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Self-Determination and Autonomy Regimes

The vital concept or right or ideal or vision of self-determination continues to play a major role in political and legal debate. Its place of honor as Article 1 of the two major Covenants itself suggests its status as a 'super rule,' as a concept that stands apart from the normal discourse of rights and directly affects political power and organization within and among states. No one can deny its deep historical significance for several phases of the human rights movement, starting with decolonization and extending to the contemporary focus on democratization.

This chapter presents in Section A a number of readings that offer different perspectives on self-determination and on the 'peoples' that enjoy a right to it. These readings trace the history of the concept, and raise issues that are as contemporary as the ongoing conflicts in the former Yugoslavia, in India, in the Americas and elsewhere. Many of those conflicts have an ethnic character, involving minorities and indigenous peoples.

Section B, for which the readings in Section A provide a necessary background, examines in more detail trends in the human rights movement toward recognition of rights of ethnic minorities and indigenous peoples, and of their members. Those materials stress the character and significance of autonomy regimes—political systems or subsystems organized within a state for purposes of fostering political participation and self-government by ethnic minorities and indigenous peoples. Together with several other human rights norms, the notion of self-determination continues to exert a strong influence on the debate over and possible forms of realization of these autonomy regimes.

A. SELF-DETERMINATION: SOME HISTORY AND COMMENTARY

HURST HANNUM, RETHINKING SELF-DETERMINATION

34 Va. J. Int. L. 1, at 3 (1993).

I. *HISTORICAL DEVELOPMENT*

A. Nationalism, Woodrow Wilson, and the League of Nations

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'As an agency of destruction the theory of nationalism proved one of the most potent that even modern society has known.' Along with the physically destructive power of the machine gun, airplane, and other weapons used on a large scale for the first time, nationalist fervor hastened the disintegration of the Austro-Hungarian and Ottoman empires prior to and during World War I. The territory of the former empires required new sovereigns, and the principle of self-determination as a means of drawing new 'nationstate' boundaries became the vehicle for legitimizing the victorious powers' re-division of Europe.

Although President Woodrow Wilson was the most public advocate of 'self-determination' as a guiding principle in the post-war period, neither he nor the other Allied leaders believed that the principle was absolute or universal. Indeed, in Wilson's celebrated 'Fourteen Points' speech to the United States Congress on January 8, 1918, the phrase 'self-determination' is conspicuous by its absence, even though the speech dealt with specific territorial settlements, including the creation of independent states out of the remnants of the Austro-Hungarian and Ottoman empires.

A month later, Wilson addressed the question of self-determination directly:

> National aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.
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> . . .
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> . . . [A]ll well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them *without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.*

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Modern commentators often forget the relative nature of Wilson's concept of self-determination. They also have neglected, until very recently, the 'internal' aspect of self-determination promoted by Wilson and others: democracy. Indeed, this internal aspect, the conviction that the only legitimate basis for government is the consent of the governed, provided the ultimate justification for decolonization. 'Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.'

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B. The United Nations and Decolonization

In part because of the inconsistent manner in which it was applied following the First World War, the principle of self-determination was not recognized initially as a fundamental right under the United Nations regime created in 1945. In addition, there was great reluctance to revive a concept used to justify Hitler's attempts to reunify the German 'nation.'

The 'principle' of self-determination is mentioned only twice in the 1945 Charter of the United Nations, both times in the limiting context of developing 'friendly relations among nations' and in conjunction with the principle of 'equal rights . . . of peoples.' . . .

Neither self-determination nor minority rights is mentioned in the 1948 Universal Declaration of Human Rights, although the Declaration does contain a preambular reference to developing amicable international relations. Whatever its political significance, the principle of self-determination had not attained the status of a rule of international law by the time of the drafting of the United Nations Charter or in the early United Nations era.

Under the moral and political imperatives of decolonization, however, the vague 'principle' of self-determination soon evolved into the 'right' to self-determination. This evolution was most clearly demonstrated by the General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples ('Declaration on Colonial Independence'). Premised, *inter alia*, on the need for stability, peace, and respect for human rights, the Declaration on Colonial Independence '[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.' It declares that '[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' It also maintains that '[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.' The final paragraph reaffirms 'the sovereign rights of all peoples and their territorial integrity.'

Paragraph 6 of the declaration sets forth a fundamental limiting principle, without which one almost never (at least in United Nations forums) finds a

reference to self-determination: 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'

The thrust of the declaration is clear: all colonial territories have the right of independence. However, a closer reading reveals uncertainties arising from varying uses of the terms 'peoples,' 'territories,' and 'countries.' Although the title of the declaration refers only to 'colonial' countries and peoples, operative paragraph 2 refers expansively to the right of '[a]ll peoples' to self-determination. . . .

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The questions raised by the Declaration on Colonial Independence were also addressed ten years later by the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations ('Declaration on Friendly Relations'). Adopted without a vote by the General Assembly after years of negotiation, the Declaration on Friendly Relations may be considered to state existing international law. Its provisions therefore possess unusual significance for a General Assembly resolution.

As its title suggests, the [1970] Declaration on Friendly Relations addresses a wide range of issues. The section concerned with equal rights and self-determination of peoples is worth quoting at length:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
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> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
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> (a) To promote friendly relations and co-operation among States; and
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; . . .
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> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.
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> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit

of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right to self-determination in accordance with the Charter, and particularly its purposes and principles.

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

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The resolution also provides:

> All States enjoy sovereign equality. . . . In particular, sovereign equality includes the following elements:
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> . . .
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> (d) The territorial integrity and political independence of the State are inviolable;
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> (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems.

. . . First, the Declaration on Friendly Relations offers no definition of 'peoples.' Neither of the two purposes it sets forth suggests that self-determination is intended to provide every ethnically distinct people with its own state. In fact, the particular mention of the 'distinct' status of 'a colony or other Non-Self-Governing Territory' suggests a limited scope for the right of self-determination. Similarly, the use in the same paragraph of the singular 'people' suggests that various minorities within a territory may not enjoy the same right of self-determination as that possessed by the people as a whole.

Following previous United Nations formulations of the principle of self-determination, the Declaration on Friendly Relations places the goal of territorial integrity or political unity as a principle superior to that of self-determination: 'Nothing in the foregoing paragraphs' shall be construed to authorize or encourage 'any action' which would limit this principle. However, this restriction applies only to those states which conduct themselves 'in compliance with the principle of equal rights and self-determination of peoples as described above and [are] *thus* possessed of a government representing

the whole people belonging to the territory without distinction as to race, creed or colour.' The requirement of representativeness suggests internal democracy. However, such a requirement does not imply that the only government that can be deemed 'representative' is one that explicitly recognizes all of the various ethnic, religious, linguistic, and other communities within a state. Indeed, such a state might itself be considered to violate the requirement that it represent 'the whole people . . . *without distinction* as to race, creed or colour.'

A more persuasive interpretation, consistent with the concerns of most United Nations members when the declaration was adopted in 1970, is that a state will not be considered to be representative if it formally excludes a particular group from participation in the political process, based on that group's race, creed, or color (such as South Africa or Southern Rhodesia under the Smith regime). At the very least, a state with a democratic, non-discriminatory voting system whose political life is dominated by an ethnic majority would not be unrepresentative within the terms of the Declaration on Friendly Relations.

C. *The International Covenants on Human Rights*

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The Indian reservation to article 1 [of the ICCPR] exemplifies the view of many countries that support a restricted interpretation of 'self-determination':

> With reference to article 1 [of both covenants]. . . the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [those articles] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation—which is the essence of national integrity.

Three states, each a former colonial power, filed formal objections to the Indian reservation. . . .

The Federal Republic of Germany 'strongly object[ed]' to the Indian reservation, stating:

> The right of self-determination . . . applies to all peoples and not only to those under foreign domination. . . . The Federal Government cannot consider as valid any interpretation of the right of self-determination which is contrary to the clear language of the provisions in question. It moreover considers that any limitation of their applicability to all nations is incompatible with the object and purpose of the Covenants.

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II. THE MEANING OF SELF-DETERMINATION

Although it is debatable whether the right of self-determination is *jus cogens*, self-determination has undoubtedly attained the status of a 'right' in international law. . . .

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The various texts discussed above and the *travaux préparatoires* of the covenants do not establish that the right of self-determination, *defined as a unilateral right to independence*, was intended to apply outside the context of decolonization. As noted above, self-determination has meant at least decolonization since 1945. However, when addressing self-determination claims based on ethnicity or nationalist sentiment, one must recognize the shift from the territorially based *right* of self-determination developed by the United Nations in the context of decolonization to the ethnic–linguistic–national *principle* of self-determination advocated by Wilson and others in 1919. The difference is not only semantic. It reflects a fundamental limit on the definition that self-determination has acquired during the past four decades. . . .

Despite the apparently absolute formulation in various United Nations resolutions and the two international covenants on human rights, self-determination has never been considered an absolute right to be exercised irrespective of competing claims or rights, except in the limited context of 'classic' colonialism. . . .

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This does not mean that other aspects of the right of self-determination are also so limited. The covenants' description of the right of self-determination as a right of 'all peoples' . . . cannot be ignored. Both the right of a people organized as a state to freedom from external domination and the right of the people of a state to a government that reflects their wishes are essential components of the right of self-determination. These rights have universal applicability, and the statement that '[n]o State has accepted the right of *all* peoples to self-determination' is correct only if one equates self-determination exclusively with secession or independence.

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Self-determination is also relevant to the matrix of human rights law which has developed over the past four decades, including specific rights applicable to minorities and indigenous peoples. Defining self-determination as self-government is consistent with early United Nations formulations, including the Charter, and its implications are only now being fully considered in the context of autonomous and other domestic constitutional arrangements.

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CHRISTIAN TOMUSCHAT, SELF-DETERMINATION IN A POST-COLONIAL WORLD

in Tomuschat (ed.), Modern Law of Self-Determination 1 (1993), at 2.

According to the applicable texts, self-determination could never be considered an exclusive right of colonial peoples. Even General Assembly resolution 1514 (XV) [the 1960 Declaration on Colonial Independence], in spite of its specific object of bringing about speedy decolonization, provides that self-determination is a right of all peoples. The two International Covenants on human rights use identical language. . . .

In spite of the clarity of the legal position, until the symbolic crumbling of the Berlin wall in 1989 self-determination was mainly invoked and relied upon by colonial peoples eager to gain full control of their own destiny. With the fall of communism in Eastern Europe, however, a new era seems to have begun. . . . What can be witnessed today, however, are mostly moves in the opposite direction. Ethnic groups—to use a neutral term—within many States invoke the right to self-determination, claiming political rights which range from internal autonomy to a right of secession pure and simple. Increasingly, self-determination, instead of uniting peoples, is becoming a divisive force.

It is not only the former communist States like the Soviet Union and Yugoslavia that are affected by this new development. In the Americas, the voice of indigenous peoples is growing ever louder. Yielding to their moral and political pressure, Canada has recently made important concessions to its indigenous communities. In Latin America, too, today's political structures, the result of 500 years of Spanish and Portuguese domination, are being challenged. Similarly, in spite of its preparedness to let the Baltic Republics, Belarus, the Ukraine as well as the southern republics leave the country, the Soviet Union, now reduced to Russia, will not be able to escape claims of the populations in Siberia, which were annexed to Russia through the Tsarist policies of conquering the large areas East of the Ural, to establish themselves as political entities with a great measure of self-government and possibly true independence. Quite visibly, self-determination is becoming a tool for attempts to revise historical developments that have extended not only over decades, but centuries. The big question is whether such processes can be directed and regulated by a principle of international law like self-determination. After all, international law, although requiring compliance by States which are its main addressees, is a creation by those same States which, through its rules, seek to guarantee stability in their mutual relations. If on the contrary international law should aspire critically to assess the *raison d'être* of States, including judgments to the effect that a State must disintegrate, it would become an instrument of revolutionary change, almost the opposite of a legal rule.

Hitherto, the international community has been extremely reluctant to accept that aspect of self-determination. The civil war in Nigeria, originating from an upheaval of the Ibo community in the Biafra region against the cen-

tral government, was largely ignored by the United Nations. Similarly, the United Nations avoided to take a stand on the secession of East Pakistan from the State of Pakistan. Only after Bangladesh had emerged and consolidated itself, did the United Nations take note of that fact and admitted the new State. In the case of Cyprus, the proclamation of a Republic of Northern Cyprus was formally condemned by the Security Council and declared legally invalid. This reluctance *vis-à-vis* claims to break away from existing States is also reflected in the basic texts on self-determination. General Assembly resolution 2625 (XXV) [the 1970 Declaration on Friendly Relations] sounds a formal warning against claims imperilling territorial integrity (paragraph 6), and the comment of the Human Rights Committee on the scope of Article 1 of the International Convenant on Civil and Political Rights in absolutely silent on a right to secession.

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Criteria Justifying Claims for Self-Determination Vis-à-Vis an Established State

In pursuing further this line of thought, the student encounters two questions which follow one another in a logical sequence. The first question is whether it may be at all possible, against the background of present day international law, to define certain criteria for legitimizing claims directed against the political and territorial integrity of an existing State. One hundred years ago, even to raise such a question would have been considered preposterous or nonsensical. States were the only actors on the international stage. Their constitutional processes were considered a purely domestic matter. The veil of sovereign statehood could not be pierced. The proper role of international law was confined to regulating relationships among States. Its rules were not allowed to penetrate into matters subject to municipal jurisdiction, in particular relationships between a State and its citizens.

With the emergence of international human rights law, in particular, the traditional picture has changed dramatically. The consolidation of this new branch of international law amounts to a general recognition that States are not objectives in and by themselves and that, conversely, their finality is to discharge a task incumbent upon them in the service of their citizens. In other words, States are no more sacrosanct. Their existence is not exempt from challenge, even on a legal plane. Rather, they have a specific *raison d'être*. If they fundamentally fail to live up to their essential commitments they begin to lose their legitimacy and thus even their very existence can be called into question.

It is with a great measure of caution that one should approach answering the question as to what situations exhibit the degree of gravity required to give rise to a right of self-determination to the benefit of a group within an existing State. On one hand, it is obvious that any State is under a basic obligation to protect the life and the physical integrity of its citizens. Therefore, if a State machinery turns itself into an apparatus of terror which persecutes

specific groups of the population, those groups cannot be held obligated to remain loyally under the jurisdiction of that State. Genocide is the ultimate of all international crimes. Any government that engages in genocide forfeits its right to expect and require obedience from the citizens it is targeting. If international law is to remain faithful to its own premises, it must give the actual victims a remedy enabling them to live in dignity. It is a matter of common knowledge that, in its elaboration on self-determination, the Friendly Relations Declaration of the General Assembly would appear to go even further when stating that the principle of national unity and territorial integrity may have to yield if the State concerned is not possessed of a government 'representing the whole people belonging to the territory without distinction as to race, creed or colour'. This formulation seems to be somewhat too loose if it is intended to sanction a right of secession. In fact, secession can be only a step of last resort and should not be granted lightly as a remedy.

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MARTTI KOSKENNIEMI, NATIONAL SELF-DETERMINATION TODAY: PROBLEMS OF LEGAL THEORY AND PRACTICE

43 Int. & Comp. L.Q. 241 (1994), at 245.

In the first place, national self-determination acts as a *justification* of a State-centred international order. . . . As the 1970 Friendly Relations Declaration[1] puts it, all peoples have the right freely to determine, without external interference, their political status. A people choosing to live as a State has the perfect right to do so and in such case 'every State has the duty to respect this right'. Without a principle that entitles—or perhaps even requires—groups of people to start minding their own business within separately organised 'States', it is difficult to think how statehood and everything that we connect with it—political independence, territorial integrity and legal sovereignty—can be legitimate. As a background principle, self-determination expresses the political phenomenon of State patriotism and explains why we in general endow acts of foreign States with legal validity even when we do not agree with their content and why we think there is a strong argument against intervening in other States' political processes.

This idea of national self-determination as a patriotic concept, a justification of statehood, has not always been apparent. Much of the classical positivist writing has simply accepted States as the factual foundation of international law. The need to look behind States—into self-determination—however, becomes necessary when statehood itself is or becomes uncertain.

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[1] [Eds.] see p. 974, *supra*.

. . . A Hungarian writer has claimed that national self-determination 'is the most important basic ideological principle of the 1990s'. But it is more: it is a legal-constitutional principle that claims to offer a principal (if not the only) basis on which political entities can be constituted, and among which international relations can again be conducted 'normally'. The centrality of the State to the political order becomes comprehensible only if we regard it as the formal, political shell for which nationhood provides the substance.

But of course there is another sense of national self-determination which far from supporting the formal structures of statehood provides a *challenge* to them. According to this sense, true self-determination is not expressed in the normal functioning of existing participating processes and in the duty of other States not to interfere but in the existence and free cultivation of an authentic communal feeling, a togetherness, a sense of being 'us' among the relevant group. If, in extreme cases, this may be possible only by leaving the State, then the necessity turns into a right.

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National self-determination, then, has an ambiguous relationship with statehood as the basis of the international legal order. On the one hand, it supports statehood by providing a connecting explanation for why we should honour existing *de facto* boundaries and the acts of the State's power-holders as something other than gunman's orders. On the other hand, it explains that statehood *per se* embodies no particular virtue and that even as it is useful as a presumption about the authority of a particular territorial rule, that presumption may be overruled or its consequences modified in favour of a group or unit finding itself excluded from those positions of authority in which the substance of the rule is determined.

The extraordinary difficulties into which an attempt at a *consistent* application of the principle leads stem from the paradox that it both supports and challenges statehood and that it is impossible to establish a general preference between its patriotic and secessionist senses.

GREGORY FOX, SELF-DETERMINATION IN THE POST-COLD WAR ERA: A NEW INTERNAL FOCUS?

16 Mich. J. Int. L. 733 (1995), at 743.

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The dissolutions of the Soviet Union and the Socialist Federal Republic of Yugoslavia, despite giving birth to a myriad of new states ultimately recognized by the international community, have made only uncertain contributions to a substate conception of the self. The strongest *opinio juris* that could have emerged from either break-up would have been statements of an entitlement to self-determination before *the fact* of independent statehood was

clearly evident. Established conceptions of the self have followed this pattern. Resolution 1514 [the 1960 Declaration on Colonial Independence] was such a general statement regarding colonial territories, as was the General Assembly's recognition of SWAPO, the ANC, and the PLO as 'legitimate' representatives of peoples well before independence (or majoritarian elections) were presented to the Assembly as a *fait accompli*. Similarly, the OAU's decision to seat a POLISARIO delegation in November 1985 represented a statement that the people of the Western Sahara held *rights against* those actively denying their aspirations toward autonomy—notably Morocco. Recognition after statehood has been achieved, or after the state resisting independence finally acquiesces, does not necessarily affirm a prior right to seek independence. It may simply constitute a recognition by states or international organizations that according to the prevailing declarative theory, a new state has come into existence and must be dealt with as such.

International reaction to the break-up of the Soviet Union—and in particular the Baltic states, whose departure precipitated its dissolution—generally fell into this second weaker category. While the United States had, in principle, never recognized the incorporation of the Baltics into the Soviet Union, this was mostly a status of symbolic significance. In the aftermath of the August 1991 coup, President Bush announced not that preexisting relations with the Baltics would continue in some heightened fashion but that the United States was 'prepared immediately to *establish* diplomatic relations with their governments.' More importantly, prior to President Yeltsin's decree of August 24, 1991 recognizing the independence of Latvia and Estonia (Russia had recognized Lithuania in 1990), only Iceland had established diplomatic relations with a Baltic state, and that was with Lithuania. The European Community waited until August 27 to call for the establishment of relations. The United States extended recognition on September 2. The CSCE and the United Nations waited still longer—until after independence had been affirmed by the State Council of the Soviet Union on September 6—to admit the Baltics to membership.

Recognition of the former Yugoslav republics unfolded in a similar fashion. The unraveling of the Socialist Federal Republic of Yugoslavia (SFRY) began formally on September 27, 1990 when the Slovenian Parliament declared it would no longer recognize federal legislation as binding. Slovenes voted overwhelmingly for independence in a referendum on December 23, as did Croatia on May 19, 1991, Macedonia on September 9, and Bosnia (in a disputed vote boycotted by Bosnian Serbs) on October 14. Warfare had been raging since June 1990 when federal troops attacked the provisional Slovenian militia. By December 7, 1991, the cohesion of the federal structures had deteriorated to such an extent that the Badinter Commission of the European Community determined that the governmental organs of the SFRY 'no longer meet the criteria of participation and representativeness inherent in a federal State' and that, as a result, 'the Socialist Federal Republic of Yugoslavia is in the process of dissolution.'

Yet the response of the international community up through the time the Badinter Commission made its finding (and for a short time thereafter) was, by and large, to work at holding the old federal structures together. . . . The United States repeatedly opposed early recognition of the republics, a position it maintained through mid-December 1991. In December the Coordinating Bureau of the Non-Aligned Countries denounced 'all attempts aimed at undermining the sovereignty, territorial integrity and international legal personality of Yugoslavia.' Also in December—at a time when Germany had begun making clear its intention to offer early recognition—Secretary-General Boutros-Ghali urged forbearance until an overall peace settlement could be reached. Germany and Italy recognized Slovenia and Croatia on December 23; other states and international organizations followed over the next five months, culminating in the admission of Croatia, Slovenia, and Bosnia-Herzegovina to membership in the United Nations on May 22, 1992.

While this attenuated process might be read as affirming these states' right to secession, the repeated attempts to achieve peace by discouraging fragmentation do not suggest that was a motive in extending recognition. Formal recognition came at a time when any right to secede (if it indeed existed) had already been exercised. The establishment of relations is more plausibly attributable to states' realistic assessment that diplomatic relations with the republics could only be carried out through their newly established governments (most of which had been or would soon be elected). Alternatively, some states may have judged that the republics would be better protected against external aggression if they were Member States of the United Nations. In either case, there was virtually no prospect that the old federal system might be resuscitated. The former republics were, in fact, states and had to be dealt with as such. Given such practical necessities of the moment, coupled with earlier efforts to forestall recognition, the ultimate decision to treat the republics as sovereign implies little about their independence having been achieved pursuant to a legal right.

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It may be that in attempting to support the cohesion of multiethnic states such as the Congo, Nigeria, the Soviet Union, or the SFRY, the international community is now fighting a losing battle against centrifugal nationalist forces. Yet the normative assumptions underlying that fight continue to discourage auto-defined conceptions of the self that are subjective in all but name.

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FREDERIC KIRGIS, JR., THE DEGREES OF SELF-DETERMINATION IN THE UNITED NATIONS ERA

88 Am. J. Int. L. 304 (1994), at 306.

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[The disclaimer in the 1970 Declaration on Friendly Relations, p. 974, *supra*] referred only to a government representing the whole people belonging to the territory without distinction as to race, creed or color. The disclaimer was reiterated in the Vienna Declaration emanating from the 1993 UN World Conference on Human Rights, with one significant change. The Vienna Declaration exempted only 'a Government representing the whole people belonging to the territory without distinction *of any kind*.' These disclaimers are a far cry from the General Assembly's formulation in 1960, when it said: 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'

Of course, these are nonbinding instruments. Nevertheless, they purport to, and probably do, reflect an *opinio juris*. In the human rights field, a strong showing of *opinio juris* may overcome a weak demonstration of state practice to establish a customary rule. . . .

An arguable, limited right of secession is only one of the numerous faces of self-determination. Mentioned below are the more prominent ones that have appeared. Of course, some of them remain quite controversial because of disagreement either over what is meant by 'peoples' or over what is meant by self-determination itself. The many faces include:

(1) The established right to be free from colonial domination, with plenty of well-known examples in Africa, Asia and the Caribbean.

(2) The converse of that—a right to remain dependent, if it represents the will of the dependent people who occupy a defined territory, as in the case of the Island of Mayotte in the Comoros, or Puerto Rico.

(3) The right to dissolve a state, at least if done peacefully, and to form new states on the territory of the former one, as in the former Soviet Union and Czechoslovakia. The breakup of the former Yugoslavia except for Serbia and Montenegro might even be considered an example of this, after the initial skirmish in Slovenia ended and the Yugoslav federal forces ceased operating as such in Croatia and Bosnia–Hercegovina. The later fighting in Croatia and Bosnia–Hercegovina could be seen as efforts not so much to hold the old state of Yugoslavia together as to define the territories and ethnic composition of the new states, including possible new states within Bosnia–Hercegovina.

(4) The disputed right to secede, as in the case of Bangladesh and Eritrea.

(5) The right of divided states to reunite, as in Germany.

(6) The right of limited autonomy, short of secession, for groups defined territorially or by common ethnic, religious and linguistic bonds—as in autonomous areas within confederations.

(7) Rights of minority groups within a larger political entity, as recognized in Article 27 of the Covenant on Civil and Political Rights and in the General Assembly's 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

(8) The internal self-determination freedom to choose one's form of government, or even more sharply, the right to a democratic form of government, as in Haiti.

One must ask which of these is actually a right under international law, and which just an aspiration of some groups or putative governments. Clearly, the right to be free from alien colonial control is an established rule of international law. One cannot categorically say the same about the other manifestations. Their juridical status varies. Nevertheless, we can make some headway toward evaluating each claim by borrowing some of the tools of social scientists. That is, we can try to identify key variables that reduce the vast complexity of the problem to a manageable form and can serve as rough predictors for normative assessment of claims as they are made.

The key variables can be found in the General Assembly's 1970 Declaration of Principles of International Law concerning Friendly Relations and in the 1993 Vienna Declaration. . . . Dismemberment is at the end of a scale of claims, ranging from modest to extremely destabilizing, that includes all of those listed above. Moreover, as there are degrees of claim, there are degrees of representative government, with absolute dictatorship and all-inclusive democracy at the opposite extremes.

One can thus discern degrees of self-determination, with the legitimacy of each tied to the degree of representative government in the state. The relationship is inverse between the degree of representative government, on one hand, and the extent of destabilization that the international community will tolerate in a self-determination claim, on the other. If a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized.

In this schema, a claim of right to secede from a representative democracy is not likely to be considered a legitimate exercise of the right of self-determination, but a claim of right by indigenous groups within the democracy to use their own languages and engage in their own noncoercive cultural practices is likely to be recognized—not always under the rubric of self-determination, but recognized nevertheless. Conversely, a claim of a right to secede from a repressive

dictatorship *may* be regarded as legitimate. Not all secessionist claims are equally destabilizing. The degree to which a claimed right to secede will be destabilizing may depend on such things as the plausibility of the historical claim of the secessionist group to the territory it seeks to slice off.

. . .

To summarize: The right of self-determination may be seen as a variable right, depending on a combination of factors. The two most important of these seem to be the degree of destabilization in any given claim, taking into account all the circumstances surrounding it, and the degree to which the responding government represents the people belonging to the territory. If a government is quite unrepresentative, the international community may recognize even a seriously destabilizing self-determination claim as legitimate.

