international supervision, the system requires a combination of measures that will assure the effectiveness of the Special Rapporteur, provide training to civil servants, judges, and journalists, provide for the adoption of urgent measures (in cases of possible irreparable harm), strengthen the case system, and provide for increased action by political organs.

There are a number of ways these objectives can be achieved. One way is by allowing the Special Rapporteur to visit countries where freedom of expression is seriously threatened without the need to seek prior permission or receive an invitation from the State. Another is to finance the office of the Special Rapporteur to guarantee that it has sufficient resources to function properly. In addition, lawyers and judges should be trained to invoke and apply international norms in domestic law. This training in both the jurisprudence and procedure of the Inter-American System can play a preventive role by fostering internal remedies without the need to involve international organs.

The Commission should also adopt preventive measures in the case of threats against journalists. If the measures are not applied, the cases should be submitted immediately to the Court in order to raise international awareness of this type of threat. All cases involving freedom of expression should be taken to the Court if the State involved does not accept the opinions and recommendations of the Commission. This will open more possibilities for enforcing compliance with international norms. Finally, the OAS political organs should adopt measures directed at States that do not comply with decisions of the Commission and the Court on freedom of expression issues. The political organs, at a minimum, should place these issues on the agenda and discuss them, and also adopt measures of a political nature to promote this freedom, for example, suspension from participation in the organization.

There is an ongoing debate about which rights are most important. Regardless of whether non-derogable rights or economic, social, cultural, civil, or political rights take precedence, the discussion itself is only possible if the right to freedom of expression exists. Accordingly, full respect for this freedom in the Western Hemisphere must be guaranteed.
A Conversation with Dr. Hanan Ashrawi*

Introduction: Dr. Ashrawi was the official spokesperson at the Madrid Peace Process (also known as the Madrid Conference) for the Palestinian Delegation and will speak about those issues and whatever issues you would like to talk about.¹

Dr. Ashrawi: Anything you are interested in, I would be glad to address, related of course, to what I have been doing. I am not going to address the latest space explorations, but I am quite willing to be diverse in talking about the Middle East Peace Process, how it started, the issues of Palestinian-Israeli realities, regional realities, questions related to human rights and democracy in the region, and developments in our part of the world. So, I do not know if you want me to begin with a brief presentation or if you would like to start with your questions and tell me what you are interested in, because every session I promise to be interactive, and then I end up lecturing, and this time I will do it too. I am going to have you ask questions and I will answer those questions.

* Hanan Ashrawi, who holds a Ph.D. in medieval literature from the University of Virginia, is the founder and Secretary General of the Palestinian Initiative for the Promotion of Global Dialogue and Democracy, an organization committed to human rights, democracy, and global dialogue in Jerusalem. As a feminist, one of Dr. Ashrawi’s major goals is to strengthen the political participation of Palestinian women and to achieve equal rights in a new nation based on the foundations of credibility, freedom, and legitimacy. In 1991, she became the official spokesperson for the Palestinian delegation to the Middle East Peace Process and in 1993 was appointed General Commissioner of the Palestine Independent Commission for Citizen’s Rights. Dr. Ashrawi was an active participant in the creation of the 1993 Oslo Accords. In 1996, she was elected to the Palestinian Legislative Council and named Minister for Higher Education and Scientific Research. She is currently a member of the Legislative Council, where she has become an outspoken critic of corruption in government and a leader for the creation of a democratic Palestine committed to human rights and peace. Dr. Ashrawi is the author of several publications, the latest of which is her book This Side of Peace: A Personal Account. Dr. Ashrawi is married to Emil, a photographer with the United Nations headquarters in Jerusalem, and has two daughters, Amal and Zeina.

¹ On March 8, 2000, Dr. Ashrawi held this conversation with students of Nova Southeastern University, Shepard Broad Law Center during her visit as one of five distinguished speakers at the Law Center’s 2000 Goodwin Seminar on International Human Rights in Fort Lauderdale, Florida. The Nova Law Review selected the materials included in the citations to this conversation.
Student: Although Israel is negotiating with the Palestinian Authority\(^2\) for peace, are Palestinian authorities doing all that they can to influence the perception of the Palestinian community as to the benefits of peace and as to why they should want peace instead of organizing student demonstrations against the peace process?

Dr. Ashrawi: First, I doubt anybody can organize a student demonstration or tell the students to demonstrate now and not to demonstrate later. That is one. Second, Israel is negotiating with the Palestine Liberation Organization ("PLO")\(^3\) and not the Palestinian Authority. The Palestinian Authority was sort of a formation of the interim phase agreements where a system of government was set up to govern part of the land and part of the people, only for the transitional phase. Then we get to permanent status issues. Supposedly, we will end up with the devolution of occupation and the evolution of statehood. One of the negotiating parties is the PLO, which represents the Palestinian people everywhere, because as you know five million Palestinians are refugees. We are not only going to deal with Palestinians who are in the West Bank and Gaza, because you do not make partial peace with part of the people. So, that is number one. Two, I do not know if you have looked at the facts, or if you have an underlying assumption, or if you have looked at the Israeli statements, but frankly speaking, Palestinian public opinion has moved and has made a serious qualitative shift in its political discourse, basically since 1991.

In 1974, the Palestinians accepted the idea. First of all, let me go back to 1967. In 1967, we proposed a one state solution, one democratic non-sectarian, pluralistic state in Palestine for everybody—Muslims, Christians, Jews, Arabs, Palestinians, and Israelis—after the war. That was turned down by the Israelis because they said that goes against the Zionist ideology. That was before the 1967 War. Then there was the revolution where we said all of Palestine belongs to the Palestinians because in 1947, 1948, when Israel was formed, there was such a thing as a Palestine.

\(^2\) Hillel Frisch, From Palestine Liberation Organization to Palestinian Authority: The Territorialization of "Neopatriarchy", in THE PLO AND ISRAEL FROM ARMED CONFLICT TO POLITICAL SOLUTION, 1964–1994 75–77 (Avraham Sela & Moshe Ma'oz eds., 1997) [hereinafter Frisch]. The Palestine Liberation Organization ("PLO") was established in 1964 for the purposes of liberating Palestine and establishing a form of government for Palestine. \textit{Id.}

\(^3\) \textit{Id.} at 56–57. The Palestinian Authority began as an interim government that expanded into Gaza and the West Bank. \textit{Id.}
Historical Palestine was a country in which people were living for centuries on their own land. What happened then was that the state of Israel was created on the majority of what was Palestinian land. We ended up with a situation of tremendous suffering. We had the dual injustice of dispossession, dispersal, and exile. More than 750,000 Palestinians were kicked out, more than 400 villages were totally demolished.4 We had a series of massacres. We can talk about these later, which can only be described in modern terminology as ethnic cleansing in 1948. Then again, beyond that, when we made the concession, we made that historical shift, which began in the early 1970s, to accept sharing Palestine and to accept a two state solution. That was a very serious historical compromise.5 Because, as my father said, we are not denying this past, this history, the fact that there was a Palestine on all of Palestine but, we are dealing with a future for our children in which we recognize that a homeland, a historical homeland, is not the same as a state, a contemporary geopolitical state. So while we would not deny our past, while we would not change our historical narrative and deny our existence, we would at the same time accept to share historical Palestine within the two state solution.

Now, this took a lot of doing and I discovered, through a very painstaking debate and dialogue, even within the Palestinian circles. In the 1970s it was very difficult not just to mention the two state solution, but even to talk to any Israeli or Palestinian or to propose a peaceful settlement for the conflict. I am saying this to give you a background as to the major changes and to the political thought in Palestine. Then, in 1988 there was a meeting of the Palestinian National Council (“PNC”) in the aftermath, or when the intifada was still active. We set up a meeting of twenty-two Palestinians from all over the world and we issued a statement.6 We sent it to the PNC. We said that this is our position, and that the only resolution for the conflict is through peaceful means. The only way it can be done is to accept the two state solution and we should launch a peace initiative. We


5. Samer Badawi, “Ashrawi Delineates Palestinian ‘Red Lines,’ Reiterates Need for a Two-State Solution,” Report From a CPAP Briefing With Hanan Ashrawi, available at http://palestinecenter.org/news/20000316ftr.html (Mar. 16, 2000). This article is based on remarks delivered on March 14, 2000, by Dr. Hannan Ashrawi and was written by Samer Badawi, staff writer for the Center for Policy Analysis on Palestine. It should be noted that Dr. Ashrawi’s views do not necessarily reflect those of the Center.

called it a peace initiative then. In 1988, the PNC, which is the parliament in exile, accepted the two state solution in Algiers and declared Palestinian statehood.\(^7\) And, of course, there is a beautiful declaration of independence.\(^8\) I would like you to read it at some point, as it is a very good basis for a constitution. And then, we moved from there, giving rise to the acceptance of the peace initiative and the peace process itself in 1991, when we participated in the peace process. Now, although we started the process earlier, when we started the official meetings with Baker in 1991,\(^9\) the majority of Palestinians were against the meetings.\(^10\) We had about forty percent in support and sixty percent against the meetings. Systematically, we continued with an internal dialogue and debate until we got a constituency for peace.

I do not know if any of you remember the launching of the Madrid Peace Process in 1991, but when we came back from Madrid, we had eighty-seven percent support.\(^11\) We managed to do this with the most open system of dialogue, of debate, and of discussion. People were involved in the decision making. People would hold us accountable. They would ask us, "what did you do, what did you say?" They would come to our homes and have a right to know, and say, "we are telling you what to say next." So they had a stake in it, they understood it, and it was absorbed. It was not imposed from above. That is why I believe the discourse for peace has a legitimacy and constituency which we gained, systematically through not just persuasion, but through active participation. You have a stake in the process. Until now, there has been a majority of support for the peace process or for peace. This is despite all the problems. It is despite the fact that the peace process has produced more suffering for the Palestinians. It is despite the fact that more land is being confiscated, more houses demolished. Despite living, we will live in an area that is like a series of Bantustans or isolated reservations. And Israel still controls our crossing points and we have no freedom of movement whatsoever.

Approximately fifty percent of Palestinians are still critical of the process itself and the way the negotiations have been conducted. But, we have over seventy percent consistently in favor of a peaceful solution. Israel cannot claim the same because they are almost down the middle, for and against the peace process.

\(^7\) Id.
\(^8\) Id.
\(^10\) Id.
\(^11\) See id.
Now, of course we have political pluralism. We have those who do not approve of our coming to Madrid and starting the peace process, but we will defend that right to dissent and to disagree. We have the right to disagree. Why is it that in Palestine when we have democracy and pluralism and people express different points of view, we are told, “well you are not unified, you are fragmented or you have extremists.” And, if we all agreed, you know, as a nation of sheep, they would say, “you have a monolithic dictatorial system.” Well, no, we do not all agree. We have different points of view. We are not a nation of sheep and we have never been. Nobody can dictate to us how to think and what to think. Palestinian Authority cannot brainwash people and cannot prevent people from speaking out, from expressing their opinions. But it must safeguard the rule of law, and it must hold people accountable through *due process*, of course. The peace process said in some of the agreements that there would be no incitement. And at the same time there was tremendous emphasis on Israeli security, no emphasis on Palestinian security whatsoever. And while, if you look at it numerically, and I hate to do that, more Palestinians have been killed, *daily* actually, by Israeli violence, by settler violence, by soldiers who do it with impunity.\(^1\) The last time settlers killed the Palestinians, they were fined one cent each. So we said “this is the value of Palestinian human life.” The soldiers, who in the early days buried people alive, were demoted, reprimanded. This is the kind of distortion that you have. While Palestinians, I suppose, are not only to safeguard their own security, they are supposed to safeguard Israeli security and prevent any possible dissent and action, or violence, which has led to internal distortions and violations within Palestinian society.

The Palestinian Authority is now arresting people on the basis of their political beliefs in order to show good faith and that they are committed to the peace process and to prevent any acts of violence. They have cracked down on the opposition. They have implemented a state security court that is a military court to try people instantly. And, the Israelis keep pushing for more. Now, when you distort internal realities, you upset, you violate the rule of law, you create a police state, and you are not going to have peace with anybody. The peace process should not be an instrument for the distortion of Palestinian ideologies, it should be for the *empowerment* of Palestinians because only the strong can make peace.

So, when I get questions like this I generally answer more than just the question. Because these questions are generally being sent out by the Israeli

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government and by the American-Israel Public Affairs Committee ("AIPAC"). I even received some of these questions last night. They are misleading because they are not based on facts. You have to look at the whole context and you have to look at the facts. The facts are that the Palestinian Authority and the PLO have bent over backwards to fulfill all their obligations as per the agreements, even though it meant self-negation with the Palestinian people, and then erosion of their own credibility and their own support among the people. They have accepted their role as guardians of Israeli security when the Israelis, for more than thirty years of occupation, using the most brutal military means, could not guarantee their security because there was a situation of occupation and injustice.

And of course we do not control or patrol Israeli streets and cities. And not only that, the Palestinian Authority and the PLO accepted to do that without having any assurances that Palestinian security would be safeguarded, be it in terms of territorial security, political security, economic security, or human security. You can lose your land, you go to bed owning a home and you wake up in the morning and it is gone. Your house can be demolished, you could be deported, you are living in a state of siege and at the same time you are measured and judged only in accordance with how much Israeli security you can provide.

Now, I told everybody that if we were all secure, if we were living happily ever after next to each other as good neighbors, there would be no need for a peace process. The peace process is there in order to prevent any situation of conflict and violence and to promote security for everybody. So, if you make security a prerequisite, it means that you make peace impossible. Security comes from signing a peace agreement, from dealing with the causes of conflict, from removing the grievances, and creating a situation that is conducive to cooperation rather than one that produces more conflict. You can not occupy a people, a whole nation and enslave a nation, rob them of all their rights, and then tell them they have to sit back and take it and that if they defend themselves, if they resist, they are automatically terrorists. Then, at the same time in the context of the peace process, we should find democratic and peaceful means of expressing dissent. Otherwise, you would end up having to arrest more than half of Israel which, is against the peace process.

Student: Yes, but these Israelis that you say are against the peace process do not go around blowing up buses within the Palestinian Authority.
Dr. Ashrawi: Will they kill Palestinians with impunity? Yes. They shot people in the mosque. The attack at the al-Ibrahimi Mosque during Ramadan at the hands of Baruch Goldstein is a famous example, but I can tell you of daily incidents. I do not want anybody's loss of life. There is equal value to all human lives. I do not want violence at all. That is why we entered the peace process.

Student: How can Israel be asked to create peace if the PLO cannot control these terrorist organizations within its nation to create peace? How can you make peace with someone who cannot control his own people?

Dr. Ashrawi: How do you control your own people? Of course, anybody who breaks the law should be punished in accordance with the law.

Student: Should be, but can be? What about Hamas?

Dr. Ashrawi: Why do you assume that Hamas is all terrorists? Hamas is a political organization. It has a military wing. I have a constant dialogue with Hamas. We should. You have to give them a stake in the process. You cannot accept that Israel dictates to exclude all political parties who disagree with you, then they will turn to violence. Anybody who breaks the law should be punished. Be it Israeli, be it Palestinian, but you cannot have political prisoners and political detention.

Also, you do not say, “control everybody.” Otherwise, every time there is a bombing, whether in Oklahoma or anywhere else, you could hold Clinton accountable and you punish him. No, you have to have a system, a legal system. You have to have a law enforcement system. This is just law and order, but it does not mean that you outlaw anybody who disagrees with you or who criticizes you, which is what is happening now. And actually,
even the language, can Arafat\textsuperscript{17} control this? No. Can anyone control every individual person, short of creating a police state and having a policeman with everybody? No. However, you need to create a collective atmosphere, a discourse of peace that is not conducive to violence. You need to end Palestinian victimization. I cannot tell people whose lands have been stolen, whose houses have been demolished or whose relatives have been killed, whether their children, or their sisters or their brothers, “you have to act peacefully, you have to love the Israelis. They are good neighbors. They are doing nothing wrong.”

No, they are doing all sorts of things wrong. But we can say that we will deal with the occupation. We will deal with it through peaceful means. We will end the occupation. So it is much more than the simple slogans, you know, “control your people,” “stop all violence.” No. You want to stop violence, let us stop it on all sides then. How do you do that? It can only be done through a just and genuine peace that addresses the causes of the conflict and ends the sense of grievance and hostility.

\textbf{Student:} Just to put a little bit more of a historical perspective on this, what was life like in Palestine before 1948 and even in the early 1960s before the Palestinians got ejected?

\textbf{Dr. Ashrawi:} I wish you would ask my parents. I was a baby in 1948, I am telling you my age now, which I do not mind. It is the worst kept secret anyway. But, I am not one of those who have idealistic memories and who have romanticized the past with nostalgia. Palestine was a country that had been under several occupations. The Ottoman occupation, and then the British Mandate, and then the West Bank annexed to Jordan after 1948, and Gaza was under the control of Egypt. So before 1947 or 1948, even before the nineteenth century, if you read the travel books and literature, Palestine had a society which was predominantly peasant. Agriculture was the major source of income. It was also a land of pilgrimage.\textsuperscript{18} So even before the days of tourism, even in my medieval studies going back to Holy Jerusalem\textsuperscript{19}

\begin{footnotes}
\item[17.] See generally Said K. Aburish, \textit{Arafat: From Defender to Dictator} (1998). Born in Cairo, Egypt, in 1929 as Abdul Rahman Abdel Rwout Arafat Al Qwdua Al Husseini, he is now known as Yasser Arafat, leader of the Palestinian National Authority. \textit{Id.}
\item[19.] \textit{Id.} at 653–54. Mr. Breger points out that each religious group has long recognized Jerusalem as being the most holy place in the world, and each had co-existed for
\end{footnotes}
and Holy Palestine, there were Christian communities and Christian pilgrims, constantly. It was a land of pluralism also, because three religions coexisted in Palestine.

Student: Are you talking about before 1948?

Dr. Ashrawi: Before 1948, of course. There were three religions. The principal religion was Islam. The second was Christianity. The third religion was Judaism. They were a distinct minority. In 1923, the boundaries of Palestine were delineated and then the League of Nations placed it under the British Mandate, as Palestine. The people there were, on the whole, highly educated, because historically Palestinians have placed tremendous emphasis on education, and I know that was the case of my parents’ generation. My father studied medicine. He used to write all the time. He wrote on women’s rights and I will give you some of his writings. When he died, at his memorial service, the bishop chose those statements dealing with women to read. In the 1920s, before he married and had five daughters, he said that women were equal by right and not as a gift from the men. And he said “beware, if you do not recognize that right, I advise the oppressor to be aware of the anger of the oppressed, once women rebel and take what is theirs by right, by force.” He said they should have it without force. So in a sense there was a movement for women. There was a movement in education, there was a center of intellectual and literary achievements. Palestine was thriving. There was a lot of trade. There were key urban centers. Jaffa was the greatest city in Palestine, along with Haifa, and of course Jerusalem. These were the major intellectual trade and


20. FRANK J. CALABRESE, THE PALESTINE LEGACY: A POLITICO-LEGAL HISTORY 1917–1990 33 (1994): The British Mandate acquired jurisdiction de jure over Palestine in September 1923 following conclusion with Turkey of the Treaty of Lausanne. Before this, the de facto administration was first in the form of a military government from December 1917 to June 1920, with a civilian High Commissioner, Sir Herbert Samuel, taking office on July 1, 1920.

Id.

21. See generally ASHRAWI, supra note 9.

22. Id. at 47. For more information see Andrea E. Bopp, The Palestine-Israeli Peace Negotiations and Their Impact on Women, 16 B.C. THIRD WORLD L.J. 339 (1996).

23. ASHRAWI, supra note 9, at 47.

24. See id.
cultural centers. At the same time, Jerusalem remained a city where we had a lot of pilgrimages, a lot of activity, and was always an education center. Many of the journals, books and so on, written during the intellectual renaissance, started in Jerusalem by some who were friends of my parents. So it was mainly agricultural and rural areas and city centers that were based on education, culture, and trade, and of course the pilgrimage and tourist industry.

Student: So it was a sovereign nation by itself?

Dr. Ashrawi: It was under occupation. It had boundaries. It was recognized. My parents' marriage certificate says Palestine. My birth certificate says Palestine. The money said Palestine. Even what is now the Jerusalem Post was called the Palestine Post. So there was a Palestine with its own currency, with its own laws. Israelis use the fact we were always under occupation or unjustly treated to justify further occupation and lack of justice. No, there was a culture, it had a history. We had institutions. We had colleges and schools. We had everything. Actually, we were known as the most advanced country in the Arab world.

Now our development, our growth, was rudely suspended in 1948, of course with the partition25 and then with the war.26 After that, in 1951, the West Bank was next to Jordan, which was the kingdom of Trans Jordan and Gaza was graced under Egyptian rule. These were the days of Arab nationalism, when the Arabs said "we want to have Arab unity and what we will do is we will save Palestine for the Palestinians." This created a greater mess because the Arabs were certainly not democratic regimes, nor were they equal to Israel in military power. It was not until the mid 1960s that the Palestinians had even set up the PLO as part of an Arab venture. The Palestinians decided to rescue Palestinian decision making from Arab decisionmaking, resulting in our own organization and our own world. Not because we were against Arab unity. No, but because it was under the guise of unity Palestine was lost, and it was subsumed by an Arab cause. What we


26. Salman Abu-Sitta, Palestinian Refugees and the Permanent Status Negotiations, at http://palestinecenter.org/news/19991116pb.html (last visited Jan. 27, 2001). "In 1948, 85 percent of the Palestinians who lived in the part of Palestine that became Israel were driven out of their homes by Jewish forces." Id.
wanted was to, first of all, get an affirmation of our identity and our history, regain our rights, and build our state.