NOTE

Compare the following comments of Rodolfo Stavenhagen; [2]

> It does not help matters that 'self-determination' means different things to different persons. It is, as one international lawyer asserts, 'one of those unexceptionable goals that can be neither defined nor opposed'. Is it then, a goal, an aspiration, an objective? Or is it a principle, a right? And if the latter, is it only a moral and political right, or is it also a legal right? Is it enforceable? Should it be enforceable? Or is it none of these, or all of these at the same time, and more? . . . [S]elf-determination has become, indeed *is*, a social and political fact in the contemporary world, which we are challenged to understand and master for what it is: an *idée-force* of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that may also be expressed, in one of its many guises, as a legal right in international law. Whereas for some the 'self' in self-determination can only be the singular, individual human being for others the right of collective self-determination, that is, the claim of a group of people to choose the form of government under which they will live, must be treated as a myth in the Lévi-Straussian sense (that is, as a blueprint for living); not as an enforceable or enforced legal, political or moral right.

B. AUTONOMY REGIMES

We here turn to rights and protections of ethnic minorities and indigenous peoples and members of each of them. In particular, Section B examines political arrangements relevant to both kinds of groups that the materials refer to

[2] Self-Determination: Right or Demon?, IV Law and Society Trust (Issue No. 67, November 1993), at 12.

as autonomy regimes (defined below). Such regimes may be bargained for, created and governed by both ethnic minorities and indigenous peoples. The materials explore the degree to which international law has recognized or is moving toward recognition of a 'right' of either or both of these kinds of groups or collective entities to autonomy regimes.

Although there are important similarities between the categories of ethnic minorities and indigenous peoples, there are also significant differences. It has been important for strategic and other reasons for indigenous peoples to emphasize these differences and therefore to argue for a separate regulatory regime under international law. In fact, the UN has addressed the rights and protections of ethnic minorities and indigenous peoples in two separate contemporary standard-setting processes; one led to a 1992 declaration, while the other is now in mid-stream en route toward a declaration. The materials below follow this division.

As described at p. 96 *supra*, the special regimes for a number of minorities in Central and East Europe that grew out of World War I fell into disfavor because of their ineffectiveness and the malign uses to which some of their concepts were put. As a consequence, and in the belief that observance by states of individually based norms would solve the historical problems of oppression and brutality that many minorities had confronted, the UN Charter, the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights paid scant attention to minorities as such or (subject to the major exception of the self-determination clauses, and to the very conception of the state) to collective rights as such. Not until 1992, when the General Assembly adopted the Declaration on Minorities, p. 1001, *infra*, did the human rights movement produce a universal instrument dedicated to the problems and rights of minorities and their members.

In a general sense, the full range of the classical and individually based human rights norms becomes relevant to the rights and protections of minorities and indigenous peoples, from rights to personal security or due process or equal protection[3] to rights of speech or association and the right to political participation. Three ICCPR provisions, however, are particularly pertinent to the discussion in this section of autonomy regimes: Article 1 on self-determination, the subject of Section A; Article 25 on political participation, discussed at pp. 661–72, *supra*; and Article 27, discussed in the Comment below.

1. ETHNIC MINORITIES

The following materials concern minority groups that are typically ethnic, racial, religious, linguistic, or national origin in character. The text below uses the term 'ethnic' as a shorthand reference to all such minorities, whatever their

[3] See, for an earlier illustration in a minority regime after World War I, the advisory opinion of the Permanent Court of International Justice in Minority Schools in Albania, p. 89, *supra*.

distinctive characteristic. Hence that term embraces groups as diverse as Muslims of North African background in France, blacks and Jews in the United States, Gypsies in Hungary, Kurds in Iraq or Turkey, Russians in Georgia, Tamils in Sri Lanka, Copts in Egypt, and Turks in Germany. Frequently these ethnic minorities bear two or more of the defining characteristics, such as Basques in Spain, the Francophone population in Canada, or Palestinians in Israel.

To characterize a group within a state as a minority tells us little about its political, economic or cultural situation. Relations with a dominant majority or with other minority groups may be amicable or hostile. The minority may be well integrated, indeed moving towards a voluntary assimilation, or may be both rejected by dominant groups and intent on maintaining its own distinctive character. The differences in religion, culture and so on between majority and minority may be formal and inconsequential, or dramatic and involving basic world-views.

Two world wars, and many savage conflicts during the last half century of the human rights movement, have made evident the ways in which ethnic conflicts deeply affect international politics. Third-party countries become involved in such conflicts, particularly when their co-religionists or other groups with which they identify are involved—India in Sri Lanka, Turkey and Greece in Cyprus, several Muslim states in Bosnia, and so on. Conflicts spill across frontiers, as the violence in the Former Yugoslavia continues to threaten to do. Refugee flows involve other countries in serious ways. Universal or regional security systems observe and sometimes act, effectively or ineffectively. Hence steps to alleviate tensions between ethnic minorities and a state, or among such minorities, and to assure a necessary minimum of protection for minorities, would contribute not only to the well being of countless individuals but also to international peace and stability.

These materials are concerned with the degree to which, and the ways in which, minority issues have become 'internationalized'—that is, are now subject to regulation by international law and particularly by human rights norms. What indeed are 'minorities' within the discourse of international law? No authoritative instrument like a treaty or declaration imposes a definition. Hence the term remains to some degree politically disputed, a subject of debate among scholars, spokespersons for minorities or indigenous peoples, and governments. There appears to be a consensus over two broad parts of a definition, sometimes expressed in terms of objective and subjective criteria. *Objectively*, the group at issue must constitute a non-dominant minority of the population (usually a relatively small percentage of the population, even if a substantial number of people), and its members must share distinctive characteristics such as race, religion or language. Some of those characteristics will be natural, immutable; others (subject to cultural constraints) may be open to change. *Subjectively*, (most) members of this group must hold or evidence a sense of belonging to the group, and evidence the desire to continue as a distinctive group. (See discussions in the Reports of Asbjorn Eide, fn. 8, p. 1004, *infra*.)

One caveat should be noted. These materials are concerned only with the universal human rights system. Minority issues have figured as well in regional settings, particularly within the system of the Council of Europe. In some respects, the instruments growing out of Europe—particularly through the processes of the Conference on Security and Cooperation in Europe—are bolder than the analogoues instruments within the UN, in term of both their norms and institutional development. The problems are most intense in a global setting, where profound differences among groups, cultures and political systems burden the task of developing common standards.

ROSALYN HIGGINS, COMMENTS

in Catherine Brölmann, R. Lefeber & M. Zieck (eds.), Peoples and Minorities in International Law 29 (1993), at 30.

[Higgins contends that 'it is one of the great myths that the UN Charter provided for and required self-determination in the form in which it evolved.' The concept developed in ways 'quite *un*intended' by the Charter, whose Articles 1(2) and 55 referred in context only to 'rights of the peoples of one state to be protected from interference by other states or governments.' But ideas develop, and the growing identification of self-determination with independence from colonial rule 'has long since been regarded on all sides as legitimate and desirable.'

Higgins then inquires into what the concept has come to mean since the 1960 Declaration on Colonial Independence, p. 973, *supra*.]

. . . Can terms be invoked to mean whatever the user finds it convenient for them to mean? I am aware that I here approach the dangerous waters of linguistics and the current controversies on deconstructionism. My position is that I believe that legal ideas develop, and that that is proper. But that is not to say that they can mean simply whatever those using them want them to mean. The degree of change from a given normative understanding, that we should as lawyers tolerate, must depend in large part upon the policy implications.

. . .

. . . The concept of the self-determination of peoples requires us to answer not only what self-determination means, but the 'peoples' to whom it applies. Minority rights are the rights held by minorities. . . . But the right of self-determination is the right of *peoples*. The Political Covenant gives entirely discrete rights to minorities on the one hand (minority rights, as elaborated in Article 27) and to peoples (self-determination rights, as provided in Article 1). One cannot—though many today try, lawyers as well as politicians—assert that minorities are *peoples* and that therefore minorities are entitled to the right of

self-determination. This is simply to ignore the fact that the Political Covenant provides for two discrete rights. It also, more insidiously, denies the right of self-determination to those to whom it was guaranteed—the peoples of a state *in their entirety*.

. . .

It follows that international law provides no right of secession, in the name of self-determination, to minorities. . . .

Quebec has no legal right to secede on the alleged ground that it is composed of a linguistic minority within a state in which the majority are of a different linguistic grouping. Francophone Quebecois *are*, of course, fully entitled to use their own language. . . . Croatia and Bosnia–Hercegovina had no automatic legal right to secede by invocation of a right of self-determination of ethnic or religious groups who formed a minority in the larger federal state of Yugoslavia. The perceived need of secession is understandable when minorities are denied their rights as minorities or where they cannot participate, as part of the entire peoples of a country, in the political and economic life of the country. But I am less sure . . . that even this entails a legal right to secession, in contra-distinction to a compelling political imperative. Where I certainly agree . . . is that, even if international law does not authorize secession, it will eventually recognise the reality once it has occurred and been made effective.

. . .

So I return to the importance of using concepts with some care. Looking at the ideas behind this current battle of the words, I am of course very aware that there are those who use the armoury of words in full knowledge of what they do. What, they ask, is wrong with secession/self-determination for every minority that wants it? Why shouldn't this be their right? And what is so wrong with the prospect of a world of two thousand states? I can only give my own answer. . . . There is, quite simply, no end to the disintegrative processes that are encouraged. The facts relating to Bosnia–Hercegovina bear witness. A majority of its inhabitants favours independence, including 750,000 Croats resident there as well as its 1.9 million Muslim Slavs. But most of its 1.4 million Serbs oppose the republic's independence. And if the regions where 1.4 million Serbs live are, through the use of force by Serbia, integrated into Greater Serbia, within it there will be disenfranchised Muslims—can they then, as a further minority, now in turn secede? And what of the few Croatians who may still live in those areas? And so on, *ad infinitum*.

Because I believe in diversity, and plurality, and tolerance, and mutual respect, I favour multilateralism and multinationalism. The use of force is appalling, indiscriminate barbarity unforgivable. But the move to uninational and unicultural states that constitutes postmodern tribalism is profoundly illiberal. The attempt to legitimate these tendencies by the misapplication of legal terms runs the risk of harming the very values that international law is meant to promote.

COMMENT ON AUTONOMY REGIMES

Forms and Types

Autonomy regimes refer to governmental systems or subsystems within a state that are directed or administered by a minority or its members. They take many forms. Three general types figure in this discussion, each subject to variations that range from strong to weak regimes. In each case, a distinguishing mark of the regime is that it depends on legal authorization—customary, statutory, or constitutional law. In most instances, the state's formal legal system defines the powers and scope of the regime. That is, autonomy regimes are instituted in law, and those governing or administering them exercise a form of governmental power.

The first type, personal law regimes, provides that members of a defined ethnic group (that could include both majority and minority groups) will be governed with respect to matters of personal law—marriage, divorce, adoption, perhaps inheritance, and so on—by a law distinctive to it, usually religious in character. Thus all members of a religious community—Jews, Muslims and members of different Christian communities in Israel; Hindus and Muslims in India—may be subject to a personal law applied by religious courts. Depending on the state, members of such groups may or may not be able to 'opt out' by selecting a nation-wide secular law.

A second type of regime has a territorial organization, and hence is plausible only when the ethnic minority at issue is regionally concentrated—as is true, for example, of the Tamil minority in Sri Lanka or the Kurdish minority in several states. This organization may take the form of component part of a federalism, or of a regional government to which powers have been devolved within a unitary state. The ethnic minority exercises one or another degree of political control over the territory and to that degree governs its own affairs. Self-government including regional elective government can extend to matters ranging from regulation of natural resources or the tax system to control of regional schools. Contemporary illustrations include Catalonia in Spain, or the states in India.

The third type, power-sharing regimes, assures that one or several ethnic groups will benefit from a particular form of participation in governance, in economic activity, or in other fields. Like personal law regimes, it does not demand that the ethnic minority be regionally concentrated. Power sharing can assume many forms. It may affect the composition of the national legislature—for example, through provision that members of an ethnic minority are entitled to elect a stated percentage of legislators through the use of separate voting rolls specific to the minority. It may require approval by a majority of the legislative representatives of a minority group before certain changes—say, a change in constitutional provisions giving the minority group stated protections—can be made. A certain percentage of the civil service, or of the army officer corps, or of cabinet positions may be reserved for

members of the minority. Belgium and Lebanon illustrate relatively successful and failed power-sharing arrangements.

Article 27 of the ICCPR

Article 27 has become the preeminent human rights norm for discussion of rights and protections of minorities and their members. It provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Note several aspects of this provision: (1) It refers to 'minorities' rather than, as in ICCPR Article 1, to 'peoples.' (2) It protects 'persons belonging to' minorities rather than the minorities themselves. (3) Nonetheless, the right is to be exercised 'in community with the other members' of a minority.

In 1994, the ICCPR Committee on Human Rights adopted *General Comment No. 23 on Article 27 of the Covenant*.[4] A summary of several of its provisions follows:

> Para. 3.2: Enjoyment of rights under Article 27 'does not prejudice the sovereignty and territorial integrity of a State party.' Nonetheless, aspects of rights of individuals protected under that article, such as enjoyment of a particular culture, 'may consist of a way of life which is closely associated with territory,' particularly for members of indigenous communities.
>
> Para. 6.1: A state party is 'under an obligation to ensure that the existence and the exercise of [the right declared by Article 27] are protected against their denial or violation. Positive measures of protection are, therefore, required . . . also against the acts' of non-state actors.
>
> Para. 6.2: Although the rights protected are individual, they depend on the ability of the minority group to maintain its culture. 'Accordingly, positive measures by States may also be necessary to protect the identity of a minority' and the rights of its members. Such positive measures must respect the non-discrimination clauses of the Covenant with respect to treatment among minorities and between minorities and the rest of the population. 'However, as long as those measures are aimed at correcting conditions' impairing enjoyment of the guaranteed rights, they may 'constitute a legitimate differentiation . . . [if] based on reasonable and objective criteria.'

[4] CCPR/C/21/Rev. 1/Add.5. 26 April 1994. General Comments are adopted under Article 40(4) of the Covenant. See pp. 522–35, *supra*.

Para. 7: Cultural rights under Article 27 extend to ways of life 'associated with the use of land resources, especially in the case of indigenous peoples. . . . The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.'

Para. 8: None of the protected rights under Article 27 may be exercised 'to an extent inconsistent with the other provisions of the Covenant.'

Autonomy Regimes: Individual or Collective Rights

Most rights declared in the human rights instruments have an individual character. Many of them are at the same time germane, indeed essential, to the formation of groups. Thus the rights to advocacy and association are vital to the organization of interest groups. Moreover, certain rights such as those identified in Article 27 are inherently collective, such as the right of members of minorities to use their own language or practice their own religion. Indeed, Article 27 states that such rights may be exercised 'in community with the other members' of a linguistic, religious or other ethnic group.

Other types of rights that are characteristically expressed in individual terms, such as the right to equal protection in ICCPR Articles 2(1) and 26, also have a group aspect. The prohibited governmental conduct amounts to the disadvantaging of an individual because of that individual's group characteristic or identity. It is the individual's link to the group that provides the very occasion for discrimination. Moreover, the entire group benefits from the protection against discrimination accorded to any one of its members.

What then would be the nature of a 'right' to an autonomy regime? If we assume that such a right exists—say, to extensive regionally concentrated self-government, or to a form of power sharing—it would have a markedly different character even from the individual rights noted above that have some collective or group association. Autonomy rights are unmistakably collective, in the sense that they can be exercised *only* by the group—by its spokespersons or representatives, however they are selected—and cannot be reduced to or expressed through rights of its members. The group itself would have bargained for the arrangements that are confirmed in law for some form of autonomy regime. Officials or official institutions of the group—its clergy, a regional government, an ethnic political party—implement and administer autonomy schemes.

HENRY STEINER, IDEALS AND COUNTER-IDEALS IN THE STRUGGLE OVER AUTONOMY REGIMES FOR MINORITIES

66 Notre Dame L. Rev. 1539 (1991), at 1547.

[This article examines autonomy regimes, in the sense described in the preceding Comment, from the perspective of norms and ideals in the human rights movement. The excerpts below assess such regimes against those ideals as expressed primarily in the Universal Declaration and in the International Covenant on Civil and Political Rights.]

IV. Ideals and Counter-Ideals

. . . We now inquire whether [autonomy] schemes tend to realize vital ideals pervasive to the entire human rights movement, and paradoxically threaten at the same time to subvert those very ideals.

Let us first consider how autonomy schemes reinforce a basic human rights ideal. The Universal Declaration and Civil–Political Rights Covenant accept and, indeed, encourage many forms of diversity. They insist on respect for difference, an insistence expressed only in part through the particular attention given ethnic minorities in article 27. The value placed on the survival (and creation) of diversity in cultural, religious, political, and other terms permeates human rights law, which evidences throughout its hostility to imposed uniformity.

. . .

Other rights declared in basic human rights instruments complement the ideal of equal respect and confirm the value placed on diversity. Everyone has a right to adopt 'a religion or belief of his choice' and has freedom 'either individually or in community with others and in public or private' to manifest belief or religion in practice and teaching. Rights to 'peaceful assembly' and 'freedom of association with others,' in each case qualified by typical grounds for limitation like public order or national security, further commit the human rights movement to the protection of people's ongoing capacity to form, develop, and preserve different types of groups.

We have noted that such provisions of the Universal Declaration and Civil–Political Rights Covenant are expressed in terms of individuals' freedom and choice of action, but that their individual and collective characters are nonetheless inextricably linked. This must be so. Groups and communities, not isolated individuals, transmit culture from one generation to the next. They embody and give significance to cultural and social differences in a society. Hence we see the link between autonomy regimes and an ideal of maintaining diversity. Since those regimes protect, indeed entrench, diversity in group terms, they must constitute an effective means to realize this fundamental human rights ideal.

. . .

By valuing diverse cultural traditions, and by its related protection of groups, human rights law evidences what must be a basic assumption—namely that differences enrich more than endanger the world. They contribute to a fund of human experience on which all individuals and groups can draw in the ongoing processes of change and growth. Ethnic groups nourish that fund. The diversity that they supply endows a society with different histories, experiences, beliefs, ideals, arts, and cultures. The survival of distinctive characteristics of ethnic minorities guards against the trend toward homogenization that has accompanied Western development, technology, and material prosperity, and Western influence on the rest of the world. Autonomy regimes of ethnic minorities defend cultural survival rights in counteracting this trend. In given contexts, they may be useful or essential to the preservation of a culture.

. . .

. . . The ideal in the human rights movement of preserving difference cannot [however] so readily be bent to support the creation of autonomy regimes. To the contrary, a further elaboration of that ideal prompts a deep criticism of such regimes and their fragmenting effects.

Consider at the outset the relation of autonomy schemes to the norm of equal protection. We noted earlier that these schemes in some ways complement one purpose of a nondiscrimination norm of preserving differences. Institutionalized separateness, however, also violates the spirit and perhaps the letter of that norm.

A state must give all its citizens equal protection. Power-sharing schemes proceed on a contradictory premise. They are cast in ethnic terms (group X is assured of x% of the legislature or cabinet or judiciary or military, group Y of y%) and thus explicitly discriminate among groups on grounds like religion, language, race or national origin. Separate voting rolls or application forms for civil service positions drive home the lesson that socioeconomic life and career turn on ethnic bonds. Separate personal laws for each religious community, particularly if enforced within a mandatory assignment system permitting no escape by community members to a nationwide secular law, dramatize citizens' particular rather than shared characteristics.[5]

[5] A contrast can be drawn with school racial segregation in the United States. That system compulsorily separated blacks from whites, and amounted to a form of autonomy regime instituted and enforced by the state (by component states within the American federal system). Black citizens were given no choice, and the compulsory character of school segregation was important to the decisions of the Supreme Court finding it unconstitutional. Autonomy regimes considered in this Article differ. They generally stem from negotiations between the central government and minority groups, or negotiations directly between such groups. The resulting accommodations are then ratified in law. Nonetheless, even assuming that a rigorous standard of free and voluntary choice were met by the processes leading to agreement over a scheme, the fact remains that differences among ethnic groups expressed in autonomy regimes are institutionalized and enforced both by central government and by ethnic communities. The concept of equal protection/ nondiscrimination must at least be qualified to justify such regimes. Quite clearly, all are not treated the same, different treatment stemming from ethnic identity.

. . .

To a lesser or greater degree, autonomy schemes frustrate a major objective of the human rights movement of assuring that societies remain open to challenge and change. That movement institutionalizes no one ideal of social order. To the contrary, it explicitly allows for many faiths and ideologies while denying to any one among them the right or power to impose itself by force. It expresses a humanistic commitment to ongoing inquiry and diversity. . . . It denies governments the right to close avenues of reflection, criticism, advocacy, and innovation in order to impose any orthodoxy. To the extent that autonomy regimes protect historical differences but inhibit the creation, as it were, of fresh differences, they would convert the human rights movement's framework of protection of open inquiry and advocacy into the protection of static traditions. A state composed of segregated autonomy regimes would resemble more a museum of social and cultural antiquities than any human rights ideal.

. . .

Two deep characteristics of human rights law are here relevant. The first characteristic involves the relation between groups and individuals. Communities have a right to guard their own integrity, but only within the constraints imposed by human rights norms on governments' treatment of individuals, including the equal respect due to all members of a society. The central government of a state must respect individual conscience and choice. So then must ethnic communities within a state when they exercise (constitutionally based or statutorily delegated) governmental power over their members by applying a personal law or exercising a territorial authority or administering a power-sharing scheme in the central government.

In wielding governmental power, ethnic minorities may violate human rights norms in numerous ways—for example, by discriminating among their members on grounds forbidden by those norms, except to the extent that disadvantaged members can be understood to 'accept' the discriminatory treatment as part of their cultural tradition.[6] Within practical and cultural constraints, which may indeed be so deep and powerful as to block individuals from exercising any choice, all persons should be seen as empowered by

[6] I make this point boldly to set forth the argument clearly, but recognize that it raises many complex questions and, while vital, must be qualified. A group's treatment of its own members within an autonomy regime poses issues about cultural relativism and universalism in human rights norms, and about the degree to which cultural survival for many communities may be understood to require practices violating human rights instruments—practices like gender discrimination or government by a nonelected leadership. The notion of members' 'acceptance' of practices like discrimination or severe forms of punishment is itself problematic: what kind of acceptance, in what, if any, context of choice or even knowledge of alternative social arrangements? The notion of 'disadvantaged' members may itself be problematic, as a concept drawn from an alien political and moral framework. See the discussion of some of these issues in Minow, Putting Up and Putting Down: Tolerance Reconsidered, in Comparative Constitutional Federalism: Europe and America 77, 88–94 (M. Tushnet ed. 1990)

human rights norms to decide whether to remain on one side of a cultural boundary, to shift to another side, or to seek a life not committed to one or the other community.

A second characteristic of human rights law pointing toward open boundaries within a state concentrates on the polity as a whole rather than on individuals. Strong ethnic consciousness and concentration may stamp out the desire or even capacity for broader political or cultural associations. Formal legal barriers reinforce the natural tendencies of a group's members to look inward and assume only a particular identity, rather than to experience the tension between the particular and a more diffuse or broader identity as a citizen or human being.

As the sense of a common humanity weakens, alliances among people that shatter ethnic boundaries become more unlikely. Polyethnic political formations resting on generic interests like economic class or political ideology will confront decisive obstacles. Demonization of 'the other' may become part of an ethnic group's credo and stamp out the possibility of developing empathy for others. Such extreme manifestations of ethnic bonds will become the cardinal obstacle to a human rights consciousness, at least with respect to attitudes of members of the ethnic group toward 'the other.' Enforced ethnic separation both inhibits intercourse among groups, and creative development within the isolated communities themselves. It impoverishes cultures and peoples.

The distinctions between the ideals or pictures of social life that inhere in the human rights movement as a whole and those that point toward autonomy regimes can be stated with different degrees of contrast. Much turns on the strength and exclusivity of the autonomy regimes. For example, advocates of these regimes may argue that the inclusive ideals of the human rights movement are ultimately desirable for a state, but that autonomy is necessary for a transitional period. Such an argument may be based on circumstances of necessity, such as the incidence of violence described below, or on the view that some degree of autonomy is essential for maintenance of the group's culture against the onslaught of the modern state. On the other hand, those advocates may decisively reject human rights ideals as alien and evil since they risk the subversion from within or without of a religious or other tradition that binds a community together.

Autonomy regimes differ in other salient ways. The regime may involve relatively slight group differentiation and barely affect outsiders (a personal, religious law of marriage and divorce), or it may separate groups with respect to political matters of vital significance for all members of the polity (separate voting rolls, quotas, and so on). Within a federal state, an autonomy scheme for a geographically concentrated ethnic minority may grant that minority modest self-government and retain vital powers for the central government, or grant it extensive powers that border on self-rule. Those administering an autonomy regime may invite popular participation or may subject a population to decision-making powers of, say, religious officials.

For purposes of clarity and emphasis, the following list of ideals or pictures of social life bypasses these important distinctions, assumes strong and exclusive autonomy regimes, and hence states the differences in terms of stark contradictions.

Human Rights Ideals and Pictures of Social Life	*Strong Autonomy Regime Ideals and Pictures of Social Life*
Self and others, intercourse with strangers	Self vs. others, avoid strangers
Ethnic identity in tension with human identity and potential	Ethnic identity as total identity
Relevance of both particular and universal identity	Stress on the particular, what is exclusive rather than shared
Open, pluralism of spirit	Closed, separate lives within boundaries
Learn from own tradition and from others	Learning only within own tradition
Forward looking, potential for change in cultural tradition	History (myth) looking, stability-oriented
Attention to individual choice in affiliation with ethnic group	Affiliation as identity, a given that is not subject to individual choice

V. The Need for Autonomy Regimes

One way of testing the preceding observations is to inquire whether justifications as deep as those supporting, for example, rights to personal security or freedoms of conscience or expression, also support autonomy schemes for ethnic minorities. Can the same broad consensus among many political traditions and religions be identified with respect to 'rights' to separate regimes for different ethnic groups within the modern state? Or, on the other hand, are autonomy arrangements better understood as contingent, perhaps contextually necessary, ways to achieve desired ends such as peaceful coexistence rather than as ends that are valued in and of themselves?

The question raised is whether autonomy regimes express respect for difference or express despair over the possibility that diverse peoples can live with difference. Their widespread use in diverse countries and their potential effectiveness in realizing important goals indicate that these arrangements, if not ideal, are not anathema. They may rest on genuine acceptance by all affected communities. They may grow out of concrete and agonizing histories, frequently involving authoritarian and abusive rule over a minority that has been denied a fair share of power, resources, and opportunities. Often the product of negotiations between hostile communities seeking to contain discord that

may have led to violence, they appear to be justified in such circumstances as the best available solution to otherwise unyielding problems.

Separation of ethnic communities through power-sharing arrangements, regional governments, and personal laws may then constitute a practical necessity, a 'least worst' solution that is surely preferable to ongoing violence and systemic oppression. The solutions that they bring to ethnic conflict may improve chances for pacific co-existence and provide the only realistic alternative not only to continuing oppression, but to a split of the contending ethnic groups into two states. Internal self-determination through autonomy schemes may blunt a minority's demands for external self-determination.

The distinction that I have drawn is a vital one: recognizing that autonomy regimes in given contexts may be preferable to other arrangements, or alternately characterizing autonomy regimes as a 'right' to be declared in international norms. The rhetoric of rights legitimates claims and mobilizes support for groups demanding autonomy. That rhetoric empowers and encourages. It goes beyond the welfare maximizing, contextual justification for autonomy regimes as 'least worst' solutions to pressing situations.