Now, in the meantime, in 1967 of course, Israel occupied the rest of Palestine. If you look at it historically, the United Nations Resolution 181\(^{27}\) and the Partition Plan\(^{28}\) gave Israel fifty-six percent of Palestine at that time.\(^{29}\) These are historical facts. Fifty-six percent of the land of Palestine was given to the Jews. At that time they owned seven percent of the land. And they were less than ten percent of the people. Then they became thirty percent of the people with the Holocaust. We were made to pay the price of Western anti-Semitism and Western crimes against humanity because many of the Jews started coming to Palestine and of course Britain, as the occupying power, as the mandate power, did help and bring them into Palestine. And now you are going to begin to see the narrative of 1948 Palestine coming through the Israeli new historians, who were called revisionist historians. Now, they are called the new historians, because they are relating authentic history and not the revised history. I would advise you to read people like Benny Morris,\(^{30}\) Teddy Katz,\(^{31}\) and Norman Finkelstein.\(^{32}\) These authors went through the intelligence archives of Israel and they not only interviewed Palestinian survivors about what happened, but also interviewed members of the Jewish armed gangs then in 1948.\(^{33}\)

Thus, a picture is going to emerge. Only a couple of months ago, the history of Al-Tantura came out.\(^{34}\) Al-Tantura was one of the villages that was destroyed by the Israelis in 1948. Nobody believed the people of Al-Tantura when they said that there was a massacre. Then, two months ago, a

\(^{27}\) Report on Palestine, supra note 25, at 322.
\(^{28}\) Id. at 323.
\(^{31}\) See Ramzy Baroud, Al-Tantura: Over 50 Years of a Denied Massacre, available at http://msanews.mynet.net/Scholars/Baroud/tantura.html (last visited Feb. 2, 2001) (describing the Israeli historian Teddy Katz and his research at the University of Haifa).
journalist, who was doing his research for a masters thesis at the Hebrew University, issued his findings showing that some of the gangs that went into the army, who were involved in Al-Tantura, came out with a horrible story.\textsuperscript{35}

Now of course there was a resistance to that, because everybody would like to believe that the creation of the state of Israel was done somehow in accordance with the myth of a land without people for a people without land. So they denied our existence as a people, and they considered our land empty, believing that Israel was a heroic venture, and that it was suddenly attacked by the Arab world. Not that it came to displace a whole nation and to expel and massacre a whole people. Now that these things are coming from Israeli sources, people are beginning to listen. I am not saying this in order to encourage extremism. I am saying this in order to say that, at a certain point, you have to come to terms with history. You have to acknowledge and recognize guilt and culpability. Then, you have to move ahead and find solutions because if you want a historical reconciliation it has to be based on truth, on a narrative which is not twisted, which is not a myth, and which does not impose a distorted reality on both sides’ perceptions. Come to grips with history and move ahead. This is part of the process of reconciliation. Then, when you make peace, you make peace knowing that the Palestinians were first excluded and totally denied, even as a people, and as a nation. The Palestinians were told we did not even exist. Even Golda Meir asked, “who are the Palestinians?” They did not exist. Once you begin the politics of recognition, re-recognition, of history and identity, the politics of inclusion, that we are all people with equal human rights, regardless of objective power, then you can begin the politics of reconciliation through a just peace process. I think it is a healthy process of rectification because we are involved in a historically “redemptive act,” not just in an act of appeasement and recapitulation.

\textit{Student:} How widely are the facts of which you speak accepted in the international community?

\textit{Dr. Ashrawi:} They were totally suppressed for awhile and the Palestinians who spoke out, the victims, were denied because nobody believed them. The Palestinians and the Arabs were easily labeled in international public opinion. We were the Muslims, we were the “other,” we were not part of the Judeo-Christian tradition. We did not have many Arabs or Muslims living in the United States or the West and so we were not part of the Western

\textsuperscript{35} \textit{Id.}
dialogue. Now, because it is the Israeli historians who are conveying these facts, who are writing scholarly books on history and even archeology, they are beginning to be accepted and understood.

In Europe, these things were better known because Europe was close, Europe was part of it. The British were part of it, if you look at the British archives. Terrorism was introduced into the region by the Jewish gangs, not by the Palestinians. They were the ones who assassinated Count Bernadotte. They were the ones who blew up the King David Hotel. However, it was not called “terrorism.” It was called “liberation.” When we were expelled, when our religious sites were razed and when a series of massacres took place, again, this was called “liberating the land”; this was not called “ethnic cleansing.” It was heroic to do that to Palestinians who were primarily unarmed and primarily peasant communities. Now, with the truth coming out, I think that it is a very healthy process because the Israelis also have to come to grips with their own history and they have to understand that denial is not a way of forging a future—that you have to recognize the “other” in the same way the Palestinians have to understand the Holocaust and the horror of what happened.

My father used to say “we have to take in the Jews, they are our cousins and it is the West that is anti-Semitic, it is the West that is killing them and massacring them and torturing them, and that we should give them refuge.” Then later he told me, “but we didn’t do it so they would kick us out.” We thought we could live together because of the Semitic bond, because Arabs and Jews are Semitic and everybody says that we are cousins. Yet blood relations and blood ties are not enough. You have to deal with the fact that a grave historical injustice has been done to the Palestinians. It was “ethnic cleansing.”

Now, how do we undo that injustice? How do we make room for both peoples to co-exist? How, in historical Palestine, in two states, as good neighbors, not as occupier-occupied and not within a zero sum game? So it is a clash of legitimacies, a clash of identities. It is a clash of many things. However, it has to be understood so that the solution can emerge from the conflict, from the causes, on the basis of truth, not on the basis of myths, legends, and distortions. I think we are on the way to reconciliation because of the historians, the change in attitude, the recognition that power, politics, and dictates do not make peace. You have to remove injustice to make peace.

Student: Two questions. One, were there ever talks of carving Israel out of a piece of Germany because it was Germany who dealt the injustice to the
Jewish people and that is where the Jewish people were from, primarily in Eastern Europe? Two, when the British had control over Palestine, did all three religions live together fairly peacefully without it being a police state?

Dr. Ashrawi: Okay, first the Zionist movement\(^{36}\) started in the nineteenth century. Zionism as you know, is an extension of nineteenth century ideologies, of nationalism, and nation states.\(^{37}\)

Student: Of the Bible.

Dr. Ashrawi: No. The Bible is not Zionist. I am explaining that where Zionism started as an ideology. I have read the history of Zionism. I have read Herzl’s diaries. I have read everybody. Do not worry. Zionism as a political ideology began in the nineteenth century. Judaism was viewed as a religion, not as a national identity. It was with the early Zionists, in the late nineteenth century, that they started asking for a state for the Jews. First they were offered, and I think they were contemplating, Uganda, at one point. Then, I think at some point in the late nineteenth century, early twentieth, they were offered Cypress. They contemplated different locations. Only at the beginning of the twentieth century, between 1910 and 1912 did Palestine emerge. Then, they started with the land without the people.

Zionism was primarily a left wing socialist ideology.\(^{38}\) Therefore, it did not have any kind of territorial sort of preference. They said, we need a homeland for the Jews because we want the Jews to express themselves as a national identity, not as a religion. When the religious Jews began to be more powerful and injected themselves into the Zionist ideology, they brought in the idea of the Bible. Then, Palestine was introduced as that homeland, even though there were still several alternatives being discussed.

Now the question is how can you arbitrarily or even willfully select other peoples’ lands to create or superimpose a new state on it? Secondly, we were never asked as Palestinians, are we willing to give away our land, our history, and so on to create another state? Thirdly, and I think this is the main issue, it is the guilt of the West over the horrors of what they did to the Jews that led them to totally deny and disregard Palestinian rights because they could put all the Jews in one country. They would not have to pay the

\(^{36}\) For a more comprehensive history of the Zionist movement see ZIONISM AND RELIGION, 25–39 (Shmuel Almog, et al. eds., 1998).

\(^{37}\) Id.

\(^{38}\) Id. at 3.
price and then they could ignore the Palestinians. Thus, they unleashed a whole cycle of conflict and violence. They solved, at least they thought they solved, an injustice by creating another. Accordingly, if you simplify the situation, nobody has the right to give away somebody else’s land.

In response to your other question, no, nobody thought of Germany. Germany was paying reparations. However, they were perfectly happy to support Israel right or wrong, the same way the United States supports Israel, right or wrong, as a means of paying back for their guilt. Anybody who even mentioned Palestinians or said we were a people with rights was immediately branded anti-Semitic, which is amazing since we are Semites as well.

But the real issue is that historically, Palestine has always been pluralistic, always. It has never been the home of one religion. Palestine has the longest recorded culture and history in the region, yet it was totally denied. Until now, I know many Jewish friends who still say they are Palestinians and those who did not stay in Israel and came to the States, and those in Israel who say they do not have a problem being Palestinian. However, the issue is that a religion cannot be a national identity. Frankly, that is what I think. I do not think that you can set up, in the twentieth and twenty-first century reality, states on the basis of exclusive religions. We are talking here about pluralism interaction, not of exclusivity. Imagine if we said we want an exclusively Muslim state or an exclusively Christian state, or you have rights only if you happen to be of one religion. Had any other state done that, it would have been an outrage. It is a combination of the guilt of the West and the Zionist ideology itself. A sense of insecurity within Jewish communities and Israel per se, which to me nowadays is needless because I do not believe that contemporary societies allow for discrimination or racism. Now Israel has to decide, does it want to be a nation among equals? Does it want to be a Middle Eastern state? Or, does it want to be an artificial construct and an extension of Western Palestine?

The peace process is giving Israel the opportunity to gain recognition, legitimacy, and a place in the region to open up. I believe you cannot have a democracy if all the rights and if all the laws are geared toward exclusivity, whether you happen to be of one religion or not. I certainly do not like to see it in Iran. I would not want to see a theocracy in Israel either. However, it is not up to me to redefine Zionism.

There is some very interesting literature now coming out, the post-Zionist literature, the new Zionist literature. The Truman Institute is doing a lot. The Institute is reexamining Zionism to try, first of all, to change it from nineteenth century roots and its twentieth century expressions, and to make it
contemporary with, and consistent with, twenty-first century requirements of democracy and, of course, interactive regional and global realities. That means that there is a lot of soul searching in Israel taking place. This is taking place among intellectual circles and it is a very exciting debate that I follow regularly. But I certainly would not be interested in solving the Palestinian question by creating another injustice. The cycle of injustice has to stop and the cycle of vengeance has to stop. Therefore, we need a language of accommodation, not just inclusion, of re-recognition, not denial of legitimacies.

One Israeli friend told me, “one reason we do not trust you as Palestinians is because if anybody did to us what we did to you we would never forgive and forget.” Really, and he said that openly and I appreciated the honesty. I told him that I am not here to prove to you that I am sincere. Look at what we are doing. We have launched a peace process. We have recognized Israel. We have accepted this, although it is a tremendous historical shift and compromise which did not come easily. We risked our lives to do it, heaven knows, I mean from both sides. I have had Israeli settlers try to kill me with machine guns several times. I have had extremists try to kill or bomb me several times. It does not matter. The thing is you take risks if you want to resolve the conflict. You do it by addressing the substance and the issues, not propaganda and statements of distorted history. No. We need to deal with the truth. Deal with realities. We must include others and recognize the legitimacies. I always say, disengage from this fatal proximity a relationship of occupied, unoccupied, and injustice, and we will reengage as equals and cooperate as equals and forge new realities based on mutuality, on trust, and on mutual benefit.

Student: In a time when there is so much disharmony in the Middle East, what is the role of Palestinian women or women of Israel in the Middle Eastern states?

Dr. Ashrawi: That is a topic close to my heart. The Palestinian women’s movement goes back to the 1920s, as I told you. It was mainly middle class, urban-educated women, a sort of charitable societies with intellectual organizations. Now, since the 1970s, actually the early 1970s, we were involved in the women’s movement with a real gender consciousness. It is not that Palestinian women were ever excluded. We never had a culture that was entirely closed. We have the discrimination of a traditional patriarchal,
male-dominated society, which is true I think of most countries in the world. There has been discrimination. But, we do not, in a sense, have a total exclusion of women from education, public life, or work. We have never done that.

In the 1970s we started the women's movement on the basis of a clear gender agenda asking for full participation, on an equal basis. And, of course, rejecting the argument that a national struggle supersedes social justice. And that there are issues that can be postponed and issues that are primary and that are secondary. The women's issue is a primary issue and is not capable of being postponed. If you are fighting for justice, you cannot tolerate social injustice. If you are struggling for liberation, you cannot enslave women. If you want self-determination as a nation, you cannot withhold it from women. So our argument was always the integrated comprehensive approach to liberation.

You have to struggle against the mentality of oppression, exclusion, and discrimination on all fronts. You cannot say I want national liberation but I will enslave the women. That is how we intruded on our patriarchal society. We are nowhere near where we want to be. Of course the Arab world, predominantly Muslim culture, tends to be more conservative and has the whole spectrum—from the most oppressed, excluded, and silenced women to the most liberated, outspoken, and defiant women, and everything in between. So we do not generalize about Arab women. But we can say that Arab society on the whole is traditional, with social conservatism based on a recognition of a sort of patriarchal system of property and of power. Women are involved, of course. We have a strong women's movement with several organizations that have a general agenda. There is a tension between the traditional women who still talk about the national agenda as being separate, and the women activists who are involved in the gender agenda as being an instrument of internal empowerment to face external challenges.

We do have support systems for women. We are trying to change the whole bent of a shame-oriented culture to a guilt-oriented culture when we deal with issues of honor. For example, honor was always associated with women's behavior in Arab societies, right? Honor was the whole link to her social behavior, her sexual behavior, and her obedience. The family honor was linked to the women and therefore, the women had to pay the price. They were contained and controlled. There is still the phenomena of honor

killings which, in Jordan, now has come out in the parliament because they are trying to change the law.\textsuperscript{41} There was, by law, a mitigating circumstance that if you kill your daughter or your wife or your sister because she shamed you through dishonorable behavior, then you get a very minimal sentence, a life sentence.\textsuperscript{42}

Quite often there is collusion among the judiciary, the police, and everybody else to hide these things. I was just dealing with a case before I came, and this is an extreme case. The case involved a young woman who, as a child, suffered from incestuous rape having been repeatedly raped by her brother and her father. Then they married her off at an early age to somebody who used her as a prostitute, to make money off of her. She ran away. They threatened to kill her on the basis of honor, that she dishonored the family by running away. She came to a women’s shelter in Jerusalem where she was sheltered for a while. We agreed that she should be trained to start a profession. She insisted that she wanted to make peace with her family. We said “okay, you want to make peace with your family, and with your past? We will go with you, we will send our lawyers with you, you should not go alone.” So we did. The lawyers went with her, women lawyers. The family said that of course they will take her back and they were happy that she was being trained. They also said they would not force her to go back to her husband who was abusing her and was using her for prostitution, as well as subjecting her to physical abuse. They said she would stay with her family, and she would start her training program with the women’s organization, the legal aid center. I think it took two weeks before her body was found in a well and the family said she committed suicide. The doctor who found her, the coroner, was asked to say that it was suicide. The judge immediately signed a statement that it was suicide. We had a demonstration and went to that village, which was unprecedented. We said that we knew that it was not suicide. This woman was starting a whole new phase, she was being trained. This was a case where a woman was intensively oppressed. And I used this as the most extreme case with which we dealt. It is not the case of all Palestinian or Arab women. This is an extreme case to show you how far this can go.

\textsuperscript{41} Carol Anne Douglas, \textit{Jordan: Working Against “Honor Killings”}, \textsc{Off Our Backs}, Jan. 1, 2001. The National Jordanian Campaign Committee to Eliminate Crimes of Honor has been working for the past two years against “honor killings.” \textit{Id.} Honor killings are killings of girls and women by their male relatives. \textit{Id.}

\textsuperscript{42} \textit{Id.}; see also 20 Jordanian Women Died in 2000 in “Honour Killings”, \textsc{Agence France-Presse}, Dec. 31, 2000, \textit{available at} 2000 WL 24790096 (“[a] murderer in Jordan would ordinarily face the death penalty”).
What we need to do is to redefine a woman’s honor. By redefining dishonor and shame as being part of the national establishment, being a collaborator, women gained new recognition as activists, political activists. Women who went to jail under occupation quite often did not get married when they came out of jail because there were questions of virginity—there were questions of abuse in prison, whether they were tortured, and whether they were still virgins. Who would marry them?

One woman was released after ten to twelve years of imprisonment and torture, when she married another person who was imprisoned and it was a source of honor. We had a huge breaking point just to show that these two instances have redefined again the concept of honor; that she was honorable and she was a source of pride and this gradually changed many things for all Palestinians.

For example, a young girl, my niece, was elected head of the labor department of our political party. Accordingly, she was giving instructions to men who were her father’s age, who were doctors and lawyers while she was a student. In the political hierarchy, women came into positions higher than the men. Thus, the men could not use the traditional means of control such as “I am your father. I am your brother.” And so, we also changed the system of government. You have to do this systematically.

Now there is dialogue between the Palestinians and the Jews. It started in the 1970s with what is called the activist dialogue, and the solidarity movement. It started with a coalition of about thirty-two anti-occupationist organizations and we asked them all to work together. We were activists and we went to universities together to create a dialogue. The dialogue was interactive. The 1980s began what was called political dialogue. They wanted a different approach and wanted a Palestinian-Israeli partnership. In 1988, there was a historical meeting. We argued and fought but we discussed the issues and then, after two to three days, everybody ended up respecting and understanding one another. We came up with a declaration and it was honest.
The International Criminal Tribunals: Crime & Punishment in the International Arena*

Judge Gabrielle Kirk McDonald**

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The International Criminal Tribunals for the former Yugoslavia and for Rwanda have come a long way since their establishment in 1993 and 1994, respectively. This article will give some background on the two Tribunals and detail some of their contributions to the international community.

I. BACKGROUND OF THE ICTY AND THE ICTR

On May 25, 1993, the Security Council adopted the Statute drafted by the Secretary General of the United Nations ("U.N.") resulting in the formation of the International Criminal Tribunal for the former Yugoslavia ("ICTY").1 On November 8, 1994, the Security Council established the International Criminal Tribunal for Rwanda ("ICTR").2 Though it may appear otherwise to many, these tribunals were not created overnight. They were decades in the making, with several elements coming together to support their creation. Perhaps the most significant precursor to the Tribunals was the formation of courts, which were used to try persons responsible for the staggering atrocities committed during World War II. Thereafter, states formed the U.N. and joined in drafting agreements designed to protect basic human rights, including the International Bill of Human Rights,3 the Genocide Convention,4 and the four Geneva Conventions of 1949.5 Each of those instruments significantly strengthened international humanitarian law, showing a new respect for the rights of individuals caught up in conflicts and laying the groundwork for the Tribunals.

This trend continued with the joint adoption by states of several additional covenants and conventions protecting human rights, including

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those prohibiting apartheid, slavery, and torture.\textsuperscript{6} Despite the admirable goals, these instruments served largely as lip service to the protection of human rights since the international community failed to enforce them in large measure. Indeed, during the twentieth century, more than 170 million innocent civilians—not combatants—lost their lives in armed conflicts.\textsuperscript{7} The most alarming fact about that statistic is that these civilians were the very targets of aggression, as opposed to accidental casualties. Thus, these lofty instruments did not deter such abuses.

The creation of the ICTY finally empowered the international community with the ability to punish such abuses by individuals. Not only were such abuses prohibited after the creation, but they became punishable by an international tribunal.\textsuperscript{8} Numerous reasons are cited explaining why the Tribunals were created at this time, given that wartime atrocities have occurred many times in the past.\textsuperscript{9}

Some say that it was because the Cold War thawed. Others point to the effect of the media, bringing images of the atrocities into living-rooms throughout the world. Still others say that it was because these heinous acts were carried out in Europe, the site where the First World War began.

In any event, when we [the international community] witnessed the horrific methods of “ethnic cleansing” and ... [were] either unable or unwilling to stop this carnage, the decision was made to establish a tribunal to prosecute persons responsible for these crimes.\textsuperscript{10}

The decision to form a similar Tribunal for the atrocities that occurred in Rwanda followed soon thereafter.

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\textsuperscript{7} Gabrielle Kirk McDonald, Friedmann Award Address: Crimes of Sexual Violence: The Experience of the International Criminal Tribunal, 39 COLUM. J. TRANSNAT'L L. 1, 3 (2000).
\textsuperscript{8} S.C. Res. 827, supra note 1.
\textsuperscript{10} McDonald, supra note 7, at 3.
\end{flushleft}
Both the ICTY and the ICTR are limited strictly in their respective jurisdiction and mandates. The Statute of the ICTY\textsuperscript{11} gives that Tribunal jurisdiction to prosecute persons who committed or ordered the commission of grave breaches of the Geneva Conventions of 1949,\textsuperscript{12} violations of laws or customs of war,\textsuperscript{13} genocide,\textsuperscript{14} or crimes against humanity.\textsuperscript{15} Similarly, but not identically, the Statute of the ICTR\textsuperscript{16} gives that Tribunal subject matter jurisdiction over acts of genocide,\textsuperscript{17} crimes against humanity,\textsuperscript{18} and violations of common Article 3 and Additional Protocol II of the Geneva Conventions of 1949 committed in Rwanda or by Rwandese nationals during 1994.\textsuperscript{19}

To accomplish these prosecutions, both Tribunals have three organs—the Chambers, the Office of the Prosecutor, and the Registry.\textsuperscript{20} The Chambers of each Tribunal are comprised of three Trial Chambers and one Appeals Chamber, which they share.\textsuperscript{21} The President of the ICTY, which is one of the ICTY judges, presides over the Appeals Chamber.\textsuperscript{22} The position of President of the ICTR is held by one of the ICTR Trial Chamber judges.\textsuperscript{23} The Office of the Prosecutor, which is also shared by both Tribunals, includes investigators and attorneys who prosecute the cases against the accused before the Chambers.\textsuperscript{24} The Prosecutor heads this office from the Hague, the Netherlands,\textsuperscript{25} although there is a Deputy-Prosecutor for the
ICTR in Kigali, Rwanda. The Registry is responsible for servicing the Chambers and the Office of the Prosecutor, much like a clerk of a federal court in the United States. A Registrar heads the Registry of both Tribunals. The ICTY is located in the Hague, and the ICTR is located in Arusha, United Republic of Tanzania.

The Tribunals are ad hoc, that is, they were established solely for the conflicts in the former Yugoslavia and Rwanda. The trials are conducted by judges without a jury, the Prosecutor is independent and responsible for initiating the investigation and submitting the indictment to a judge who determines whether a prima facie case has been established. The judges are elected by the General Assembly of the U.N. for a four-year term and are eligible for re-election. As originally constituted, the Chambers had two Trial Chambers and one Appeal Chamber shared by both Tribunals. A third Trial Chamber was added for each of the Tribunals in 1998.

As mentioned, the Registry is somewhat like a clerk of the court in the United States. However, it has considerably more responsibilities, which include overseeing the Tribunal’s Detention Unit and the Victims and Witnesses Section, and maintaining contacts with states. National courts have concurrent jurisdiction with the Tribunals, but the Tribunal, established by the Chapter VII powers of the Security Council, have primacy, giving them the authority to request national courts to defer to their competence.

Those accused before the Tribunals are guaranteed internationally recognized rights, including the presumption of innocence and the right to be tried in person. The maximum penalty that may be imposed is life

27. Id.; REPORT OF THE INTERNATIONAL TRIBUNAL, supra note 12, at 18.
28. ICTY Statute, supra note 11, at art. 17; ICTR Statute, supra note 16, at art. 16.
29. ICTY Statute, supra note 11, at art. 31.
31. See ICTY Statute, supra note 11, at art. 23; ICTR Statute, supra note 16, at art. 22.
32. ICTY Statute, supra note 11, at art. 18; ICTR Statute, supra note 16, at art. 17.
33. ICTY Statute, supra note 11, at art. 13; ICTR Statute, supra note 16, at art. 12.
34. See ICTY Statute, supra note 11, at art. 11; ICTR Statute, supra note 16, at art. 10.
35. ICTY Statute, supra note 11, at at. 11; ICTR Statute, supra note 16, at art. 10.
37. ICTY Statute, supra note 11, at art. 9; ICTR Statute, supra note 16, at art. 8.
38. ICTY Statute, supra note 11, at art. 21; ICTR Statute, supra note 16, at art. 20.
imprisonment.\textsuperscript{39} If an accused is found guilty, he serves his sentence in a state that has agreed to accept convicted persons from the Tribunal.\textsuperscript{40} States are required to cooperate with the Tribunal, including the arrest or detention of persons.\textsuperscript{41} If a state fails to cooperate, the President may report this noncompliance to the Security Council for appropriate action.\textsuperscript{42}

This is all reflected in the resolution establishing the Yugoslav Tribunal, but in 1993, when the judges met at the Hague and were installed, they were the entire Tribunal.\textsuperscript{43} The court had no premises, no rules, and no one in custody. Moreover, the first Prosecutor selected decided he did not want the job after all, and the U.N. could not agree on his replacement until nine months later. As a result, Richard Goldstone came on board as Prosecutor some fifteen months after the Tribunal was established.

Despite these obstacles, the judges went to work in loaned space in the Peace Palace, where the International Court of Justice sits. The first task was to draft the rules of procedure and evidence, merging elements of common and civil law into one hundred and twenty-nine rules. Uniquely charged with providing rules for the protection of victims and witnesses, and as the first judicial body specifically mandated to try crimes of sexual violence under international law, they developed significant measures to protect the identity of witnesses without infringing on the rights of the accused to a fair trial. This balancing of rights of the victims and the accused was an extraordinary challenge and a major accomplishment for a criminal institution. Moreover, the application of these rules produced the first comprehensive international code of criminal procedure.

Even after adopting the rules and procedures for the Tribunal, it was still many months before any of us went near a courtroom, principally because none existed and there were no prosecutors. However, by late 1994, the Office of the Prosecutor had a skeletal staff. Prosecution lawyers had reviewed evidence collected by the Commission of Experts, which had been created by the Security Council prior to the establishment of the Tribunal to investigate events in the former Yugoslavia \textsuperscript{44} and collect supplementary material. Thus, on November 4, 1994, the first indictment was issued against Dragan Nikolic, an alleged commander of one of the notorious

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\bibitem{39} ICTY Statute, supra note 11, at art. 24; ICTR Statute, supra note 16, at art. 23.
\bibitem{40} ICTY Statute, supra note 11, at art. 27; ICTR Statute, supra note 16, at art. 26.
\bibitem{41} ICTY Statute, supra note 11, at art. 29; ICTR Statute, supra note 16, at art. 28.
\bibitem{43} See S.C. Res. 827, supra note 1.
\end{thebibliography}
detention camps in eastern Bosnia and Herzegovina, charging him with war crimes and crimes against humanity. The indictment was reviewed and confirmed by Judge Elizabeth Odio-Benito from Costa Rica.

However, it was not until early 1995, two years after its creation, that the Tribunal secured custody of an accused. The first accused in custody was Dusko Tadic. After extensions of time requested by the parties, the first full trial in the ICTY began on May 7, 1996. As the Presiding Judge, I sat on the bench with the two other members of the Chamber, Sir Ninian Stephen of Australia and Lal Chand Vohrah from Malaysia. The opening day was a real media event; over 300 reporters were on hand. Two red tents served as their headquarters and almost made for a circus-like atmosphere. The public gallery, separated from the courtroom by bulletproof floor-to-ceiling glass, was filled to its 150 seat capacity.

After a few days, however, most of the press left. I was later told that they were looking for more “blood and gore” than the Prosecutor’s opening case offered. Court TV continued to air the trial in the United States. The trial lasted some eighty-six days, spanning a six month period, primarily because the single courtroom had to be shared for other proceedings. We heard from over 125 witnesses and admitted over 300 exhibits. Many important issues were raised and decided, which set the tone for the trials to follow. These issues included the handling of hearsay (it is admissible), dealing with the conflicting interests of protecting witnesses from harm while preserving an accused’s right to a fair trial, and handling the

48. See id.
49. Id.
50. Id.
51. Id.
52. See ICTY Rules of Procedure and Evidence, supra note 42, at sec. 3, Rules 89–90 (providing for the admission of “any relevant evidence which [a Chamber] deems to have probative value”); see generally Prosecutor v. Tadic, Case No. IT-94-01 (Int’l Crim. Trib. Former Yugo., Trial Chamber, May 7, 1997).
53. Prosecutor v. Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-01 (Int’l Crim. Trib. Former Yugo,
From a broader perspective, however, what is of significance is that the Tadic trial gave the Tribunal the first opportunity to apply the rules it crafted—especially the rules of evidence—in a way that protected the accused’s right to a fair trial, thereby demonstrating that international criminal justice was possible.

Certainly, both the ICTY and the ICTR are making significant progress in fulfilling their respective mandates. Since the Tadic trial, the international community, most notably NATO forces in some sectors, has given the Tribunals the support they need to arrest those indicted, since the Tribunals do not have a police force. Alleged perpetrators of some of the worst abuses are now being arrested. For example, included in the thirty-seven persons currently in custody of the ICTY are: Momcilo Krajišnik, Radovan Karadžić’s deputy and the former Bosnian Serb member of the post war national Presidency of Bosnia; Dario Kordic, a major political representative for Bosnian Croats; Stanislav Galic and Radislav Krstic, the generals allegedly responsible for organizing Serb military operations against Sarajevo and against Srebrenica; the commanders of detention camps in northwestern Bosnia; and three men accused of controlling camps

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and widespread sexual slavery and other torture in Foca.\(^{59}\) Moreover, fifteen persons have been tried in seven completed trials,\(^{60}\) four cases are on appeal,\(^{61}\) four more are ongoing,\(^{62}\) and nine are in the pretrial stage.\(^{63}\) Four individuals have exhausted appeals and are serving or have served their sentences,\(^{64}\) while ten others are appealing theirs.\(^{65}\) Two individuals have


64. These individuals include: Dusko Tadic, Zlatko Aleksovski, Drazen Erdemovic, Anto Furundzija. For more information on these individuals, see http://www.un.org/icty/glance/procfact-e.htm.
been acquitted and released.\textsuperscript{66} With respect to the ICTY’s growth, from virtually no staff the ICTY now has over 1000 staff members from over sixty-eight different countries and the budget increased from $276,000 in 1993 to close to $100 million in 2000.\textsuperscript{67}

Despite the difficulties faced by the Tribunals, including a delayed start with trials while it awaited the appointment of a Prosecutor, the failure of the states and the NATO forces to arrest indictees for so long, and the general apathy and doubts that a judicial institution would help the peace effort, both the ICTY and ICTR have made important contributions to international criminal justice. In particular, I will discuss some of the decisions of the Tribunals relating to crimes of sexual violence and highlight what I consider to be the broader, more general contributions.

II. AN ASSESSMENT OF THE WORK OF THE TRIBUNALS

A. Contributions Regarding Crimes of Sexual Violence

One of the most significant contributions of the Tribunals is that they have broken new ground with respect to crimes of sexual violence; crimes which, for the most part, have been ignored in international prosecutions.

In the context of war, and otherwise, “[s]exual violence demoralizes and humiliates its victims. It instills fear, anger, and hatred that may far outlast the conflict among the warring parties. In the end, its power reaches beyond its immediate victims to destroy the family and the fabric of society.”\textsuperscript{68} Widespread sexual violence has been used in armed conflicts as a fighting tactic, to reward soldiers, to build morale, or to terrorize or destroy inferior people, as women were sometimes called.\textsuperscript{69} Unfortunately, sexual

\textsuperscript{65} These individuals include: Hazim Delic, Zdravko Mucic, Esad Landzo, Goran Jelisic, Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Vladimir Santic, and Tihomir Blaskic. For more information, see http://www.un.org/icty/glance/procfact-e.htm.

\textsuperscript{66} Dragan Papic was released on Jan. 14, 2000. Zejnil Delalic was released pending appeal on Nov. 16, 1998. For more information, see http://www.un.org/icty/glance/detainees-e.htm.


\textsuperscript{69} See generally Susan Brownmiller, Against Our Will: Men, Women and Rape (Simon & Shuster, N.Y. 1975).
violence largely has gone unprosecuted in the international arena. Some say it is because sexual violence harms primarily women and in international law, men primarily have made policy and decisions. Whatever the case may be, the Tribunals are changing this unfortunate tradition. Some historical background will help to put this in perspective.

1. Prosecution of Crimes Against Women Before the ICTY and the ICTR

Crimes of sexual violence against women in an international context have always occurred. Whether seen as an unavoidable consequence of war or as intentional conduct, rape and other acts of sexual violence date back as far as war. However, the prosecution of such conduct in an international context is a relatively new phenomenon.

After World War I, the Allies established a commission to investigate reports of mass rape of French and Belgian women by other troops. However, no real action was taken. Similarly, after World War II, significant evidence of mass rape was written into the trial record of the Nuremberg trials. However, the French prosecutor declined to orally cite the details of crimes of sexual violence, although he had no problem reciting atrocious details of other war crimes. Yet, the Nuremberg Judgment does not contain one reference to rape.

However, in a rare occurrence, rape was prosecuted in the international context at the International Military Tribunal for the Far East, which sat in Tokyo. This Tribunal found several high ranking officials guilty of violations of the laws and customs of war for their responsibility for widespread rapes and sexual assaults during World War II, despite the fact that the Tribunal’s Charter did not explicitly criminalize rape. These assaults included the notorious Rape of Nanking, during which Japanese

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70. BASSIOUNI & MCCORMICK, supra note 68, at 1, 3–4.
73. BASSIOUNI & MCCORMICK, supra note 68, at 3–4.
74. Niarchos, supra note 72, at 663.
75. Id. at 664.
76. Id. at 665.
77. Id. at 666.
78. See id. at 677.
soldiers raped approximately 20,000 women and children and later killed most of them. 79 Yet, the Tribunal completely ignored the sexual slavery of “comfort women” kept by Japanese soldiers to rape at will. 80 Control Council Law No. 10, 81 which was enacted after World War II to try the lesser Axis war criminals, continued this advancement by specifically listing rape as a prosecutable crime against humanity. Unfortunately, this crime was not prosecuted under this provision.

2. The Consideration of Crimes of Sexual Violence by the ICTY and the ICTR

As noted above, the ICTY and the ICTR have even further advanced the jurisprudence and prosecution of crimes of sexual violence. Rape is explicitly listed in the Statutes of the ICTY and the ICTR as a crime against humanity. 82 Although other crimes of sexual violence are not included in the statutes, the Tribunals have held that rape and other forms of sexual violence can constitute grave breaches of the Geneva Conventions of 1949, laws or customs of war and genocide, as well as crimes against humanity. 83 Three judgments in particular show the development of this jurisprudence: Prosecutor v. Akayesu 84 from the ICTR and the Celebici 85 and Furundzija 86 judgments from the ICTY.

80. Niarchos, supra note 72, at 666.
82. See ICTY Statute, supra note 11, at art. 5; ICTR Statute, supra note 16, at art. 3.
84. Id.
In the *Akayesu* case, the Prosecutor indicted the accused for killings and sexual assaults of Tutsi residents in Rwanda during 1994. Although not accused of raping anyone himself, the Trial Chamber found that as the bourgmestre of the Taba commune in Rwanda, Akayesu "had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated." The Chamber determined that Akayesu facilitated the commission of these acts through his words of encouragement, "which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place."

This judgment is tremendously important for two reasons. First, it was the first judgment of either of the Tribunals to define rape, finding it to be "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." This judgment also included a definition of sexual violence, which the judges determined was "any act of a sexual nature which is committed on a person under circumstances which are coercive." This judgment found that such acts are "not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."

Second, the Trial Chamber found that rape and sexual violence can constitute the factual elements of the crime of genocide "in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such." Thus, although rape is not specifically listed as a crime of genocide in the statute, it has been held to cause "serious bodily and mental harm" to members of the group and can therefore be prosecuted under the applicable provisions.

The *Celebici* case was next to address crimes of sexual violence. In the *Celebici* indictment, one of the four accused was charged with subjecting two victims to repeated incidents of forced sexual intercourse, a charge which the prosecution argued could be considered torture as defined by the Torture Convention and incorporated into the *Statute of the ICTY* in Articles

87. *See Akayesu*, Judgment, Case No. 96-4-T, at para. 12–12B.
88. *Id.* at para. 452.
89. *Id.* at para. 694.
90. *Id.* at para. 688.
91. *Id.*
92. *Akayesu*, Judgment, Case No. 96-4-T, at para. 688.
93. *Id.* at para. 731.
94. *Id.*
The Trial Chamber adopted the Akayesu definition of rape, and, after seeking guidance from cases from the Commission of Human Rights and the European Court of Human Rights, found that rape could constitute torture. Specifically, the Trial Chamber held that, for a finding of torture under Article 2 or 3 of the Statute of the ICTY: 1) there must be an act or omission causing severe mental or physical pain or suffering; 2) the inflicted suffering must be intentional; 3) the act must be performed for a specific purpose such as obtaining information or a confession, punishment, intimidation, or discrimination; and 4) the act or omission must be officially sanctioned by one in an official capacity.

The Trial Chamber ultimately found that rape, "a despicable act which strikes at the very core of human dignity and physical integrity," satisfies a factual element of torture. Interestingly, the Chamber determined that the crimes were committed against the two victims because they are women, finding that "this represents a form of discrimination which constitutes a prohibited purpose for the offense of torture." Because gender is not identified in the Statute of the ICTY as a basis of group identification that enjoys protection from discrimination, this was a significant finding.

This is not to say that only women are the targets of sex based crimes. In the Tadic case, the first trial to be conducted by the ICTY, the accused was convicted for aiding and abetting in the sexual mutilation of a male prisoner. In Celebici, the Trial Chamber convicted one of the accused of war crimes and grave breaches of the Geneva Conventions for forcing male inmates to perform fellatio and other sexually humiliating acts on each other.

96. Celebici, Judgment, Case No. IT-96-21, at para. 479.
98. Celebici, Judgment, Case No. IT-96-21, at para. 479.
99. Id. at para. 494.
100. Id. at para. 495.
101. Id. at para. 941. This decision went further than the Akayesu Judgment which found only that the victims were targeted as Tutsi women. See Akayesu, Judgment, Case No. 96-4-T.
102. The Statute does list gender as a ground on which persecution as a crime against humanity can be committed in Article 7(1)(h).
finding that such conduct constituted "at least, a fundamental attack on . . . [the victims'] human dignity." The Trial Chamber found that the act fulfilled the elements of inhuman treatment under Article 2 and cruel treatment under Article 3. Importantly, the Trial Chamber there noted that this act "could constitute rape" as well, implying that rape could be committed against men or women.

The *Furundzija* Judgment is more recent and builds upon the jurisprudence established by the Tribunals addressing sexual violence. There, the Trial Chamber found that the commander of a special military police unit (ironically called the Jokers) interrogated a woman, and another detainee, while she was beaten on her feet with a baton, and then failed to intervene in any way while the woman was "forced . . . to have oral and vaginal intercourse" with a subordinate officer. The commander was found guilty of two counts of violations of laws or customs of war: torture and outrage upon personal dignity including rape. Further, as stated above, the Trial Chamber found that the definitions of rape in the *Akayesu* and *Celebici* judgments suffered from a lack of specificity, and resorted to national legal systems to craft a broader definition. Based on its review, the Trial Chamber defined rape as:

(i) [T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.

Significantly, this definition includes sexual penetration of the mouth of the victim by the penis of the perpetrator, which would often be classified as sexual assault in many systems, and carry a lower penalty. Finally, the Trial Chamber noted that rape and serious sexual assault should be

105. *Id.*
106. *Id.*
108. *Id.* at Disposition.
109. *Id.* at paras. 176–84.
110. *Id.* at para. 185.
111. *Id.* at para. 174.
prosecuted as a grave breach, genocide, and of course, as a crime against humanity as provided in Article 5 of the statute.  

The significance of this decision cannot be underestimated. It recognizes that coercion—which the Trial Chambers in *Akayesa* and *Celebici* found is inherent in armed conflict—exists whether directed toward the victim or toward third parties. Further, the definition of rape is more explicit than the prior definitions in the Tribunals and now unequivocally encompasses oral sexual acts.

On July 21, 2000, the Appeals Chamber affirmed the Trial Chamber’s findings, challenged by Furundzija, and denied the appeal. I will only mention three issues which were considered. First, Furundzija claimed he was prejudiced because the Trial Chamber relied on evidence of acts that were not charged in the Indictment, including Furundzija’s complicity in rapes or sexual assaults by another accused. The Appeals Chamber found that an indictment need only contain a “concise” statement of the facts that the prosecution will rely on; it need not contain every fact. Further, the Appeals Chamber noted that if Furundzija believed that evidence came out during trial that did not fall within the scope of the Indictment, he could have challenged its admission or requested an adjournment to prepare his defense against the charges.

Secondly, Furundzija argued that his sentence was so excessive that it constituted “cruel and unusual punishment.” In support of this contention, Furundzija noted what he saw as emerging sentencing principles in the Tribunal. Specifically, he claimed that the trial decisions of the ICTY thus far indicated that “crimes against humanity should attract harsher sentences than war crimes” and that crimes not involving the death of a victim warranted shorter sentences. Based on this reasoning, and relying on the

112. *Furundzija*, Judgment, Case No. IT-95-17/1, at para. 172.
114. See *id.* at paras. 25, 254.
115. *Id.* at para. 25.
116. *Id.* at para. 61.
117. *Id.* at para. 217.
119. *Id.* at para. 217.
120. *Id.*
sentences imposed on Tadic, Erdemovic, and Aleskovski, he argued that his sentence should be a maximum of six years.\textsuperscript{121}

The Prosecutor opposed the proposed reduction in the sentence, but asserted that it would be beneficial for the Appeals Chamber to establish sentencing guidelines to achieve consistency in sentencing.\textsuperscript{122} The Appeals Chamber implied that such a process would be premature, given that there have been only three final sentencing judgments, each of which admittedly altered the sentence imposed by the original Trial Chamber.\textsuperscript{123} In addition, the Appeals Chamber noted that there were too many issues regarding sentencing that had not yet been addressed to set such guidelines.\textsuperscript{124}

The final issue I will refer to concerned the disqualification of a judge. Furundzija argued that his conviction should be vacated because Florence Mumba, one of the Trial Chamber judges, should have been disqualified.\textsuperscript{125} This argument was based upon the fact that prior to joining the Tribunal, Judge Mumba worked with the U.N. Commission on the Status of Women, an organization which, among other things, was concerned with the allegations of mass and systematic rape during the conflict in the former Yugoslavia.\textsuperscript{126} Furundzija claimed that this constituted an appearance of bias, although he did not assert actual bias.\textsuperscript{127} In rejecting this claim, the Appeals Chamber established guidelines for the disqualification of judges when such a claim is made.\textsuperscript{128} The Chamber found that there is an unacceptable appearance of bias where:

\begin{itemize}
  \item [i)] Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties... [or]
  \item [ii)] the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.\textsuperscript{129}
\end{itemize}

\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Furundzija, Appeals Judgment, Case No. IT-95-17/1-A, at para. 237.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at para. 169.
\textsuperscript{126} Id. at para. 166.
\textsuperscript{127} Id. at paras. 169–70.
\textsuperscript{128} Furundzija, Appeals Judgment, Case No. IT-95-17/1-A, at para. 179.
\textsuperscript{129} Id. at para. 189.
Based on these criteria, the Appeals Chamber found no bias.\footnote{Id. at para. 199.} It noted that Judge Mumba was serving as a representative of her country and not in her personal capacity, and held that even if Judge Mumba expressed her support of the objectives of the organization, there was no basis for a finding that such an inclination would impede her impartiality in any given case.\footnote{Id. at paras. 199--200.} The Chamber also pointed out that one of the Security Council’s reasons for establishing the Tribunal was to bring perpetrators of crimes against women to justice.\footnote{Id. at para. 201.} Accordingly, sharing such goals was insufficient to prove bias.\footnote{Furundzija, Appeals Judgment, Case No. IT-95-17/1-A, at para. 202.}

Each of these judgments devotes significant attention to crimes of rape and sexual violence, showing that, at long last, they should be prosecuted as vigorously as other crimes committed during conflicts. Although rape is expressly enumerated only as a crime against humanity in the Statute of the ICTY and the Statute of the ICTR, these judgments recognize that rape and sexual violence can also constitute a grave breach of the Geneva Conventions, a violation of the laws or customs of war, or an act of genocide.