. . .

Despite these problems, the argument for recognizing in certain circumstances the justice or legitimacy of minority claims for some form of autonomy regime deserves support. The high incidence of ethnic conflicts and the particular dangers that they pose for the ethnic minorities require that the United Nations and regional institutions examine the possibility of international regulation. International attention to the systemic, structural aspects of ethnic conflict must be given a chance to show what it is capable of achieving, including achievement through the development of international law in this field. Given the reluctance of a government to support the development of international law principles favorable to autonomy schemes that may be relied on by dissident ethnic groups in its own state, or its reluctance to intervene in ethnic conflicts in foreign state and thereby risk others' intervention in its own internal disputes, the effort to achieve progress at the start through a United Nations declaration confronts dramatic obstacles.[7] But the effort must be made.

. . .

[7] It should be borne in mind that international regulation of ethnic minority claims for some form of autonomy would represent an important, but not a dramatically different, kind of 'intervention' into a state's affairs. The entire human rights movement amounts to such an 'intervention,' as demonstrated by the broad recognition of how deeply that movement has eroded the concept of domestic jurisdiction. All human rights influence the distribution and exercise of power in a country, from the prohibition of torture (limiting the means that a government can use to suppress opposition) to the vote (which, if freely exercised by all, would radically transform government and economy in many states).

NOTE

Consider the following observations of Claude Lévi-Strauss in *Race and History* (1958), at 12. Rather than view the diversity of cultures as a 'natural phenomenon,' people 'have tended rather to regard diversity as something abnormal or outrageous.' to the point of rejecting 'out of hand the cultural institutions . . . which are furthest removed from those with which we identify ourselves.' One sees 'crude reactions,' 'instinctive antipathy,' 'repugnance' toward ways of life or beliefs to which we are unaccustomed and which we term 'barbarous.'

Nonetheless, collaboration between cultures has been the key to achievement. The greater achievements stem not from 'isolated' cultures but from those which have 'combined their play' through such means as migration, borrowing, trade or warfare. 'For, if a culture were left to its own resources, it could never hope to be "superior".' Indeed, the greater the diversity between the cultures concerned, the 'more fruitful' such a 'coalition of cultures' will be.

Lévi-Strauss turns to a problem stemming from his preceding observations, that of cultural uniformity. He proposes some solutions to it, but emphasizes that he is describing a process that is inherently 'contradictory.' That is, progress requires collaboration among cultures, but 'in the course of their collaboration, the differences in their contributions will gradually be evened out, although collaboration was originally necessary and advantageous simply because of these differences.' To this contradiction he finds no clear solution. He stresses that

> man must, no doubt, guard against the blind particularism which would restrict the dignity of humankind to a single race, culture or society; but he must never forget, on the other hand, that no section of humanity has succeeded in finding universally applicable formulas; and that it is impossible to imagine mankind pursuing a single way of life for, in such a case, mankind would be ossified.

The currents toward both unification and diversity are essential. One must preserve diversity as such, diversity itself, the idea and substance of it, rather than any one historically realized form. One must look for 'stirrings of new life, foster latent potentialities,' and see each form of diversity as 'contributions to the fullness of all the others.'

* * * * *

A proposal in 1978 for commencing work in the UN Commission on Human Rights on a declaration on minorities and their members initiated a 14-year process that came to fruition in 1992 with the adoption of the declaration by the General Assembly. It is a supreme irony that the Government of Yugoslavia, a country in dissolution in 1992 when gripped by

an intensifying violence among its ethnic groups, was the author of the original proposal.

As initially introduced, the draft concerned the 'rights of national, ethnic, linguistic and religious minorities.' A later draft referred to the 'rights of persons belonging to' such minorities. The tension between these two formulations of the project, with their significantly different implications, continued until the end. Successive drafts postponed a decision by indicating uncertainty through the use of brackets in phrases like, '[persons belonging to] minorities have the right to' establish associations, and so on. Ultimately, in the great majority of the articles, the brackets themselves rather than the bracketed phrases were deleted. That decision in the Commission led to the title of the declaration that introduces the following reading.

DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS OR LINGUISTIC MINORITIES

GA Res. 47/135, 18 December 1992.

The General Assembly

. . .

Inspired by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious or linguistic minorities,

Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,

Emphasizing that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States,

Considering that the United Nations has an important role to play regarding the protection of minorities,

. . .

Proclaims this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

4. Persons belonging to minorities have the right to establish and maintain their own associations.

5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 3

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.

2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration.

Article 4

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Article 5

1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

. . .

Article 8

. . .

2. The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.

3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

4. Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

. . .

NOTE

Consider the clauses in the Declaration on Minorities that refer to 'participation.' Article 2(2) provides that '[p]ersons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.' Article 2(3) gives such persons the right 'to participate effectively' in national or regional decisions concerning the minority, 'in a manner not incompatible with national legislation.' Under Article 4(5), states are to consider 'appropriate measures' so that such persons 'may participate fully in the economic progress and development in their country.'

In a report submitted to the UN Sub-commission (of the UN Commission) on Prevention of Discrimination and Protection of Minorities, Asbjørn Eide[8] states (para. 17) that members of minorities must be given 'opportunities for effective participation in the political organs of society,' but 'no single formula exists which is appropriate to all minority situations.' He suggests the exploration of various options, including the representation of minorities on advisory and decision-making bodies in fields like religion, education or cultural activities; self-administration ('functional autonomies') by the minority on matters essential to its particular identity such as development of language or religious rituals; local forms of self-government 'on a territorial and democratic basis;' and measures to assure representation of minorities in national legislatures 'even when their numerical strength is too small to have representation under normal conditions.'

In his comments on Article 2 of the Declaration on Minorities, Patrick Thornberry[9] notes that in the drafting process, the phrase 'public life' in para. 2 was preferred to 'political life;' some believed that it was a more comprehensive term. He suggests that 'effective participation' can involve the creation of ethnic associations as well as political parties, and that doctrine will 'probably move in the direction of greater decentralization, toward levels of government appropriate to continuing "effective" involvement. . . . No specific formula is mandated by the Declaration.' Thornberry emphasizes that the principle of participation 'has the advantage of turning the face of the minority to the general society, and represents an inclusive and not a separating concept.'

QUESTIONS

1. The preamble to the Declaration on Minorities states that it was 'inspired' by Article 27. Compare the Declaration and article.

   a. As a spokesperson of a minority, does the Declaration strengthen your hand (relative to your relying on Article 27 alone) in advancing claims of right for the minority or claims for protection of the minority by the state? For example, does it better support a claim for an autonomy regime that would assure the minority of, say, 20% of the seats in a national legislature, or of extensive self-government in the region where the minority is concentrated? Does it better support a claim for financial support by the state for a minority's religious schools or for cultural activities like theatre, art or music?

   b. Does the Declaration rely explicitly or implicitly on the right of peoples to self-determination or on the individual right to political participation in order to support its provisions? If so, how?

[8] Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities: Recommendations. E/CN.4/Sub.2/1993/34/Add.4. 11 August 1993. Eide submitted several reports including valuable descriptions and analysis. See, *eg*, E/CN.4/Sub.2/1993/34. 10 August 1993.

[9] The UN Declaration on Rights of Persons Belonging to Minorities, in Alan Phillips and A. Rosas (eds.). The UN Minority Rights Declaration 11, 41 (1993).

c. 'The Declaration was unnecessary. The problem lies in persuading states to observe the rights of individuals (including of course members of minorities under Article 27) that are stated so fully in the basic human rights instruments. If individual rights were honored, minorities would have no legitimate or defensible claim to further and special protection under international law.' Comment.

d. 'Individual rights take the form of the abstract and universal. Collective rights take the form of the concrete and local. To reach the goals of cultural survival and preservation of differences, collective rights are essential. Article 27 goes only half way toward meeting that goal, and is patently inadequate.' Comment.

2. 'It is said that the UN bodies drafting and adopting the Declaration, by repetition of the phrase "persons belonging to minorities," purged the Declaration of any recognition of collective rights or interests. Minorities are present only through their members, not as communities or collectivities in their own right. This is a mistaken view. The Declaration is instinct with the notion of group protection, group identity, group cultural survival, group association, group participation. Given the obvious political constraints on the drafting of the Declaration, it went as far in this direction as it could possibly go.' Comment, indicating what you believe the 'obvious political constraints' to be.

3. How do you react to Steiner's assessment of autonomy regimes for ethnic minorities? Would you support, say, a supplementary declaration or convention that would to some extent authorize such regimes? If, as Steiner suggests, 'rights language' is not an appropriate way to express arguments in favor of such regimes, what alternative language would you propose for an instrument that went beyond the provisions of the Declaration on Minorities?

4. Power-sharing arrangements are not necessarily restricted to ethnic groups. Recall the materials in Chapter 13 (p. 961) on political participation of women, and the provisions and proposals in several states for allocating to women stated percentages of seats in, say, a local or national legislative body. Would you view such proposals more or less favorably than the same form of power sharing for an ethnic minority?

5. 'Autonomy regimes (such as local government within a federalism, or a personal law regime governing marriage and divorce) should be accepted as legitimate within the Declaration on Minorities, or accepted by human rights law in general, only if they observe basic human rights, including popular participation in the formation of local government, freedoms of expression and association, and non-discrimination norms.'

a. The minority might deny this assertion and claim the right to follow its own traditions, practices, and norms within its field of self-government, even if they departed from some human rights standards. It might claim that the very

purpose of an autonomy regime is to permit the minority to preserve its cultural identity that by definition differs from the state's majority culture. How do you assess such arguments?

b. Would you distinguish among different kinds of 'departures' by autonomy regimes from universal human rights norms, some being acceptable and others not? What would be the basis of the distinction?

c. 'To be considered legitimate and consistent with the human rights norms, an autonomy regime that internally practices, say, gender discrimination in family and political life, or that imposes punishment after criminal conviction that would be found to violate Article 7 of the ICCPR ("cruel, inhuman or degrading" punishment), should put such practices to a vote by the minority community.' Comment.

6. As a member of the UN Commission concerned about ethnic minorities, what steps might you urge the Commission to take in relation to the Declaration on Minorities—for example, steps related to implementation of the Declaration's provisions, or to monitoring of dangerous situations involving minorities, or to efforts to arrest growing ethnic violence?

ADDITIONAL READING

In addition to the sources noted in this section, see Francesco Capotorti, *Study on the Rights of Persons Belonging To Ethnic, Religious and Linguistic Minorities* (1979); Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1990); Donald Horowitz, *Ethnic Groups in Conflict* (1985); Patrick Thornberry, *International Law and the Rights of Minorities* (1991).

2. INDIGENOUS PEOPLES

COMMENT ON RIGHTS OF INDIGENOUS PEOPLES UNDER INTERNATIONAL LAW

As these materials use the term, *indigenous peoples* include the native tribes of the Americas, as well as non-dominant groups in other parts of the world that are culturally distinctive and distanced in significant ways from state governments and state political activity as well as from the modern economy—groups ranging from tribal peoples in India or Sri Lanka to Australian aboriginal communities. Although no authoritative text defines indigenous peoples, the term is usually thought to refer to communities or nations having an important historical continuity with societies that inhabited the same

general territory and that predated colonization or invasion by other peoples. We are here concerned with such peoples who seek to preserve their ethnic and cultural identity, often through preservation of ancestral territory, and to continue as distinctive communities with their own social and legal institutions. These characteristics include both the 'objective' and 'subjective' criteria referred to above in the discussion of minorities.

The history of indigenous peoples has universally included exploitation by other groups, often in the form of harsh colonization, and generally involving one or another degree of dispossession from hereditary lands and destruction of native culture. Such peoples—referred to in different cultures or states in different ways, including Indians, nations, aboriginals, natives, tribes or bands—have long been plagued by the sense of inferiority imposed upon them by the dominant culture. They have rarely participated in a serious way in governance or decision-making in their states of residence on matters of vital significance for them. They have generally gained little from the economic development of those states. The centuries-long struggle in the Western Hemisphere between such peoples and the states in which they live forms part of a well-known history.

This Comment traces recent developments that have tended to 'internationalize' these struggles around the world.[10] In that sense, it is parallel to the discussion in Section (B)1 about ethnic minorities, ICCPR Article 27 and the Declaration on Minorities.

During and following the period of colonization of the Americas, international law justified in many respects the conduct (civilizing mission) of the European states, effectively legitimating colonization and subjugation while demeaning the culture, religious beliefs and achievements of the conquered or hostile native peoples. Civilization and Christianity stood against paganism and barbarism. Although these beliefs and doctrines were moderated, indigenous peoples did not start to become a significant protected category under international law until the start of the human rights movement. Progress was slow, and only in the last decade has the human rights movement acted vigorously to recognize the interests of indigenous peoples. In the process, international law has given increased recognition to indigenous peoples as distinctive communities meriting a special international-law regime distinct from both the general regime of individual rights and the regime for minorities and members thereof discussed in Section B(1). One commentator[11] describes the struggle of indigenous peoples for recognition of their right to self-determination, which would establish that they are

[10] Some information in this Comment is drawn from Robert Coulter, Commentary on the UN Draft Declaration on the Rights of Indigenous Peoples, Cult. Surviv. Q. 37 (Spring 1994); and from Stephan Marquardt, International Law and Indigenous Peoples, 3 Int. J. Group Rts. 47 (1995).

[11] Russel Barsh, Indigenous Peoples in the 1990s: From Object to Subject of International Law?, 7 Harv. Hum. Rts. J. 33, 35 (1994).

> members of the international community who have legal personality under international law—'subjects' of international legal rights and duties rather than mere 'objects' of international concern. Although most United Nations Member States shrink fearfully from explicit references to 'peoples' and 'self-determination' in United Nations documents relating to indigenous peoples, the legal status . . . is changing incrementally, in deed if not always in word.

There now exist two binding universal instruments dealing specifically with indigenous peoples. A 1957 International Labor Organization (ILO) Convention No. 107, concerned with 'protection and integration' of indigenous 'populations' in independent states, was subjected to increasing criticism over the years because of its integrationist—most would say, assimilationist—approach to the issue of indigenous peoples. Many indigenous groups came to view the convention as paternalist in character, and as implicitly assuming the cultural inferiority of indigenous communities. Pressure grew for its revision. Cultural integrity, autonomy and survival displaced integration as a major goal.

ILO Convention No. 169, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, became effective in 1991 and, as of January 1995, had seven states parties. It partially revises Convention No. 107, which however remains effective to the extent that its parties do not ratify the new convention. There was much dispute over use of the term 'peoples,' as a result of which Article 1 states that use of that term 'shall not be construed as having any implication as regards the rights which may attach to the term under international law.'

ILO Convention No. 169 takes a different route in imposing obligations on states to protect the recognized rights of indigenous peoples and to protect their social, cultural, religious and spiritual values. Relative to the Draft Declaration referred to below, it takes an important step but a short one. The few duties imposed on governments include duties of consultation rather than, say, duties to obtain consent of indigenous peoples before enacting certain measures. The Convention does not indicate the means or forms of participation by indigenous peoples in national decision-making. It gives no effective rights of autonomy.

Over the last decade a Draft Declaration on the Rights of Indigenous Peoples has been prepared within the UN System. In 1995, it came before the UN Commission on Human Rights for consideration. Work on the Declaration by Indian and other native leaders from the Americas began in 1977. In 1982 the UN created a Working Group on Indigenous Populations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, a body subordinate to the UN Commission and, unlike that Commission, consisting of independent expert members.

The Working Group started drafting a declaration in 1985. It consisted of five Sub-Commission members from different regions. Under its influential chairperson Erica-Irene A. Daes, it became the pre-eminent forum for discus-

sion of issues relating to indigenous peoples and for proposals for UN action. At its 1993 session (held in Geneva at the same time as the annual meeting of the Sub-Commission), over 600 persons attended as observers—principally indigenous leaders and representatives of about 125 peoples and organizations from all parts of the world, and experienced human rights NGOs and experts. Many indigenous groups held their own annual meetings in Geneva to develop proposals for the Declaration and draft language that they submitted to the Working Group. The annual August meetings of the Working Group were considered among the most broadly participatory in the entire UN system.

Note that this process did not formally involve state governments, although representatives of several governments attended the annual meetings as observers and commented like the NGOs on the developing draft. Many leading states did not so participate.

The Draft Declaration was agreed upon by the Members of the Working Group and was submitted to the UN Sub-Commission, which adopted the draft and submitted it in 1994 in the same form to the UN Commission on Human Rights for its consideration. The matter is likely to remain before the Commission, a body of governmental representatives, for several years. By Resolution 1995/32, 3 March 1995, the Commission created an open-ended inter-sessional working group 'with the sole purpose of elaborating a draft declaration,' considering the draft submitted to it by the Sub-Commission.

Recall the journey (starting in this instance with the Sub-Commission's working group) with many stops that is traced at p. 120, *supra*, for declarations or draft conventions within the UN system. At each stop there may be amendments: Commission to ECOSOC to the General Assembly for adoption by that body. Recall also that a number of declarations adopted by the General Assembly have been followed by the preparation within the UN of draft conventions on the same subject that, after adoption by the Assembly, have been submitted to states for ratification.

NOTE

Why should indigenous peoples not come within the category of minorities, so that Article 27 and the Declaration on Minorities would constitute the formal protection of such peoples by international law? Representatives of indigenous peoples have long resisted that classification. Consider the following observations:[12]

> . . . The fact that the rights of minorities and the rights of indigenous peoples are the object of separate international documents strongly suggests that under international law—at least *de lege ferenda*—, indigenous peoples are to be distinguished from minorities.

[12] Stephan Marquardt in n. 10 *supra*, *op. cit.*, at 70.

From a legal point of view, this position can further be supported with reference to the different types of rights pertaining to minorities and indigenous peoples respectively, as illustrated by the applicable international instruments. . . .

In contrast, the rights of indigenous peoples as expressed in the Draft Declaration are primarily collective by nature, although they may also have an individual component. These rights may in principle only be exercised by a 'people', i.e. by a collective entity, and not by individual persons. . . . The recognition of collective rights appears necessary for the protection of those characteristics forming a people's identity, i.e. those features pertaining to a people as a whole. The mere protection of individual rights would not be sufficient to protect such features. Accordingly, the Draft Declaration expressly provides for a number of collective rights of indigenous peoples. . . .

Even if collective rights of minorities were to be recognized, it is submitted here that indigenous peoples are still to be distinguished from minorities under international law.

Art. 27 of the ICCPR refers to ethnic, religious and linguistic minorities and the Declaration on Minorities makes an additional reference to national minorities. These qualifications indicate that minorities are characterized by elements which do not encompass all of the characteristics of indigenous peoples. A common ethnic origin, religion or language are in many cases the only elements which distinguish a minority group from the majority of the population in a given State. Many minorities are to greater or lesser degrees integrated into the population of the State in which they live and do not object to be treated as national citizens. As reflected in the rights protected under the Declaration on Minorities, minorities often seek only to practice their own religion, language or culture. . . .

Most indigenous peoples, by contrast, constitute distinct entities within the States in which they live. The essential element which distinguishes them from minorities is their ancestral, 'pre-colonial' link to the territory, which is not the case for most minorities. Furthermore, indigenous peoples in most cases seek some form of political autonomy on the ground of their separate identity. These differences may be seen in the U.S.A. and Canada, where Indian (and Inuit) peoples all have a certain degree of autonomy in the form of limited self-governing powers. Most Indian and Inuit peoples also categorically reject classification as Canadian or US citizens and claim their own nationality.

Compare the following comments of Rosalyn Higgins[13], which immediately follow her argument that minorities should not be considered 'peoples' within ICCPR Article 1 and are not therefore entitled to self-determination, which is a group rather than individual right.

[13] Minority Rights: Discrepancies and Divergencies between the International Covenant and the Council of Europe System, in Rick Lawson and M. de Blois (eds.), The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers 195, 198 (Vol. III, 1994).

Two caveats may be entered. The first is that there is today an increasingly stated view that, exceptionally, minorities may be entitled to secede if their oppression is of a duration and magnitude that they are suffering gross violations with no prospect of relief or remedy. The second is that there is a developing tendency to grant certain rights, increasingly referred to as self-determination rights, to indigenous peoples. Indigenous peoples see their status as other than minorities in their own land. They are 'first peoples' and often have a culture and rights closely associated with the land. The UN Draft Declaration on Indigenous Rights provides that indigenous peoples have the right to autonomy in respect of a variety of functions traditionally reserved to State structures. A Convention on Indigenous Rights is being prepared but is still some way off: but the concept of autonomy for this special group appears to be gaining ground.

UN DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

UN Doc. E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994.

[The Preamble anticipates many themes of the Declaration's articles. A few of its distinctive clauses state that 'all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind;' that doctrines advocating superiority of peoples or individuals on the basis of racial, religious, ethnic or cultural differences 'are racist, scientifically false, legally invalid, morally condemnable and socially unjust;' and that 'respect for indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.' Excerpts from the Draft Declaration follow:]

. . .

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

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

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal

systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

. . .

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.

. . .

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

. . .

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies

and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

. . .

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

. . .

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

. . .

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. . . .

. . .

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

. . .

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

. . .

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

. . .

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

. . .

QUESTIONS

1. ILO Convention No. 107 of 1957 referred to 'indigenous *populations*.' The Draft Declaration was prepared by a Working Group on Indigenous *Populations*. Nonetheless the Draft Declaration uses the term 'indigenous *peoples*.' In what respects is the use of that term significant for the Draft Declaration? Which provisions would you emphasize?

2. Compare the Draft Declaration with the 1992 Declaration on Minorities with respect to the relative significance in each document of collective and individual rights.

a. Which provisions of the Draft Declaration fall within the first category?

b. What significance do you attach to such collective rights? Do you believe that they were essential to realize the goals of the Draft Convention? Why would individual rights alone not have sufficed?

3. 'At this stage, the Draft Declaration is radically different from the 1992 Declaration on Minorities or Article 27, far bolder in its assertion of rights, stronger in the duties that it imposes on states. How much of this contrast will remain after the General Assembly adopts a declaration is another question.' How do you explain why the Draft Declaration is now bolder and stronger? Which of the Draft Declaration's provisions are apt to be subjected to the most critical review?

4. What meaning or meanings—secession and sovereign independence, democratic self-government, autonomy regimes, and so on—does the Draft Declaration (which has no definitive gloss) appear to attribute to the concept of self-determination? Recall the discussion at pp. 974–76, *supra*, of the relevance of the 1970 Declaration on Friendly Relations to the right of a people to secede in its exercise of self-determination. Should the 1970 Declaration be as applicable to indigenous peoples? Does the Draft Declaration take a stand on this issue?

5. Assume that the Draft Declaration is adopted in its present form by the General Assembly. What is the effect of Article 37? Assume, for example, that a state refuses to provide funds for education in their own culture and language of indigenous children living outside their communities. The relevant Indian nation, tribe or band believes that the state has violated Article 15. How would it develop its argument about the state's duty under international law, and where (before what fora) could it advance that argument?

LOVELACE v. CANADA

Communication No. R.6/24/1977, Human Rights Committee
Views of Committee, July 30, 1981
UN Doc. A/36/40, Supp. No. 40, reprinted in 2 Hum. Rts. L. J. 158 (1981).

[Sandra Lovelace, the author of this communication to the ICCPR Human Rights Committee under the Optional Protocol (see pp. 535–52, *supra*), was born in Canada where she had been registered as a Maliseet Indian. In 1970, Lovelace married a non-Indian. As a consequence, she lost her rights and status as an Indian under Section 12(1)(b) of the Canadian Indian Act. That Act provides that if an Indian woman who is a member of a band (such as the Maliseet) marries a person who is not a member, she 'ceases to be a member of that band.' She therefore loses her right to the use and benefits of the land allotted to the band, as well as her right to reside on an Indian reserve. Under the Act, an Indian man who marries a non-Indian woman does not lose Indian status.

Canada became a party to the ICCPR in 1976. Lovelace, who had been divorced and therefore sought to live as of right on a reserve, argued to the ICCPR that the Indian Act discriminated on grounds of sex and violated Articles 2(1), 3, 23(1) and (4), 26 and 27 of the Covenant. Her last claim was

that 'the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity.'

The Canadian Government stressed to the Committee the 'necessity of the Indian Act as an instrument designed to protect the Indian minority in accordance with article 27 of the covenant. . . . Traditionally, patrilineal family relationships were taken into account for determining legal claims.' For this and other reasons,

> legal enactments as from 1869 provided that an Indian woman who married a non-Indian man would lose her status as an Indian. These reasons were still valid. A change in the law could only be sought in consultation with the Indians themselves, who, however, were divided on the issue of equal rights. The Indian community should not be endangered by legislative changes.

Nonetheless, the Government noted its intention to put a reform bill on the issue to Parliament.

Lovelace denied that legal relationships within all Indian families were traditionally patrilineal in nature; her own cultural background was matrilineal. She denied that the Indian Act accurately expressed any prevailing pattern of rule or practice within Indian communities, and requested the Committee to recommend that Canada now amend the provisions in question.

The Committee decided to assess the post-1976 situation of Canada as involving a possible continuing violation of the Covenant in view of Lovelace's inability to reside as of right in an Indian reserve. Of the ICCPR provisions invoked by Lovelace, it considered Article 27 to be 'most directly applicable to this complaint.' Excerpts from the Views of the Committee under Article 5(4) of the Optional Protocol follow:]

14. The rights under article 27 of the Covenant have to be secured to 'persons belonging' to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian legislation . . . Protection under the Indian Act and protection under article 27 of the Covenant . . . have to be distinguished. . . . Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as 'belonging' to this minority and to claim the benefits of article 27 of the Covenant. . . .

15. . . . [I]n the opinion of the Committee the rights of Sandra Lovelace to access to her native culture and language 'in community with the other members' of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. On the other hand, not every interference can be regarded as a denial of rights within the meaning of article 27. Restrictions on the right to

residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. . . . The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. . . .

16. In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be. . . .

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. . . . The Committee's finding . . . makes it unnecessary to examine the general provisions against discrimination (articles 2, 3 and 26) in the context of the present case . . . .

19. Accordingly, the Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the present case, which establish that Sandra Lovelace has been denied the legal right to reside on the Tobique Reserve, disclose a breach by Canada of article 27 of the Covenant.

[Canada subsequently recognized the right of Lovelace to live on an Indian reserve, and amended the Indian Act.]

QUESTIONS

1. The ICCPR Committee assumes that, rather than debates whether, Article 27 is applicable to the case. What issue might have been debated?

2. In the actual case, it was disputed whether the Canadian Indian Act accurately reflected Indian customary or traditional rules or practices. Assume, however, that this issue was not disputed, that under prevailing Indian law as well as

under the Indian Act Lovelace had lost her previous rights. Assume, moreover, that the Committee had reached the issue of equal protection under ICCPR Articles 3 and 26.

a. How should it have resolved that issue?

b. In your proposed resolution, would you consider it relevant whether the group or community at issue were (i) a 'minority' within Article 27 and the Declaration on Members of Minorities (like, for example, Tamils in Sri Lanka, Sikhs in India, or Turkish Cypriots), or (ii) an indigenous people as in the *Lovelace* case? If so, why?

c. Are your answers to (a) and (b) affected by the fact that the issue in *Lovelace* involved gender discrimination rather than, say, a form of punishment pursuant to a tribal tradition of criminal justice that would be considered to violate the proscription of ICCPR Article 7 of 'cruel, inhuman or degrading' punishment?