**B. General Contributions of the Tribunals**

Perhaps the most far-reaching contribution of the Tribunals is that their very establishment signaled the beginning of the end of the cycle of impunity. Those responsible for committing or ordering the commission of horrific acts of violence against innocent civilians, simply because of the happenstance of their birth, their ethnicity, their religious beliefs, or their gender, are now for the first time being called to account for their criminal deeds. By ensuring this accounting, the Tribunals concretely show that the international instruments guaranteeing basic human rights are more than merely an aspiration.

The Tribunals have also demonstrated that the rule of law is an integral part of the peace process; expanded the jurisprudence of international humanitarian law; raised the international community’s level of consciousness regarding the need of states to enforce international norms; and accelerated the development of the permanent International Criminal Court. Further, the Outreach Program, which I will discuss in a few
moments, offers an important mechanism to help the reconciliation process in the former Yugoslavia.

The Security Council's choice of a court of law as the measure to help to bring about and maintain peace is a victory for the rule of law, the anchor of civil society. In the ICTY's early days, some thought that the prosecution of alleged war criminals was inconsistent with efforts to bring peace to the region. Now, the goals of peace and international criminal justice are no longer seen as mutually exclusive. Rather, they are interdependent and complimentary.

Moreover, the trials in the Tribunals develop a historical record of what happened in the regions of conflict, thus guarding against revisionism. The judgments, which typically detail the factual circumstances of the crime charged, provide an incontrovertible record of the brutality engaged in by ethnic groups pitted against each other by incessant, virulent propaganda. The judgments also have made substantive findings on a myriad of legal issues, most of which had never been considered by a court. For example, the Geneva Conventions of 1949 establish a "grave breaches" regime that prohibits certain types of behavior directed against protected persons or property. The ICTY has held that Article 2 applies only in the context of an international armed conflict. Further, the victims must be regarded as "protected" by the Fourth Geneva Convention.

In the Tadic case, the Trial Chamber, by majority, found that the conflict in the Prijedor area of Bosnia was not international after May 19, 1992, the date of the purported withdrawal of the forces of the Federal Republic of Yugoslavia ("FRY"), the Yugoslav military. The majority also found that the victims were not protected persons. The Appeals Chamber reversed on this point and after a lengthy discussion of the Nicaragua Decision from the International Court of Justice, construed it as requiring only that the Bosnian Serb armed forces were acting "under the overall control of and on behalf of the FRY." Thus, the Bosnian victims were deemed to be in the hands of an armed force of a state of which they were not nationals and thus, were protected persons. The Blaskic Judgment follows this approach and has found that the "grave breaches" regime

134. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, supra note 5.
136. Id. at para. 608.
137. Id. at para. 162.
applied.\textsuperscript{138} The ICTY also construed broadly laws and customs of war and held that this body of law, known as the "Hague Law," applies to both international and internal armed conflicts.\textsuperscript{139} The judgments also have significantly advanced the jurisprudence relating to crimes of sexual violence, an area ignored in international law, which I have discussed.

Additionally, the work of the Tribunals has significantly raised the awareness of the importance of enforcing international humanitarian law. It has given the many human rights instruments some real meaning and power. Since the establishment of the Tribunals, the awareness of the need to enforce human rights violations in armed conflicts and the actual prosecution of such crimes has increased. This is an important development because the ad hoc Tribunals cannot possibly handle all of the potential prosecutions growing out of the conflicts in the former Yugoslavia and in Rwanda. Because of limited resources, the Tribunals can apply law which has been ignored in a forum free from accusations of bias, thereby developing a body of jurisprudence that can be used by municipal courts in their own trials. Thus, by raising the consciousness of states and developing a body of law that states can apply, the Tribunals pass the torch to national courts which are, or may become, better equipped to handle large numbers of prosecutions.

Another important contribution of the Tribunals is that they have, without question, accelerated the movement to establish a permanent International Criminal Court. The Tribunals have demonstrated that international criminal justice is possible. They are positive proof it is possible to try persons charged with serious violations of international humanitarian law in international courts and that the differences in the civil and common law systems—not to mention the country by country differences even within the same type of system—are not insurmountable obstacles.

Finally, the importance of the Outreach Program cannot be overstated. Increasing the awareness of and combating the misinformation about the ICTY was one of my priorities when I was elected President of the ICTY in November of 1997. Considering the ICTY's extraordinary mandate, I felt that the ICTY must take affirmative steps to make the processes and


personalties known and understood, especially by the people in the former Yugoslavia.

Following much debate, the Program was finally established in September of 1999. The Program has a coordinator based in the Hague, with offices in Croatia and Bosnia, through which there are regular contacts with the media, legal professionals, and other groups. To date, it has organized weekly television updates on its activities, broadcasted its proceedings, and conducted regular conferences and exchanges of personnel and information between the Hague and the region. During my term as President, many of the judges of the Tribunal wanted to visit the region, but for much of that time the conditions on the ground would not permit such visits. Now there have been visits to Sarajevo and Croatia, and the exchanges between the people of the region and the judges have been mutually beneficial.

This is only a first step that must be consolidated and expanded. The United States and the MacArthur Foundation responded to my personal appeal for funding, and various European States have contributed as well. However, the current funding will only take the Program to the end of 2000. I continue to believe that it represents a vital aspect of the Tribunal’s work, which is so different than courts of national systems that are integrated in the criminal justice framework of the community. Support for this initiative, both within and outside of the Tribunal must not be eroded. If judgments issued hundreds of miles from the scene of the conflict by an international court are to have an effect on the community, that community must understand and appreciate the work of the Tribunal; this is the goal of the Outreach Program.

III. CONCLUSION

The critical contribution of the Tribunals has been to foster and enhance the recognition by states of the need to enforce norms of international law prohibiting massive violations of human rights. Judicial mechanisms are now an established element of conflict resolution, and proposals under discussion around the world envision a range of international, national, and mixed Tribunals. Moreover, following the lead of the Tribunals, the culture of impunity is being challenged by states whose national courts are applying international law. Finally, the International Criminal Court would not be so close to reality—getting closer every day—without the influence of both the ICTY and the ICTR.

140. Justice, Accountability and Social Reconstruction, supra note 9, at 8–9.
The judgments of the Tribunals do more than determine the guilt or innocence of the accused. They do more than establish a historical record of what transpired. They do more than interpret international humanitarian law. Rather, the judgments of the Tribunals are evidence of actual enforcement of international norms. This is the best proof that the numerous conventions, protocols, and resolutions affirming human dignity are more than promises. Rather, the rule of law is an important component of the peace process.

It is clear then that we are living through tremendously encouraging times. Yet, how do we situate the progress over the past seven years in light of the amount of bloodshed that has gone unchecked from Iraq to the former Yugoslavia, to Somalia, through Rwanda, Afghanistan, Burundi, Liberia, Sierra Leone, Columbia, the Congo, Chechnya, Indonesia, and the Sudan? The Tribunals have demonstrated that international criminal law is feasible. We have seen that the establishment of international courts of law is now being considered as a policy option to respond to humanitarian crises. No court can prevent all war, and the challenge of the twenty-first century is to utilize options to prevent the wanton destruction of innocent civilians which was characteristic of the twentieth century.
What is Needed to Protect International Human Rights in the 21st Century

Dr. Oscar Arias

International human rights is a subject of special significance to me, as a citizen and former President of Costa Rica. My country has a long tradition of valuing and respecting human rights, while at the same time the region of Central America knows all too well the pain and suffering caused by brutal human rights violations.¹

In Costa Rica, we believe that all people should be able to live and express themselves without fear of their government, that all people are entitled to educational and medical services, and that all people are entitled to lead productive, dignified lives. Costa Rica has often served as an

¹ Dr. Oscar Arias, former President of Costa Rica and 1987 Nobel Laureate, holds international stature as a spokesperson for the Third World. Championing such issues as human development, democracy, and demilitarization, he has traveled the globe spreading a message of peace and applying the lessons garnered from the Central American Peace Process to topics of global debate.

Dr. Arias was born in Heredia, Costa Rica in 1940. He studied law and economics at the University of Costa Rica. In 1974, he received a doctoral degree in political science at the University of Essex, England. After serving as professor of political science at the University of Costa Rica, Dr. Arias was appointed Costa Rican Minister of Planning and Economic Policy. In 1986, Dr. Arias was elected President of Costa Rica and held that position until 1990.

In 1987, Dr. Arias drafted a peace plan to end a time of great regional discord in Central America. Widely recognized as the Arias Peace Plan, his initiative culminated in the signing of the Esquipulas II Accords, or the Procedure to Establish a Firm and Lasting Peace in Central America, by all the Central American presidents on August 7, 1987. In that same year, he was awarded the Nobel Peace Prize.

In 1988, Dr. Arias used the monetary award from the Nobel Peace Prize to establish the Arias Foundation for Peace and Human Progress. From these headquarters, Dr. Arias has continued his pursuit of global peace and human security.

Dr. Arias has received honorary doctorates from numerous universities and many honorary prizes, among them the Jackson Ralston Prize, the Prince of Asturias Award, the Martin Luther King, Jr. Peace Award, the Albert Schweitzer Humanitarian Award, the Liberty Medal of Philadelphia, and the Americas Award.

** The Nova Law Review selected the materials included in the citations of this essay.

example and taken the lead in raising the subject of human rights in the international arena. The treaty establishing hemispheric institutions to protect human rights was signed in San José in 1969, and the Inter-American Court of Human Rights has its headquarters in Costa Rica. A related agency, the Inter-American Commission on Human Rights, has its headquarters in Washington D.C.

My nation's concern with human rights arises at least in part because we have witnessed and learned from the painful experiences endured by our neighbors in recent decades. In many Central American countries, the repressive actions of military dictatorships and government sponsored death squads created a climate of fear and disillusionment and has stifled the creativity of an entire generation. During the civil wars of the 1980s, senseless violence claimed the lives of hundreds of thousands of our people; and millions more suffered hardship and deprivation as fighting and sabotage disrupted the process of economic growth. In a poor region like ours, we cannot afford to squander opportunities for development by wasting our energy on violence and repression. Having seen the destruction wrought by internal conflicts in Guatemala, El Salvador, and Nicaragua, Costa Ricans have come to understand the true importance of maintaining a culture that respects human rights. Fortunately, our neighbors are beginning to understand the importance of human rights as well; with democratic leaders

3. Id. at 121. The Court renders decisions in contentious cases of human rights violations brought before it. Id. at 122.
6. Id.
now governing all of the countries on the isthmus, we can reasonably hope for a brighter future for our region.

As the title indicates, the focus of this article is on human rights in the twenty-first century. However, I want to begin my analysis by assessing the progress that has been made in the fight for human rights and human dignity over the past hundred years. For those of us who are deeply concerned about the establishment and protection of the fundamental rights of all people, the twentieth century has been the best of times and the worst of times. On one hand, we have made many important advances. For example, as we look back upon the past hundred years, we can celebrate the adoption of the Universal Declaration of Human Rights, through which all nations have pledged to uphold the basic liberties of all human beings. In recent decades, additional treaties have been promulgated to protect the social, cultural, and economic rights of all people. An impressive array of international bodies and nongovernmental organizations ("NGOs") have arisen to protect and defend human rights, and the cause of human rights has advanced as democratically elected governments have replaced repressive regimes in South Africa, Central America, Eastern Europe, Indonesia, and Nigeria.


15. Id. at 20.

16. Id. at 22–23.

17. See id. at 28.

18. See generally LINDSAY MICHE EADES, THE END OF APARTHEID IN SOUTH AFRICA (1999). The first democratic election was held in 1994. Id.


21. See INDONESIA BEYOND SUHARTO: POLICY, ECONOMY, SOCIETY & TRANSITION 359–61 (Donald K. Emmerson ed., 1999). The first democratic election was held in the late 1990s. Id.

22. See ADEBAYO ADEDEJ, ET. AL., NIGERIA: RENEWAL FROM THE ROOTS?: THE STRUGGLE FOR DEMOCRATIC DEVELOPMENT 45–46 (1997). The first democratic election was held in 1960. Id. at 45.
We cannot forget, though, that the Universal Declaration of Human Rights was drafted only after six million people perished in the Holocaust.\textsuperscript{23} It is sobering to think that the international community formally defined and codified human rights only after the most systematic and brutal violation of human rights the world had ever seen. It is even more sobering to note that human rights have been flagrantly violated throughout the half century since the adoption of the Universal Declaration. Despite the commitment of all nations to defend human rights, two million people lost their lives during the Khmer Rouge’s reign of terror in Cambodia,\textsuperscript{24} dissidents and activists “disappeared” during Latin American dictatorships,\textsuperscript{25} and institutionalized racism prevailed for decades in South Africa.\textsuperscript{26}

Even as the new millennium begins, human rights continue to be violated and abused around the world. Within the past few years, we have seen an attempt at genocide in Rwanda,\textsuperscript{27} where nearly a million people lost their lives in government-sponsored violence.\textsuperscript{28} We have seen so-called “ethnic cleansing” campaigns in the Balkans,\textsuperscript{29} and we continue to receive reports of atrocities in Chechnya.\textsuperscript{30} In China, more than a billion people live under an undemocratic regime that restricts religious freedom, persecutes its Tibetan and Muslim minorities, and holds political prisoners in labor camps.\textsuperscript{31} Even in Western democracies like the United States, there are well-documented cases of police brutality and racism.\textsuperscript{32}

Perhaps most distressing of all is the fact that leaders of some nations have begun to question openly the universality of human rights. Certain repressive regimes in the Far East have suggested “Asian values” are not fully compatible with the individual rights that are enshrined in the

\begin{itemize}
\item \textsuperscript{23} See Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth-Century Experience 26 (1999) (discussing genocide in the 20th century).
\item \textsuperscript{24} Id.
\item \textsuperscript{25} See id. at 219.
\item \textsuperscript{26} See Eades, supra note 18, at 12–13.
\item \textsuperscript{27} Ball, supra note 23, at 155–56.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. at 128–29.
\end{itemize}
Universal Declaration of Human Rights,\textsuperscript{33} and the leaders of some African countries have remarked that the Universal Declaration should not apply fully to their continent because most African countries did not take part in drafting the document in 1948.\textsuperscript{34} To be sure, we must avoid ethnocentrism when we formulate our concept of human rights, but we must strongly resist the efforts of those who would deny the universality of those rights. By their very nature, human rights extend to every man, woman, and child on the planet, regardless of their ethnic background or social standing.

In promoting worldwide respect for human rights in the next century, we must have the same courage and vision that the signers of the Universal Declaration had a half century ago. Through that important document the nations of the world promised that they would never again allow the violation of human rights.\textsuperscript{35} The leaders who signed the Declaration in 1948 recognized that violations of human rights anywhere represented a threat to the basic liberties of people everywhere.\textsuperscript{36} They made a collective pledge to respect fundamental human freedoms, and they called for collective action to punish those who abused them.\textsuperscript{37} Sadly, however, the experience of the past fifty years has shown that solemn pledges and noble intentions are not enough to safeguard the rights of all people.\textsuperscript{38} Therefore, in looking ahead to the twenty-first century, we must seek to create a new world order under which human rights will truly be secure. I believe that it will be possible to create such an order if we focus our energies on constructing stronger international institutions, reducing global military expenditures, providing debt relief to poor countries, controlling the proliferation of arms, and responding quickly and decisively to human rights crises.

It will not be only the government’s role to accomplish these things. If we wait for national governments to take the lead in combating human rights violations in the new century, we may be waiting a very long time. Fortunately, NGOs are becoming increasingly visible and powerful in drafting, promoting, and winning official approval of multilateral initiatives.

\textsuperscript{35} BALL, supra note 23, at 91.
\textsuperscript{36} Id.
\textsuperscript{37} See Espiell, supra note 34, at 15.
\textsuperscript{38} See id. at 62.
that contribute to peace, social justice, and human security. While negotiations on such sensitive issues as disarmament and national sovereignty were once the exclusive province of governments, representatives of civil society are now having an impact on international policymaking in a broad range of areas.

Indeed, NGOs have become such an integral part of the international system that we often fail to notice the many ways in which they affect policymaking. Groups such as Amnesty International and Human Rights Watch do more than any government to draw attention to human rights violations around the world. Humanitarian NGOs like the Red Cross, Doctors Without Borders, and Oxfam—to name just a few—save countless lives in conflict torn regions. Organizations like Transparency International seek to fight corruption wherever it is to be found, and a host of environmental groups argue forcefully for the protection of the world's ecosystems and natural resources. Truly, NGOs are active in every imaginable policy area.

In recent years, NGOs have become more fully conscious of the influence they have on international policymaking, and they have begun to come together in undertaking ambitious projects. By doing so, they have convinced many governments to adopt policies that protect human rights and promote human development. What is encouraging is that ordinary citizens, by banding together to fight for universal human dignity, have been able to—and continue to—have an impact beyond what was formerly deemed possible. The steps toward safeguarding human rights in the twenty-first century, which I shall outline below, reflect the ways in which NGOs and

39. See Jan Mårtenson, The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme in UNIVERSAL DECLARATION, supra note 14, at 28; see also BALL, supra note 23, at 196.
40. BALL, supra note 23, at 196.
41. See id. at 196–97.
42. Mårtenson, supra note 39, at 28.
45. See id.; see also Doctors Without Borders, supra note 43.
governments can and must work together to rid the world of human rights abuses in the twenty-first century.

A first step toward the protection of human rights in the new century will be the creation of multilateral institutions capable of deterring abuses and empowered to punish violators of human rights. The international community has taken an important step in this direction by establishing tribunals to investigate war crimes and human rights violations that have taken place in Rwanda and in the former Yugoslavia. However, the deterrent value of these courts is limited by the fact that their work is purely retrospective. A comprehensive international system for dealing with suspected human rights abusers is desperately needed, as the confusion and controversy that surrounded the arrest of former Chilean dictator Augusto Pinochet clearly demonstrated.

The creation of an International Criminal Court ("ICC") would do much to address the deficiencies of the current system. Because the ICC would be a permanent body responsible for trying suspected war criminals and human rights abusers, its existence alone would serve to deter would-be violators of human rights who might otherwise be able to act with impunity. Moreover, by ensuring that the perpetrators of heinous crimes are brought to justice quickly, the ICC would help conflict-torn nations on the road to reconciliation and recovery.

Proposals for the establishment of an ICC have been circulating since the days of the Nuremburg trials, but the movement to set up such an institution has only gained momentum since the end of the Cold War. Outraged by scenes of bloodshed and suffering in places like Somalia and the Caucasus region, several NGOs and countless individuals have energetically called for the creation of a permanent international tribunal. Many governments have resisted this movement, citing the need to protect "national sovereignty." Because the political will to create such an institution did not exist within the governments of most nations, NGOs have

49. Id. at 170–71.
50. Id. at 121.
51. Id. at 196–98.
52. Id. at 219.
53. BALL, supra note 23, at 196.
54. Id. at 194.
55. Id. at 188.
57. BALL, supra note 23, at 196–97.
58. Id. at 200–02.
led the way in fighting for the establishment of an ICC.\textsuperscript{59} These efforts bore fruit in 1998, when an overwhelming majority of delegates at a diplomatic conference in Rome expressed their support for the foundation of an ICC.\textsuperscript{60} Since then, ninety-eight nations have signed the so-called Rome Statute, and fourteen countries have ratified the accord.\textsuperscript{61} The NGO coalition for an ICC continues to apply pressure on governments to sign and ratify the agreement, and it seeks to build a popular consensus in favor of an ICC in countries around the world.\textsuperscript{62} To be sure, much work remains to be done: forty-six more ratifications will be necessary before the Rome Statute takes effect and an ICC is established.\textsuperscript{63} Moreover, backers of the ICC face a difficult task as they seek to convince key United States leaders to support their project. Nonetheless, it is remarkable to note that a coalition of NGOs has achieved so much, in collaboration with governments who were either supportive from the beginning or who came to see the light because of the work of this coalition.

The duty remains with those of us who are dedicated to preventing and punishing human rights abuses to continue advocating for the ratification of the Rome Statute until it takes effect with the necessary sixty ratifications.\textsuperscript{64} Since the Court will not be fully effective unless all nations recognize its jurisdiction and support its work, activists and concerned citizens must work to convince leaders of certain recalcitrant countries that the creation of an ICC is both morally necessary and politically desirable. Not long ago, the idea of an ICC would have been dismissed as an impossibly idealistic goal. Today, thanks largely to the efforts of a broad-based coalition of NGOs, the goal of creating a permanent international tribunal is within reach, even if much work remains to be done.

The existence of an ICC would certainly help to deter the most outrageous forms of human rights abuses such as genocide, war crimes, and crimes against humanity, but there are also many simpler human rights to defend. These basic rights include the right to education, health care, and other essential social services, not to mention adequate food and shelter. To

\begin{itemize}
  \item \textsuperscript{59} Id. at 196–97.
  \item \textsuperscript{60} Id. at 196–205.
  \item \textsuperscript{61} Coalition for an Int'l Criminal Court, http://www.igc.org/icc/index.html (last visited Feb. 13, 2001). Since Dr. Arias' address in April, 2000, the number of nations who have signed the Rome Statute is 139 and the number to ratify has increased to 28. Id.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id. Currently, 32 additional signatures are needed for ratification. See id.
\end{itemize}
ensure that all people have the opportunity to exercise these rights, it will be necessary to challenge a world military-industrial complex removed from democratic controls and humanitarian standards. "Without a doubt, military spending represent[s] the single most significant perversion of worldwide priorities known today." The 745 billion dollars spent on weapons and soldiers in 1998 constitute a global tragedy.

In India, Pakistan, the Middle East, sub-Saharan Africa, Indonesia, and in many other nations, unnecessary investment in military hardware has helped to perpetuate poverty and create a global crisis. It is an economic crisis when nearly a billion and a half people have no access to clean water, and a billion live in miserably substandard housing. It is a leadership crisis when we allow wealth to be concentrated in fewer and fewer hands, so that the world’s three richest people have assets that exceed the combined gross domestic product of the poorest forty-eight countries. It is a spiritual crisis when—as Gandhi said—many people are so poor that they only see God in the form of bread, and when other individuals seem only to have faith in the "invisible hand" that guides the free market. It is a moral crisis when 40,000 children die each day from malnutrition and disease. And it is a democratic crisis when 1.3 billion people live on an income of less than one dollar per day and are effectively excluded from public decision making because of the wrenching poverty in which they live.

All of these crises, in fact, constitute a crisis of human rights. For it is not only kidnapping, torture, and assassination that constitutes abuse of human rights. To quote from Article 25 of the Universal Declaration of Human Rights, "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food,


68. Press Release, supra note 65.
69. Id.
71. Press Release, supra note 65.
clothing, housing and medical care and necessary social services ...."73 The 
Declaration goes on to state in Article 26 that "[e]veryone has the right to 
education. Education shall be free, at least in the elementary and 
fundamental stages.... Technical and professional education shall be made 
generally available and higher education shall be equally accessible to all on 
the basis of merit."74

Is it not a trampling of these rights when excessive levels of military 
spending make it impossible for the poor to receive the basic services that 
are due to them as human beings? Tragically, half of the world’s 
governments spend more money on defense than they spend on health 
programs,75 and military spending is rising quickly in poverty-stricken 
countries such as India, Sri Lanka, and China.76 For its part, the United 
States is hardly providing moral leadership; United States legislators and 
presidential candidates seem intent on adding large amounts of money to an 
already bloated defense budget, even as millions of American children grow 
up poor and without health insurance.77 Such distortions in national budgets 
contribute to poverty and retard human development. As President Dwight 
D. Eisenhower once said:

Every gun made, every warship launched, every rocket fired 
signifies, in the final sense, a theft from those who hunger and 
are not fed, those who are cold and are not clothed.

This world in arms is not spending money alone.

It is spending the sweat of its laborers, the genius of its 
scientists ....78

War, and the preparation for war, are among the greatest obstacles to 
the creation of a world in which human rights are universally respected.

74. Id.
75. The Int’l Code of Conduct on Arms Transfers, available at http://www.arias.or.cr/
76. See generally Military Expenditure, Economic Dev. & Soc. Spending, available at 
http://www.arias.or.cr/documentos/cpr/guat2-i.htm (last visited Apr. 9, 2001) (discussing 
military spending effects upon underdeveloped countries).
77. Oscar Arias et al., Less Spending, More Security: A Practical Plan to Reduce 
78. Dwight D. Eisenhower, Toward a Golden Age of Peace, Address before the Am. 
Truly, unnecessary military spending fosters a vicious cycle of arms buildups, violence, human rights violations, and poverty.

In addition to military spending, the tremendous burden of debt under which many poor nations labor presents another colossal impediment to the protection of human dignity for their citizens. In sub-Saharan Africa, the world's poorest region and the current scene of a raging AIDS epidemic that has life expectancies falling and horrifying numbers of children becoming orphaned, debt payments exceed public spending on health care and education by a factor of four.\(^7\) In Nicaragua, where thirty-four percent of the adult population is illiterate, the government spends approximately one million dollars every day in interest on its foreign debt.\(^8\)

The scope of the problem is enormous. It is estimated that developing nations together owe more than two trillion dollars to the governments of rich countries, to foreign commercial banks, and to international financial institutions.\(^8\) What is worse, we cannot even pretend that the money borrowed was put to its intended use. In many cases, loans were carelessly given to corrupt rulers and undemocratic regimes that either stole the money or wasted it on unnecessary military hardware and useless public works projects.\(^8\) Now, the democratic governments that have replaced those dictators and that have not inherited any benefits from those loans are demanded to repay them.

The debt burden of poor countries is creating hopelessness and perpetuating poverty, public health epidemics, and widespread lack of access to education, all of which are in violation of the Universal Declaration of Human Rights.\(^8\) If this document and the rights it was drafted to defend are to be taken seriously, then debt relief to poor nations must be taken seriously as well, and undertaken immediately. To this end, another coalition of NGOs has led the way in calling for a just and humane solution to the debt problem. The Jubilee 2000 Coalition is a global network of NGOs calling for debt forgiveness for the poorest, most heavily indebted nations of the world as the new millennium begins.\(^8\) By drawing attention to the massive scale of the problem, and by applying pressure on governments in many

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81. See id. at 531.
83. See generally Compilation, *supra* note 73.
parts of the world, the groups that make up the Jubilee 2000 Coalition hope to prompt creditor nations to adopt far-reaching debt relief measures. They also hope to convince debtor nations to invest in much needed anti-poverty programs in exchange for debt forgiveness.

As debt servicing payments and military spending continue to rob the poor of basic health and education services, developed nations continue to profit from this tragic situation. Just as the Jubilee 2000 Coalition is calling on wealthy nations to cancel debt, the arms sales by these same first world powers must be put to an ethical test. For far too long it has been extremely easy for governments that violate human rights to obtain weapons from abroad. In the 1980s, Western governments and corporations played a significant part in arming Saddam Hussein's despotic regime in Iraq. Earlier in this decade, France provided significant military aid to the genocidal government of Rwanda. Until recently, the Indonesian military used British-made equipment against pro-independence groups in East Timor. When arms sales to undemocratic or repressive regimes are proposed, humanitarian considerations are regularly subordinated to short-sighted strategic interests or to a desire for profit. It is unconscionable that undemocratic states and governments that abuse human rights can easily acquire sophisticated weaponry on the international market, and it is outrageous that leading democracies such as the United States, France, and Great Britain fuel bloody conflicts by supplying warring factions with armaments.

For these reasons, a group of NGOs and Nobel Peace Prize laureates are advocating an International Code of Conduct on Arms Transfers. This agreement demands that any decision to export arms should take into account several characteristics pertaining to the country of final destination. The recipient country must endorse democracy—defined in terms of free and fair elections, the rule of law, and civilian control over the

85. Id.
86. Id.
90. See generally Int’l Code of Conduct, supra note 75.
91. Id.
military and security forces. Its government must not engage in gross violations of internationally recognized human rights. And, the International Code of Conduct does not permit arms sales to any country engaged in armed aggression—against other nations or against its own people—in violation of international law.

Many say that such a code is impractical, but I am not alone in denouncing the status quo and in supporting an International Code of Conduct on Arms Transfers. Nobel Peace Laureates Elie Wiesel, Betty Williams, and the Dalai Lama stood with me in presenting the Code in 1997. As did Jose Ramos-Horta, Amnesty International, the American Friends Service Committee, and the International Physicians for the Prevention of Nuclear War. Since then Archbishop Desmond Tutu and Rigoberta Menchú have joined this impractical group, as have Lech Walesa, Adolfo Pérez Esquivel, Mairead Maguire, Norman Borlaug, Joseph Rotblat, Jody Williams, and John Hume. In all, nineteen winners of the Nobel Peace Prize have endorsed the Code. But more importantly, thousands of individuals, groups, and community leaders have expressed their belief that a code of conduct is desperately needed to ensure that human rights will be secure in the next century. These people, and the force of their convictions, turn possibility into progress and impractical ideas into reality.

Finally, if this century is to be less bloody than the last, the international community must show a greater willingness to intervene forcefully and decisively to protect human rights. To achieve this goal, leading nations such as the United States will have to take a more active role in world affairs. When human rights are under threat in any part of the world, they will need to have the political will to take action—not unilaterally but through legitimate multinational fora such as the United Nations. New international treaties or agreements are not necessary. As I said thirteen years ago when I received the Nobel Peace Prize, "[w]e already have an abundance of words, glorious words, inscribed in the declarations of
the United Nations, the World Court, the Organization of American States and a network of international treaties and laws. We need deeds that respect these words, which honor the commitments avowed in these laws."100

Shamefully, the international community has repeatedly stood on the sidelines as innocent citizens have been imprisoned, tortured, and killed. The United States overlooked the human rights records of many military dictatorships in Latin America, because it considered those regimes to be strong bulwarks against communism.101 The West turned its back on Rwanda when the Hutu-dominated government set out to eliminate the country’s Tutsi minority.102 The United States and other leading democracies ignored clear evidence and denied that genocide was taking place.103 In the United Nations, Western governments actively obstructed initiatives that would have saved the lives of many innocent people.104 More recently, bloody internal conflicts in West Africa have received little media attention, and therefore, the suffering of people in that region has been almost entirely ignored.105

When human rights are violated, foreign governments attempt to justify their failure to act by saying that they have no strategic interest in the county where the abuses are taking place, or they claim that the situation there is a purely internal matter.106 But as the third millennium begins, we must move beyond these empty excuses. We must accept the moral responsibility that we all share as human beings, and we must take action to ensure that basic human rights are respected everywhere.

In calling for a fundamental shift in the way in which the international community responds to the violation of human rights, I am touching upon the one change that is most desperately needed in the world today: it will be vitally important for us to discard the destructive values that guided much of

100. Arias, supra note 9.
103. Id.
104. Id.
the twentieth century, and it will be absolutely essential for us to embrace a new set of values based on love, compassion, and mutual respect. The selfishness and the cynicism that have resulted in two world wars, countless internal conflicts, and centuries of economic exploitation must be set aside, and a new sense of altruism and mutual concern must take their place as guiding forces in our societies. Selflessness and solidarity must replace the greed and materialism that have led to inequality and environmental degradation. A more thoughtful approach, in which leaders take a global, long-term outlook must replace the shortsightedness that has frequently characterized the policymaking processes of our countries. In short, we will have to change the ways in which we live, the ways in which we think, and the ways in which we act. Such a transformation will not be easy, but it will be necessary to ensure the security of human rights in the twenty-first century.

Visionary leaders have long called for such a change in values in order to bring an end to strife and suffering. More than a hundred years ago, British Prime Minister William Gladstone made an appeal not unlike the one I have made here. He said, "[w]e look forward to the time when the power to love will replace the love of power. Then will our world know the blessings of peace."

As the twenty-first century begins, we are still looking hopefully to that time. At this critical juncture in world history, it is more important than ever to develop a new global ethic focused on human need, human security, and human rights. Fortunately, the dawning of the year 2000 has prompted people around the world to reflect upon the direction in which the world is heading, and I am hopeful that these thoughtful individuals will come to the conclusion that a new spirit of humanism is desperately needed.

We face great challenges in our struggle for human rights. Violence rages in many parts of the world, and intolerance, hatred, and poverty seem to be omnipresent. Nonetheless, the dawn of a new century provides us with an opportunity to recommit ourselves to the principles enshrined in the Universal Declaration of Human Rights. In doing so, we must embrace initiatives that will allow the human spirit to flourish. We must have the courage to take innovative steps to create an international framework that will promote respect for human rights. The international community would take extremely positive and productive steps by creating an ICC, by reducing military expenditures and providing debt relief to poor nations, by implementing an International Code of Conduct on Arms Transfers, and by responding more energetically to human rights crises. These should be top priorities for the leadership of the nations of the world.
But the international community should not limit itself to the projects that I have outlined here. Each of us must do our part to expand the definition of human rights, and we must give of ourselves in an effort to put an end to poverty, despair, hopelessness, and all of the forces that prevent people from leading dignified lives. Readers of this scholarly publication, as trained professionals in the richest country in the world, have an important opportunity and responsibility to contribute to the well being of those who live without hope. Indeed, it is a solemn duty. Progress in the fight for peace and human rights will not come effortlessly or automatically, but if we work together, there is no limit to what we will be able to achieve.
Breaking the Shackles of the Past:* The Role and Future of State Sovereignty in Today’s International Human Rights Arena

Temple Fett Kearns**

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* This phrase was taken from an address given by Professor Henry T. King, Jr., of Case Western Reserve University School of Law, at the McLean Lecture, University of Pittsburgh Law School. In that speech, he stated:
Nuremberg was right, and it was just. It was a revolutionary break with the shackles of the past, and it grew out of the conviction that there was a better way. We saw the stars at Nuremberg and the vision of a secure world under a rule of law. Let that vision always remain with us, and let us always keep our eyes on the stars.


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I. INTRODUCTION

The use of the word "sovereignty" historically referred to the relationship between the rulers of a country and the persons over whom they ruled.¹ Yet, over time, this idea grew to its modern understanding as a description of the relationship between states.² Commentators have criticized the creation of this new meaning as "an illegitimate offspring"³ but regardless, it is used and perceived as both a sword and a shield to protect a state from the evils it perceives from other states. The legitimacy of a state's ability to hide behind its sovereignty has been to be challenged over the past half century as we witness an evolution to a new idea of what role a state's sovereignty should play.⁴

This article will explore the role state sovereignty plays in the evolving international human rights arena. Specifically, it will address the concept of universal jurisdiction and how its growing acceptance cuts into a state's ability to cry sovereign. Part II will begin with a brief discussion of the evolution of state sovereignty into this modern day wall separating states. This section will also describe the methods by which states use their sovereignty as a defense from scrutiny or review through the development and use of such concepts as the act of state doctrine and sovereign immunity. Part III will address the concept of universal jurisdiction through a discussion of its history and development over time. Included in this section will be a discussion of the recent revival of the controversies which surround the use of universal jurisdiction with Spain's attempt to prosecute General Augusto Pinochet Ugarte for his part in the systematic widespread human rights violations against the people of Chile while under his control. Part IV will analyze the state's effect on sovereignty when it invokes universal jurisdiction to review and judge actions that occur in other states. Although it is the view of the author that the expansion of universal jurisdiction is eroding the idea of sovereignty, this article will conclude by explaining why this doctrine of jurisdiction alone can not, and will not, be its demise.

². The use of the word "states" throughout this article will be used in its international context, which refers to other countries, and not to any individual American state.
³. Henkin, supra note 1, at 2.
⁴. See generally id. at 1–14.
II. STATE SOVEREIGNTY

A. Historically

The historical use of the word sovereignty referred to the persons having independent and supreme authority over those they ruled. This meant that the Queen of England, for example, was the sovereign, but only with respect to her subjects, not to other states. Sovereignty was a domestic term used in a domestic context; it had no international meaning.

Through the centuries, however, this concept of sovereignty was expanded to its modern understanding as a description of the relationship between states. Under this view, we saw the creation of a new legal concern: that of a state and the protection of its very existence. This was an important shift because this new understanding of sovereignty was very powerful. It became a widely accepted principle which governments and courts used as a means of avoiding judgment or review by other states, through the development and use of related attributes of sovereignty, such as sovereign immunity and the act of state doctrine. Because of the very existence of this new legal concern—that of the state and its territory—states had to develop the means by which to ensure their survival.

B. Defenses Created out of State Sovereignty

With the development of this concept of absolute sovereignty by nations came the creation of two notable legal doctrines: the act of state doctrine and sovereign immunity. These two legal theories, although not founded solely on the principle of sovereignty, lose their necessity as the concept of sovereignty loses its power. Each has at its core the idea that the sovereign—the state—is not to be judged.

5. See id.
6. Id. at 2.
7. See id.
9. See text and accompanying notes infra Part II.B.
1. Sovereign Immunity

The doctrine of sovereign immunity provides that domestic courts should decline to hear a case against a foreign sovereign. It evolved out of the idea that the "king can do no wrong." Historically this immunity was absolute in that a foreign court could not hear the case no matter what the acts complained of may have been, or what injuries were caused. In recent history, however, this immunity has been somewhat restricted. The predominant understanding now is that a sovereign state is only immune from those cases that involve injuries resulting from the sovereign's governmental actions.

This trend of restricting the ability of a state to hide behind sovereign immunity developed out of need. Historically the state was only involved with such things as tax collection, national defense, and law enforcement. However, as the modern state became more involved in the commercial arena, it became apparent that persons needed an avenue of redress when that state failed to perform its obligations on its commercial contracts.

Additionally, as a result of the egregious acts committed during World War II, the international community agreed that states need to be accountable and responsible for the international crimes they commit. It is


14. Id. at 123.

15. Id. at 123-24.

this idea that has helped foster the expansion of crimes subject to a state invoking universal jurisdiction, and as a result, has allowed for a slight erosion to the traditional notions of sovereignty.

The application of this belief, however, has proven to be much more difficult in practice since the issue of sovereign immunity was not addressed in the human rights treaties ratified after the war.\(^\text{17}\) Many of the treaties provide for enforcement either through some international body, or through the use of the appropriate state’s national courts when handling internal obligations, yet there were no discussions of a state’s ability to take jurisdiction over another state.\(^\text{18}\)

To complicate this further, none of the states that codified some form of the restricted sovereign immunity concept ever provided an explicit exception for human rights violations.\(^\text{19}\) In practice, this proved to be a brick wall in that numerous cases were dismissed or subsequently reversed on the basis of sovereign immunity.\(^\text{20}\) However, in 1996, the United States stepped up to correct this error by amending the Foreign Sovereign Immunities Act to provide an explicit exception for a civil suit to be brought against a sovereign for “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking . . . .”\(^\text{21}\) Although this exception is a step in the right direction, it is important to note that it merely provides for a civil remedy to obtain money damages for the wrongful acts of a foreign sovereign.\(^\text{22}\) It does not provide for an exception

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) See id. at 38.

\(^{20}\) See, e.g., Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (holding that states are presumptively immune from a court’s jurisdiction and that the only method of obtaining jurisdiction in the United States courts is under the Foreign Sovereign Immunities Act); Von Dardel v. Union of Soviet Socialist Republics, 736 F. Supp. 1 (D.D.C. 1990) (dismissing the case on sovereign immunities grounds, citing six reasons why the Foreign Sovereign Immunities Act does not apply). In Siderman de Blake v. Argentina, the Ninth Circuit reversed the district court, which had dismissed the case on sovereign immunity grounds. 965 F.2d 699, 723 (9th Cir. 1992). The Ninth Circuit held that, in this limited fact situation, Argentina had impliedly waived its right to the sovereign immunity defense because it had previously sought the assistance of the United States courts. Id. at 720–23. For a detailed discussion of the treatment of human rights cases under the doctrine of sovereign immunity in other states, see generally Osofsky, supra note 16.


\(^{22}\) See 28 U.S.C. § 1605(a)(7) (Supp. IV 1998) (providing that “[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in which money damages are sought against a foreign state” for such acts as torture) (emphasis added).
from immunity for criminal prosecution when the foreign state, through its actors, commits these enumerated acts. Thus, this exception does not grant jurisdiction to a United States court to universally prosecute a foreign sovereign for its human rights violations, but merely prevents a foreign sovereign from using immunity as a defense when the case is rightfully before a United States court.\footnote{23} Thus, the United States court must obtain proper jurisdiction to hear the case by some other means. Only then will this exception come into play by disallowing a defendant from arguing sovereign immunity. Therefore, under current law, although a state may invoke universal jurisdiction to prosecute those individuals, the Foreign Sovereign Immunities Act still provides one more hurdle for that state to overcome.

Despite no explicit exception to sovereign immunity under the statute, it has been argued that a person should not be permitted to assert a sovereign immunity defense in a criminal prosecution for human rights violations.\footnote{24} This argument is premised on the underlying purpose of the sovereign

\footnote{23. This statute explicitly provides that the human rights exception cannot be used if the actions alleged were committed solely in the territory of the foreign sovereign and neither the claimant nor the victim is a United States national. \textit{See} § 1605(a)(7)(B)(i)–(ii). However, people in those situations are not closed off to civil remedies in the United States court system. Under the Alien Tort Claim Act, an alien may initiate a lawsuit in the United States seeking civil damages against another alien for actions that occurred in a foreign state. \textit{See} 28 U.S.C. § 1350 (1994).

24. Willard B. Cowles, \textit{Universality of Jurisdiction over War Crimes}, 33 \textit{CAL. L. REV.} 177, 194 (1945) (noting that war criminals take advantage of the fact that often there is no well-organized police or judicial system where the act is committed, and therefore they hope to commit their crimes with impunity); \textit{see also} Jodi Horowitz, Comment, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet: \textit{Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations}, 23 \textit{FORDHAM INT'L L.J.} 489 (1999) (discussing Prefecture of Voiotia v. Fed. Republic of Germany, Case No. 137/1997 (Court of First Instance of Leivadia, Greece, 1997)). In \textit{Prefecture of Voiotia}, the Greek court held that a state should deny immunity for certain violations of human rights because the sovereign could not have reasonably expected to receive immunity for such grave violations of international law, and therefore it constructively waived its privilege when it committed the egregious acts. \textit{Id.} at 510. Additionally, the court noted that when such acts are committed, the sovereign is not acting within its authority and therefore should not be able to hide behind its sovereignty. \textit{Id.} at 510–11. The United States Supreme Court, however, rejected an implied waiver argument by holding that the Argentine government did not implicitly waive its immunity by signing certain treaties. \textit{See} Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442–43 (1989). In that decision, the Court stated "[n]or do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." \textit{Id.}
immunity doctrine and the rationale for its current limitations. Just as a sovereign is not immune from inquiries into its commercial contracts since those are distinguished from its official acts, so too should the sovereign be subject to prosecution for its human rights violations, as those actions are not within the ambit of any state's official acts. However, until such time as this becomes a recognized exception to sovereign immunity, there is always the chance that no justice will be served.