3. Suppose that the Draft Declaration had been adopted by the General Assembly at the time of these proceedings in the form appearing above.

a. Should the ICCPR Committee have considered such a declaration relevant to its decision?

b. If so, in what ways do the provisions of such a declaration differ from the provisions of the ICCPR?

ADDITIONAL READING

Russel Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 Harv. Hum. Rts. J. 33 (1994); Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (1987); Alexander Ewen (ed.), *Voice of Indigenous Peoples* (1994); Marie Leger (ed.), *Aboriginal Peoples: Towards Self-Government* (1994); Douglas Sanders, *Collective Rights*, 13 Hum. Rts. Q. 368 (1991).

15

International Crimes and Criminal Tribunals

This chapter explores a number of related themes: international crimes, the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, proposals for a permanent international criminal court, and issues of amnesty for violators of international human rights norms. In several of these respects, the chapter builds on the discussion of the Nuremberg tribunal and proceedings at p. 98, *supra*.

Each of these themes has a current significance. Among other considerations before the Security Council, the massive brutality and serious human rights violations of the conflicts in the former Yugoslavia and related public pressure contributed toward persuading it to establish an *ad hoc* international criminal tribunal, the first such tribunal since the post-World War II tribunals constituted by the victorious powers in Nuremberg and Tokyo. Conventions that entered into force over the last few decades and the related evolution of international customary law have greatly expanded the number of crimes imposing an individual criminal responsibility that international law now defines. Recent work of the International Law Commission responding to requests of the General Assembly have led to drafts of documents on (i) crimes under international law against the peace and security of mankind, and (ii) the establishment of a permanent rather than *ad hoc* international criminal tribunal. Issues of punishment, impunity, amnesty and pardon of those involved in serious violations of human rights have become endemic to the resolution of conflicts whether internal or international in character. They regularly figure as components of the arrangements or agreements leading to new governments that pledge observance of human rights.

A. UNIVERSAL JURISDICTION AND INTERNATIONAL CRIMES

We here consider (1) the nature of crimes for which states have a 'universal jurisdiction' to define and prescribe punishment, even if a given state has no

significant links to the conduct or persons involved, (2) crimes defined under international law, and (3) relationships between these first two categories.

As used in this chapter, 'international crimes' refer to crimes committed not by states as such but by individuals who bear a personal criminal responsibility. As the materials indicate, the meaning of the term 'international crime' is not self-evident. For example, is a crime 'international' in character simply by virtue of being within the scope of states' universal jurisdiction? Or within the subject-matter jurisdiction of an international tribunal? Or by virtue of having been defined by a treaty that obligated states parties to take the necessary measures (such as legislation) to make that crime applicable to individuals within its territory? Or by virtue of becoming part of customary international law?

Section A begins with a review of basic jurisdictional principles on which states prescribe (make law), and of crimes imposing individual responsibility that are defined by international law and are tried before state courts (perhaps under laws based on a 'universal jurisdiction') or before an international criminal tribunal. The *Eichmann* case in Israel then serves for an examination of these ideas in a distinctive context. The section concludes with a description of a Draft Code of Crimes against the Peace and Security of Mankind.

COMMENT ON JURISDICTION OF STATES TO PRESCRIBE CRIMINAL LAW

Certain distinctive characteristics of criminal legislation and of the adjudication of criminal cases affect the bases of judicial jurisdiction and give special importance to the jurisdiction of a state to prescribe (legislate) criminal law that reaches events (acts, effects) or persons outside its boundaries.

(1) Unlike civil litigation, where courts may entertain an action and render a default judgment when any of several bases for adjudicatory jurisdiction are present, custody of the person in criminal cases is ordinary essential. Some states' practice of conducting certain types of criminal trials *in absentia* is rare.

(2) In civil litigation, a court may invoke principles of choice of law (private international law, conflict of laws) to apply the law of a foreign state to certain aspects of the litigation when the persons or acts involved have links to other states—for example, applying the tort rules of the foreign state where the accident at issue occurred. But choice of law generally does not figure in criminal litigation. The court applies only the law of the state from which it derives its authority, almost invariably the one in which it sits, even if the prosecution is based on conduct that took place in other states. (Exceptions include military tribunals sitting in foreign states, and the reliance by states on the principle of universal jurisdiction to prescribe that is discussed below.)

If courts then are to apply their own law to their criminal prosecutions, the bases on which they can enact those laws become all the more critical. Jurisdiction of states to prescribe with respect to criminal law falls into cer-

tain conventional categories. Some of these categories are more broadly accepted internationally—more generally recognized as valid by international law—than others. This Comment, drawing on *Restatement (Third) The Foreign Relations Law of the United States* (1987), summarizes several categories that are relevant to the later materials.

Restatement §402 provides that a state has jurisdiction to prescribe law under several principles:

(1) *Territorial principle.* A state can prescribe law with respect to 'conduct that, wholly or in substantial part, takes place within its territory.' This 'most common basis for the exercise of jurisdiction to prescribe' has 'generally been free from controversy.'

(2) *Effects principle.* A state can prescribe law with respect to 'conduct outside its territory' that has 'substantial effect within its territory.' This principle is 'an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category.' A classic illustration would involve shooting or sending libellous publications across a boundary.

(3) *Nationality principle.* A state can prescribe with respect to 'activities, interests, status, or relations of its nationals outside as well as within its territory.' Typical criminal laws of the United States based on the nationality principle include a treason statute, statutes requiring citizens to register for military service, and judicial subpoenas addressed to nationals abroad. Many states provide that nationals may be prosecuted for all crimes, or serious crimes, regardless of where they are committed.

(4) *Protective principle.* A state can prescribe law with respect to 'certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.' That limited class concerns primarily 'offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems' including espionage, counterfeiting currency, and perjury before consular officials.

(5) *Passive personality principle.* This principle asserts a state's jurisdiction to prescribe with respect to an act committed outside the state by a person not its national 'where the victim of the act was its national. The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality.'

Frequently a criminal statute will rest on more than one of these principles—for example, a combination of the effects and nationality principles (as when the conduct of a national abroad has substantial effects within a state) or a combination of the effects and protective principles.

The Restatement indicates a number of qualifications and competing con-

siderations relevant to the exercise of jurisdiction to prescribe on the bases noted above. For example, §403 provides that even when such bases are present, a state 'may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.' That section notes factors relevant to a conclusion of unreasonableness, including the strength of the connections to the prescribing state, the character of the activity to be regulated, the extent to which another state may have an interest in regulating the activity, the likelihood of conflict with another state, and the existence of justified expectations that might be hurt by the prescribing state.

There follows Restatement §404 on the principle of universal jurisdiction that is particularly relevant to the later materials.

RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES

American Law Institute, 1987.

§404. Universal Jurisdiction to Define and Punish Certain Offenses

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . .

COMMENT:

a. Expanding class of universal offenses. . . . [I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law. Universal jurisdiction for additional offenses is provided by international agreements, but it remains to be determined whether universal jurisdiction over a particular offense has become customary law for states not party to such an agreement. . . .

. . .

REPORTERS' NOTES

1. *Offenses subject to universal jurisdiction.* Piracy has sometimes been described as 'an offense against the law of nations'—an international crime. Since there is no international penal tribunal, the punishment of piracy is left to any state that seizes the offender. . . . Whether piracy is an international

crime, or is rather a matter of international concern as to which international law accepts the jurisdiction of all states, may not make an important difference.

. . .

That genocide and war crimes are subject to universal jurisdiction was accepted after the Second World War . . . .

The [Genocide] Convention provides for trial by the territorial state or by an international penal tribunal to be established, but no international penal tribunal with jurisdiction over the crime of genocide has been established. Universal jurisdiction to punish genocide is widely accepted as a principle of customary law. . . .

International agreements have provided for general jurisdiction for additional offenses, e.g., the Hague Convention for the Suppression of Unlawful Seizure of Aircraft . . . and the International Convention against the Taking of Hostages. . . . These agreements include an obligation on the parties to punish or extradite offenders, even when the offense was not committed within their territory or by a national . . . . Articles on State Responsibility, prepared for the International Law Commission, would include a provision that an international crime may result from 'a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid.' . . . An international crime is presumably subject to universal jurisdiction.

. . .

YORAM DINSTEIN, INTERNATIONAL CRIMINAL LAW

5 Israel Y'bk on Hum. Rts. 55 (1975).

I

The individual human being is manifestly the object of every legal system on this planet, and consequently also of international law. The ordinary subject of international law is the international corporate entity: first and foremost (though not exclusively) the State. Yet the corporate entity is not a tangible *res* that exists in reality, but an abstract notion, moulded through legal manipulation by and within the ambit of a superior legal system. When the veil is pierced, one can see that behind the legal personality of the State (or any other international corporate entity) there are natural persons: flesh-and-blood human beings. . . . In other words, the individual human being is not merely the object of international law, but indirectly also its subject, notwithstanding the fact that, ostensibly, the subject is the international corporate entity.

It is important, however, to stress that the individual human being is not merely the indirect subject of international law. Sometimes, he bears international rights and duties directly, without the interposition of the legal

personality. Those who are interested in international human rights must also pay heed to the other side of the coin, namely, to international human duties.

. . . [I]ndividual responsibility means subjection to criminal sanctions. When an individual human being contravenes an international duty binding him directly, he commits an international offence and risks his life, liberty or property. Hence, international human duties are inextricably linked to the development of international criminal law.

II

In its origins, international criminal law goes back to customary international rules, which have long since prohibited piracy and war crimes. At the end of the nineteenth and the beginning of the twentieth century, other international offences (*delicta juris gentium*)—defined in international treaties—were gradually added to the list, and the pace of international legislation in this field has quickened as of the Second World War. It is possible nowadays to draw up a fairly long roster of international offences:

1. *Piracy*. The pirate is regarded by international law as the 'enemy of mankind (*hostis humani generis*),' whom every State is entitled to prosecute and punish. Piracy *jure gentium* is today delineated in Articles 15 to 17 of the Geneva Convention on the High Seas of 1958. . . .

The Geneva Convention expressly recognizes, in Article 19, the universal jurisdiction of every State in the world in respect of the offence of piracy.

2. *War Crimes*. War crimes constitute particularly grave offences against the laws of war. The most authoritative definition of war crimes appears in the Charter of the International Military Tribunal, annexed to the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. [The definitions in the Charter of the IMT and the Judgment of the IMT appear at pp. 100 and 102, *supra*.]

. . .

There is no doubt that each belligerent is entitled to put on trial war criminals (including in particular war criminals from among enemy soldiers who fall into its hands), and the prevailing view is that jurisdiction in this case, as in piracy, is universal, *i.e.*, granted to all States (even neutrals).

3. *Crimes against Peace*. The London Charter provides, in Article 6(a), that war of aggression or war waged in violation of international treaties constitutes a crime against peace. The *Nuremberg* Judgment proclaims in unequivocal terms that this stipulation is declaratory in character, and that modern international law treats a war of aggression as a serious crime. Although the *Nuremberg* ruling encountered some doubts in 1946, today it is indisputable that war has not merely been proscribed by international law (subject to the exceptions of self-defence and collective security), but constitutes a crime; in fact not just a crime, but *the* crime against the international community. For jurisdictional purposes, war as a crime (against peace) is to be assimilated to war crimes.

Granted that at *Nuremberg* only the major war criminals were prosecuted, the provision of Article 6(a) of the London Charter is phrased in sweeping language, which appears to condemn as a criminal every soldier who fights in an aggressive war. Yet, in 1948, in the *German High Command Trial*, an American Military Tribunal determined (in the course of the 'subsequent proceedings' at Nuremberg) that officers below policy level must be acquitted of the charge of crimes against peace. In the *I. G. Farben Trial*, another American Military Tribunal, in the same year, held that a departure from the concept that only major war criminals—those persons in the political, military or industrial spheres who were responsible for the formulation and execution of policies—are to be convicted for crimes against peace would lead to incongruous conclusions: it would be necessary to indict the whole population, including the private soldier on the battlefield, the farmer who supplied the armed forces with foodstuffs and even the housewife who conserved essential commodities (say, canned beans) for the military industry.

4. *Crimes against Humanity*. Article 6(c) of the London Charter defines crimes against humanity as murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during war, or persecutions on political, racial or religious grounds in connection with any crime within the jurisdiction of the International Military Tribunal. . . . The *Nuremberg* Judgment reaches the explicit conclusion that the Nazi persecutions against the Jews in Germany, prior to the outbreak of the Second World War in September 1939, were not connected with crimes against peace or war crimes, and therefore were not to be considered crimes against humanity. . . . As a result, though in theory it does not matter whether or not crimes against humanity—under Article 6(c)—are committed before or during war, in general practice these crimes must necessarily be committed in war-time.

The definition of crimes against humanity in paragraph (c) of Article 6 overlaps in many respects the definition of war crimes in paragraph (b): for example, murder and deportation of civilian population are specified in both places. It is noteworthy, however, that paragraph (b) applies only to the civilian population in occupied territories, whereas paragraph (c) relates to any civilian population, not excluding that of the State whose armed forces commit the crimes (*e.g.*, Jews in Germany). The outcome is that murder or deportation of the civilian population in occupied territories is both a war crime and a crime against humanity, while murder or deportation of any other civilian population in time of—and in connection with—war is only a crime against humanity. By contrast, crimes against humanity are circumscribed in their application to civilian population, unlike war crimes which can be—and usually are—directed against the armed forces too (by way of illustration, murder or maltreatment of prisoners-of-war or use of poisoned weapons in battle).

Insofar as crimes against humanity are concerned, it is obvious that universal jurisdiction over offenders is afforded to all States. . . .

5. *Genocide*. . . . In 1948, the General Assembly of the United Nations

adopted a Convention on the Prevention and Punishment of the Crime of Genocide. In its second Article, the Convention defines genocide as any of the following acts committed with intent to destroy—in whole or in part—a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) inflicting on the group conditions of life calculated to bring about its physical destruction; (d) imposing measures intended to prevent births within the group; or (3) forcibly transferring children of the group to another group.

. . . [T]he essence of genocide is not the actual destruction of a group, but the intent to destroy it as such (in whole or in part). This has a dual consequence: first, if a group was destroyed through acts committed without an intent to bring about such destruction, there is no genocide; secondly and conversely, the murder of a single individual may be categorized as genocide if it constitutes a part of a series of acts designed to attain the destruction of the group to which the victim belonged. . . .

. . .

Though genocide may be looked upon as a crime against humanity *par excellence*, it should be pointed out that such is the case only when destruction of civilian population is carried out in connection with war. The definition of genocide transcends that of crimes against humanity in Article 6(c) of the London Charter both in its extent (for instance, as regards the forcible transfer of children from one group to another) and in the time of its application. Whereas crimes against humanity must be committed in connection with war, the first Article of the Genocide Convention expressly confirms that genocide may be committed either in time of war or in time of peace. . . .

In contradistinction to crimes against humanity, the Genocide Convention refrains from according criminal jurisdiction over offenders to every State. Article VI of the Convention provides that persons charged with genocide shall be tried by the courts of the State in whose territory the offence was committed (or by an international penal tribunal having appropriate jurisdiction, if and when established). This Article, needless to say, signifies a victory of the territoriality principle over the universality principle. A thorny problem arose in this context in the *Eichmann Trial*, inasmuch as the defendant was prosecuted and punished for genocide by a State (Israel) that could not rely on the territoriality principle. The Supreme Court of Israel resolved the problem in the following way:

> Article VI reflects a contractual obligation of the Parties to the Convention, to be applied from that moment on. That is to say, it binds them to prosecute cases of genocide that will take place within their boundaries in the future. But this undertaking has nothing to do with the universal *power* granted to every State to prosecute cases of this type that took place in the past, a power which is based on *customary* international law.

The idea is that the crime of genocide exists under both customary and conventional international law, and, whereas no universal jurisdiction pertains to it under conventional law (which is future-oriented), there is—and continues to be—a universal jurisdiction under customary law (which relates also to the past: . . .

. . 6. *Grave Breaches of the Geneva Conventions for the Protection of Victims of War*. The Four Geneva Conventions, of 1949, for the Protection of Victims of War contain common Articles dealing with grave breaches of the Conventions that involve acts committed against protected persons or property. Grave breaches are defined as follows in Article 50 of the (First) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and in Article 51 of the (Second) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Article 130 of the (Third) Geneva Convention Relative to the Treatment of Prisoners of War repeats most of the constituent elements of the definition, but replaces the last part (on destruction and appropriation of property) by other grave breaches, namely, compelling a prisoner-of-war to serve in the forces of a hostile Power; wilfully depriving a prisoner-of-war of the rights of fair and regular trial. Finally, Article 147 of the (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War reiterates the entire definition of the first two Conventions, but adds to it the following grave breaches: unlawful deportation or transfer or unlawful confinement of a protected person; compelling a protected person to serve in the forces of a hostile Power; wilfully depriving a protected person of the rights of fair and regular trial; taking hostages.[1]

. . .

All these grave breaches in effect constitute war crimes or crimes against humanity. The Four Geneva Conventions obligate all Contracting Parties to search for persons who commit grave breaches and bring them to trial regardless of their nationality (or alternatively to extradite them). The Conventions impose a duty on—and therefore also authorize—neutral States to prosecute the offenders. What this boils down to is establishing universal jurisdiction.

. . .

[1] [Eds.] The First Protocol to the Geneva Conventions—Protocol Relating to the Protection of Victims of International Armed Conflict, which entered into force in 1978—adds to the list of grave breaches. Its definitions of such breaches includes medical or scientific experimentation on protected persons; making the civilian population the object of attack; launching an indiscriminate attack affecting the civilian population in the knowledge that such attack will cause excessive loss of life or injury to civilians; transference by an occupying Power of part of its own civilian population into territory it occupies, or deportation of all or parts of the population of the occupied territory; and practices of racial discrimination.

9. *Enslavement and Slave Trade.* Under Article 6 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the act of enslaving another person shall be a criminal offence under the laws of Contracting Parties, and offenders must be prosecuted and punished. A similar provision appears in Article 3 of the Convention in respect of conveying slaves from one country to another by whatever means of transport (including ships and aircraft), with a view to preventing and punishing slave trade. The 1958 Geneva Convention on the High Seas includes a specific clause very much like it in Article 13 relating to the transport of slaves in ships.

10. *Traffic in Persons for Prostitution.* The 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others—which supersedes several previous instruments relating to traffic in women and children (once dubbed 'white slavery' as distinct from the regular slavery of coloured people)—imposes on Contracting Parties the obligation to punish a number of acts pertaining to the exploitation of prostitution and the traffic in persons for such purposes.

11. *Narcotic Drugs.* According to Article 36 of the 1961 Single Convention on Narcotic Drugs, Contracting Parties are in duty bound to enjoin as punishable offences and to punish a whole series of activities in regard to the production, manufacture, extraction, distribution, delivery, sale and purchase of narcotic drugs.

. . .

15. *Aircraft Hijacking.* The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft provides in its first Article that any person who unlawfully—by force or threat thereof, or by any other form of intimidation—seizes or exercises control of a civil aircraft in flight, commits an offence. The Convention practically sets up universal jurisdiction over the offence, but this is not done in a clear-cut way.

. . .

III

These are the main international offences which are recognized—or attempts are made to have them recognized—in the practice of States, more particularly in international treaties.[2] What turns an act into an international offence? The answer is, its definition as a punishable offence in international (usually conventional) law. From time to time new offences are added to the rolls, in conformity with the changing needs of the international community, and it is impossible to determine a priori which acts are criminal under international law. One may patently identify certain features which characterize interna-

[2] [Eds.] See also the discussion at p. 805 *supra*, of the provision in the Convention against Torture on criminal prosecution of offenders.

tional offences—chiefly, the gravity of the acts under consideration and the fact that they harm fundamental interests of the whole international community—but the presence of these general traits by themselves does not denote that a specific act (such as an act of terrorism) is an international offence *de lege lata*. The practice of States is the conclusive determinant in the creation of international law (including international criminal law), and not the desirability of stamping out obnoxious patterns of human behaviour.

The very use of the general term 'international offences' is controversial and problematic. When international treaties define offences, they do not employ an unambiguous—or even a consistent—terminology. There are no less than five principal formulas, which the treaties tend to use in diminishing grades of clarity:

> a. A categorical provision to the effect that the forbidden act constitutes an international crime involving the application of international criminal responsibility to individuals. Such limpid prose is used . . . in the London Charter. . . .
>
> b. A less detailed provision confining itself to a statement that the forbidden act constitutes an international crime. The *locus classicus* is the Genocide Convention, which declares that genocide 'is a crime under international law'.
>
> c. A vague provision according to which the forbidden act is a crime or an offence, without spelling out explicitly that it is necessarily an international crime or offence. This is the case, for example, in the Hague [Convention].
>
> d. A provision which refrains from describing the forbidden act as a crime or an offence, and merely imposes a duty on Contracting Parties to prosecute and punish those who commit it. This is the method used in the Geneva Conventions for the Protection of Victims of War.
>
> e. A provision which just prescribes that the forbidden act shall be a crime or an offence under the internal law of the Contracting Parties. Such a provision appears in the Slavery Convention. . . .

IV

Of course, at bottom all five formulas have an important common denominator: in all instances, it is international law that defines the acts under consideration as offences. But what is the legal significance of such a definition? It must be conceded that, at this phase in the evolution of international criminal law, the significance is primarily reflected in rather minor aspects:

> a. International offences—and only international offences—may sometimes be subject to the universal jurisdiction of all States (or all Contracting States). That is to say, any State which lays its hands on the

offender may put him on trial and punish him, irrespective of the locus of the offence and the nationality of the offender (or the victim). This, to be sure, is an exceptional jurisdiction, but one must realize that, although applicable exclusively to international offences, it does not automatically cover them all, and it is contingent on the treaties defining the offences. Thus, as we have seen whereas universal jurisdiction is recognized in regard to piracy—and, in less pellucid form, in respect of aircraft hijacking and sabotage—it is excluded from the Genocide Convention.

b. Contracting States are bound to collaborate in suppressing international offences. Consequently, they are required to exercise due diligence in attempting to forestall the forbiddent act, seize the offenders, try them—if criminal jurisdiction is available (and to the extent available)—and punish them. This is an important obligation, but it must be qualified in two substantial ways:

> (1) It is not enough that a State has undertaken, in an international treaty, to prosecute offenders: the question is whether the undertaking has in fact been incorporated in its domestic law. That is why the international treaties usually include a specific stipulation imposing on Contracting States a duty to enact the necessary internal legislation with a view to punishing offenders effectively. . . .
>
> (2) It is not enough that a State has enacted the necessary internal statutes: the question is whether it is sincerely interested in prosecuting the offenders. A special problem arises when the offenders are organs of the very same State. . . .

c. When Contracting Parties are under an obligation to extradite international offenders, international law does not permit the offenders to rely on the political nature of their acts, so as to evade extradition. International offences do not come within the purview of the rule of non-extradition of political criminals. The hitch is that treaties defining international offences do not always create an absolute duty of extradition, and, short of such a duty by treaty, the State holding the offender is not required to respond to the extradition request (regardless of the political or other nature of the offence).

. . .

e. In the absence of an express provision—in a treaty defining an international offence—in respect of the maximal penalty that can be meted out to offenders, the prosecuting State may determine the sentence as its discretion. In effect this means that any usual punishment (including the death sentence) can be imposed, depending on the circumstances. Often the treaty instructs that 'severe penalties' be imposed. . . .

V

. . . [T]he pivotal question is whether, over and above the duties devolving on States, there are also international obligations imposed directly on individuals. Many jurists maintain that this is by no means the case. In their opinion, the duty of trial and punishment—incurred by the Contracting State as such—is the sole international obligation created by the treaties, and the individual is only indirectly affected by this obligation as an object of the conduct of the State. Or . . . the crime created by the Convention is a crime 'under international law' (i.e., a crime defined by that law), not a crime against international law: the act can only be a crime against internal law, provided that the prohibitions of the Convention are incorporated in the domestic legislation. Even the fact that special rules relating to criminal jurisdiction may be applicable to offences defined by international law, does not impress the protagonists of this school of thought, for, to their mind, even if universal jurisdiction is established over the offence, that does not suffice to impose duties directly on the individual: it is merely a case of an extraordinary extension of the regular criminal jurisdiction of the State. The extension of jurisdiction has its palpable impact on the individual caught in its net, but it does not transform him from an object into a subject of international law.

It is not easy to contradict this approach—and to insist on the existence of international offences in the full sense of the term—as long as no permanent International Criminal Court has been established for the trial of international offenders. It is true that International Military Tribunals functioned successfully at *Nuremberg* and *Tokyo*, but those were judicial bodies that were set up ad hoc for the prosecution of the major war criminals of the Second World War, and when their duties were terminated they ceased to operate. It is symptomatic that, when Israel seized Eichmann, it did not possess an option of handing him over for trial by any extant international court.

The idea of founding a permanent international penal tribunal has been contemplated for a long time.

Faute de mieux, as long as no penal tribunal has been established on the international plane, the trial of persons charged with offences defined by international law must take place in the national courts of States (mainly, States Parties to international treaties). These courts may be regarded, for this purpose, as organs of the international community applying international criminal law and bringing it home to the individual, who is directly subjected to international obligations. . . .

While this situation lasts, international criminal law is admittedly beclouded by doubts: from the viewpoint of the offender—facing a regular judge in a domestic court—the criminal trial looks like ordinary municipal proceedings: and from the standpoint of the national judge, that judge does not apply international law unless it is incorporated into the national legal system and to the extent of its incorporation. If and when a permanent international criminal court comes into being, it will be possible to distinguish between real

international offences (namely, international duties incurred directly by the individual, who is criminally liable for their infraction—over which the court will have jurisdiction—and national offences originating in international treaties (that is, international obligations imposed on the State, which is required to take measures to suppress the forbidden acts through the application of effective sanctions against their perpetrators). But as long as no such court exists, the distinction is not easy to draw.

. . .

The *Nuremberg* Judgment transcends in its importance the specific question of crimes connected with war. In many respects, the International Military Tribunal laid the groundwork of modern international criminal law when it proclaimed:

> That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. . . . individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

. . .

QUESTION

As indicated in editors' footnotes to the preceding article, the scope of 'international criminal law' has continued to expand since the time that the article was written. Note the contemporary effort to develop provisions on 'terrorism' described at p. 1039, *infra*.

Do you find any coherence among the the historical categories, a distinctive character of such 'international crimes' that binds them within a unified framework? Or does the historical list simply reflect the changing priorities of the international community over time, so that expansion will be less a matter of logic than of new and broadly shared perceptions of need together with an ability to build a consensus over the definition of a crime?

COMMENT ON THE EICHMANN TRIAL

Adolf Eichmann, operationally in charge of the mass murder of Jews in Germany and German-occupied countries, fled Germany after World War II. He was abducted from Argentina by Israelis, and brought to trial in Israel under the Nazi and Nazi Collaborators (Punishment) Law, enacted after Israel became a state. Section 1(a) of the Law provided:

> A person who has committed one of the following offences—(1) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against the Jewish people; (2) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity; (3) did, during the period of the Second World War, in a hostile country, an act constituting a war crime; is liable to the death penalty.