In addition to the overall sovereign immunity exception, there is also the subset of head of state immunity. Although this doctrine is legally distinct from state immunity, its force as a viable defense against prosecutions for human rights violations is questionable. The Nuremberg Charter, enacted after World War II, provided that "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." This principle was recently reaffirmed by the creation of the international tribunals in both the former Yugoslavia and Rwanda. Yet, even if a state successfully overcomes these two jurisdictional hurdles, it will then face another potential defense—the act of state doctrine.

2. The Act of State Doctrine

The act of state doctrine is a judicial doctrine which precludes American courts from inquiring into the validity of another foreign sovereign’s acts when those acts are committed within that foreign
This doctrine differs from sovereign immunity in that sovereign immunity operates to deprive a court of jurisdiction to hear a case; whereas, in contrast, the act of state doctrine does not defeat a court’s jurisdiction, but rather, merely precludes inquiry on certain issues. Although this is a doctrine used in the American court system, many other states have similar concepts.

There are several justifications for the act of state doctrine. Traditionally, it was seen as an offspring of sovereignty and a means to protect the importance of sovereign authority. Other justifications for this doctrine include comity and the separation of powers. Comity is an international principle based on reciprocity. Simply stated, it is the idea that we, as a sovereign government, do not want to tell others how to rule their country because we do not want them to tell us how to rule ours. Separation of powers also comes into play because the United States Constitution vests the executive branch with the exclusive right to conduct foreign affairs; therefore, the judiciary is not authorized to review those actions. Originally, when the term sovereign spoke of the relationship between the

29. Ricaud v. Am. Metal Co., 246 U.S. 304, 309 (1918). The Supreme Court noted in that decision that the act of state doctrine:

[D]oes not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.

Id.


31. See Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (noting that “[e]very sovereign State is bound to respect the independence of every other sovereign State . . .”).

32. Comity is the “[r]ecognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own citizens.” BLACK’S LAW DICTIONARY 267 (6th ed. 1990).


34. “In general, [the] principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.” BLACK’S LAW DICTIONARY 267 (6th ed. 1990) (citing Brown v. Babbitt Ford, Inc., 571 P.2d 689, 695 (Ariz. Ct. App. 1977)).

government and its people, the idea of this doctrine was that the sovereign made the law and therefore we could not challenge it. As the concept of sovereignty expanded, this doctrine came to be understood as the absence of a foreign government's right to enter another state and judge its actions.

Traditionally, the act of state doctrine required that United States federal courts accept, without question, the validity of a foreign sovereign's acts of state that were performed in that sovereign's territory. The United States Supreme Court explained this doctrine by stating:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Years later, the Supreme Court reexamined the doctrine in a case that arose out of the Cuban expropriations of American assets. In Banco Nacional de Cuba v. Sabbatino, the Supreme Court noted that "constitutional underpinnings" compel adherence to the act of state doctrine, specifically, the constitutional mandate on separation of powers. However, the Court put an end to the prior categorical approach to this doctrine and replaced it with a case-by-case analysis, in which a three-part test would be used to determine when the doctrine should be applied.

This test, a form of "balanc[ing] of relevant considerations" looked to whether adjudication of any given issue would interfere with the nation's foreign affairs. In deciding whether to apply the act of state doctrine, the court must balance: 1) the degree of codification regarding the international legal principle in question; 2) the impact of the matter on United States foreign relations; and 3) the status of the foreign government whose act is allegedly implicated. The Court articulated this test by stating:

37. Underhill, 168 U.S. at 252.
40. Id. at 423.
41. Id. at 427.
42. Id.
43. Id.
It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.\footnote{44}

Since the Supreme Court’s decision in \textit{Sabbatino}, the act of state doctrine has been litigated in numerous decisions, although rarely making it to the United States Supreme Court.\footnote{45} In its latest decision, the Supreme Court has slightly deviated from its holding in \textit{Sabbatino} by articulating a threshold question that must be satisfied prior to a court embarking on the \textit{Sabbatino} balancing test.\footnote{46} The Court held that the proper question at the outset is whether adjudication requires inquiry into the \textit{validity} of the public act of a foreign sovereign.\footnote{47} If the challenged acts are found to qualify as acts of state, then the \textit{Sabbatino} balancing test can be applied to limit the doctrine’s applicability.\footnote{48} The Court articulated this distinction by stating:

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for

\footnote{44. \textit{Sabbatino}, 376 U.S. at 428.}
\footnote{45. The United States Supreme Court has only addressed the act of state doctrine in three cases since its decision in \textit{Sabbatino}. \textit{See} W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l, 493 U.S. 400 (1990); Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). The United States Legislature reversed the effect of the United States Supreme Court’s decision in \textit{Sabbatino} by enacting the Hickenlooper Amendment, also known as the \textit{Sabbatino} Amendment. \textit{See} 22 U.S.C. § 2370(e)(2) (1994). This amendment requires United States courts to adjudicate takings claims if the foreign government does not provide "speedy compensation" for the property taken despite a claim of defense under the act of state doctrine. \textit{Id.} However, although this amendment reversed the outcome of the Supreme Court’s decision in \textit{Sabbatino}, it did nothing to affect how the act of state doctrine is to be applied in future decisions by United States courts for matters that do not involve a property taking.}
\footnote{46. \textit{See} W.S. Kirkpatrick & Co., 493 U.S. at 409.}
\footnote{47. \textit{Id.}}
\footnote{48. \textit{See id.}}
cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.\textsuperscript{49}

Under the above analysis, it appears that a foreign sovereign would not be able to successfully use this doctrine to defeat a United States court from hearing a human rights case against it. With the addition of the threshold question a court must answer to determine whether the further balancing of interests must be entered into, one can make a tighter argument that the act of state doctrine should not defeat the court's ability to hear a human rights case. Clearly, a state's actions of committing human rights violations could not and should not be deemed "acts of state." By a court holding that such actions are not acts of state, the court would not need to continue further into the balancing test, and thus it would not be precluded from hearing the case.

However, until such time as the arguments are made and precedent is set, both sovereign immunity and the act of state doctrine represent two types of hurdles persons seeking punishment for human rights abuses must overcome. With the expansion of universal jurisdiction, the threat of a case being dismissed on sovereign immunity grounds weakens. Additionally, with the United States' new articulation of the appropriate use of the act of state doctrine, this, too, is no longer impossible to overcome.

\section*{III. Universal Jurisdiction}

It is a basic premise of every legal system that a court must have jurisdiction before it may decide a case. Jurisdiction is defined as "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and nonjudicially."\textsuperscript{50} The jurisdictional principle of universality provides that every state has the right to prosecute offenders under its domestic laws for certain crimes even though the defendant and the victim are not nationals of that state, or the alleged crime did not occur in that state.

\begin{footnotes}
\footnote{49. Id.}
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state. These crimes are considered to be of such a universal concern and mutual threat to all states that every nation has an interest in punishing the perpetrators.

A. Historical Development of Universal Jurisdiction

The principal of universal jurisdiction was first developed as a means of punishing pirates and slave traders. Pirates were considered *hostis humanis generis*, enemies of mankind, and any nation could assume jurisdiction over them. The rationale behind the development of universal jurisdiction to this offense was based on the fact that the offenses were committed on the high seas and not within the territorial jurisdiction of any particular state. Slave trading is also an offense that is subject to every state's jurisdiction. Through the use of various treaties, the international community agreed that despite the fact that slave trading did not threaten commerce or navigation between nations in the same manner as piracy, this offense was of such a heinous nature that it was subject to prosecution in every state.

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51. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 788 (1988). Universal jurisdiction is only one of five principles of jurisdiction a state can use to have the authority to hear a case. These extraterritorial jurisdiction principles are:

(1) [T]he territoriality principle, which applies when an offense occurs within the territory of the prosecuting state; (2) the nationality principle, which admits jurisdiction when the offender is a national or resident of the prosecuting state; (3) the protective principle, which permits jurisdiction where an extraterritorial act threatens interests that are vital to the integrity of the prosecuting state; (4) the passive personality principle, which recognizes jurisdiction where the victim is a national of the prosecuting state; and (5) the universality principle, which holds that some crimes are so universally abhorrent and thus condemned that their perpetrators are *hostis humani generis*—enemies of all people—and allows that jurisdiction may be based solely on securing custody of the perpetrator.

Joyner, *supra* note 50, at 164–65 (internal citations omitted).


54. See Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).


57. Id. at 800; see, e.g., Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 U.N.T.S. 253; Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51; Supplementary Convention of the Abolition of
It was not until the conclusion of the second World War, however, that the concept of universal jurisdiction began to truly develop. As World War II came to an end, and the international community became aware of the atrocities committed, the cries of “never again” became the theme. The international community drafted the Nuremberg Charter of 1945 (“Nuremberg Charter”), which permitted the piercing of a state’s sovereignty in order to hold a foreign individual accountable, regardless of his or her position as a head of state or a government official, for crimes against peace, crimes against the laws of war, and crimes against humanity. The significance of the Nuremberg Charter not only paved the way for the establishment of ad hoc tribunals in Nuremberg and Tokyo to prosecute persons charged with these crimes, but it also sparked a growth in the desire to enact treaties aimed at the codification of international humanitarian law.

The majority of the treaties passed, and the trials that took place never directly made reference to the use of universal jurisdiction, although it is generally agreed that this was the appropriate justification for the establishment of the tribunals and the various proceedings. It was not until

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58. In the days following the liberation of the Nazi concentration camps throughout Germany, Austria, and Poland, the world became aware of, and was astounded by, the revelation of the millions of Jewish people and Gypsies that had been exterminated by the Nazis as a direct result of the policies of the German State under Adolph Hitler’s “Final Solution.” See generally Yves Beigbeder, Judging War Criminals: The Politics of International Justice 29–31 (St. Martin’s Press, Inc. 1999); Daniel R. Brower, The World in the Twentieth Century: The Age of Global War and Revolution 148–49 (2d ed. Prentice-Hall 1992).


60. Id.


62. In fact, the ability of the international community to even hold the trials prosecuting various German officials in Nuremberg was ridiculed as being merely “victor’s justice.” Beigbeder, supra note 58, at 38–41.

63. See Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985). In Demjanjuk, the Sixth Circuit Court of Appeals held that the United States could extradite Demjanjuk to Israel for the crimes he committed when he was a guard at Treblinka, a Nazi concentration camp in Poland, pursuant to Israel’s exercise of universal jurisdiction. Id. at 584. The court held that the acts committed by Demjanjuk were of such a universally recognized nature that they were punishable by any member of the international community. Id. at 582.
several years later that such a clear use of universal jurisdiction would be seen. Almost fifteen years after victory was declared, the world witnessed one of the most controversial trials in its history when the State of Israel kidnapped Adolph Eichmann from Argentina and invoked universal jurisdiction to prosecute him for crimes against humanity. In its decision, the Supreme Court of Israel stated:

Not only do all the crimes attributed to [Eichmann] bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try [Eichmann].

The creation of various international agreements following the conclusion of the war also helped to solidify the principle of universal jurisdiction by codifying various aspects of international humanitarian law. The European Convention on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), and the Universal Declaration of Human Rights are three examples of such agreements. Of these agreements, the Genocide Convention was the most notable since it called for the international condemnation of not only those acts specified in the Nuremberg Charter, but

65. Id. The controversy over this case surrounded Israel's actions of kidnapping Eichmann from Argentina without Argentina's consent. See Randall, supra note 51, at 813. Although Israel had a right, pursuant to universal jurisdiction, to prosecute Eichmann for the crimes against humanity, universal jurisdiction did not give it the right to invade Argentina's sovereignty in pursuit of that right. Id. Additionally, controversy arose over Israel's ability to try Eichmann, since Israel was not in existence at the time the acts were committed. Id. at 813-14. Although this argument could have been used to negate other jurisdictional principles, it is irrelevant when using universal jurisdiction. Id. at 814.
66. Eichmann, 36 I.L.R. at 304.
added the crime of genocide to the list of punishable offenses. Additionally, the international community, through its concern over the acts that were committed during the war, as well as the lack of any international court to address such crimes, ratified the four Geneva Conventions of 1949. Each of these treaties provide that the signatories are under an obligation to either search for persons alleged to have committed grave breaches and bring them to trial, or to extradite the offenders to another state that is willing to try them.

The treaties codified the various crimes that the international community believed to be of such importance as to demand worldwide assistance in punishing the perpetrators. Over the next several decades, numerous treaties were ratified to include additional acts which defined the modern day enemy and therefore expanded the types of acts that are considered universal. The significance of these new additional crimes were that they differed from piracy and slave trading in that they were not international in nature. The new crimes were being committed within the territorial jurisdiction of one state against the nationals of that state. Without their inclusion into universal jurisdiction, any other foreign state lacked a jurisdictional tie to prosecute these crimes when committed.


73. See infra Part III.B.
B. Current Evolution

The momentum established after the war quickly dissipated, as the Cold War went into full force. In fact, even the four Geneva Conventions were weakened by the failure on the part of the international community to establish an international criminal court. The trend, however, to create new international rules prevailed with the focus now on the new, contemporary war criminal. These new *hostis humanis generis* were committing outrageous acts within the territory of a state and were too often even empowered by that state. The battle against this new type of war criminal provided the perfect basis for expansion of the doctrine of universality.

The international community first turned its aim at the growing crimes of hijacking and aircraft sabotage. These treaties, although providing for both protective and territorial jurisdiction, also hinted at the ability to use universal jurisdiction. Next came the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973. This convention defined apartheid as certain “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.” It required the signatories to create domestic legislation criminalizing the use of apartheid. However, similar to the hijacking and aircraft sabotage conventions, it does not explicitly mention universal jurisdiction as a basis for a state to punish violators.

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74. White, *supra* note 61, at 135.
75. See, e.g., *infra* Part III.C, which details the legal problems Spain faced when it attempted to prosecute Augusto Pinochet for his alleged role in the torturing and murdering of persons in Chile between September 1973 and March 1990.
77. White, *supra* note 61, at 136 (stating that the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft “mandat[ed] that no ‘criminal jurisdiction exercised in accordance with national law’ is excluded’
79. *Id.* at 245, art. II.
80. *See id.* at 244.
In the 1970s and 1980s, this trend continued with a focus on terrorism and torture. The International Convention Against the Taking of Hostages, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, each contain a provision, with slight variations, that provides:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

Such a provision signifies the international community’s willingness to rely on the domestic courts of its nations to prosecute violators of these crimes. These were the first treaties ratified that explicitly called for persons to be tried in the national courts of various states around the world under that state’s laws. To facilitate this process, the treaties also required their signatories to pass appropriate domestic legislation prohibiting the same conduct.

C. Universal Jurisdiction Today

The principle of universal jurisdiction for human rights violations has recently come full circle with the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda. This is the first time since the Nuremberg Trials that an international body has been established to prosecute violators of human rights. Although the existence and use of these international tribunals to prosecute those individuals responsible for human rights abuses does not rely on universal jurisdiction, it does solidify the list of acts that the international community agrees should be punished. This can

82. Dec. 4, 1979, 18 I.L.M. 1456.
85. Randall, supra note 51, at 819.
86. Id.
87. Both tribunals were set up by the United Nations Security Council. See ICFY Statute, supra note 27; ICTR Statute, supra note 27.
then be used by a state to justify its use of universal jurisdiction in prosecuting other individuals that commit such egregious acts as genocide, torture, war crimes, and crimes against humanity.

The use and expansion of universal jurisdiction, however, took a step backward with the recent legal battle in the English courts surrounding the detention and attempted extradition of General Augusto Pinochet. On October 16, 1998, while on a medical visit to the United Kingdom, General Pinochet was arrested in London at the request of a Spanish court, which had issued a provisional arrest warrant. The warrant alleged that Pinochet was responsible for systematic acts of murder, torture, disappearances, illegal detention, and summary executions while he was President and Director of the National Intelligence Directorate ("DINA"). This extradition request by Spain led to a legal battle that lasted approximately two years before General Pinochet was released by the English courts and allowed to return to his home in Chile.

During his seventeen years as the President of Chile, it is estimated that more than 2000 people were killed and thousands more tortured by DINA operatives at the direction of Pinochet in an effort to retain power. Prior to his resignation as President, the government of Chile enacted a new constitution. This not only created a position of senator for life for all ex-presidents who serve for over six years, but, more importantly, it incorporated a general amnesty law which prohibited prosecution of any individuals for crimes committed during the coup in 1973 through the

88. For a detailed discussion of the history surrounding General Pinochet's rise to power and the human rights violations which formed the basis for Spain's attempt to prosecute him, see Nehal Bhuta, Justice Without Borders: Prosecuting General Pinochet, 23 MELB. U. L. REV. 499 (1999).

89. Id. at 513.

90. See, e.g., Ray Moseley, Ailing Ex-Dictator Pinochet Heads Home to Chile: Extradition Effort is Dead, But Foes Still Want a Trial, NEW ORLEANS TIMES-PICAYUNE, Mar. 3, 2000, at A8; Tim Vandenack, Pinochet Faces Future in Santiago: Freed Ex-dictator Could Encounter Human Rights Charges as He Comes Home to Friends and Foes, SUN-SENTINEL (Ft. Lauderdale), Mar. 3, 2000, at 1A; Key Dates in Saga that Cost Pounds 15m, SCOT. DAILY RECORD, Mar. 3, 2000, at 11, available at 2000 WL 13728918 (detailing the chronology of events from Pinochet's arrest to his release). The legal battle to prosecute Pinochet for his human rights violations continues as Chile has now sought to have him charged in its domestic courts. See Jonathan Franklin, Pinochet Put Under House Arrest: Ex-dictator Indicted For His Role in Hit Squad Murders, THE GUARDIAN, Jan. 30, 2001.

91. See Bhuta, supra note 88, at 508 (citing the Chilean National Commission on Truth and Reconciliation).

92. Id. at 509.
dissolution of DINA in 1978. This law meant that Pinochet could not be prosecuted in Chile for his human rights violations.

Upon hearing that Pinochet was in London for back surgery, action was taken by a human rights organization to notify the Spanish prosecutors that were investigating alleged human rights violations in Chile and Argentina against Spanish citizens. On October 13, 1998, Spanish Judge Garzon issued a provisional international arrest warrant and requested that England detain General Pinochet pending a formal extradition request. Pinochet was subsequently arrested and he immediately applied for judicial review and habeas corpus. The legal issues raised in the courts in England involved: 1) whether Spain had jurisdiction to hear the case; 2) whether Pinochet was immune from prosecution due to the fact that the alleged acts were committed while Pinochet was President, and thus a head of state; and 3) whether the arrest warrants listed an offense for which England could rightfully extradite Pinochet to Spain.

The English High Court granted immunity to Pinochet as a former sovereign and head of state, and thus it held that he could not be extradited to Spain. In its decision, the High Court distinguished its grant of

93. Id. (citing Decree Law No. 2191, Apr. 19, 1978).
94. Id. at 510 (noting that the amnesty law was subsequently upheld by Chile’s Supreme Court as constitutional and thus has been successful at barring any prosecutions for human rights violations that fell within the amnesty time period).
95. Id. at 513.
96. Bhuta, supra note 88, at 513.
97. Id.
98. In re Pinochet, 38 I.L.M. 68 (Q.B. Div’l Ct. 1998). This issue detailed whether Spain could legally prosecute General Pinochet for human rights violations that occurred within Chile. Although Spain prefaced its charges with the allegation that the acts were committed against Spanish citizens living in Chile, thus making the argument that the Spanish court has jurisdiction based on passive personality, universal jurisdiction was discussed and recognized by the English courts as a means of finding jurisdiction in the Spanish court. See id.; see also Joyner, supra note 50, at 163–65.
99. In addition, Pinochet also enjoyed the title of senator for life, and thus raised the additional legal question of whether a current head of state could be prosecuted. See In re Pinochet, 38 I.L.M. at 80.
100. As explained by the English High Court, for the crime to be extraditable under English law, the defendant must have committed a crime that is an extraditable offense under both Spanish law and English law. See Bhuta, supra note 88, at 513–14. Although this article does not address in detail this aspect of the English decision, the process the English courts used to analyze the issue raised questions of what crimes were considered international crimes and thus subject to extradition by England.
101. In re Pinochet, 38 I.L.M. at 85.
immunity for Pinochet as a head of state from the current international view that precludes head of state immunity for certain crimes. The High Court held that although heads of state have been subject to criminal prosecutions, those prosecutions were the result of international agreements and thus one sovereign state was not being judged by another sovereign state. In Pinochet, however, it was not an international body seeking to prosecute Pinochet, but rather the sovereign state of Spain.

On appeal, however, the House of Lords reversed the High Court and held that Pinochet was not immune as a former head of state for internationally recognized crimes. Within its decision, the court held that the actions alleged to have been committed could in no way be regarded as normal functions of a head of state, and thus no immunity could be had for such activities. Yet this decision by the House of Lords was set aside as a result of a potential bias, and a new panel heard the case. In this substituted decision, the new panel held that Pinochet could only be subject to prosecution for those crimes he committed after 1988. This substituted decision by the House of Lords was a setback to the international human rights community because of its failure to recognize that Pinochet could be prosecuted pursuant to universal jurisdiction for his actions prior to 1988. It implies that torture was not an international crime prior to the adoption of the Torture Convention. By such implication, the case can now be used as

102. Under the Nuremberg Charter persons charged with crimes against humanity, crimes against the laws of war, and crimes against peace were subject to prosecution despite their position as heads of state or governmental officials. See Nuremberg Charter, supra note 26, art. 7, 59 Stat. at 1556, 82 U.N.T.S. at 288. This principle was recently reaffirmed by the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, which allow former heads of state to be prosecuted for the human rights violations they commit. See ICFY Statute, supra note 27, art. 7, para. 2, 32 I.L.M. at 1175; ICTR Statute, supra note 27, art. 6, para. 2, 33 I.L.M. at 1604 (stating “the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”).