The Law defined 'crimes against the Jewish people' to consist principally of acts intended to bring about physical destruction. The other two crimes were defined similarly to the like charges at Nuremberg, p. 100, *supra*. The 15 counts against Eichmann involved all three crimes. The charges stressed Eichmann's active and significant participation in the 'final solution to the Jewish problem' developed and administered by Nazi officials. Eichmann was convicted in 1961 and later executed. There appear below summaries of portions of the opinions of the trial and appellate courts.

The Attorney-General of the Government of Israel v. Eichmann[3]

Eichmann argued that the prosecution violated international law by inflicting punishment (1) upon persons who were not Israeli citizens, (2) for acts done by them outside Israel and before its establishment, (3) in the course of duty, and (4) on behalf of a foreign country. In reply, the Court noted that, in event of a conflict between an Israeli statute and principles of international law, it would be bound to apply the statute. However, it then concluded that 'the law in question conforms to the best traditions of the law of nations. The power of the State of Israel to enact the law in question or Israel's "right to punish" is based . . . from the point of view of international law, on a dual foundation: The universal character of the crimes in question and their specific character as being designed to exterminate the Jewish people.'

Thus the Court relied primarily on the universality and protective principles to justify the Israeli statute and its application. It held such crimes to be offenses against the Law of Nations, much as was the traditional crime of piracy. It compared the conduct made criminal under the Israeli statute (particularly the 'crime against the Jewish people') and the crime of genocide, as defined in Article 1 of the Convention for the Prevention and Punishment of Genocide.

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.[4]

[3] District Court of Jerusalem. Judgment of December 11, 1961. This summary and the selective quotations are drawn from 56 Am. J. Int. L. 805 (1962) (unofficial translation).

[4] [Eds.] Article 6 of the Convention, the meaning and implications of which were viewed differently by the parties, states: 'Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.' No such tribunal has been created.

The Court also stressed the relationship between the Law's definition of 'war crime' and the pattern of crimes defined in the Nuremberg Charter. It rejected arguments of Eichmann based upon the retroactive application of the legislation, and stated that 'all the reasons justifying the Nuremberg judgments justify *eo ipse* the retroactive legislation of the Israeli legislator.'

The Court then discussed another 'foundation' for the prosecution—the offence specifically aimed at the Jewish people.

> [This foundation] of penal jurisdiction conforms, according to [the] acknowledged terminology, to the protective principle . . . . The 'crime against the Jewish people,' as defined in the Law, constitutes in effect an attempt to exterminate the Jewish people . . . . If there is an effective link (and not necessarily an identity) between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has a very striking connection with the State of Israel. . . . The connection between the State of Israel and the Jewish people needs no explanation.

Eichmann v. The Attorney-General of the Government of Israel[5]

After stating that it fully concurred in the holding and reasoning of the district court, the Supreme Court proceeded to develop arguments in different directions. It stressed that Eichmann could not claim to have been unaware at the time of his conduct that he was violating deeply rooted and universal moral principles. Particularly in its relatively underdeveloped criminal side, international law could be analogized to the early common law, which would be similarly open to charges of retroactive law making. Because the international legal system lacked adjudicatory or executive institutions, it authorized for the time being national officials to punish individuals for violations of its principles, either directly under international law or by virtue of municipal legislation adopting those principles.

Moreover, in this case Israel was the most appropriate jurisdiction for trial, a *forum conveniens* where witnesses were readily available. It was relevant that there had been no requests for extradition of Eichmann to other states for trial, or indeed protests by other states against a trial in Israel.

The Court affirmed the holding of the district court that each charge could be sustained. It noted, however, much overlap among the charges, and that all could be grouped within the inclusive category of 'crimes against humanity.'

[5] Supreme Court sitting as Court of Criminal Appeals, May 29, 1962. This summary is based upon an English translation of the decision appearing in 36 Int'l. L. Rep. 14–17, 277 (1968).

QUESTIONS

1. Consider the alternatives to trial of Eichmann by the Israeli court. Would any international tribunal have been competent? What would have been involved in an effort to establish another *ad hoc* international criminal tribunal like Nuremberg, and would that effort have been likely to succeed? Would trial before the courts of another state have been preferable? Which state?

2. If you had been the author of the opinion, how would you have responded to Eichmann's charges that the prosecution violated international law?

3. Which of the Israeli legislative bases for the trial of Eichmann do you view as most satisfactory? Does any provision of the Nazi and Nazi Collaborators Law raise troublesome issues with respect to its possible use as precedent for prosecutions in different contexts in other states?

NOTE

The work of the International Law Commission figures in the following article on international crimes, and in a later article on a permanent international criminal court. This Commission, constituted under its statute enacted by General Assembly Resolution 174(II) of November 21, 1947, as amended, has 25 members who are to be 'persons of recognized competence in international law.' Article 15 of the ILC Statute distinguishes between *development* ('the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States') and *codification* ('the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine'). The distinction is sometimes more easily stated that realized in practice. The ILC examines a subject sometimes at the request of the General Assembly, sometimes at its own initiative. Drafts adopted by the ILC are often submitted to the General Assembly for its consideration.

JOHN MURPHY, INTERNATIONAL CRIMES

in Oscar Schachter and C. Joyner (eds.), United Nations Legal Order 993 (Vol. 2, 1995), at 997.

Following the General Assembly's affirmation of the Nuremberg principles, the International Law Commission began work on a Draft Code of Offenses Against the Peace and Security of Mankind as well as on a Draft Statute for an International Criminal Court [see p. 1081, *infra*]. By 1954 a Draft Code . . .

had been developed by the ILC. . . . The Draft Code was in 1978 again placed on the agenda of the Sixth (Legal) Committee of the General Assembly and in 1982 the ILC resumed work on it. On July 12, 1991, the ILC adopted, on first reading, Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind and transmitted them, through the Secretary-General, to governments, for their comments and observations. . . .

. . . Although the ILC adopted the Draft Articles on a first reading, many provisions remain controversial, and there are likely to be several critical comments forthcoming from the governments to which they have been submitted. Moreover, it has not yet been determined whether these articles will be adopted in binding legal form—perhaps as part of a treaty or as a model law—or in a non-binding mode along the lines of the Helsinki Accords. This issue is closely linked with the question of whether the Code should serve, in whole or in part, as the statute for an international criminal court. . . .

. . . [I]t should be noted that the Draft Articles are limited in their coverage to crimes that threaten the peace and security of mankind. Because of this bedrock test, Article 21 of the Draft Articles covers 'systematic or mass violations of human rights' but not human rights violations that do not rise to this level of magnitude, on the rationale that the latter are unlikely to cause disputes that would threaten the peace. The international nature of the crimes covered by the Draft Articles is highlighted by Article 2, which provides in pertinent part that the 'characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law' . . . .

Part II of the Draft Articles sets forth specific crimes against the peace and security of mankind. Twelve such crimes are listed: aggression (Article 15); threat of aggression (Article 16); intervention (Article 17); colonial domination and other forms of alien domination (Article 18); genocide (Article 19); apartheid (Article 20); systematic or mass violations of human rights (Article 21); exceptionally serious war crimes (Article 22); the recruitment, use, financing and training of mercenaries (Article 23); international terrorism (Article 24); illicit traffic in narcotic drugs (Article 25); and willful and severe damage to the environment (Article 26). . . .

It should first be realized that the Draft Articles both codify and develop the law of international crimes. For example, some of the acts covered clearly constitute international crimes under current law, including aggression, threat of aggression (probably), genocide, international terrorism (at least as defined by the Commission) and illicit traffic in narcotic drugs. Other acts, although arguably already constituting international crimes and in some cases covered by international conventions, are more debatable. Many developed Western countries in particular would deny some are currently established as international crimes, for example, intervention; colonial domination and other forms of alien domination; apartheid; and the recruitment, use, financing and training of mercenaries. With respect to still other acts the Commission would seem to be proposing new categories of international crimes. Systematic or mass violations of human rights, for example, is a new crime against the peace and

security of mankind. Some of the human rights violations covered—torture, slavery and deportation or forcible transfer of population—are already established as international crimes when committed on a nonsystematic or nonmass basis. Others, namely murder and persecution on social, political, racial, religious, or cultural grounds, are not generally regarded as international crimes absent the higher level of magnitude.

Similarly, although war crimes, including 'grave breaches,' have long been established as international crimes, the concept of 'exceptionally serious war crimes' as a crime against the peace and security of mankind is new.

Finally, although there are some provisions in treaties and conventions on the law of armed conflict regarding damage to the environment, the provision on willful and severe damage to the environment is an exercise in law development. Deliberate and widespread damage to the environment during the Gulf war, with global repercussions, has helped generate support for such a provision.

. . .

The historical record indicates that many, perhaps most, of these crimes against the peace and security of mankind will prove difficult to prosecute and punish. Aggression and genocide have long been established as among the most severe of international crimes, yet since the Nuremberg and Tokyo trials, there have been no prosecutions—much less punishments—for their commission. The crime of aggression is not even listed among the crimes covered by most national criminal codes and statutes.

. . .

It should also be noted that experts in criminal jurisprudence have suggested that, as currently worded, the definitions of the crimes covered by the Draft Articles are so ambiguous and vague as to make their prosecution in national courts difficult or perhaps even unconstitutional.

. . .

Despite efforts to do so, neither the United Nations nor its specialized agencies have been able to agree on a definition of 'international terrorism.' Partially because of this, the United Nations has also been unable to agree on a single convention on the legal control of terrorism. Rather, the United nations has adopted a piecemeal approach to the problem through the adoption of separate conventions aimed at suppressing aircraft hijacking, unlawful acts against the safety of civil aviation, or of airports serving international civil aviation, unlawful acts against internationally protected persons, including diplomatic agents, the taking of hostages, unlawful acts against the safety of maritime navigation and, most recently, the use of plastic explosives. . . .

Although these treaty provisions are often loosely described as 'antiterrorist,' the acts themselves that they cover are criminalized regardless of whether,

in a particular case, they could be described as 'terrorism.' Whether the crimes covered by the antiterrorist conventions may be classified as 'international crimes' is debatable. At the least, they establish a legal framework for states parties to cooperate toward punishment of the perpetrators of these crimes. They also create a system of universal jurisdiction over these crimes for states parties. . . .

. . .

B. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

THEODOR MERON, THE CASE FOR WAR CRIMES TRIALS IN YUGOSLAVIA

72 Foreign Affairs 122 (No. 3 1993), at 123.

. . . Except in the case of a total defeat or subjugation—for example, Germany after World War II—prosecutions of enemy personnel accused of war crimes have been both rare and difficult. National prosecutions have also been rare because of nationalistic, patriotic or propagandistic considerations.

The Versailles Treaty after World War I illustrates the case of a defeated but not wholly occupied state. Germany was obligated to hand over to the allies for trial about 900 persons accused of violating the laws of war. But even a weak and defeated country such as Germany was able to effectively resist compliance. The allies eventually agreed to trials by German national courts of a significantly reduced number of Germans. The sentences were both few and clement. The Versailles model proved to be clearly disappointing.

On the other hand, after the four principal victorious and occupying powers established an international military tribunal (IMT) following World War II, several thousand Nazi war criminals were tried either by national courts under Allied Control Council Law No. 10 or by various states under national decrees. Nuremberg's IMT, before which about 20 major offenders were tried, and the national courts functioned reasonably well; the Allies had supreme authority over Germany and thus could often find and arrest the accused, obtain evidence and make arrangements for extradition.

Despite the revolutionary development of human rights in the U.N. era, no attempts have been made to bring to justice such gross perpetrators of crimes against humanity or genocide as Pol Pot, Idi Amin or Saddam Hussein; perhaps because the atrocities in Cambodia, Uganda and Iraq (against the Kurds) did not occur in the context of international wars. Internal strife and even civil wars are still largely outside the parameters of war crimes and the grave breaches provisions of the Geneva conventions.

The Persian Gulf War, as an international war, provided a classic environment for the vindication of the laws of war so grossly violated by Iraq by its plunder of Kuwait, its barbaric treatment of Kuwait's civilian population, its mistreatment of Kuwaiti and allied prisoners of war and during the sad chapter of the U.S. and other hostages. Although the Security Council had invoked the threat of prosecutions of Iraqi violators of international humanitarian law, the ceasefire resolution did not contain a single word regarding criminal responsibility. Instead, the U.N. resolution promulgated a system of war reparations and established numerous obligations for Iraq in areas ranging from disarmament to boundary demarcation.

This result is not surprising, for the U.N. coalition's war objectives were limited, and there was an obvious tension between negotiating a ceasefire with Saddam Hussein and demanding his arrest and trial as a war criminal. A historic opportunity was missed to breathe new life into the critically important concept of individual criminal responsibility for the laws of war violations. At the very least, the Security Council should have issued a warning that Saddam and other responsible Iraqis would be subject to arrest and prosecution under the grave breaches provisions of the Geneva conventions whenever they set foot abroad.

. . .

Warnings of war crimes trials have been unsuccessful deterrents in past wars and may prove no more effective in the case of the former Yugoslavia. The precedent and moral considerations for the establishment of the tribunal require action in any event. Furthermore, several factors may yet strengthen deterrence. First, modern media ensures that all actors in the former Yugoslavia know of the steps being taken to establish the tribunal. Second, the tribunal will probably be established while the war is still being waged. Even the worst war criminals involved in the present conflict know that their countries will eventually want to emerge from isolation and be reintegrated into the international community. Moreover, they themselves will want to travel abroad. Normalization of relations and travel would depend on compliance with warrants of arrest. A successful tribunal for Yugoslavia will enhance deterrence in future cases; failure may doom it.

. . .

The establishment of an ad hoc tribunal should not stand alone, however, as a sole or adequate solution. The world has failed to prosecute those responsible for egregious violations of international humanitarian law and human rights in Uganda, Iraq and Cambodia. To avoid charges of Eurocentrism this ad hoc tribunal for the former Yugoslavia should be a step toward the creation of a permanent criminal tribunal with general jurisdiction. The drafting of a treaty on a permanent tribunal, on which work has begun by the U.N. International Law Commission, should be expedited, providing an

opportunity to supplement the substantive development of international law by an institutional process.

. . .

COMMENT ON SECURITY COUNCIL DECISIONS

The materials following this Comment consider the role of the Security Council in establishing the International Criminal Tribunal for the Former Yugoslavia. They indicate the degree to which the Council acted by taking decisions under Chapter VII of the UN Charter. This Comment provides some background about the historical use by the Council of Chapter VII.

The collective security system provided for in the UN Charter accords 'primary responsibility' for the maintenance of international peace and security to the Security Council (Art. 24). Member states are obligated to carry out the Council's decisions (Art. 25). Throughout the Cold War years, the system as a whole, and particularly the provisions for enforcement under Chapter VII, remained largely paralyzed. Apart from a limited range of decolonization matters, the Council was relatively inactive. Its decision in 1990 to respond to the invasion of Kuwait by Iraq marked the beginning of a new phase of Council activism.

The statistics tell the story as to the degree of involvement of the Council and the highly politicized selection of the few situations to which it was attentive. Between 1946 and 1989 the Council held 2,903 meetings and adopted 646 resolutions. Between 1990 and mid-1994 alone, it held 495 meetings (plus innumerable consultations) and adopted 288 resolutions. Until 1986, the Council declared breaches of the peace only in Korea in 1950 and the Falklands/Malvinas in 1982. Its determinations during that period that a state had committed acts of 'aggression' reached only to Israel and South Africa, and it recognized the existence of a 'threat to international peace and security' only in relation to seven situations: Palestine in 1948, the Congo in 1961, Southern Rhodesia in 1966, Bangladesh in 1971, Cyprus in 1974, South Africa in 1977, and Israel's attack on the PLO headquarters in Tunis in 1985.

Prior to 1990 the Council authorized the use of military force only three times (Korea, the Congo and Southern Rhodesia), and imposed sanctions twice (Southern Rhodesia 1966–79, and South Africa 1977–94, see. p. 365, *supra*). In contrast, between 1990 and 1995, the Council authorized the use of military force in five situations (Iraq, Somalia, the former Yugoslavia, Rwanda and Haiti), and imposed sanctions in eight situations (the preceding five, plus Liberia, Libya and Angola).

Peace-keeping operations show a similar trend. At the end of 1990, the UN was involved in eight operations with a total of 10,000 troops. Four years later there were 17 such operations (including the UN Protection Force in the former Yugoslavia established in 1992) involving more than 70,000 troops and costing over $3 billión a year.

Such heightened activity was both a cause for and a consequence of a considerable expansion in the Council's self-determined competence. In particular, the Council gave far greater attention to internal conflicts. Of 21 operations undertaken between 1988 and 1994, only eight related to inter-state wars; the Secretary-General characterized the balance of 13 conflicts as intra-state.

A large proportion of the situations addressed by the Council involved human rights violations, often systemic and brutal violations. Nonetheless, such aspects of these conflicts remained an incidental rather than primary focus for the Council. Chapter VII of the Charter does not refer to human rights violations as a condition for Council decisions ranging from sanctions to the use of armed force. Many commentators and a few states called on the Council to play a more active role in responding to such violations. This has not, however, occurred. The reasons of course involve the distinctive powers of the Council to make 'decisions' under Chapter VII. The General Assembly has no such power, but it does exercise a competence to debate, discuss, and recommend on a broader range of issues that include human rights concerns. Thus states fear a further erosion of their sovereignty, and seek to uphold the division of institutional competence between the Council and the Assembly. Many argue that the Council is subject to greater control by the West and thus would not act objectively if given a major human rights brief.

Nonetheless, the Council has recently taken up a number of situations that have involved significant human rights components. They include:

> Resolution 688 (1991) in which it characterized Iraq's repression of the Kurds, leading to cross-border refugee flows, as a threat to international peace and security and insisted that Iraq 'allow immediate access by international humanitarian organizations;'
>
> Resolution 794 (1992) in which it authorized multinational forces to establish a secure environment for humanitarian relief operations in Somalia;
>
> various similar resolutions in relation to the former Yugoslavia; and
>
> Resolution 940 (1994) authorizing the use of 'all necessary means to facilitate the departure from Haiti of the military leadership . . . . the prompt return of the legitimately elected president and the restoration of the legal authorities of the Government of Haiti'.

Despite various calls on it to recognize a right to humanitarian intervention, the Council has not used such terminology. Indeed, its insistence that unimpeded access be given to the delivery of humanitarian relief supplies has met with only limited success in situations such as the former Yugoslavia and Rwanda.

The establishment of the office of the UN High Commissioner for Human Rights in 1994 has led to suggestions that the High Commissioner act as an

early warning mechanism to alert the Council to actual or potential situations involving gross violations of human rights. The same suggestion has been made in relation to the human rights treaty bodies, such as the ICCPR Human Rights Committee. The uncertain attitude of the Council toward such suggestions, together with the reluctance of the Secretary-General to develop the role given him under Article 99 of the Charter, indicate the significant political obstacles to such developments.

ADDITIONAL READING

N. D. White, *The United Nations and the Maintenance of International Peace and Security* (1990); Helmut Freudenschuss, *Between Unilateralism and Collective Security: Authorizations to Use Force by the Security Council*, 5 Eur. J. Int. L. 492 (1994); Andrew Hurrell, *Collective Security and International Order Revisited*, 11 Int. Rel. 37 (1992); Boutros Boutros-Ghali, *An Agenda for Peace* (2nd ed. 1995); Philip Alston, *The Security Council and Human Rights: Lessons to Be Learned from the Iraq–Kuwait Crisis and its Aftermath*, 13 Aust. Y. B. Int. L. 107 (1992); Sean Murphy, *The Security Council, Legitimacy and the Concept of Collective Security after the Cold War*, 32 Colum. J. Transnat'l L. 201 (1994); Martti Koskenniemi, *The Police in the Temple: A Dialectical View of the United Nations*, 6 Eur. J. Int. L. (forthcoming 1995).

SECURITY COUNCIL RESOLUTIONS ON ESTABLISHMENT OF AN INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Reprinted in 14 Hum. Rts. L. J. 197 (1993).

Resolution 808, 22 Feb. 1993

. . .

Recalling paragraph 10 of its resolution 764 (1992) of 13 July 1992, in which it reaffirmed that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.

. . .

Recalling further its resolution 780 (1992) of 6 October 1992, in which it requested the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts. . . with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia,

. . .

Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of 'ethnic cleansing',

Determining that this situation constitutes a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

. . .

1. *Decides* that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991;

2. *Requests* the Secretary-General to submit for consideration by the Council. . . a report on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision contained in paragraph 1 above, taking into account suggestions put forward in this regard by Member States;

. . .

Resolution 827, 25 May 1993

. . .

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;

2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

. . .

4. Decides that all Sates shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of

States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;

. . .

7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;

. . .

REPORT OF THE SECRETARY-GENERAL UNDER SECURITY COUNCIL RESOLUTION 808

Doc. S/2504, 3 May 1993, reprinted in 14 Hum. Rts. L. J. 198 (1993).

. . .

I. THE LEGAL BASIS FOR THE ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

18. Security Council resolution 808 (1993) states that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. It does not, however, indicate how such an international tribunal is to be established or on what legal basis.

19. The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or a specially convened conference), following which it would be opened for signature and ratification. Such an approach would have the advantage of allowing for a detailed examination and elaboration of all the issues pertaining to the establishment of the international tribunal. It also would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.

20. As has been pointed out in many of the comments received, the treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.

21. A number of suggestions have been put forward to the effect that the General Assembly, as the most representative organ of the United Nations, should have a role in the establishment of the international tribunal in addi-

tion to its role in the administrative and budgetary aspects of the question. The involvement of the General Assembly in the drafting or the review of the statute of the International Tribunal would not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993). The Secretary-General believes that there are other ways of involving the authority and prestige of the General Assembly in the establishment of the International Tribunal.

22. In the light of the disadvantages of the treaty approach in this particular case and of the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. Such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.

23. This approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.

24. In the particular case of the former Yugoslavia, the Secretary-General believes that the establishment of the International Tribunal by means of a Chapter VII decision would be legally justified, both in terms of the object and purpose of the decision, as indicated in the preceding paragraphs, and of past Security Council practice.

25. As indicated in paragraph 10 above, the Security Council has already determined that the situation posed by continuing reports of widespread violations of international humanitarian law occurring in the former Yugoslavia constitutes a threat to international peace and security. The Council has also decided under Chapter VII of the Charter that all parties and others, concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provision of resolution 771 (1992), failing which it would need to take further measures under the Charter. Furthermore, the Council has repeatedly reaffirmed that all parties in the former Yugoslavia are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.

26. Finally, the Security Council stated in resolution 808 (1993) that it was convinced that in the particular circumstances of the former Yugoslavia, the establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.

27. The Security Council has on various occasions adopted decisions under

Chapter VII aimed at restoring and maintaining international peace and security, which have involved the establishment of subsidiary organs for a variety of purposes. Reference may be made in this regard to Security Council resolution 687 (1991) and subsequent resolutions relating to the situation between Iraq and Kuwait.

28. In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations, it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.

29. It should be pointed out that, in assigning to the International tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

30. On the basis of the foregoing considerations, the Secretary-General proposes that the Security Council, acting under Chapter VII of the Charter establish the International Tribunal. . . .

II. COMPETENCE OF THE INTERNATIONAL TRIBUNAL

. . .

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV)

Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

36. Suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law. While international humanitarian law as outlined above provides a sufficient basis for subject-matter jurisdiction, there is one related issue which would require reference to domestic practice, namely, penalties (see para. 111 below).

Grave breaches of the 1949 Geneva Conventions

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. . . .

38. Each Convention contains a provision listing the particularly serious violations that qualify as 'grave breaches' or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.

39. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law.

40. The corresponding article of the statute would read: [Article 2 appears in the Statute, *infra*.]

Violations of the laws or customs of war

41. The 1907 Hague Convention (IV) Respecting the Law and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.

. . .

44. These rules of customary law, as interpreted and applied by the Nürnberg Tribunal, provide the basis for the corresponding article of the statute which would read as follows: [Article 3 appears in the Statute, *infra*.]

Genocide

45. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its

Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951.

46. The relevant provisions of the Genocide Convention are reproduced in the corresponding article of the statute, which would read as follows: [Article 4 appears in the Statute, *infra*.]

Crimes against humanity

47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.

48. . . . In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

49. The corresponding article of the statute would read as follows: [Article 5 appears in the Statute, *infra*.]

STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Reprinted in 14 Hum. Rts. L. J. 211 (1993).

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as 'the International Tribunal') shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provision of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

Article 6

Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of crim-

inal responsibility if he know or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9

Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10

Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account

the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

. . .

Article 18

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any orders as may be required for the conduct of the trial.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant

to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

Article 22

Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures

shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

Article 23

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

. . .

Article 27

Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council

their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

. . .

Article 29

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal.

. . .

Article 32

Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

. . .

NOTE

By Resolution 955 (1994), the Security Council established an International Tribunal for Rwanda 'to prosecute persons responsible for genocide and other serious violations of international humanitarian law' committed in that country in 1994. This tribunal is closely related to the International Tribunal for the Former Yugoslavia, using the same Prosecutor and appellate judges, but having separate trial judges. The Statutes of the two tribunals are in most respects identical but differ in a few important ways. For example, the internal rather than international nature of the conflict in Rwanda required different references in that tribunal's Statute to treaties and provisions thereof on war crimes.

RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

As amended, IT/32/Rev.3, 30 January 1995.

. . .

Rule 8

Request for Information

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 29 of the Statute.

Rule 9

Prosecutor's Request for Deferral

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.

Rule 10

Formal Request for Deferral

(A) If it appears to the Trial Chamber seised of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal.
(B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.
(C) Where deferral to the Tribunal has been requested by a Trial Chamber, any subsequent proceedings shall be held before the other Trial Chamber.

Rule 11

Non-compliance with a Request for Deferral

If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the order, the Trial Chamber may request the President to report the matter to the Security Council.

Rule 12

Determinations of Courts of any State

Subject to Article 10(2) of the Statute, determinations of courts of any State are not binding on the Tribunal.

Rule 13

Non Bis in Idem

When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall, following *mutatis mutandis* the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.

. . .

Rule 54

General Rule

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas and warrants as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 55

Execution of Arrest Warrants

(A) A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. . . .

(B) A warrant for the arrest of the accused and an order for his surrender to the Tribunal shall be transmitted by the Registrar to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be. . . .

. . .

Rule 56

Cooperation of States

The State to which a warrant of arrest is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the Statute.

Rule 57

Procedure after Arrest

Upon the arrest of the accused, the State concerned shall detain him, and shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal shall be arranged between the State authorities concerned, the authorities of the host country and the Registrar.

Rule 58

National Extradition Provisions

The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 59

Failure to Execute a Warrant

(A) Where the State to which a warrant of arrest has been transmitted has been unable to execute the warrant, it shall report forthwith its inability to the Registrar, and the reasons therefore.

(B) If, within a reasonable time after the warrant of arrest has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest and the Tribunal, through the President, may notify the Security Council accordingly.

. . .

Rule 61

Procedure in Case of Failure to Execute a Warrant

. . .

(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States.

. . .

Rule 68

Disclosure of Exculpatory Evidence

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest

the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

Rule 69

Protection of Victims and Witnesses

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

. . .

Rule 75

Measures for the Protection of Victims and Witnesses

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an *in camera* proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him . . . ;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

. . .

Rule 77

Contempt of the Tribunal

(A) Subject to the provisions of Sub-rule 90(E), a witness who refuses or fails contumaciously to answer a question relevant to the issue before a Chamber may be found in contempt of the Tribunal. The Chamber may impose a fine not exceeding US$10,000 or a term of imprisonment not exceeding six months.

. . .

Rule 95

Evidence Obtained by Means Contrary to Internationally Protected Human Rights

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96

Evidence in Cases of Sexual Assault

In cases of sexual assault:

(i) no corroboration of the victim's testimony shall be required;
(ii) consent shall not be allowed as a defence if the victim
  (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
(iv) prior sexual conduct of the victim shall not be admitted in evidence.

. . .

Rule 103

Place of Imprisonment

(A) Imprisonment shall be served in a State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons.

. . .

Rule 105

Restitution of Property

(A) After a judgement of conviction containing a specific finding as provided in Sub-rule 88(B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

. . .

Rule 106

Compensation to Victims

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under Sub-rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

. . .

JAMES O'BRIEN, THE INTERNATIONAL TRIBUNAL FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE FORMER YUGOSLAVIA

87 Am. J. Int. L. 639 (1993).

. . .

1. Establishment of the Tribunal

A confluence of political opportunity, disappointed expectations of peace, and publicity have allowed the Security Council to respond to atrocities in the former Yugoslavia. The breakdown of the bipolar world since 1989 has enabled major powers to find common, not opposed, interest in punishing violations of international law. The end of the Cold War may also have raised hopes of a comfortable peace, at least in Europe, perhaps because it threatened these expectations, the fighting in the former Yugoslavia sparked a strong international response. Daily media reports of atrocities—including the abuse of women, inhumane detention facilities, indiscriminate targeting of defenseless civilians, forced expulsions and deportations, and the obstruction of relief convoys—have maintained a high level of public outrage. There is cause to doubt that the available national judicial systems (which would usually be responsible for enforcing international humanitarian law) can be either impartial or effective in punishing those responsible for violations. Yet the victims of atrocities in the former Yugoslavia deserve justice, as do all those elsewhere who will be protected by strengthened international humanitarian law.

. . .

[One] part of the explanation for the Security Council's response lies in the exhaustion of alternative remedies. On becoming seized of the issue in 1991, the Council tried to facilitate negotiations and efforts to reduce the human

toll, and it has continued that effort. Other organizations, such as the UN Human Rights Commission, the Conference on Security and Co-operation in Europe (CSCE), the European Community, and the International Conference on the Former Yugoslavia, have all tried, without success, to end the conflict or at least reduce the fighting.

By the summer of 1992, widespread and credible reports of atrocities in the former Yugoslavia prompted the Council to take four steps in succession: condemnation; publication; investigation; and, by establishing the tribunal, punishment. As a first step, the Council publicly *condemned* atrocities as violations of international humanitarian law. . . .

As the reported atrocities grew throughout the month of July 1992, the Council took a second step by *publicizing* them. In Resolution 771, on August 12, 1992, the Council called upon states and other bodies to submit 'substantiated information' to the Secretary-General, who would report to the Council 'recommending additional measures that might be appropriate.' . . .

Without waiting for the submission of a single report from a state or for the Secretary-General's recommendations for further steps, the Council, on October 6, took the third step of *investigating* violations through a 'Commission of Experts,' established by Resolution 780. It was hoped that the formation of the 'War Crimes Commission,' the first since World War II, would deter abuses. It was tasked with preparing cases for possible prosecution in national or international courts, and drawing up an internationally accepted record of atrocities and their perpetrators.

. . .

Finally, on February 22, 1993, Security Council Resolution 808 announced the fourth step: *punishment* through due process of law, by creating an international tribunal to prosecute those violating international humanitarian law in the former Yugoslavia. Pursuant to Resolution 808, the Secretary-General submitted his report, which included a draft statute for the tribunal, on May 6, 1993, taking into account the views of thirty-one states and several organizations. The Council established the tribunal on May 25, 1993, in Resolution 827, which unanimously adopted the statute developed by the Secretary-General, without change.

The Council has the authority under chapter VII to take measures necessary to maintain international peace and security. The Council may suspend commerce between states or authorize the start of hostilities; it would be odd if it could not take the lesser, surgical step of ameliorating a threat to international peace and security by providing for the prosecution of individuals who violate well-established international law. Moreover, the threat to international peace and security at issue—violations of international humanitarian law—is best addressed by a judicial remedy. . . .

Furthermore, provision for consent is built into the tribunal's statute. The UN General Assembly must approve the tribunal's budget, and thus approve its mandate and, in effect, its statute. The tribunal's authority to issue manda-

tory orders is limited to the transfer of indicted individuals and to other forms of judicial assistance. . . .

Perhaps most importantly, the Yugoslav tribunal is accountable to the defendants, who are not prohibited from challenging its authority (as they were under the Nuremberg Charter). The tribunal may—and probably should—decide that it lacks the power to consider the legitimacy of the Security Council's actions to establish it, because this would require that it construe the powers of the Security Council. . . .

II. Structure and Powers of the Tribunal

. . .

Structure of the Tribunal. Articles 11–15 of the statute provide that the tribunal will have eleven judges, three in each of two trial chambers and five in a single appellate chamber. There are no provisions for alternate judges or for the appellate court to sit in panels. These and related topics will presumably be addressed in the tribunal's rules of procedure, which will be adopted by the tribunal. Article 16 establishes the office of the prosecutor to conduct investigations and prepare indictments; the prosecutor will select his or her own staff. . . . Article 31 provides that the seat of the tribunal will be at The Hague. . . . Regardless of where the tribunal's headquarters are located, it may conduct proceedings wherever required to carry out its functions.

Subject matter jurisdiction. The Secretary-General emphasized that the law to be applied must be well established. Pursuant to Articles 1–5 of its statute, the tribunal will have jurisdiction over war crimes and crimes against humanity, including genocide, committed as of January 1, 1991, almost seven months before Slovenia became the first former Yugoslav republic to declare independence. The Charters of the Nuremberg and Tokyo Tribunals recognized a third crime, crimes against peace. Crimes against peace are appropriately omitted from the Yugoslav statute. Their inclusion would almost inevitably require the tribunal to investigate the causes of the conflict itself (and the justifications issued by the combatants), which would involve the tribunal squarely in the political issues surrounding the conflict.

Articles 2 and 3 provide the tribunal with jurisdiction over violations of the international law of armed conflict. These articles should provide the basis for most of the tribunal's work, as virtually any act that might constitute a crime against humanity or genocide would also be a war crime. Without question, rape—one crime that may fall into all three categories—is a war crime.

In explaining the scope of Articles 2 and 3, the Secretary-General referred only to the 1907 Hague Conventions, the Nuremberg judgment, and the 1949 Geneva Conventions. The elastic 'but not limited to' language of Article 3 ensures that all relevant, well-established international law falls within the tribunal's jurisdiction. The United States, the United Kingdom and France explained, when voting for Resolution 827, that the laws and customs of war

under Article 3 included all law of armed conflict in force in the territory of the former Yugoslavia, in addition to customary international law. The tribunal may thus apply the provisions of the Geneva Conventions on nongrave breaches, including common Article 3 concerning internal armed conflict, and the Additional Protocols to the Conventions.

. . .

Common Article 3 and Additional Protocol II may prove to be even more important. The Hague Regulations, the Nuremberg judgment and Additional Protocol I apply to *international* armed conflicts. The conflict in the former Yugoslavia has internal and international elements. There was only one country until Slovenia declared independence on June 25, 1991. Thereafter, some fighting involved intranational conflict (particularly Bosnian against Bosnian) and some international elements, such as the Yugoslav National Army (JNA); the JNA was officially withdrawn from Bosnia-Hercegovina in the spring of 1992, ostensibly leaving only internal combatants there. It is possible (but not correct, as I note below) that the tribunal might determine the conflict to be internal. . . .

The tribunal should conclude that the conflict in the former Yugoslavia is covered by the law applicable to international armed conflict, at least after June 25, 1991, when the former republics of Yugoslavia began declaring their independence. Consistent with the provisions of the Geneva Conventions, the parties to the conflict have agreed to apply the law of international armed conflict. Moreover, some internal conflicts fall under the law of international armed conflict. Most importantly, the conflict is clearly international: three nations have fought, primarily in the territory of two of them (thus far), with a number of fronts and partisan or proxy groups participating on behalf of each. Once this determination is made, it should not matter that some combatants are citizens of the same nation-state. . . .

Articles 4 and 5 give the tribunal jurisdiction over crimes against humanity, including genocide. Although these crimes overlap considerably with war crimes, they may reach some acts that are not war crimes, for example, acts by persons not covered by the laws of armed conflict, acts outside an armed conflict and a state's acts against its own civilians. . . .

Genocide—the attempt to destroy a group in whole or in part—is a special case of crimes against humanity. Article 4 of the statute adopts verbatim the definition in the 1948 Genocide Convention of genocide . . . Because genocide requires proof of the intention to destroy a group, not only criminal intention against an individual (as is true of war crimes) or on the basis of group membership (as may be the case with crimes against humanity), it may be the most difficult charge to prove, particularly against lower-level persons whose connection to a policy may be hard to trace.

Article 5 of the statute defines crimes against humanity. . . .

Article 5 also requires that crimes against humanity be committed against a 'civilian population.' Thus, at a minimum, crimes against humanity must be

systematic or organized, not simply episodic and/or scattered attacks on individuals. . . .

The most difficult question concerns the requirement that crimes be 'committed in armed conflict.' The legacy of the post-World War II tribunals is unclear on this point. Both the Nuremberg and Tokyo Charters restricted the vitality of crimes against humanity by requiring that they be committed 'in execution of, or in connection with' another crime in the Charters of the tribunals. . . . The United Nations has not endorsed a definition of crimes against humanity that severs such crimes from armed conflict. In making recommendations for the Yugoslav tribunal, however, most states that dealt with the topic did not connect crimes against humanity to another crime or an armed conflict.

On its face, the Yugoslav statute requires only a connection between crimes against humanity and armed conflict, which is not itself a crime under the statute; it thus marks a modest advance over the Nuremberg Charter by expressly removing the requirement of connection to another crime under international law. The question remains, however, how to interpret 'committed in armed conflict.' It would make sense to interpret the phrase as 'during' the conflict, without requiring any proof of substantive connection between the crime and the armed conflict. This reading comports with the intention of the Secretary-General and the Security Council, which did not require substantive links between crimes against humanity and armed conflict. . . .

. . .

Individual criminal responsibility. . . .

Paragraphs 3 and 4 of Article 7 pose some of the more interesting questions facing the tribunal: the responsibility of superiors for acts of subordinates and of persons following orders. The tribunal should look at higher officials who have guided or at least benefited from the atrocities that anger the world. It is not clear how useful Articles 7(1) and 4 will be in this regard. In the former Yugoslavia, the military situation appears (on the basis of information available at the time of writing) to be chaotic, with front-line forces operating under opaque (and perhaps nonexistent) lines of authority, spotty communications and rare direct orders.

If orders or other direct involvement cannot be found, prosecutions of political and military leaders will rest on the doctrine of command responsibility, which requires commanders to repress or punish violations of international humanitarian law by their subordinates. Article 7(3) provides that a commander is not 'relieved' of his individual responsibility if he or she did not prevent or punish violations of which he or she knew or had reason to know. Although the article does not indicate the source of the commander's 'responsibility,' the Secretary-General says, and the relevant statements by Security Council members agree, that the responsibility is to be defined in accordance with well-established international law:

> This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

Here the Secretary-General accurately states international law. Yet to apply this standard to the facts of the conflict in the former Yugoslavia will present formidable and interesting issues, if persons of political and military authority appear before the tribunal.

. . .

In the former Yugoslavia, much of the fighting is done by small paramilitary bands, making it difficult to determine a chain of political or military authority. The application of the doctrine of command responsibility to persons with oblique or attenuated authority will depend heavily on specific facts and may prove very difficult. Nevertheless, a few legal doctrines derived from the case law provide a tentative start. Evidence of a pattern (similarity of atrocities, coordination among those who commit them) can support the inference that persons with military or political authority (even if not over those committing the atrocities) acquiesced in them. Further, those with occupational or executive responsibility for an area are responsible for repressing and punishing violations, even if committed by forces not under their operational or administrative control. The tribunal should be reluctant to doubt the authority of persons who present themselves (or their superiors or subordinates) as powerful, for example, in peace negotiations. In addition, persons cannot create ignorance or impotence by their own actions: the duty to repress or punish violations cannot be discharged by delegation, by forfeiting authority even in the face of a deteriorating command-and-control capacity, or by permitting troops not under one's control to take over an area. . . .

. . .

III. Conclusion

States are also accountable for the tribunal's success. They should provide it with adequate resources and their cooperation and persuade other states to cooperate fully as well. To the extent that states are concerned that the tribunal may encroach on their own responsibilities to enforce international humanitarian law, they should be encouraged to conduct thorough and impartial proceedings of their own. The early difficulties of the War Crimes Commission, which tried to operate without active state interest, demonstrate the importance of continual state involvement and teach the simple lesson that, in the end, states are responsible for these international endeavors. All states have their self-interest at stake: viable international humanitarian law

will one day protect their own citizens, as well as deter violations that may quickly threaten international peace and security.

It may be more important that states create a political climate in which the tribunal will have a chance to succeed. States should speak out clearly and resolutely against violations of international humanitarian law. In addition, they should explain repeatedly that the tribunal lacks the mandate and ability to consider the responsibility of racial, ethnic or religious groups for the conflict in the former Yugoslavia. It is, instead, a means to determine *individual* responsibility, and both states and the tribunal itself must be careful to keep it separate from efforts to allocate responsibility for, or rewards from, the broader conflict. Simply put, the tribunal is aimed at bad soldiers (and those who should control them), not bad sides or groups. If the tribunal is merged into the broader political discourse of responsibility and resolution of the conflict, states and groups that perceive themselves as having little to gain from such a body may withhold their cooperation. It may also be easier to regard the tribunal as another element of the group conflict, to be settled (and perhaps traded away) between and among groups, without permitting recourse to a full and fair determination of individual responsibility. For the principle of individual accountability underlying international humanitarian law, this could be the most cynical result of all.

. . .

NOTE

The systematic incidence of mass rape in the former Yugoslavia has drawn particular attention from observers and scholars, both in terms of the legal characterization of rape under international humanitarian law[6], and in terms of its strategic use as an instrument of fear, shame and ethnic cleansing. The crime of rape is referred to once in the Tribunal's Statute, as an instance of crimes against humanity under Article 5.

Consider the following observations about the different motivations and consequences of rape in wartime, the excerpts below being directed to the former Yugoslavia:[7]

> Rape has long been mischaracterized and dismissed by military and political leaders . . . as a private crime, a sexual act, the ignoble conduct of the occasional soldier, or, worse still, it has been accepted precisely because it is so commonplace.
>
> . . .

[6] Theodor Meron, Rape as a Crime under International Humanitarian Law, 87 Am. J. Int. L. 424 (1993).

[7] Dorothy Thomas and Regan Ralph, Rape in War: Challenging the Tradition of Impunity, SAIS Review 81, 84 (Winter–Spring 1994). See generally 5 Hastings Women's L. J. (Summer 1994, No. 2).

In fact, rape is neither incidental nor private. It routinely serves a strategic function in war and acts as an integral tool for achieving particular military objectives. In the former Yugoslavia, rape and other grave abuses committed by Serbian forces are intended to drive the non-Serbian population into flight.

. . . The attention to rape's strategic function, however, has attached much significance to 'mass rape' and 'rape as genocide.' This emphasis on rape's scale as to what makes it an abuse demanding redress distorts the nature of rape in war by failing to reflect both the experience of individual women and the various functions of wartime rape.

Rape rises to the level of a war crime or a grave breach of the Geneva Conventions regardless of whether it occurs on a demonstrably massive scale or is associated with an overarching policy. Individual rapes that function as torture or cruel and inhuman treatment themselves constitute grave breaches of the Geneva Conventions. . . . When rape does occur on a mass scale or as a matter of orchestrated policy, this added dimension of the crime is recognized by designating and prosecuting rape as a crime against humanity.

. . .

Although rape is a sex-specific type of abuse, it generally functions like other forms of torture to intimidate and punish individual women. In some instances, however, it also can serve a striking sex-specific function, when, for example, it is committed with the intent of impregnating its victims. A Bosnian rape victim told Human Rights Watch, '. . . They wanted to humiliate us. They would say directly, looking into your eyes, that they wanted to make a baby.'

Soldiers are motivated to rape precisely because rape serves the strategic interests delineated above. But the fact that it is predominantly men raping women reveals that rape in war, like all rape, reflects a gender-based motivation, namely, the assertion by men of their power over women. . . . It is therefore difficult to distinguish the gender elements of a rapist's motivation from the specific political function served by the rape.

COMMENT ON ISSUES BEFORE THE TRIBUNAL

The establishment of this International Criminal Tribunal (ICT) for the Former Yugoslavia was a truly historic event, holding considerable promise and inescapable risk. This Comment notes several aspects of the ICT and its work.

1. Observers have read different motivations into the Security Council's decision to establish the Tribunal. Some understand the ICT to be an essential response by the Council to the public outcry after exposure by the media of the outrages in the conflict—a minimum response, an effort to do 'something' that could prove to be significant and that was politically manageable (unlike the failures in efforts at negotiation or in discussion of types of inter-

vention). Others understand the Tribunal to be a slave to conscience for the West, a way of dealing with ethnic cleansing and the accompanying brutality without effectively dealing with it. Whatever the motivations—and they were surely complex—the fact remains that a tribunal has been created, and the arguments for or against its establishment are now irrelevant. Success in its work—that is, some minimum of convictions after the fair trials by independent and impartial judges that the Statute requires—seems imperative, for failure at this stage would be far more serious than an earlier decision not to establish the tribunal at all.

2. The ICT is in a radically different situation from a court in a state observing fundamental principles of the Rule of Law in the sense that the state's executive and legislative branches comply with and execute court judgments. The Security Council has created an independent organ, as must be the case. Nonetheless, the ICT remains fundamentally dependent on an uncertain and changing political context; it lacks the relative autonomy of a court in a state with a strong tradition of an independent judiciary. The Tribunal depends for funds on a UN General Assembly whose members hold different views about it and who may judge its work differently. It must receive support from states and from the Security Council with respect to such basic matters as enforcing its orders related to gathering evidence, or obtaining custody of indicted persons. There is no equivalent to a 'national tradition' for the Tribunal to draw on.

3. Beyond its fundamental mission of bringing a sense of justice and reconciliation to the combatants and civilians in the area, the ICT possesses an exceptional opportunity to develop international law in the field of individual criminal responsibility in an authoritative way. Its distinguished Prosecutor (and his staff) and the many distinguished judges will confront in their presentations of cases and in their decisions numerous vexing issues, some of ancient lineage and some bred by the developments over the last half century in international humanitarian law including the crimes defined at Nuremberg. For example, prosecutions will likely involve the following issues: the nature of the 'intent' required for genocide; the relation between ethnic cleansing and genocide; the characterization of rape within the crimes stated in the Statute; the ambiguities in the concept of 'grave breaches' under the Geneva Conventions; the problems in imposing criminal liability for failure to exercise command responsibility; the problems of siege warfare and indiscriminate fire.

4. The Prosecutor, Judge Richard Goldstone, has publicly stated his intention to give priority to indicting the most culpable—that is, those who gave the orders, who were in charge. Here, however, the potentially conflicting demands of the ICT and of those attempting to negotiate an end to the conflict may be at their point of greatest tension with each other. The Prosecutor characterizes the Tribunal as an independent organ pursuing its professional and objective task as defined by the Security Council without attention to larger political considerations. Nonetheless, the political context may become very

relevant for the essential institutional supporters of the Tribunal: states individually, the General Assembly and the Security Council.

QUESTIONS

1. The determination of the Security Council stated in Resolution 808 (restated in Resolution 827) that 'this situation constitutes a threat to international peace and security,' as well as the stated conviction of the Council that 'in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would . . . contribute to the restoration and maintenance of peace,' derive from the conditions for making a decision under Chapter VII (see Art. 39). What arguments would you make to support or to challenge these statements?

2. Observers have described the aims of the ICT in ways that evoke traditional notions of the aims of the criminal law generally, but that also address specific characteristics of this conflict. Consider:

a. Deterrence. Whom is the Tribunal attempting to deter, the present leaders in this conflict, or those who might instigate and commit crimes in future conflicts? Should different strategies be at work to achieve one or the other goal? Who indeed is deterrable in an ethnic conflict stirring such deep hatreds and cruel actions—only the leaders, or also the foot soldiers who commit many of the atrocities? What are the conditions for effective deterrence in this present conflict, and have they been met? Is a court the most effective instrument of deterrence, or does the Tribunal necessarily play this role because of failure of other means of addressing the conflict?

b. Punishment–retribution. How can the Tribunal best serve this function? Is symbolic justice through the conviction and imprisonment of a small number of people (in relation to the number of people committing the international crimes defined by the Statute) sufficient to create a broad sense of justice among the conflict's victims? What other means (shy of forceful intervention) are available to help build this sense of catharsis and justice?

c. Reconciliation, long-run peace and stability. Can reconciliation and a 'true' lasting peace be achieved partly through the work of the Tribunal? What role are convictions and imprisonments likely to play in this process of reconciliation relative to, for example, the kind of settlement about territorial control and residence that emerges, provisions for compensation of victims, and so on?

3. The preceding Comment refers to the 'considerable promise and inescapable risk' for the Tribunal and its work. How do you understand the promise, and the risk?

4. The Comment also states that the priority in seeking indictments that the Prosecutor has described may pose a situation of conflicting demands of the Tribunal and of those working toward an end of the conflict through negotiations. Why should this be the case?

5. Note the strict rules in the Tribunal's Statute and Rules of Procedure and Evidence that protect the rights of the accused by assuring a fair trial. Suppose that you were a member of the office of the Prosecutor sent on an investigative mission to find evidence supporting an indictment and prosecution of particular individuals who were (i) leaders of battalions that were alleged to have committed rape and other atrocities against the civilian population and (ii) persons in charge of detention camps where torture was routinely practiced. The relevant events took place in 1993. What kinds of problems would you anticipate in gathering adequate evidence for a trial?

6. What do you believe are the appropriate substantive conditions (as opposed to the formal legal conditions governing decisions by the Security Council) for the establishment of an *ad hoc* international criminal tribunal for a given conflict? For example, should it be relevant that the conflict has an international rather than internal character, or that the conflict as a whole reaches a certain level of systematic atrocity?

7. Suppose that negotiations among the parties end the conflict (whatever the resulting settlement). Do the relevant resolutions of the Security Council establishing the ICT remain in effect so as to permit ongoing indictments and prosecutions?

NOTE

The conflict in the former Yugoslavia has been ugly almost beyond belief. The reports of systematic murder of civilians, systematic and gross cruelty including rape and mutilation, and systematic deportations to achieve 'ethnic cleansing' are legion. Although all parties to the conflict are reported to have committed serious crimes under international law as described in the Tribunal's Statute, the large majority of violations have been attributed to the Serbian/Bosnian Serb participants.

Such charges grow out of the massive documentation, much of it of high quality, achieved through the remarkable work of the UN-established Commission on Experts under Professor Cherif Bassiouni as its chairman, the detailed reports of the Special Representative (Tadeusz Mazowiecki) appointed by the UN Commission on Human Rights, the many investigative reports of international human rights NGOs and numerous press accounts. All such sources have provided the Tribunal with a base on which to proceed with its own detailed investigations to accumulate evidence of the reliability and specificity necessary to support indictments and prosecutions. Here as elsewhere, the Tribunal has been hampered in its work by the contingent and inadequate funding provided by the UN.

As of July 1995, a number of indictments had been issued (approved, as required by the Statute, by a judge of a Trial Chamber upon application by

the Prosecutor), and a number of requests by the Prosecutor for deferral to the Tribunal by state authorities had been approved by a Trial Chamber.[8]

KENNETH ANDERSON, NUREMBERG SENSIBILITY: TELFORD TAYLOR'S MEMOIR OF THE NUREMBERG TRIALS

7 Harv. Hum. Rts. J. 281 (1994).

[In this review of Telford Taylor's *Anatomy of the Nuremberg Trials* (1992), Anderson compares Nuremberg with the International Criminal Tribunal for the Former Yugoslavia.]

> The leitmotiv of Goering's defense at the Nuremberg trials returned time and time again to this theme: 'The victor will always be the judge, and the vanquished will always be the accused.'
>
> Albert Camus, *The Rebel*

> That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason.
>
> Justice Robert H. Jackson

Justice Robert H. Jackson's opening statement at the Nuremberg trial has justly been characterized as one of the greatest orations in modern juristic literature. Yet behind its rhetorical power lies a fervent anxiety: a desire to silence the skeptical voices whispering that the Nuremberg trials were just the tarted-up revenge to which Camus alludes.

Nuremberg was indeed the profoundest tribute of power to reason, as Jackson claimed, but of what did the tribute consist? Jackson said it was to 'stay the hand of vengeance,' so to turn vengeance into something else in the instant before the hand falls. Vengeance, therefore, becomes justice by virtue of a *pause*: a pause in which the partial becomes impartial. The action that had seemed inevitable becomes suddenly, for a moment, contingent. A pause, a moment, a space of time, a gap in the historical action: this was the tribute that constituted Nuremberg. It resolves the skeptical anxiety that the trial was only about vengeance.

. . .

[8] For illustrative documents, see the application of Richard Goldstone, Prosecutor, for an indictment against Dragan Nikolic, and the Decision of the Trial Chamber granting the Prosecutor's application for a formal request for deferral by Germany to the competence of the Tribunal in the matter of Dusko Tadic, 15 Hum. Rts. L. J. 480 and 486 (1994).

Taylor shows that American legalist sensibilities . . . are, in fact, deeply rooted. Deepest of all is the belief that the courtroom is the right place for dealing with war crimes. The American lawyers viewed the war effort and the war itself as properly bringing the rule of law to bear on an ever-widening range of human conduct, subjecting mere politics to it . . . .The Nuremberg trial was needed to convert the contingent fact of Allied might into the eternal fact of Allied right.

. . .

Indeed, as Taylor makes clear, Jackson aimed to establish a judicial precedent on the criminality of aggressive war. Jackson 'made crimes against peace—the criminalization of initiating aggressive war—the foremost feature of the Nuremberg trial . . .' (p. 635). He saw the fundamental crime as a crime against peace, the crowning, pathbreaking charge that the Americans and British divided between them. For Jackson, war crimes were minor matters to be left to the French and Soviet prosecutors.

As today's Security Council establishes the Yugoslavia tribunal, Nuremberg remains relevant principally for matters of war crimes, crimes against humanity, and genocide—the 'minor' matters at Nuremberg. Jackson's aspiration for Nuremberg has faltered precisely on account of the existence of the Security Council. To be sure, Nuremberg did establish a rule of law concerning aggressive war; it is codified in the United Nations Charter. In that sense, at least, war is no longer merely the foreign policy option of an independent sovereign. The rule of law has replaced political decision. However, this rule of law is not justiciable; it is not, as at Nuremberg, a matter of judicial determination. Instead, the determination of aggressive war and threats to peace and security is committed to the hands of the Security Council itself. Great power politics is now dressed up in the rhetoric of the rule of law and sanctified by the U.N. Charter.