103. In re Pinochet, 38 I.L.M. at 84–85. Those cases cited in support of not recognizing head of state immunity are international tribunals and have been organized for the sole purpose of these criminal trials. In the case at hand, Spain was seeking to use its domestic courts to prosecute Pinochet.

104. Id.


106. Id. at 1333.


108. See Bartle, 38 I.L.M. at 619 (holding that Pinochet could only be extradited and thus prosecuted for those acts of torture he committed after the Convention against Torture became binding on the United Kingdom, Spain, and Chile).
precedent to preclude a state from invoking universal jurisdiction to prosecute individuals for torture prior to the enactment of the Torture Convention.

IV. LIMITATIONS ON UNIVERSAL JURISDICTION

Although the expansion of universal jurisdiction limits a state’s right to hide behind its sovereignty, several factors exist which restrict its ability to make a more dramatic impact. It is important to emphasize that universality is a limited jurisdictional means. Although it has expanded over the years, it still covers only those acts held by the international community to be egregious violations of world peace. The crimes that are subject to universal jurisdiction must be of such world-wide importance and threat to the human race as to warrant this extraterritorial reach.\(^{109}\)

Additionally, universal jurisdiction does not grant a state the power to invade another state’s sovereign borders to essentially kidnap the individual in order to bring them to justice in that state.\(^{110}\) Therefore, if an individual remains in the safe borders of a chosen country, that for whatever reason, decides not to prosecute him, the individual will, in essence, escape prosecution. Yet, upon leaving that state, any country can then request that the person be extradited to stand trial in its national courts.\(^{111}\) However, as is evident by the recent attempt by Spain to have General Pinochet extradited from England, this is not an easy step.

As previously noted, the evolution of the new “sovereign” brought with it legal doctrines to protect its existence. Each of these doctrines can be used by a state to avoid review of its actions by another sovereign. The Foreign Sovereign Immunities Act is an almost absolute bar on jurisdiction in United States courts for cases against a sovereign.\(^{112}\) It is important to note, however, that this is for suits brought against a state, or an individual for his or her official acts.\(^{113}\) When a state is seeking to prosecute an individual, such as a foreign president, for violations of human rights, a strong argument

\(^{109}\) See Joyner, supra note 50, at 165.

\(^{110}\) See generally Randall, supra note 51.

\(^{111}\) Id.


\(^{113}\) Id.
exists to prevent this president from crying sovereign.\textsuperscript{114} The illegal acts of killing or torturing its citizens should not be considered \textit{official acts}. Likewise, a president's claim of head of state immunity would also fail. It is clear in the international human rights context that a head of state is not free from responsibility for such egregious crimes by reason of his official position. This was clearly laid out in the Nuremberg Charter and recently reaffirmed by the international tribunals in the former Yugoslavia and Rwanda. Although some commentators have made the distinction that the Nuremberg Charter, as well as the tribunals in the former Yugoslavia and Rwanda, only stand for the proposition that a head of state is not immune from prosecution by an \textit{international} tribunal, the recent decision by the House of Lords declined to draw this distinction.\textsuperscript{115} Because of such arguments, however, a state wishing to invoke universal jurisdiction cannot dismiss immunity claims lightly.

\section*{V. Conclusion}

As this article discussed, the use of the word sovereignty has evolved over the years from a reference to the relationship between the sovereign and its subjects, to its modern understanding as a description of the relationship between states. This new understanding of sovereignty has been used by governments and courts as a means of avoiding judgment or review. More recently, with the birth of the human rights movement following the discovery of the atrocities committed during World War II, the role of state sovereignty is again changing form. As the human rights movement continues to gain momentum and the idea of some form of international human rights obligations become engrained, what will happen to this notion of sovereignty? Although there are additional factors contributing to this reformation of sovereignty,\textsuperscript{116} the expansion of the acts subject to universal jurisdiction by another state indirectly chips away at this concept without the direct consent of the state itself.

With the creation of the ad hoc tribunals in the former Yugoslavia and Rwanda, the international community is sending a strong signal to the

\begin{itemize}
\item \textsuperscript{114} In addition, as a result of the House of Lords decision denying immunity to General Pinochet, the human rights community now has support for its contention that sovereign immunity should not extend to human rights violations.
\item \textsuperscript{115} \textit{See id}; Horowitz, \textit{supra} note 24, at 515.
\item \textsuperscript{116} Other factors include globalization, the creation of the first international criminal court, and the ever increasing use of treaties. For a detailed discussion on the effects of these factors, see generally Henkin, \textit{supra} note 1.
\end{itemize}
individual nations of the world that the international community is not going
to idly stand by while its citizens' basic human rights are being violated. It
is no longer going to be acceptable to hide behind the wall of sovereignty.
Just as the Nuremberg trials held that it was not a defense that the defendant
was just following orders, sovereignty can not now be used to escape
prosecution for acts committed in the state's name. The former Yugoslavia
tribunal clearly addressed this idea in its first decision by stating:

It would be a travesty of law and a betrayal of the universal need
for justice, should the concept of State sovereignty be allowed to
be raised successfully against human rights. Borders should not be
considered as a shield against the reach of the law and as a
protection for those who trample underfoot the most elementary
rights of humanity.\textsuperscript{117}

This statement sends a clear warning to all future heads of state to respect
the human rights of the nationals of its state just as if those individuals were
not subject to their control. One commentator, while speaking on the lessons
from Nuremberg, hinted at what this new role of sovereignty should be. He
explained:

The fact is that unrestricted national sovereignty means, in real
terms, international anarchy. Nuremberg showed us that there must
be some limitations on national sovereignty if we are to have a
more secure world... . . .

Nuremberg showed us that we must reach the behavior of
individuals to create a better world. That we must penetrate the
veil of national sovereignty and punish individuals for violations of
international law if we are to give that law life and vitality.\textsuperscript{118}

Thus, despite the fact that universal jurisdiction has rarely been invoked
throughout history, the world-wide acceptance of its expansion has led to the
reformation of our idea of sovereignty. And, although universal jurisdiction,
with its various limitations, cannot alone crumble this brick wall, we are
witnessing an evolution of a new concept of sovereignty—the creation of a
world-nation to act as a true keeper of its citizens. This new world-nation is

\textsuperscript{117} Prosecutor v. Tadic, 35 I.L.M. 32, 52 (Int'l Crim. Trib. for the Former Yug.
1995).

\textsuperscript{118} Henry T. King, Jr., The Meaning of Nuremberg, 30 CASE W. RES. J. INT'L L. 143,
one with no boundaries to act as a barrier to protect its people against prosecution for crimes against humanity.

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I. OVERVIEW

This article discusses how international human rights and humanitarian law can be applied to the current armed conflict in Colombia and specifically considers whether human rights violators currently operating there with almost total impunity can be effectively prosecuted and punished under international law. Since the ongoing violations of the human rights of Colombian citizens have been implicitly excused by a government that is increasingly ineffective in dealing with the political chaos that has caused them, an international solution may be the best available alternative. By ceding or losing control of large portions of its national territory to guerrilla forces, by allowing paramilitary groups to act as vigilantes or as unofficial units of the military, and by looking the other way while its own military abuses the rights of its citizens, the Colombian government has demonstrated that it is unable or unwilling to address a problem that grows worse as the conflict accelerates.

Part II of this article briefly analyzes the origins of the current conflict within the context of Colombia’s violent political history. Part III identifies the organizations that are principally responsible for violating human rights in Colombia today. Part IV identifies several of the major human rights abuses taking place in Colombia that rise to the level of violating both international human rights and humanitarian law. Part V discusses Colombia’s contradictory approach to human rights issues, including an exemplary adherence to international treaties and an espoused commitment to human rights in its domestic laws, coupled with a reputation as having the worst human rights record in the world. Part VI examines the international legal regimes that can be used to hold human rights violators in Colombia liable for their actions, and identifies which fall short and which may be effective in bringing perpetrators to justice. Part VII concludes with a discussion of why the asserted solution is justified in this case.
II. INTRODUCTION

A. The Current Conflict in Colombia

Colombia is a country where impunity reigns. In the face of a protracted period of violence and insecurity, the government is increasingly ineffective and unresponsive to the needs of its citizens. The judiciary is virtually powerless as a result of decades of death threats and payoffs from drug traffickers, and today less than three percent of crimes are successfully prosecuted. The impact of this judicial vacuum exacerbates an already weakened executive branch. Colombia's former president was widely believed to have financed his presidential campaign with drug money, revealing to the world the extent to which drug cartels have infiltrated and compromised the government. The current president, Andres Pastrana, witnessed further deterioration of the situation due to the government's inability to effectively control guerrilla groups, paramilitary groups, and to some extent its own military, despite a concerted effort to negotiate peace. Pastrana's government is seen as "weak and increasingly unpopular." His brainchild solution, Plan Colombia, consisting largely of an infusion of

2. Id.
military aid from the United States, has the potential to escalate hostilities and make a bad situation worse.\(^8\)

As a result, governmental legitimacy has been severely eroded and violence has become a way of life.\(^9\) Colombian citizens are constantly subjected to rampant political and criminal upheaval perpetrated by guerrillas, paramilitary groups, and drug traffickers, as well as by the Colombian military and national police.\(^10\) Violence has divided the country, killed thousands, and displaced even more.\(^11\) Over the past ten years, more than 35,000 lives have been lost in this continuing conflict, and more than one million civilians have been displaced.\(^12\) This situation has led to Colombia’s reputation as having the worst human rights record in the world today.\(^13\)

\section*{B. \textit{Colombia’s Violent History}}

Violence in Colombia is nothing new. More than 500,000 Colombians have died as a result of political violence during the past 100 years.\(^{14}\) For at least the past fifty years, the country has been mired in a protracted state of political violence, which has caused a steady decline in national security.\(^{15}\) This violent political history provided fertile ground for the rise to power and illicit political dominance of the drug cartels, which capitalized on

\begin{footnotesize}
\begin{enumerate}
\item Andrew Miller, \textit{U.S. Military Support for Plan Colombia: Adding Fuel to the Fire}, \textit{8 HuM. RIGHTS BRIEF 8} (2000). In 2000, the United States approved a $1.319 billion aid package to assist in the implementation of Plan Colombia, a $7.5 billion Colombian national recovery program designed to address problems of economic recovery, strengthen state institutions, strengthen national security and counter-narcotics operations, and kick start the peace process. \textit{Id.} at 10. The majority of the United States aid package was earmarked for military operations. \textit{Id.} The aid was originally tied to Colombian compliance with five human rights conditions but subject to waiver. In August 2000, all but one condition was waived and $1 billion dollars was distributed. \textit{Id.}
\item See \textit{Human Rights in Colombia}, supra note 6.
\item Julia Manglano, \textit{The Pervasive Immunity that Surrounds Human Rights Violations Committed by Colombia’s Military}, \textit{3 DEPAUL DIG. INT’L L. 45, 47} (1997); see also \textit{1999 Columbia Country Reports, supra note 1}; \textit{Human Rights in Colombia, supra note 6}.
\item Sibylla Brodzinsky, \textit{Colombian Citizens Fear Repression, Retribution}, USA TODAY, Oct. 25, 1999, at 17A.
\item \textit{Id.}
\item Manglano, \textit{supra} note 10, at 45.
\item Ruz Gutierrez, \textit{supra} note 5; see also Esquirol, \textit{supra} note 5, at 26–29.
\item Ruz Gutierrez, \textit{supra} note 5 (explaining that from 1948–1966, it is estimated that nearly 300,000 Colombians died as a result of partisan fighting, in a period known as La Violencia, \textit{“The Violence”}.
\end{enumerate}
\end{footnotesize}
Seagrave

governmental weaknesses and complicity, and embraced violence as a means to exert control over the country.\(^{16}\) This violent heritage was also the basis for the current conflict between the government and guerrilla insurgents that had its genesis more than thirty years ago.\(^{17}\) By using violence to maintain their respective power bases, the drug cartels, the guerrillas, and the government have accelerated the downward spiral in human rights violations that has now reached crisis proportions.\(^{18}\)

The current conflict in Colombia is the culmination of decades of violence.\(^{19}\) Throughout the twentieth century, human rights violations have been inflicted on the citizens of Colombia with increasing impunity, first by the political status quo, later by the drug mafia, and finally by the guerrilla forces and their nemeses—the paramilitary groups and the Colombian military.\(^{20}\) The human rights violators of today share a commonality of purpose with their predecessors. Colombian history shows that political factions—whether governmental, quasi-governmental, insurgent or criminal—maintain power through violence.\(^{21}\) In the current conflict, violence is used to maintain the respective fiefdoms of the military, the drug traffickers, the guerrilla forces, and the paramilitary groups, thus preventing the government from effectively addressing either national concerns of governance or the promotion of internationally recognized human rights.

III. WHO IS RESPONSIBLE FOR HUMAN RIGHTS VIOLATIONS IN COLOMBIA?

Responsibility for human rights violations in Colombia is shared by guerrilla factions, paramilitary groups, drug traffickers, and government forces.\(^{22}\) All of these groups have committed atrocious human rights violations to further their respective positions in the ongoing conflict.\(^{23}\)

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16. Ruz Gutierrez, supra note 5.
17. Brodzinsky, supra note 11.
18. Manglano, supra note 10, at 45.
19. Ruz Gutierrez, supra note 5.
20. Id.
21. Id. This explains how the causes of violence, poverty, social reform, and political maneuvering have not changed throughout the 20th century, and that the guerrillas have “sacrificed ideology to survive through capitalism . . . .” Id.
23. Id.
Under international human rights law, liability for abuses normally extends only to state action. Liability can be extended to private individuals or groups only if they qualify as state agents. This extension of liability occurs if the violations of human rights law by private individuals or groups are acquiesced in, tolerated, or condoned by the state. International human rights law is therefore arguably applicable to the guerrillas, paramilitaries groups, and drug traffickers, as well as the military, because the Colombian government, through its inability to effectively deal with the violators, has acquiesced and tolerated their conduct. Even if some of the human rights violators in the Colombian conflict are deemed to be private individuals which human rights law therefore cannot reach, international humanitarian law can fill the void and exact justice. It expressly binds all parties to a conflict, including state security forces, dissident armed groups, and all of their respective agents and proxies.

A. Government Forces

Throughout the 1990s, government forces have been responsible for a substantial percentage of the human rights violations that occur in Colombia. Most human rights violations inflicted by government forces are perpetrated by the military and the national police. Responsible parties range from specifically identifiable military officials to entire units. Ongoing abuses by police in urban areas, and by the army in rural areas, are regularly reported by local human rights organizations. Government sponsored abuses often occur when the military fails to distinguish between guerrillas and noncombatant citizens in its attempts to contain counterinsurgency, resulting in massacre, disappearance, and torture of innocent civilians. In addition, there is evidence that the Colombian military collaborates with paramilitary groups in committing human rights

25. Id.
26. Id.
27. Id.
28. IACHR Colombia Report, supra note 24, at 75, 96.
29. 1998 Colombia Country Report, supra note 3 (the army and police appear to be jointly responsible for almost as many violations as the combined nongovernmental groups).
30. Manglano, supra note 10, at 47.
31. Id.
32. Id.
33. Id. at 47–48.
abuses.\textsuperscript{34} The national police and the Colombian military are also blamed for maintaining a campaign of social cleansing within the country.\textsuperscript{35} Human rights violators within the Colombian military and police are rarely brought to justice.\textsuperscript{36}

B. \textit{Guerrilla Forces}

There are several different guerrilla factions currently involved in the armed conflict in Colombia. The principally recognized groups are the Revolutionary Armed Forces of Colombia ("FARC"), the National Liberation Army ("ELN"), and the People's Liberation Army ("EPL").\textsuperscript{37}

Of the three, FARC is the most influential and well-organized, and is described as the oldest, most belligerent, and most powerful guerrilla group in the country.\textsuperscript{38} FARC's ranks are estimated to total 10,000 to 15,000 soldiers.\textsuperscript{39} In an effort to induce the group to join peace talks, the government ceded a 16,000-square-mile area in southwestern Colombia to FARC in November 1998, which the rebels now completely control.\textsuperscript{40} Approximately 100,000 Colombian citizens live in the ceded area.\textsuperscript{41} Since gaining control, FARC has refused to allow international observers to

\begin{itemize}
\item \textsuperscript{34} See 1998 Colombia Country Report, supra note 3; Human Rights in Colombia, supra note 6 (there are troubling reports of persistent links between the army and paramilitary groups).
\item \textsuperscript{35} Elizabeth F. Schwartz, \textit{Getting Away with Murder: Social Cleansing in Colombia and the Role of the United States}, 27 U. MIAMI INTER-AM. L. REV. 381, 384 (1995-96) (explaining that "[s]ocial cleansing ... consists of 'serial killings of people who have been economically pushed so far toward the fringes of misery that the more affluent members of society classify them as undesirable.' [As such, the] victims ... are perceived ... to be dangerous and unfit to participate in society"); see also 1999 Colombia Country Reports, supra note 1 (reporting that 279 such killings occurred during the first six months of 1999).
\item \textsuperscript{36} Schwartz, supra note 35, at 396; see also Colombia Convicts Former Army General in Rights Case, USA TODAY, Feb. 14, 2001, at 13A (reporting that a former Colombian general convicted for failing to defend a village during a killing spree by a right wing death squad was "the first conviction of a Colombian general in a major human rights case").
\item \textsuperscript{37} 1999 Colombia Country Reports, supra note 1.
\item \textsuperscript{38} Pablo Rodriguez, \textit{Cada Vez Mas Distantes el Gobierno y Las FARC}, EL NUEVO HERALD (Miami), Sept. 21, 1999, at 6A.
\item \textsuperscript{39} Esquirol, supra note 5, at 29; see also Colombia, Rebels Will Talk Again, MIAMI HERALD, Sept. 26, 1999, at 3A.
\item \textsuperscript{40} Brodzinsky, supra note 11.
\item \textsuperscript{41} See 1999 Colombia Country Reports, supra note 1.
\end{itemize}
oversee conditions in the zone.\textsuperscript{42} It is estimated that with the addition of this area ceded by the government, guerrilla forces now control approximately forty percent of Colombian territory.\textsuperscript{43}

Guerrilla forces are known to collect fees on narcotics production and trafficking, which take place in the geographic areas they control, and the funds collected are used to maintain their power base in the country.\textsuperscript{44} The influence of these combined guerrilla forces is such that they have effectively replaced the government in certain areas of the country.\textsuperscript{45} All of the known guerrilla groups inflict a wide variety of human rights violations on Colombian citizens with total impunity.\textsuperscript{46}

C. Paramilitary Groups

As the government has ceded or lost control over large areas of the national territory, the influence and power of paramilitary groups has grown.\textsuperscript{47} It is estimated that a paramilitary umbrella organization consisting from 5000 to 7000 combatants now exists in Colombia.\textsuperscript{48} The goal of this organization is to extend its presence into areas of the country now under guerrilla control.\textsuperscript{49} This is accomplished by terrorizing guerrilla sympathizers into fleeing their homes and, by so doing, depriving guerrillas of civilian support.\textsuperscript{50} In the process, civilians that are deemed to be supporters of the guerrillas are murdered, tortured, and displaced.\textsuperscript{51}

\textsuperscript{42} Golden, \textit{supra} note 7.
\textsuperscript{43} \textit{Colombia Calls for Arms from Uncle Sam}, \text{THE ECONOMIST}, Sept. 25, 1999, at 17, available at 1999 WL 7364607.
\textsuperscript{44} Juan O. Tamayo, \textit{U.S. Officials Tie Colombian Guerrillas to Drug Exports}, \text{MIAMI HERALD}, Dec. 13, 2000, at 3A; \textit{see also 1999 Colombia Country Reports, supra} note 1 (estimating that these revenues run to the hundreds of millions of dollars); Andrew Selsky, \textit{U.S.-Aided Drug War Starts Strong}, \text{SUN-SENTINEL} (Broward), Feb. 4, 2001, at 21A (reporting that FARC “earns huge profits by protecting coca crops and taxing the growers”).
\textsuperscript{45} \textit{1999 Colombia Country Reports, supra} note 1.
\textsuperscript{46} \textit{IACHR Colombia Report, supra} note 24, at 96–112. \textit{See discussion in text infra Section IV.}
\textsuperscript{47} \textit{See 1998 Colombia Country Report, supra} note 3.
\textsuperscript{48} Id.
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} Id.
\textsuperscript{51} Id.
Evidence exists to suggest that the paramilitary groups have strong ties to both drug traffickers and to the Colombian military.\textsuperscript{52} Drug traffickers employ paramilitaries as their own private armies.\textsuperscript{53} The military uses them to fight insurgents.\textsuperscript{54} The influence of paramilitary groups is on the rise, and the government is unable to bring them under control.\textsuperscript{55}

D. Drug Traffickers

The ongoing role of drug cartels in the Colombian conflict and their complicity in perpetrating human rights abuses should not be overlooked. Although much of the reporting on human rights tends to ignore their involvement, drug traffickers have long been associated with murders of government officials, peace negotiators, educators, journalists, and other civilians.\textsuperscript{56} While the high point of drug violence may have ended with the demise of the more notorious kingpins, it still exists in a more decentralized and underground form.\textsuperscript{57} Even if violations of human rights by drug traffickers are not as overt as in the past, there is evidence that drug trafficking is used to finance the operations of other participants in the conflict, and that drug traffickers hire both the guerrilla and paramilitary armies for protection.\textsuperscript{58} Regardless of the degree or nature of the cooperation, it is apparent that drug traffickers are complicit participants in the conflict in Colombia and as such bear responsibility for the rampant violations of human rights that occur there on a daily basis.