The Yugoslavia tribunal's charter, therefore, is noteworthy for what it does not reproduce from the vastly more sweeping Nuremberg charter. The division between *jus ad bellum* and *jus in bello* is fully restored in the Yugoslavia tribunal charter, with the Security Council having sole discretion as to the former, and the tribunal adjudicating only the latter. . . .

Of course, the Yugoslavia tribunal's authority is limited by a more practical matter: it has no one to try. Still, my own experience—private conversations with senior military officers and judge advocates of the NATO armies over the past two years—suggests that this tribunal has more than just practical difficulties: there is a deep malaise. Senior European military officers and diplomats have told me that they see no point in scheduling a trial if no one is willing to commit to a military victory. . . .

. . . Many of these officers argue that there is no justice but 'victor's justice.' . . . A military victory is not simply a practical prerequisite to a trial, they seem to say, but a moral necessity.

This assertion captures my own point about the sensibility of Nuremberg:

to reduce the world to a courtroom, to legal memoranda and pleadings and paperwork, is possible only once an army sits atop its vanquished enemy. Otherwise, the enormity of the crimes left unaddressed out in the hills of Bosnia so dwarf those raised before the tribunal that it mocks justice. A trial, Nuremberg taught, puts the symbolic seal of justice on what armies have rectified with force. These officers imply that to hold a trial without having 'fixed things' in the field is, symbolically, as much or more an act of ratification as condemnation.

In other words, to hold a war crimes trial in the former Yugoslavia today would be like holding Nuremberg after acquiescing in the German annexation of Poland, the Ukraine, and the rest of the eastern lands.

. . .

. . . The Yugoslavia tribunal invokes the law as a rhetorical device to make the U.N. appear to do more than it has, but everyone knows that those who would conduct the trial have not paid the price.

. . .The Yugoslavia tribunal seeks to make history; but the true lesson of Nuremberg is that the power of law to reduce history to its terms can only be accomplished where history—victory and surrender—has been made elsewhere.

QUESTION

'Anderson's argument should be stood on its head. To have rejected the idea of an international criminal tribunal for the conflict in the former Yugoslavia would have been to acquiesce in the argument of those who understand Nuremberg only as "victor's law." It was essential to make the point through the ICT that international standards (at least of *jus in bello* if not *jus ad bellum*) must be vindicated independently of whether there was or would ever be a military victory to roll back the illegal and cruelly-achieved gains. International law is more than an afterthought. This Tribunal indeed provides the golden opportunity for that law to demonstrate its autonomy from international military force as a means of protecting human rights.' Comment.

* * * * *

The following reading raises questions about amnesty in the Yugoslavian conflict that are examined in a broader setting in Section D of this chapter.

PAUL SZASZ, THE INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA AND THE WAR CRIMES ISSUE

American Society of International Law, Proceedings of the 87th Annual Meeting 20 (1993).

. . .

It is clear that effective peace negotiations cannot be conducted in an atmosphere of mutual or unilateral accusations of criminal conduct. The Co-Chairmen [of a negotiating group] cannot seriously say: 'Please sign this agreement, Mr. K, and as soon as you do so and fighting has ceased we expect you to answer criminal charges in our war crimes court.' Therefore, they must keep their distance from the establishment or operation of such a tribunal, from the prosecution of alleged offenses within it, and even from the investigation of charges. . . .

The question has been raised: How can the Co-Chairmen talk to or negotiate with accused war criminals? (As if there were a choice!) . . . [P]eace negotiations must evidently be conducted with the persons who control the warring forces. It is no use seeking to talk only to persons uncompromised by the struggle, for most likely they could not cause its termination . . .

. . .

This brings me logically to the final question that is constantly raised in connection with our subject today: Will not an overall peace settlement negotiated within the framework of the Conference necessarily include an amnesty provision under which all accused war criminals escape responsibility for their acts? . . .

The answer is really quite simple. The parties can, individually or collectively, grant each other and themselves immunity only from prosecution under their own laws and within their own courts. War crimes, and crimes against humanity, such as the ones that would be prosecuted in an international war crimes tribunal, are, however, not primarily national crimes—they are crimes against the world community. . . . [N]ational organs cannot, whether by domestic actions or by regional treaties, exculpate their citizens from crimes committed against the world community.

. . .

If the world community, through the Security Council, decides that particular offenses should be prosecuted in a war crimes tribunal, then it is only the world community—presumably, but not necessarily, acting through the same organ—that can grant amnesty or respite from prosecution. . . .

There is another objection often raised in connection with the proposal to establish an ad hoc tribunal to deal with war crimes in former Yugoslavia:

Why start just with this conflict? Nothing was done about Cambodia, or the Iraqi invasions of Iran and Kuwait and the associated outrages and inhumanities, or Idi Amin in Uganda (and others I might list). What justifies a different attitude now? One answer is that, in some ways, what is being reported from the Balkans is indeed in many ways worse—in both actions and expressed motivations—than anything that has occurred since World War II. Even without entering into such a process of weighing, however, it should be said that we must make a start somewhere! If past inaction necessitates or merely excuses similar neglect now and in the future, then there is little hope for any improvement in the lot of humanity.

. . .

NOTE

On 20 March 1993 the Republic of Bosnia and Herzegovina filed a complaint against the Federal Republic of Yugoslavia (Serbia and Montenegro) in the International Court of Justice alleging violations of the Convention on the Prevention and Punishment of Genocide. In response to a request for provisional measures, the Court decided as follows:

A. (1) Unanimously,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2) By 13 votes to 1,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;

B. Unanimously,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution.

In response to a second request for interim measures, the Court in its Order of 13 September 1993 reaffirmed its earlier order but was not prepared to go further at that stage. The case remains pending.

C. PROPOSALS FOR A PERMANENT INTERNATIONAL CRIMINAL COURT

BERNHARD GRAEFRATH, UNIVERSAL CRIMINAL JURISDICTION AND AN INTERNATIONAL CRIMINAL COURT

1 Eur. J. Int. L. 67 (1990), at 73.

. . .

For a long time, the question of international implementation of criminal law was approached from the viewpoint of the need to prevent possible interference with state sovereignty and not from that of the need for coordinated struggle and cooperation in the fight against international crimes. Thus, states either cited the sovereignty principle as justification for objecting to the extension of universal criminal jurisdiction or as justification for rejecting the establishment of an international criminal court. This situation continues to exist today, though in a different fashion; there is increasing recognition that national security is at present achievable only by way of international cooperation. In this context, however, one cannot underestimate the importance of the fact that states are the essential structural elements of today's international legal order, that they represent the effective political organizational form of peoples and that they have particular protective functions which they actually exercise. However compelling the precept of cooperation may be, all states want to insure that other states will not be permitted to use criminal law to interfere with their sovereignty or to achieve goals incompatible with the interests of the international community and peoples' right to self-determination.

. . .

[S]tates use the sovereignty principle to justify their objections to the competence of an international criminal court. The underlying fear here is that criminal jurisdiction over crimes committed on one's own territory, where the victim is a citizen or national interests are at stake, will be at the mercy of an international system of criminal justice controlled by others. . . . [T]he Soviet Union and other socialist countries. . . have repeatedly rejected the creation of an international criminal court as a supra-national institution. Following the example of Nuremberg, they have always advocated the creation of *ad hoc*

courts whose competence could be based on the existence of joint national criminal jurisdiction, decisively opposing attempts to create an international criminal court which would have the competence to act side by side, or in place of national criminal jurisdiction, decisively opposing attempts to create an international criminal court which would have the competence to act side by side, or in place of national criminal jurisdiction. They have regarded it as impossible for states to hand over their own citizens to an international court for punishment or to refrain from criminal prosecution of offences committed on their territory.

Rejection of, and skepticism about, an international criminal court is not in any way a typically socialist attitude or a position confined to the socialist states. Britain in particular, but the US too, has opposed creation of an international criminal court. Vehemently opposed to the proposal set forth by the International Law Commission, Fitzmaurice stated that the ILC had failed to establish that states regarded creation of any such institution as at all desirable. Obviously he was right. The debate on the Genocide Convention clearly showed that the majority of states did not favor an international criminal court. To date, no viable majority in the UN has been found to favour the creation of such a court.

Many states advocate the creation of an international criminal court, claiming that an international court is necessary if the Draft Code of Crimes against the Peace and Security of Mankind is to be implemented effectively. These states assert that the establishment of an international court is the only way to guarantee objective, impartial jurisdiction, which is particularly important and, at the same time, particularly hard to achieve. In addition these states often point out that the creation of an international criminal court is the only way to avoid differing punishment by individual states. But while these questions are certainly of central importance to the international criminal legal regime, it is not convincing to argue that the only solution to these problems is to transfer criminal jurisdiction from states to an international criminal court.

. . .

. . . [I]t seems to me important . . . to get away from the sterile thoroughly unproductive approach of setting up an alternative between universal criminal jurisdiction of national courts and criminal jurisdiction of an international criminal court. This approach, which led I. Sinclair to declare, 'it is implied that there are two alternatives: universal jurisdiction or an international criminal jurisdiction,' has been the position assumed by many states in the past. In fact, even the special rapporteur gave vent to this approach in his explanation of Article 4 of the International Law Commission's draft code, stating: 'The problem of competent jurisdiction was most serious, since it involved a choice between creating an international jurisdiction and extending the competence of national courts to cover such crimes.'

There is no real reason, however, to see the system of universal criminal

jurisdiction and the power of an international criminal court as mutually exclusive. . . .

In fact, most drafts for an international criminal court are reconcilable with this position; most do not provide the international criminal court with court exclusive criminal jurisdiction for particular crimes. The notion that states would be prepared to delegate their sovereignty over crimes committed on their territory, against them, or by their citizens to an international criminal court is so far from reality that it has hardly been seriously defended.

. . .

NOTE

For several years, the International Law Commission (ILC) has been working on draft provisions for a permanent international criminal court. In 1994, it adopted a Draft Statute for an International Criminal Court, the subject of the following article.

JAMES CRAWFORD, THE ILC ADOPTS A STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

89 Am. J. Int. L. 404 (1995), at 408.

. . . The Draft Statute does not correspond to any single criminal justice model, adopting elements from different national traditions. Thus, there is an essentially accusatorial procedure, with an independent prosecutor as distinct from an investigating magistrate. But decision making is by a multimember panel of judges, with no jury, and as in the civilian tradition dissents are suppressed.

. . .

The Court envisaged by the Draft Statute is to be:

(1) a permanent court in the sense that it will be available to act as required, but one that will not have a large infrastructure or permanent staff; in particular, it is intended that the judges will perform other roles (e.g., as national judges) unless called on;
(2) a court created by treaty under the control of the states parties, but in a close relationship with the United Nations;
(3) a court of defined jurisdiction over grave crimes of an international character under existing international law and treaties;
(4) a court the basis of whose jurisdiction is—with the significant exception of genocide—dependent on the acceptance of states; and
(5) a court whose operation is integrated with the existing system of international criminal assistance and which is not intended to displace that

> system in cases where it is functioning. As the preamble states, the Court 'is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole . . . [and] to be complementary to national criminal justice systems in cases where [their] trial procedures may not be available or may be ineffective.'

. . .

The Court is to have a defined jurisdiction over crimes of an international character or concern, and the Draft Statute thus lists specifically the crimes that are to be within the jurisdiction, avoiding merely generic definitions.

In the 1993 draft, three categories of crimes were envisaged: (1) crimes under general international law, (2) crimes under a list of treaties in force (the Genocide Convention, the four Geneva Conventions of 1949 and the first Protocol of 1977, and the various 'terrorism' conventions directed at hijacking, hostage taking, etc.), and (3) a further category of crimes under national law giving effect to what were described as 'suppression conventions.' This third category was meant to cover conventions such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of December 20, 1988, which in terms envisage that the crimes punishable in accordance with the convention are crimes *under national law*. Those conventions cover a wide range of conduct, far wider than could justifiably be brought within the scope of an international criminal jurisdiction. Despite these characteristics, no list of suppression conventions was drawn up, comparable to the list of treaties within the second category.

The Draft Statute as adopted avoids the earlier generic definitions both of crimes under general international law and of suppression conventions. In the interest of simplicity and clarity, the number of categories is reduced to two, both consisting of enumerated crimes, and (with the exception of genocide) the prerequisites for the exercise of jurisdiction over such crimes are the same. As to crimes under general international law, the earlier definition had been criticized by states on the grounds of its uncertainty. The Court should not, it was said, have a general power to 'define' new crimes under general international law. Accordingly, the 1994 Draft Statute (Article 20) confers jurisdiction over four named crimes under general international law: '(a) the crime of genocide; (b) the crime of aggression; (c) serious violations of the laws and customs applicable in armed conflict; (d) crimes against humanity.' The content of these crimes is to be found in general international law. The Statute itself is conceived of as primarily procedural and adjectival, with the substantive law the Court applies deriving from other sources.

. . .

With the exception of aggression, the list of crimes under general international law in Article 20 reflects that in the Statute of the Tribunal for Former Yugoslavia, although discussion of their definition is contained in the com-

mentaries rather than in the Draft Statute itself. Genocide is included only in Article 20 (a), since the Commission took the view that the definition of genocide in the Genocide Convention of 1948 reflects that under general international law. In other respects also, genocide is given special treatment, since it is the only crime within the 'inherent' jurisdiction of the Court. . . .

. . .

As noted already, the earlier distinction between crimes under listed treaties and crimes under suppression conventions was abandoned. In effect, the two categories are merged, combining the more restrictive elements of each. Thus, as was the case with crimes under listed treaties in the 1993 draft, there is a *numerus clausus* of treaties. If additional treaty crimes are created, the Statute will have to be amended to include them. On the other hand, the 1993 draft required for crimes under 'suppression conventions' that the crime in question reach a threshold level of seriousness, and this requirement has been extended to *all* treaty crimes under the 1994 draft. . . .

As to the crimes encompassed by the list of treaties, illicit traffic in narcotic drugs and psychotropic substances contrary to Article 3 (1) of the 1988 Drugs Convention is added, and also the crime of torture as defined by Article 4 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of December 10, 1984. The omission of the latter Convention from the 1993 Statute had been widely criticized.

The same requirements of state consent or acceptance are laid down for all crimes referred to in Article 20 (other than genocide). . . .

. . .

Rather than focusing further on the detail of the ILC's draft, it may be more profitable to reflect on the underlying factors that will determine whether the 1994 Draft Statute, or any other version of an international criminal court, stands a chance of acceptance. . . .

. . .

. . .[T]he importance of the political changes in the United Nations following the end of the Cold War cannot be overestimated. Quite simply, things are now possible that were not when the likelihood of a veto lay ever present over the Security Council, and when consensus could often be achieved only at the price of inaction. But the very activism of the Security Council is one of the reasons for the change of mood about a criminal court. Many commentators, and not a few governments, are concerned by the rather ad hoc character of the Security Council's actions in establishing tribunals for the former Yugoslavia and Rwanda.

There are both practical and constitutional issues here. Practically, the establishment of a new tribunal and the appointment of its personnel are a difficult, expensive and time-consuming process. Particular difficulty was experienced with the office of the prosecutor.

Moreover, the establishment of a tribunal for a particular conflict carries with it the risk that the tribunal will be seen in a sense as *part* of the conflict. The creation of a special tribunal raises expectations that something will happen, and may divert attention from the resolution of conflict to the targeting and punishment of wrongdoers. . . .

A further fundamental issue is that of the constitutional security of a set of international criminal tribunals established ad hoc for particular conflicts. It is certainly arguable that the Security Council's chapter VII powers extend to the creation of criminal tribunals where necessary as part of an approach to resolving a conflict. But the creation of such tribunals by executive resolution in the exercise of emergency powers is less than satisfactory. The principle of legality is of particular significance in criminal cases. It connotes that criminal courts be established on a secure constitutional base; that the law to be applied be sufficiently defined in advance; that court personnel, the judges especially, have security of tenure, and that they be independent of executive interference in the performance of their judicial functions. These conditions may be met de facto in the case of the tribunals so far established—and it must be stressed that those involved in the two tribunals have been working with vigor and integrity to discharge their mandate. But, quite apart from underlying issues of *vires*, the tribunals could be abolished by Security Council resolution at any time, and meanwhile the financial and personal resources available to them have to be negotiated and cannot be described as secure.

The normal way in which institutions, and especially judicial institutions, are created is by legislation. At the international level this requires a treaty, and the implementation of the treaty within the national legal orders of states parties in turn requires compliance with national constitutional procedures. This is the secure and, in the long run, the only appropriate way to create an international criminal court. With the ILC's adoption of the Draft Statute, and the relatively favorable reception it received from a majority of states in the General Assembly, that idea is a step closer.

D. PUNISHMENT, AMNESTY, TRUTH COMMISSIONS

Sections B and C examined the role of international criminal tribunals for the prosecution of individuals accused of committing crimes under international law. Our attention in Section D remains on violent conflicts. Those here described have principally an internal character. The issues to be explored arise when serious human rights violations are committed by a controlling state regime or succession of regimes. At a certain stage, whether because of a strengthening internal opposition, international pressures, or distinctive international circumstances such as a war, negotiations may start that look to

political change through a popularly elected regime that pledges to observe human rights. Or the older (often military) regime in power may suddenly collapse.

The question then arises how the new regime should act toward those suspected or accused of serious human rights violations in the prior period. Should there be trial and punishment of individuals, and, if so, of all violators or only of leaders? Should there be a general amnesty? Should other paths be followed?

Section D thus departs in several respects from the prior sections. The tribunals here at issue are national rather than international. The prosecutions are for crimes under national law. Of course no issue arises of the state's jurisdiction to prescribe, for the criminal conduct took place on its very territory. Those crimes—often of a systemic and vicious character involving mass murder, disappearances, rapes, and torture—of course violate rights declared by the international law of human rights. Much of the offensive conduct also constitutes crimes under international law that impose individual responsibility—for example, the obligation of parties to the Convention against Torture to enact legislation making torture by stated persons criminal. The issues discussed in this Section D concentrate on individual criminal liability, generally of persons who acted as state officials or under color of state authority, but the discussion also reaches matters that are chargeable directly to the state such as victims' claims for compensation.

The materials concentrate on Latin America, in which questions of amnesty have been particularly prominent, almost endemic to changes of government following the rule of an oppressive regime. The states selected to illustrate the major issues fall into three patterns. Argentina employed a combination of prosecutions, exoneration and pardons. Uruguay, through legislation supported by a plebescite, determined on a general amnesty without prosecutions and without a serious effort to uncover the truth of what had occurred. Chile decided against prosecutions but its President appointed a National Commission for Truth and Reconciliation to investigate and report in detail on what had occurred. The materials also include a description of El Salvador's experience with a UN Commission on the Truth for El Salvador. Several of these states made provision for compensation to victims.

The protracted negotiations in 1993 and 1994 involving President Aristide, the military rulers of Haiti, the United States and international organizations, and looking toward the departure of those rulers and the return of the President, are a good place to start. The negotiations frequently had to deal with the military leaders' demands for amnesty for them and their subordinates. The following account indicates the many complexities (only starting with the legal and the political ones) in such situations, and suggests the kinds of problems presented in Section D's illustrations of amnesty issues in Central and South American states.

HUMAN RIGHTS WATCH WORLD REPORT

1994 (events of 1993), at 107

. . .

In 1993, as previously, the issue of army accountability was a recurring stumbling block in negotiations to restore President Aristide and democracy in Haiti. While the Clinton administration and the U.N. promised large amounts of economic and military assistance to entice the military, and to a lesser extent President Aristide, to pursue negotiations, the carrot-and-stick approach foundered on the issue of accountability. Aristide was under consistent pressure from U.N. Special Envoy Caputo and from Amb. Lawrence Pezzullo, special envoy for President Clinton, to make concessions on the Haitian army's accountability for its crimes.

Before coming to a settlement, General Cédras required guarantees that President Aristide's opponents would be immune from prosecution and protected from acts of vengeance for participating in the military coup, and that U.N. observers would play a protective role. Cédras demanded amnesty and protection for himself, his family and other members of the high command. The U.S. and U.N. supported these conditions and put Aristide in the position of making or breaking the settlement.

In June, as the *de facto* leaders in Haiti were faced with increasingly harsh sanctions. Cédras agreed to negotiate with Aristide. . . .

The ill-fated Governors Island Accord was signed on July 3. It called for the resignation of General Cédras shortly before the return of President Aristide to Haiti. . . . The agreement also called for President Aristide to issue an amnesty in accordance with the Haitian Constitution, which allows amnesty for political crimes but not for common crimes. Aristide interpreted this constitutional norm as allowing an amnesty for the crime of overturning the constitutional order, but not for the murders, disappearances and torture that had taken place since the coup.

. . .

. . . General Cédras set new conditions for his resignation by demanding that the Haitian parliament pass legislation on an amnesty for crimes committed in connection with the coup. (President Aristide had already issued a decree in early October in accordance with the Governors Island process providing amnesty only for crimes against the state, not for crimes against human rights.) Although Cédras claimed he merely wanted Aristide's decree reinforced by amnesty legislation, it was understood that he sought a broader amnesty that would cover human rights crimes, or common crimes such as murder and torture; such an amnesty would violate the Haitian Constitution. In response to this new demand, the Clinton administration failed to state

clearly that it supported the scope of Aristide's decreed amnesty or to oppose Cédras's demand for total impunity.

. . .

1995 (events of 1994), at 101

The Clinton administration made a sharp reversal in Haiti policy midway through the year, transforming its failed approach of accommodating the military regime into a face-off that resulted in the September intervention. Throughout the year, however, the administration was consistent in failing to promote accountability for human rights violations or to insist on safeguards to prevent their recurrence.

During the first half of 1994, U.S. officials actively promoted a blanket amnesty for human rights violations committed since the coup, in addition to the amnesty for crimes associated with the coup itself already decreed by President Aristide. Even after the U.S.-led occupation of Haiti, the administration consistently failed to oppose a broad amnesty that would deny victims of human rights crimes their internationally guaranteed right to a legal remedy.

. . .

Consistent with its pursuit of a power-sharing arrangement, the administration downplayed human rights abuses committed by the Haitian armed forces and its supporters, choosing not to condemn publicly serious abuses or to attribute responsibility for them to the military regime. . . .

. . .

On July 31, the U.N. Security Council passed Resolution 940, which invoked Chapter VII of the U.N. Charter and allowed the U.S. to form a multinational force 'to use all necessary means to facilitate the departure from Haiti of the Military leadership.' . . .

On September 13, the State Department rectified its past indifference by issuing a strong condemnation of human rights abuses in Haiti. Two days later, President Clinton addressed the nation with an emotional description of the regime's brutality as a principal rationale for invading Haiti. . . .

In a last-ditch effort to avoid an unpopoular hostile intervention, President Clinton authorized former President Jimmy Carter, Senator Sam Nunn, and General (Retired) Colin Powell to negotiate with the Haitian army's high command. On September 18, with war planes en route to Haiti, the Carter delegation produced an accord, signed by de facto president Emile Jonaissant, under which the top three coup leaders would step down by October 15, the Parliament would pass a general amnesty, and international sanctions would be lifted. . . .

. . .

On October 15, President Aristide returned to Haiti and was welcomed by jubilant crowds. After naming a new prime minister and government, he faced the enormous tasks of repairing the ravaged national economy, establishing a permanent, civilian police force answerable to civilian authority, and rehabilitating a crippled judiciary. He was also responsible for establishing a climate favorable to holding parliamentary and local government elections, tentatively scheduled for early in 1995. Most importantly, with financial and technical assistance of the international community, he would have to break the cycle of violence that has plagued Haiti for decades by assuring accountability for thousands of crimes committed under the coup regime.

. . .

VIEWS OF COMMENTATORS

Consider the following comments about issues of impunity and amnesty:

Amnesty International[9]

Peace settlements should include provisions for investigating past human rights abuses and ensuring that perpetrators are brought to justice. . . .

[P]rovisions for investigating past violations should be ensured in order to determine individual and collective responsibility and to provide a full account of the truth to the victims, their relatives and society. Investigations must be undertaken by impartial institutions, independent of the security forces. In the context of peace-keeping arrangements, investigations into the past should preferably include international participation. The results of the investigation must be made public. Where there has been an endemic pattern of human rights abuses, a public inquiry commission should be established to investigate the entire pattern of abuses and the reasons why they occurred. Such an inquiry should be able to examine the institutions and agencies responsible and make recommendations regarding the accountability of personnel; legislative, institutional, and procedural reforms; and human rights education and training for officials who continue in office.

Amnesty International considers that those . . . accused of human rights crimes should be tried, and their trials should include a clear verdict of guilt or innocence. Although Amnesty International takes no position on *post-conviction* pardons, where it is deemed that such a measure would be in the best interests of national reconciliation, the organization does oppose amnesty laws which prevent the emergence of the truth of individual cases as well as the pattern of abuses in the society, or which prevent the full completion of the judicial process.

[9] Peace-Keeping and Human Rights, AI Doc. IOR 40/01/94 (1994), at 38.

UN Special Rapporteur[10]

691. . . . [T]he Special Rapporteur wishes to emphasize that 'under no circumstances . . . shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, summary or arbitrary executions' (principle 19 of the Principles on the Effective Prevention and Investigation of Extra-legal, Summary or Arbitrary Executions). Even if, in exceptional cases, Governments may decide that perpetrators should benefit from measures that would exempt them from or limit the extent of their punishment, their obligation to bring them to justice and hold them formally accountable remains, as does the obligation to carry out prompt, thorough and impartial investigations, grant compensation to the victims or their families and adopt effective preventive measures for the future. The Special Rapporteur appeals to all Governments concerned to revise any legislation as may be in force exempting those involved in violations of the right to life from prosecution.

. . .

699. The link between the effective investigation of human rights violations of the right to life and the prevention of their recurrence in the future cannot be over-emphasized. . . .

Diane Orentlicher[11]

. . .

There is . . . a paradox in the development of international law prescribing the role of punishment in securing fundamental rights: on the one hand, legal norms requiring states to punish those who commit atrocious crimes have been clarified and strengthened in recent years. At the same time, however, international bodies responsible for enunciating the norms have been reticent to insist on enforcement.

What, then, accounts for this discrepancy? At one level, the answer is simple. It is a lesser intrusion on sovereignty for an international body to enunciate a norm than to insist on its enforcement—particularly when the norm asserts duties in an area traditionally left to the broad discretion of states.

At a deeper level, ambivalence about the desirability of enforcing states' general duty to punish human rights crimes has at times inhibited efforts to secure prosecutions. This ambivalence is most apparent in the now-common circumstance in which a democratically elected government has replaced one responsible for massive human rights violations. In these situations, issues of

[10] UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1994/7, at 157.

[11] Addressing Gross Human Rights Abuses: Punishment and Victim Compensation, in Louis Henkin and J. L. Hargrove (eds.), Human Rights: An Agenda for the Next Century 425, 431 (1994).

accountability frequently pose a daunting dilemma. On the one hand, the balance of power between the *ancien régime* and the new government is often precarious, and prosecuting depredations of the outgoing regime may seem to place an already fragile democracy at greater risk—particularly when the outgoing regime was dominated by military sectors that retain a monopoly on the use of force. On the other hand, impunity for atrocious crimes of the recent past undermines the law's authority just when a society is poised to reassert the supremacy of law. A Faustian pact with a brutal regime—a pact to allow impunity in exchange for the end of dictatorship—raises the specter of perpetuating the very lawlessness that is meant to be ended.