IV. WHAT HUMAN RIGHTS VIOLATIONS ARE PREVALENT IN COLOMBIA TODAY?

The following section by no means provides an exhaustive overview of human rights violations being perpetrated in Colombia today—unfortunately, there are many more. The specific abuses discussed below were chosen to illustrate the types of abuses prevalent in Colombia today.

\textsuperscript{52} IACHR Colombia Report, supra note 24, at 131–32 (explaining that the government “allowed the paramilitaries to act with legal protection and legitimacy in the 1970s and 1980s. . . . as a means of fighting the armed dissident groups”).
\textsuperscript{53} 1998 Colombia Country Report, supra note 3.
\textsuperscript{54} Id.
\textsuperscript{55} 1999 Colombia Country Reports, supra note 1.
\textsuperscript{56} See generally Ruz Gutierrez, supra note 5.
\textsuperscript{57} Esquirol, supra note 5, at 35.
\textsuperscript{58} See 1998 Colombia Country Report, supra note 3.
that qualify as violations of both international human rights law and international humanitarian law.59

A. Disappearances and Kidnappings

The prospect of forced disappearances and kidnappings are threats that Colombian citizens face daily.60 Well over 3000 cases of forced disappearances have been reported in Colombia since 1977.61 The Center for Investigations and Popular Research ("CINEP"), a nongovernmental organization ("NGO") that tracks human rights abuses in Colombia, reports that during the first nine months of 1998, paramilitary groups were responsible for 126 known cases of forced disappearance.62 There were reports of 309 cases of forced disappearance during the first nine months of 1999.63 These figures are corroborated by a second NGO, the Permanent Commission for the Defense of Human Rights ("CPDH"), which reported that during the first six months of 1998, 117 people were forcibly disappeared.64 CPDH reports indicate that most victims of forced disappearance in Colombia are never heard from again.65

While it is reported that forced disappearances are perpetrated almost entirely by paramilitary groups, kidnapping is the forte of the guerrilla factions and is described as an "unambiguous, standing policy and major source of revenue for both FARC and ELN."66 Colombia was ranked number one in the world for kidnappings for ransom in 1999.67 According to

59. IACHR Colombia Report, supra note 24 (explaining that violations of humanitarian law during internal armed conflicts such as the one taking place in Colombia include, among other things, murder, forced disappearance, the taking of hostages, torture and other cruel treatment, and displacement of civilian populations). The report explains, for example, how summary execution qualifies as both a human rights violation and a violation of international humanitarian law, in that "summary execution of a peasant farmer for alleged cooperation with the guerrilla, which constitutes a violation of the right to life under human rights law, will also involve a violation of the protections provided to civilians under international humanitarian law, since the death was related to the armed conflict." Id. at 66.

60. 1999 Colombia Country Reports, supra note 1.
62. Id.
63. 1999 Colombia Country Reports, supra note 1.
64. 1998 Colombia Country Report, supra note 3.
65. Id.
66. Id.
the NGO Pais Libre, there were 2216 kidnappings in Colombia in 1998, a thirty-three percent increase over 1997. The 1999 estimate was 2945. The preferred victims of guerrilla kidnappers covered a wide spectrum of citizens, including politicians, cattlemen, businessmen, and children, as well as foreigners. Less than half of these kidnapping victims were known to be released during the year, and arrests or prosecutions of the kidnappers were rare.

B. **Torture and Related Treatment**

In 1999, reports of torture and mistreatment of detainees by the national police and the military continued. Torture perpetrated by government officials most often occurred in connection with the detention of insurgents. In addition, CINEP reported that both paramilitary and guerrilla groups were also responsible for torture, and that the bodies of victims kidnapped and killed by guerrillas often showed signs of torture and disfigurement.

In addition, prison conditions in Colombia are particularly harsh, largely as a result of severe overcrowding and unsanitary health conditions. An Inter-American Commission for Human Rights ("IACHR") mission that visited a Bogota prison in December 1997 found conditions there amounted to cruel, inhuman, and degrading treatment on the part of the government. It also found that murder is prevalent inside prison walls.

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68. *1999 Colombia Country Reports*, supra note 1. According to the report, the NGO Pais Libre attributed 667 cases to FARC, 566 to ELN, 109 to EPL, 43 to other guerrilla groups, 20 to paramilitary groups, and 580 to other unknown organizations. *Id.*

69. *Id.*

70. *Id.* Pais Libre reports that 189 children were kidnapped, up from 131 in 1998. *Id.*


72. *Id.*

73. *Id.*; see also *IACHR Colombia Report*, supra note 24, at 104–107. Armed dissident groups were responsible for 15 percent of torture cases in 1996. *Id.* at 111. State agents tortured, released, and displaced many persons in Colombia in 1995, and another significant number were tortured before being executed. *Id.* at 104. Paramilitary groups accounted for almost 75 percent of acts of torture in 1996. *Id.*

74. *Id.*


76. *Id.* at 104–107.

77. *Id.*
C. Extrajudicial Killing

Colombia’s murder rate is the highest in the world, and homicide is the leading cause of death in the country. A large percentage of murders are extrajudicial executions carried out by security forces or result from death in combat due to the ongoing conflict. Estimates of the number of Colombians who died as a result of the armed conflict in 1998 range from 2000 to 6000. The Colombian military, paramilitary groups, guerrilla factions, and drug traffickers have all been implicated as using extrajudicial killings to further their respective goals in the ongoing conflict in Colombia.

D. Displacement

The internal displacement of thousands of Colombian citizens has been described as a “longstanding and underreported problem” that is a direct result of the ongoing conflict. It is estimated that during 1998, 300,000 Colombians were displaced as a result of ongoing paramilitary and guerrilla attacks. Prior to 1998, Colombia’s internal refugee population was estimated to be one million, placing it among the top four in the world. Most displaced Colombians remain within the country, but many seek international refuge, clearly placing this effect of the Colombian conflict in an international context.

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78. Schwartz, supra note 35, at 382.
79. Id. at 383.
80. Colombia Unida Por La Paz, EL NUEVO HERALD (Miami), Oct. 25, 1999, at 1A.
81. See generally 1999 Colombia Country Reports, supra note 1.
82. Margalit Edelman, Colombia’s Quiet Catastrophe, CHRISTIAN SCI. MONITOR, June 22, 1999, at 11.
83. Id.
84. Id.
85. Id. In a notable example, some 2600 refugees who sought refuge in Venezuela were eventually repatriated to Colombia in an apparent violation of Venezuela’s obligations under international law. Id. An examination of this aspect of the Colombian crisis, however, does not fall within the framework of this paper. It serves as an example, however, of the international community’s unwillingness to acknowledge the scope of Colombia’s internal turmoil and its human rights repercussions.
V. WHAT IS COLOMBIA'S OFFICIAL POSITION ON HUMAN RIGHTS?

A. Colombia "Talks the Talk"

Colombia's record of espousing support for human rights within both domestic and international legal frameworks is exemplary. The Colombian Constitution of 1991 incorporates human rights provisions and specifically provides for citizen's rights. Such rights include: due process, freedom from torture, and right to life to be protected from violation.86 Article 93 of the constitution places treaties that deal with international human rights and humanitarian law in preeminent positions with respect to the domestic legal system.87

On the international side, Colombia has ratified most major international human rights covenants, protocols, and conventions, including the Convention Against Torture.88 Colombia has signed and ratified the American Convention on Human Rights ("American Convention"), and has accepted the competency of the Inter-American Court for Human Rights ("Inter-American Court").89 In accepting the competency of the Court, however, Colombia reserved the right to withdraw its acceptance at any moment that it considers to be opportune.90

86. Manglano, supra note 10, at 46.
87. Id.
90. Id.
B. Colombia Doesn’t “Walk the Walk”

Colombia's record of enforcing human rights within its borders, however, is dismal and is characterized as the worst in the world.\(^{91}\) Human rights violations and violations of international humanitarian law perpetrated by the participants in the current conflict go almost totally unpunished.\(^{92}\) Although both the Colombian Penal Code and the Colombian Constitution provide support for punishing human rights violators in the domestic system by explicitly prohibiting such human rights abuses as extrajudicial killings, torture, and kidnapping, the Colombian government has shown that it is unable or unwilling to bring perpetrators to justice on this basis.\(^{93}\)

Some view the Colombian Constitution as a laudable effort by Colombia to show the world that it recognizes that human rights violations are prevalent in the country, but it has so far been ineffective, particularly against one of the principal violators of human rights in the country: its own military.\(^{94}\) By channeling human rights abuse cases against members of the military to military tribunals, the constitution virtually guarantees that such offenders will be judged only by military peers, if they are prosecuted at all.\(^{95}\) While recent reports indicate some willingness on the part of the government to prosecute a small number of military officials for human rights violations, the number is limited compared with the scope of the violations for which the military is responsible.\(^{96}\)

Although domestic law provides a legal basis to pursue other offenders, the fact that the government cedes control of up to forty percent of the national territory to guerrilla groups and allows drug traffickers to operate with near total impunity suggests that any power to bring these groups to justice on human rights grounds is extremely limited. As previously discussed, this problem is further complicated by a generally ineffective judiciary that is unable to successfully prosecute crimes.\(^{97}\)

It is, therefore, logical to conclude that such a domestic system is particularly unprepared to prosecute human rights violations when common

\(^{91}\) Manglano, supra note 10, at 45.
\(^{92}\) Id.
\(^{93}\) Id.
\(^{94}\) Id. at 47.
\(^{95}\) Id.
\(^{96}\) See 1998 Colombia Country Report, supra note 3; see also Colombia Convicts Former Army General in Rights Case, supra note 36.
\(^{97}\) Manglano, supra note 10, at 50.
criminals generally go free. In fact, reports indicate that where human rights abuses are concerned, impunity reaches 100 percent.\(^98\) Whether by choice or through powerlessness, it is clear that Colombia doesn’t “walk the walk” that is required to implement the effective prosecution and punishment of human rights violations that its domestic laws and international treaty obligations demand.

VI. WHAT ARE THE INTERNATIONAL LEGAL IMPLICATIONS OF THE CURRENT CONFLICT IN COLOMBIA?

A. Colombia’s International Human Rights Treaty Obligations: No Teeth

As indicated above, Colombia is a signatory of most of the major international human rights treaties, conventions, and protocols.\(^99\) None of these obligations provide a means by which perpetrators of human rights violations in the current conflict in Colombia can be prosecuted or punished.

B. The Inter-American System: It Falls Short

Colombia’s adherence to the American Convention and its acceptance of the binding jurisdiction of the Inter-American Court offer a limited means to address human rights violations. The Inter-American Court hears cases brought by the Inter-American Commission on Human Rights against consenting member states for violations perpetrated by the state itself, or against private individuals or groups acting with the acquiescence of the state.\(^100\) As a result, individual claims could conceivably be brought under this system.

It is important to note, however, that the Inter-American system was designed to treat cases involving the type of gross human rights violations that occur in Colombia today through its *in loco* reporting system, rather than by bringing individual claims before the Inter-American Court.\(^101\) In fact, the individual claims mechanism was conceived as a precautionary measure with a preventive role whereby “a single violation could be the first indication of the beginning of a process that, if allowed to proceed, will result in regression back to an authoritarian structure,” seemingly before a

\(^{98}\) *IACHR Colombia Report, supra* note 24, at 75.


\(^{100}\) *IACHR Colombia Report, supra* note 24, at 71.

situation reached the gross and flagrant stage.\textsuperscript{102} Such is clearly not the case in Colombia. While it is certainly conceivable that an individual claim could be brought before the Inter-American Court to address human rights abuses in the current conflict, where abuses number in the thousands, indicative of a breakdown of rule of law of enormous proportions, the individual claims mechanism of the Inter-American system would be overloaded.\textsuperscript{103}

The result of applying the \textit{in loco} reporting procedures in the case of Colombia would be the preparation of a report by the IACHR suggesting actions to be undertaken by the Colombian government to stem the tide of abuses.\textsuperscript{104} In the case of controlling human rights violations by the military, the IACHR report addresses the issue of the autonomy of the military courts, but it does not provide a means to punish any perpetrators of human rights violations who currently operate in Colombia with impunity.\textsuperscript{105} The \textit{in loco} system suggests a solution tied to a domestic judicial remedy. To be effective, such a solution requires that the country involved have control of its political system. In a country like Colombia where impunity reigns and justice is ineffective, such a solution is of limited consequence in effectively dealing with the human rights abuses that are being inflicted by a range of both state and non-state actors, which the government is unable or unwilling to control.

In fact, the IACHR recently released a report on Colombia following a visit in that country that provides the Inter-American system response to the conflict.\textsuperscript{106} The report acknowledges the existence of violations of both human rights law and international humanitarian law in Colombia, but its relatively toothless recommendations seem unrealistic and inadequate in view of the seriousness and urgency of the situation.\textsuperscript{107}

As the foregoing analysis indicates, the Colombian government has become increasingly ineffective in dealing with the problems of conflict and violence that have arisen within its borders over the last three decades. The IACHR report, however, calls for action by this inactive government to

\begin{itemize}
\item \textsuperscript{102} \textit{Id.} at 188.
\item \textsuperscript{103} \textit{Id.} (explaining that “the impact of the ‘case approach’ in situations of mass and gross violations is more limited than the impact of visits \textit{in loco}” because trying to use the case system to address thousands of violations is like “the fable of the Dutch boy who tries to stop a flood by putting his finger in a hole in a dike as the whole structure collapses”). \textit{Id.}
\item \textsuperscript{104} \textit{See id.}
\item \textsuperscript{105} \textit{See Manglano, supra} note 10, at 51.
\item \textsuperscript{106} \textit{IACHR Colombia Report, supra} note 24, at 70.
\item \textsuperscript{107} \textit{Id.} at 71.
\end{itemize}
resolve a situation it seems powerless to control.\textsuperscript{108} The report exhorts the government to resolve the conflict based on a series of recommendations, which include, among other things: 1) intensification of human rights training of security forces; 2) dissemination of human rights information to the violators and the general population; 3) immediate implementation of measures to insure effective criminal investigation of human rights abuses; and 4) immediate implementation of measures to dismantle paramilitary groups.\textsuperscript{109} The report also calls on all parties "[to] respect, implement and enforce the rules governing hostilities set forth in international humanitarian law, with particular emphasis on the protection of civilians."\textsuperscript{110} It offers no insight, however, into how this resolution is to be accomplished by a government that is at best powerless or at worst complicit, and how parties that disregard basic humanitarian concerns will all at once pay heed to this call.

The report exposes the deficiencies of the Inter-American system in dealing with the type of situation that exists in Colombia today, where the government is but one of several culprits participating in gross violations of human rights. The Inter-American system was designed in large part to respond to the abuses of dictatorships through individualized complaints that would lead to reports by the IACHR that provided authoritative accounts of the violations.\textsuperscript{111} The current situation in Colombia does not fit the model. It calls for a type of redress that the Inter-American system cannot provide, either in terms of prosecution or punishment.

Moreover, whether a solution based on human rights law can even reach such non-state actors as the drug traffickers and the guerrilla groups is an open question, since it can be argued that the Colombian government attempts to control them, albeit ineffectively, and therefore has not acquiesced, accepted, or condoned their conduct.\textsuperscript{112}

\begin{scriptsize}
\begin{flushleft}
\textsuperscript{108} Id. at 70–71. \\
\textsuperscript{109} Id. \\
\textsuperscript{110} Id. \\
\textsuperscript{111} Grossman, \textit{supra} note 101, at 189–90. \\
\textsuperscript{112} The same may not be true for the paramilitary groups, since there is evidence of acquiescence in the form of collusion between this group and government forces. It can also conceivably be argued that the guerrilla groups are state actors themselves by virtue of the fact that they control large portions of Colombian territory.
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\end{scriptsize}
C. International Humanitarian Law: Can Recent Precedent Stick?

Even if its recommendations fall short, the IACHR report offers a detailed analysis of how international humanitarian law applies to the idiosyncrasies of the ongoing conflict in Colombia.\(^{113}\) Several of the observations and conclusions reached by the IACHR indicate that international humanitarian law may provide the means to hold the Colombian government, the guerrillas, the paramilitary groups, and drug traffickers liable for human rights violations, and even punish them.\(^{114}\)

The IACHR report openly admits that the American Convention and other universal and regional human rights instruments cannot be used to regulate to any great degree human rights abuses that occur during internal conflicts like the one that is now underway in Colombia.\(^{115}\) It does, however, point out that international humanitarian law is specifically designed to restrain such conduct.\(^{116}\)

By invoking recent international humanitarian legal precedent, the IACHR issues a warning to the offending parties in the conflict. It puts them on notice that such recent international legal developments as the formation of the International Criminal Tribunal for the former Yugoslavia and the possible impending establishment of an international criminal court indicate that there is growing precedent for an international remedy that will stick to offenders like those in Colombia.\(^{117}\)

As the IACHR report points out, the application of humanitarian law to the conflict in Colombia is particularly appropriate for two reasons.\(^{118}\) First, Colombia has acknowledged that its internal conflict rises to the level required for international humanitarian law to apply.\(^{119}\) Second, Colombia has acknowledged the applicability of the Geneva Conventions, which its constitution has established as preeminent law within its own domestic framework.\(^{120}\)

The IACHR report specifically concludes that international humanitarian law norms apply equally to human rights violations committed

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\(^{113}\) IACHR Colombia Report, supra note 24, at 94–96.
\(^{114}\) Id. at 78.
\(^{115}\) Id. at 74.
\(^{116}\) Id.
\(^{117}\) Id. at 156–58.
\(^{118}\) IACHR Colombia Report, supra note 24, at 71–72.
\(^{119}\) Id. at 77.
\(^{120}\) Id. at 78.
in Colombia by guerrillas, the government, and paramilitary groups, because parties to such a conflict "are directly bound by international humanitarian law, and their belligerent acts are appropriately evaluated by reference to those norms."\textsuperscript{121} As a result, the report analyzes the activities of each of these groups in light of applicable international humanitarian law and reiterates a conclusion reached after a 1997 on-site visit to Colombia where it noted that violations of human rights and/or international humanitarian law "could constitute crimes of an international character which would incur the individual criminal responsibility of the authors, who may be prosecuted in any State in which they happen to be [found]."\textsuperscript{122}

Fortunately for the violators, and unfortunately for the citizens of Colombia, the current state of international humanitarian law most likely means that at most the perpetrators of human rights violence in Colombia will receive the type of warning contained in the IACHR report. The proposed International Criminal Court might offer a solution that applies to the conflict in Colombia because it promises to investigate and bring justice to individuals who commit the most serious crimes of concern to the international community, such as genocide, war crimes, and crimes against humanity.\textsuperscript{123} However, this solution is far from an immediate one. Even though twenty-seven countries, including the United States, ratified the treaty, sixty must do so before the court is established.\textsuperscript{124} However, in the case of the United States, the treaty is not binding without Senate approval, and there is strong opposition to such approval.\textsuperscript{125}

The situation in Colombia cannot wait for the International Criminal Court to be established. Thus, other suggested solutions will not do justice. The IACHR report's suggested solution relies too heavily on the weakened, beleaguered Colombian government to make a complete about face and bring the perpetrators to justice.\textsuperscript{126} Other suggested courses of action overlook the fact that there are multiple offenders of human rights in the current conflict. This calls for prosecution of the military alone for failing to address the full magnitude of the violations.\textsuperscript{127} Some suggest that

\textsuperscript{121.} Id. at 96.
\textsuperscript{122.} Id. at 156.
\textsuperscript{123.} IACHR Colombia Report, supra note 24, at 72.
\textsuperscript{125.} Id.
\textsuperscript{126.} Id.
\textsuperscript{127.} Manglano, supra note 10, at 51.
prosecution is not needed at all, and that the guerrillas should be excused because the basis of their insurgency is a struggle for equality, overlooking the suffering that Colombian citizens have endured for decades. Still others espouse a negotiated settlement, ignoring the fact that such a settlement in the end signifies one more round of impunity for human rights violators in Colombia. And the government views the solution in dollar terms, and seeks help in the form of financial and military aid, with the United States ready, willing, and able to provide money.

None of these approaches have worked in the past and there is little reason to believe they will work now. All overlook the depth of the chaos, its ongoing nature, and the extent of the violations. Drastic measures are required to resolve this quiet catastrophe that worsens with the passage of time.

The Colombian government is unable or unwilling to bring human rights violators to justice. International human rights law offers little chance of prosecuting and punishing human rights violators. International humanitarian law may offer hope for the thousands of Colombians abused by this conflict, which challenges established human rights law mechanisms such as the Inter-American system. The level of violence and the fact that blame can be laid at so many doors makes it impossible for the government to effectively act.

It is time for the international community to recognize that the armed conflict in Colombia has risen to the level that justifies invoking established international humanitarian legal precedent. As in the case of atrocities in other parts of the world, a Colombian war crimes tribunal should be established to bring violators from all sides in the current conflict to justice. Without international intervention of this type, there is little hope that the Colombian government will be able to regain control of the national territory while ending decades of human rights abuses inflicted upon the citizens of Colombia. Without justice for Colombia, there will be no peace.

130. See Christopher Marquis, Un “Plan Marshall” Para Colombia, EL NUEVO HERALD (Miami), Sept. 21, 1999, at 1A.
131. See Edelman, supra note 82.
VII. CONCLUSION

The foregoing analysis shows that Colombia has failed to protect its citizens from human rights violations perpetrated by its own military, by guerrilla groups, by paramilitary groups functioning either independently of or in complicity with the government, and by drug traffickers. The international and regional human rights treaties, conventions, and protocols to which Colombia has submitted are inadequate to address the problem of punishing human rights violators. Since the international criminal court is not yet operational, an international criminal tribunal should be formed to address the fact that: Colombia is unable to punish violators through its own domestic laws due to the severity of the internal conflict and the government’s ineffectiveness; and international human rights law is geared toward promoting human rights rather than enforcing them and is designed to address the government as violator, an idiosyncracy that makes its application to the current conflict in Colombia particularly ineffective.

Alan Seagrave