This dilemma has proved agonizing for the many nations that have confronted it in recent years—the cases of Argentina, Chile, El Salvador, the Philippines, and Uruguay are a few examples—and also seems to play a part in the reticence of some international human rights bodies to press for prosecutions during periods of transition from dictatorship to democracy. . . .

NOTE

Does international law impose on states affirmative duties to punish human rights violators, so that a state's grant of an amnesty or pardon[12] would be considered a violation of a treaty or of customary international law? Recall the discussion of a state's duty to prosecute under the Convention against Torture, p. 805, *supra*. The Report on Uruguay of the Inter-American Commission on Human Rights, p. 1098, *infra*, examines this issue with respect to the American Convention on Human Rights. Consider the following reading.

DIANE ORENTLICHER, SETTLING ACCOUNTS: THE DUTY TO PROSECUTE HUMAN RIGHTS VIOLATIONS OF A PRIOR REGIME

100 Yale L. J. 2537 (1991), at 2568.

[In her discussion of the International Covenant on Civil and Political Rights, Orentlicher notes that, unlike the Convention on Torture but like the European and American human rights conventions, the International Covenant does not explicitly require states to punish violations of rights set forth in it. Her discussion continues:]

[12] In general, *amnesties* foreclose prosecutions for stated crimes (often by reference to crimes or conduct that took place before a stated date), whereas *pardons* release convicted human rights offenders from serving their sentences (or the remainders thereof if they are prisoners at the time of pardon). Nonetheless, usage often views these terms as interchangeable, so that persons not yet tried are 'pardoned' and prisoners serving sentences are granted an 'amnesty.'

. . . Authoritative interpretations make clear, however, that these treaties require States Parties generally to investigate serious violations of physical integrity—in particular, torture, extra-legal executions, and forced disappearances—and to bring to justice those who are responsible. The rationale behind these duties is straightforward: prosecution and punishment are the most effective—and therefore only adequate—means of ensuring a narrow class of rights that merit special protection.

The duties derive from States Parties' affirmative obligation to ensure rights set forth in these conventions. Adherents to all three treaties pledge not only to respect enumerated rights, but also to ensure that persons subject to their jurisdiction enjoy the full exercise of those rights. The International Covenant and American Convention further require States Parties to adopt legislation or other measures necessary to give effect to the rights and freedoms recognized in the treaties, and all three conventions require Parties to ensure that individuals whose rights are violated have an effective remedy before a competent body, even if the violation was committed by someone acting in an official capacity. To underscore the importance of ensuring the right to life through legal guarantees, each convention provides that the right to life shall be protected by law.

The possibility of requiring States Parties to punish violations was never seriously considered by the drafters of the International Covenant. The United Nations Commission on Human Rights, which drafted the Covenant, debated extensively the nature of a State Party's duty under Article 2(3) to provide an 'effective remedy' for violations of the Covenant, and in this context briefly considered explicitly requiring States Parties to punish violators. . . .

. . .

But if the drafters did not seriously consider requiring States Parties to prosecute violations of the Covenant, nothing in the drafting history is inconsistent with such a duty. The text could, moreover, reasonably be interpreted to require States Parties to ensure at least some rights through use of criminal sanctions.

The Human Rights Committee established to monitor compliance with the Covenant has, in fact, repeatedly asserted that States Parties must investigate summary executions, torture, and unresolved disappearances; bring to justice those who are responsible; and provide compensation to victims. These pronouncements stand in notable contrast to the Committee's more characteristic practice of granting states substantial leeway to determine how they will implement the Covenant and to fashion an appropriate remedy when found in breach of their treaty obligations.

In 'general comments' interpreting Article 7 of the Covenant, which prohibits torture and cruel, inhuman or degrading treatment or punishment, the Committee has asserted:

> [I]t is not sufficient for the implementation of [article 7] to prohibit [torture or other cruel, inhuman or degrading] treatment or punishment or to

> make it a crime. Most States have penal provisions which are applicable to cases or torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.

As this comment makes clear, a state's duty to investigate allegations of torture and hold the wrongdoers responsible exists over and above its duty to provide victims an effective civil remedy.

. . .

Subsequent decisions on individual communications have reinforced the Committee's 'general comment' on Article 7. For example, in *Muteba v. Zaire*, the Committee found that the government of Zaire had committed torture in violation of Article 7, and concluded that the government was 'under an obligation to . . . conduct an inquiry into the circumstances of [the victim's] torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future.'

. . .

> Under [the author's preceding interpretations of] the Committee's jurisprudence, prosecution leading to an appropriate sanction is generally required when a disappearance, an extra-legal execution, or torture is credibly alleged. Some departures from this norm might be justified, however. The clearest justification would be evidentiary constraints, provided they were not the product of government malfeasance. A measure of flexibility is implied, moreover, in the Committee's use of such phrases as 'bring to justice' and 'hold responsible.' While these terms seem to contemplate appropriately severe criminal penalties, in some instances administrative disciplinary procedures might satisfy a state's duty. Clearly, however, a State Party's routine failure to punish extra-legal killings, torture, and disappearances would constitute a breach of its duties.
>
> While the Committee has made clear that punishment plays a necessary part in States Parties' fulfillment of certain duties under the Covenant, it has stopped short of recognizing a right by individuals to ensure that a particular person is prosecuted. In *H.C.M.A. v. the Netherlands*, the Committee rejected the complainant's claim that Article 14(1) of the Covenant, which guarantees the right to a fair trial, establishes a right 'to see another person criminally prosecuted.'

. . .

RONALD DWORKIN, INTRODUCTION TO *NUNCA MAS*

in Nunca Más (Report of the Argentine National Commission of the Disappeared) (1986), at xi.

Nunca Más, which was published in Argentina in 1984, is a report from Hell. The work of a special commission appointed by President Alfonsín, it describes in detail almost unbearable to read the system of licensed sadism the military rulers of Argentina created in their country from 1976 to 1979, when more than twelve thousand citizens were 'sucked' off the streets, tortured for months, and then killed. . . .

. . .

[Raúl Alfonsin was elected President after the military junta that had ruled Argentina fell.] He immediately appointed a commission of distinguished citizens, under the chairmanship of a prominent writer, Ernesto Sábato, called the Commission on the Disappeared, with full powers to investigate and report. The commission's interviews were methodical and painstaking; its members visited and explored the detention sites the witnesses they interviewed had mentioned, cross-checked the stories of each, created charts and flow charts of events, and confirmed the most pessimistic speculations about the fate of the thousands of people who had been bundled into the Ford Falcons with no license plates.

Nunca Más is the report of the Sábato Commission. . . .

The original point of the 'dirty war'—to create a climate of fear in which subversion would be impossible—was superseded, for the officers who actually carried it out, by an even more repellent purpose; the perverse exhilaration of absolute, uncontrolled dominion over others, which became an end in itself, a way of life. Nothing can seem out of bounds in a room where people are deliberately made to suffer excruciating pain. Every instinct of dignity was violated there: nuns and pregnant women were tortured with special glee, husbands and wives and children tortured in each other's presence, and babies taken from their mothers for military families who wanted children. . . .

Alfonsín had made two commitments to the nation: to investigate the disappearances, and to prosecute those responsible. The Sábato Commission was charged only with the former: it was not a judicial body, and its report, *Nunca Más*, made no judgments of individual responsibility. The new government had to decide how to proceed with criminal prosecution, and it faced a variety of problems, both legal and political. Alfonsín was anxious that the process vindicate not only justice but the rule of law. The accused were to be treated with every courtesy, and the strictest standards of evidence and procedure were to be applied.

Above all, the trials were to respect an important jurisprudential distinction: they were not to be trials in the style of Nuremberg, prosecutions by a conqueror imposing a new code of rules on a defeated regime, but acts of a

constitutional government prosecuting past officials for acts that were criminal when they were performed. No new retrospective criminal laws were needed because the outrages the Sábato Commission had documented were plainly illegal under the law of Argentina as it stood during the military rule. The military had not enacted special laws permitting kidnapping, or torture, or determination without trial, or theft, or murder. It had . . . awarded itself an amnesty just before it handed over power, but that self-amnesty was unconstitutional, according to Alfonsín's legal advisers; the new Congress had already repealed it, and the Supreme Court had held this repeal valid.

Two further crucial decisions were necessary, however, and both were politically sensitive. First, who should be prosecuted? Alfonsín, at the same time as he appointed the Sábato Commission, had in his capacity as commander in chief ordered the arrest and trial of the military men at the top: the nine commanders who formed the three ruling juntas from 1976 to 1982. But should the government also prosecute the staff and junior officers who supervised the abductions and detention centers and the torture, or the thousands of ordinary soldiers who participated in these crimes? Argentine law provided a defense for military subordinates who were merely following orders. But how should this defense be interpreted? Should it protect soldiers who followed orders that were, in fact, illegitimate? Should it protect those who, following orders, committed obvious atrocities?

Second, in which courts should those who were prosecuted be tried? It was at least arguable that, as many Argentine lawyers believed, the law required that military men be tried only in military courts for crimes committed in connection with their duties. . . .

The government was subject to intense political pressures on both sides of these two issues. The human rights community, and particularly the Mothers of the Plaza, were outraged at the possibility that the army could be left to judge itself, or that those who had actually butchered and tortured their fellow citizens might escape condemnation altogether. But Argentina needed to bury its past as well as to condemn it, and many citizens felt that years of trials would undermine the fresh sense of community Alfonsín's victory had produced. And any general program of prosecution, reaching far down the command structure, might anger the military and make it regard the new government as its enemy, which would be unwise in a nation where military coups had become almost a ritual.

The new government formally declared its intentions in a comprehensive statute, Law 23.049 of February 14, 1984, drafted mainly by one of Alfonsín's advisers, Carlos Nino, a legal philosopher from the faculty of the Law School of the University of Buenos Aires. The statute resolved the issue of jurisdiction in this way: all prosecutions of the military for alleged crimes committed under cover of a war against subversives, including both those brought by the public prosecutor and those initiated by private citizens, were to be tried in the first instance by the Supreme Council of the Armed Forces under its 'summary proceedings' jurisdiction. But the decisions of the Supreme Council were

subject to automatic review by the civilian Federal Chamber of Appeal, which could consider new evidence if it thought this necessary . . . .

The law also resolved the issue of criminal responsibility. It provided, in Article 11, that, in the absence of any evidence to the contrary, any member of the military who acted 'without decision-making capacity' would be presumed justifiably to have regarded all the orders he received as legitimate orders, except that this presumption would not hold if the acts he committed were 'atrocious' or 'aberrant.' That provision created, in effect, three categories of defendants: high-ranking officers, who were not entitled to the defense that they were merely following orders; junior officers and servicemen, who could use that defense because they were deemed entitled to treat the orders they had received as legitimate; and those of any rank who committed atrocities and were denied the defense for that reason. It was widely understood that abduction, for example, was not atrocious, so that the junior officers who formed the abduction squads would not be guilty under these standards, but that torture, rape, murder, and robbery were atrocities, so that those who could be proved to have committed those offenses would not be excused just because they had been ordered to do so.

. . .

The trial of the nine commanders in the civilian court [after the Supreme Tribunal of the military refused to participate in the trial of the nine] began on April 22, 1985, and held the nation enthralled for five months. . . .

The commanders' trial ended and the court gave its verdicts on December 9, 1985. Though the military rules under which the civilian trial had been conducted allowed for capital punishment, the prosecutor had asked only for life imprisonment for five of the nine defendants, fifteen-year sentences for two of them, and twelve- and ten-year sentences for the remaining two. Only two of the defendants were in fact given life sentences. . . .

Some Argentines were disappointed by these results. Many believed that all the defendants should have been convicted and jailed for life. But the court's policy of making distinctions among the defendants, acquitting four and giving lighter sentences to some of the others, was valuable in several ways. It showed the court's political independence from the government and from the prosecution, which had demanded much heavier sentences, and in that way reinforced the character of the trial as an exercise in due process of law rather than political vengeance. And it avoided any suggestion that there cannot be degrees of guilt in crimes against humanity, that those who have committed some outrages have nothing to fear, by way of future punishment, if they commit more.

. . .

But the most powerful evidence of complicity throughout the structure of command of each of the armed services was simply the sustained pattern of abduction, torture and murder, a pattern that could not possibly be explained

as the work of a few aberrant officers. The court explicitly relied on *Nunca Más* as evidence of this pattern, though it added that the evidence it had heard directly was sufficient to establish the pattern of outrage on which its verdict was based, even without that report. . . .

. . .

It has become clear, moreover, that some officials of the present government do want a general amnesty for junior servicemen. . . . The arguments . . . in favor of some general amnesty are powerful and in no sense illegitimate. It is desperately important, not only for Argentina but for Latin America generally, that the Alfonsín government succeed. It is one of the few governments in the region firmly committed to constitutional democracy in our own sense, one of the few we can respect unreservedly. But it is vulnerable to a variety of economic and political forces.

Argentina's economy remains fragile, even though the austere new economic plan Alfonsín instituted last summer brought down the rate of inflation and secured some monetary stability. . . . of political stability. The congressional elections last autumn were marred by bombings attributed to the right, and Alfonsín thought it necessary to declare a state of emergency for a short period to meet what he called a serious threat of disturbances. . . . Nor is the new government fully confident of political stability.

In these circumstances, the government has good reason to avoid divisive policies that might alienate the armed forces. Nevertheless, we must hope that the Alfonsín government will take that risk and prosecute anyone it can prove tortured or killed civilians, even under orders, though it may turn out that only a relatively small number can be convicted. The world needs a taboo against torture. . . . [It is] almost everywhere used, and the discrepancy is partly the result of a widespread opinion that it is justifiable sometimes, that it is defensible when carefully aimed only at extracting information needed to save lives from terrorism, for example.

The Argentine nightmare shows one of the several fallacies of this view. Torture cannot be surgically limited only to what is necessary for some discrete goal, because once the taboo is violated the basis of all the other constraints of civilization, which is sympathy for suffering, is destroyed. The Mothers of the Plaza de Mayo, and the others who call for prosecution of all torturers and murderers in the military ranks, are right—not because they are entitled to vengeance, but because the best guarantee against tyranny, everywhere but especially in countries like Argentina where tyranny has often seemed acceptable to the majority, is a heightened public sense of why it is repulsive. Trials that explore and enforce the idea that torture can have no defense may encourage that sense. Allowing known torturers to remain in positions of authority, unchallenged and uncondemned, can only weaken it.

ARYEH NEIER, WHAT SHOULD BE DONE ABOUT THE GUILTY?

New York Review of Books, Feb. 1, 1990, at 32.

[The author discusses the trial of the nine military commanders in Argentina making up the first three juntas that ruled Argentina following the military coup. He praises the meticulous investigation, the scrupulous protection of the rights of the accused, and the dignified manner in which the trials were carried out, all of which 'inculcated respect for the rule of law.']

Nevertheless, something went seriously wrong. Some lower-ranking military officers who were also facing prosecution conspired to mount small military revolts during Alfonsín's final years in office. Several army posts were briefly taken over, and indicted officers were protected from arrest and trial. As a consequence of such actions, much of what was accomplished by Alfonsín was rescinded or reversed before he left office. That reversal has now proceeded much further under his successor Carlos Saul Menem . . . .

. . .

It is worth considering why the Argentine prosecution of crimes against human rights started so promisingly and why it ended so badly. It is often said that Alfonsín was able to order the prosecutions because, at the moment he took office, the armed forces had been so weakened and discredited by the Falklands war that they had no power to resist. But this is only a partial explanation. Alfonsín acted as soon as he assumed office, at a moment when his popularity was at its highest, and when heads of state from around the world had just visited Buenos Aires for his inauguration to celebrate the restoration of democracy. More significant, I believe, were Alfonsín's decision to establish the Sábato commission, in order to document and publicize the disappearances, and the fact that the commission performed this task admirably and quickly. Though the prosecutions were announced earlier, they did not seriously get underway until after the Sábato commission issued its report.

The decision to prosecute high military commanders who were members of the junta seems to me to have been correct. Indeed, if the prosecutions had been limited to these officers, the military uprisings against the Alfonsín government might never have taken place. Punishment of officers at the higher level who were responsible for crimes would likely have been accepted by most of the Argentine population, and many in the military. But when middle-level officers were indicated as well, local revolts among the military began to take place. The prosecution of middle-level officers who had presided over acts of torture and killing was fully justified; but it was also deeply resented by many officers who claimed they were only 'following orders,' and by their military comrades. In order to appease them, Alfonsín pushed through the congress a 'due obedience' law, exonerating most such officers.

In hindsight, this appears to have been a mistake. By giving in, Alfonsín probably encouraged the rebel officers to make further demands and to launch further revolts, preparing the way for the pardons issued by President Menem in October that covered all but five convicted commanders—one is still facing trial—and for Menem's announcement that he intends to pardon those commanders soon. In retrospect, Alfonsín might have done better to limit prosecutions to the top commanders, while continuing to publicize the crimes committed by lower ranking officers.

. . .

Of course, concerns for truth and justice are closely linked. In Argentina, the disclosure of the truth by the Sábato commission helped to create a climate of opinion that supported the government's prosecutions. In most cases, a government such as Argentina's tries to suppress the truth about its abuses while they are being committed. Whereas many people may be generally aware that killing, torture, and disappearances are taking place, they know little of their extent and details. When the prosecutions were brought, the information disclosed at the trial both confirmed the findings of the Sábato commission and gave a more precise identification of torturers and killers. Indeed, because a huge number of Argentine citizens watched the trial of members of the junta day by day, the trial did more than the Sábato commission itself to circulate information.

. . .

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 1992–93

(1993), at 154.

Report No. 29/92, Uruguay, Oct. 2, 1992

[The Report on Uruguay grew out of petitions lodged with the Commission alleging that Uruguay had violated rights declared in the American Convention on Human Rights.]

. . .

2. The petitions denounced the legal effects of Law No. 15,848 (hereinafter 'the Law') and its application by the judiciary, which they allege violated rights upheld in the American Convention (hereinafter 'the Convention'): the right to judicial protection (Art. 25) and the right to a fair trial (Art. 8), among others.

3. The first article of that law states that: 'It is hereby recognized that as a consequence of the logic of the events stemming from the agreement between

the political parties and the Armed Forces in August 1984 and in order to complete the transition to full constitutional order, any State action to seek punishment of crimes committed prior to March 1, 1985, by military and police personnel for political motives, in the performance of their functions or on orders from commanding officers who served during the *de facto* period, has hereby expired.

. . .

5. Article 4 states that: 'The foregoing notwithstanding, the judge hearing the case shall remit to the Executive Branch all testimony offered in the complaint as of the date of enactment of this law, regarding measures involving individuals alleged to have been detained in military or police operations and who have since disappeared, as well as minors alleged to have been abducted under similar circumstances. The Executive Branch shall immediately order investigations to ascertain the facts. Within 120 days of the date of the communication received from the court, the Executive Branch shall advise the plaintiffs of the findings of these investigations and provide them with the information compiled.'

6. Since the Executive Branch entrusted the investigation to military judges, doubts were raised as to the seriousness and impartiality of the investigative proceeding, and as to whether the duty to provide the essential judicial guarantees has been observed (Articles 8 and 27 of the Convention).

7. The law was declared constitutional by the Uruguayan Supreme Court and was approved by a national referendum called for that purpose pursuant to the provisions of Article 79 of the Uruguayan Constitution.

Observations of the Government on the Report Adopted in Accordance with Article 50

21. Essentially, the Government contends that the Commission has failed to consider the 'democratic juridical-political context' inasmuch as it has not taken into account the domestic legitimacy of the law and has failed to consider important aspects of the present political situation, as well as the higher ethical ends of the Caducity Law [terminating prosecutions for acts committed prior to March 1, 1985].

What follows is a summary of the principal arguments in the Government's reply.

22. The Government avers that the amnesty question should be viewed in the political context of the reconciliation, as part of a legislative program for national pacification that covered all actors involved in past human rights violations, i.e., 'political crimes and related common and military crimes,' that the Caducity Law was adopted for 'the sake of legal symmetry and for very justified and serious reasons of the utmost political importance,' with 'unqualified adherence to its constitutional system and its international

commitments.' Uruguay emphasizes the fact that this law, approved by the necessary parliamentary majority, was also 'the subject of a plebiscite' by the electorate: that it cannot accept the Commission's finding that while the domestic legitimacy of the law is not within the Commission's purview, the legal effects denounced by the petitioners are; 'the express will of the Uruguayan people to close a painful chapter in their history in order to put an end, as is their sovereign right, to division among Uruguayans, is not subject to international condemnation.'

. . .

27. The Government further contended that the Commission had failed to note that the Caducity Law does not prevent the injured party from seeking damages in a Civil court; hence, the recommendation made to the Government that the victims be awarded just compensation for past human rights violations was out of order.

The Opinion and Conclusions of the Commission

. . .

A. As to the interpretation of the Convention

33. Article 29 of the Convention stipulates the following:

> No provision of this Convention shall be interpreted as:
>
> a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
>
> b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention to which one of the said States is a party;
>
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
>
> . . .

34. The Commission notes that any interpretation of the Convention must be rendered in accordance with this provision.

B. As to the right to a fair trial

35. The law in question has the intended effect of dismissing all criminal proceedings involving past human rights violations. With that, the law eliminates any judicial possibility of a serious and impartial investigation designed to establish the crimes denounced and to identify their authors, accomplices, and accessories after the fact.

36. The Commission must also consider the fact that in Uruguay, no national investigatory commission was ever set up nor was there any official report on the very grave human rights violations committed during the previous *de facto* government.

37. It is fitting, in this regard, to cite the Commission's general position on the subject, as set forth in its Annual Report of 1985–1986:

> . . . [One] of the few matters that the Commission feels obliged to give its opinion in this regard is the need to investigate the human rights violations committed prior to the establishment of the democratic government. Every society has the inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed, in order to prevent a repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of *investigating committees* whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the *judiciary* itself may undertake whatever investigations may be necessary. (Emphasis added.)

38. The Commission must also weigh the nature and gravity of the events with which the law concerns itself; alleged disappearances of persons and the abduction of minors, among others, have been widely condemned as a particularly grave violation of human rights. The social imperative of their clarification and investigation cannot be equated with that of a mere common crime . . . .

. . .

D. With respect to the obligation to investigate

[The Commission quotes with approval a lengthy passage from the *Velásquez Rodríguez* case, p. 946, *supra*.]

51. When it enacted this law, Uruguay ceased to comply fully with the obligation stipulated in Article 1.1 and violated the petitioners' rights upheld in the Convention.

52. As for the interpretation of Article 1.1, Article 8.1 and Article 25.1, and the possible restrictions on those rights as set forth in Articles 30 and 32, the Commission respects but nevertheless disagrees with the Uruguayan Government's interpretation of those provisions.

53. As for compensatory damages, the Commission points out that while it is true that the text of the law did not affect the possibility of filing a suit for such damages, the ability to establish the crime in a civil court has been considerably curtailed since vital testimony from the moral and material authors, military and police personnel of the State, cannot be adduced or used.

The Commission also noted that four years after the fact, the State invoked the caducity exception, even though at the time the crimes were committed a dictatorial government was in power whose judiciary lacked any independence, especially in matters of this nature. In the past year, the Commission has noted, with satisfaction, a number of important damages agreements that the Uruguayan State and certain victims of past human rights violations have reached, including three petitioners in these cases. Nevertheless, the Commission must make clear that the purpose of these petitions is to object to the denial of justice (Articles 8 and 25 in relation to Article 1 of the Convention) with enactment and application of the 1986 Law, and not to the violations of the rights to life (Article 4), humane treatment (Article 5) and liberty (Article 7), among others, which triggered the right to a fair trial and the right to judicial protection, but that occurred before the Convention entered into force for Uruguay on April 19, 1985, and therefore were not a subject of these complaints.

54. The Commission has carefully weighed the political and ethical dimensions of the measure adopted by the Uruguayan Government and reached a conclusion different from that of the Government as to whether, with the law, the Government's highest mission according to the obligations of the American Convention, which is to defend and promote human rights, is being served.

Given the foregoing considerations, the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

1. Concludes that Law 15,848 of December 22, 1986, is incompatible with . . . Articles 1, 8 and 25 of the American Convention on Human Rights.

2. Recommends to the Government of Uruguay that it give the applicant victims or their rightful claimants just compensation for the violations to which the preceding paragraph refers.

3. Recommends to the Government of Uruguay that it adopt the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the *de facto* period.

THOMAS BUERGENTHAL, THE UNITED NATIONS TRUTH COMMISSION FOR EL SALVADOR

27 Vanderbilt J. Trans. L. 497 (1994), at 519.

[In 1992–93, the author served as one of three Commissioners (all foreign nationals) of the UN Commission on the Truth for El Salvador, a Commission charged with the investigation of acts of violence in El Salvador between 1980 and 1991. That period cost some 75,000 lives and was characterized by an extreme cruelty involving massacres, torture and other offenses against the civilian population.

The Commission was established in 1992 pursuant to the Salvadorean Peace

Accords negotiated under the auspices of the UN between the government and the principal opposition group, the FMLN. Beyond investigation and reporting of the relevant facts, the Commission was to take into account 'the need to create confidence in the positive changes' to be effected by the peace process and 'to assist the transition to national reconciliation.'

In its Report, the Commission recommended changes designed to transform El Salvador into a state with a democratic form of government that would observe human rights.]

The Commission could have recommended that the individuals identified as responsible for the serious acts of violence described in the *Report* be tried by Salvadoran courts. However, such a recommendation would have made sense only if the Commissioners believed that the justice system of that country was capable of doing justice, which we did not. Although the Peace Accords had ended the armed conflict and called for substantial reforms in the justice system, very few of these changes had been implemented or were likely to be implemented in the near future. This meant that the same judges who were in office during the war, including some accused by the Truth Commission of covering up various offenses, would be the ones to adjudicate these charges. As stated in the *Report*:

> These considerations confront the Commission with a serious dilemma. The question is not whether the guilty should be punished but whether justice can be done. Public morality demands that those responsible for the crimes described here be punished. However, El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably.

Taking this reality into account, the Commission decided not to call for trials, nor for that matter to recommend amnesties. The former made no sense until the full implementation of the Peace Accords. The latter seemed worthwhile only, if at all, after a national consensus that an amnesty would promote the goal of reconciliation in El Salvador. Ultimately, the decision whether to grant amnesty was one for the people of El Salvador to make after an appropriate dialogue on the subject.

At the same time, it was clear that the Commission's findings required some recommendations for immediate action. In the Commission's view, those identified as responsible for serious acts of violence had to be removed from the offices that had enabled them to commit these acts. To this end, the Commission made a series of recommendations. First, it called for the dismissal from the armed forces of those active military officers who had committed or covered up serious acts of violence. Second, the Commission recommended the dismissal from their positions of those civilian government officials and members of the judiciary who committed or covered up serious acts of violence or failed to investigate them. Third, the Commission declared that '[u]nder no circumstances would it be advisable to allow persons who

committed acts of violence such as those which the Commission has investigated to participate in the running of the State.' Therefore, we recommended that appropriate legislation be adopted to ensure that all individuals found by the Commission to have been implicated in serious acts of violence—whether active or retired military officers, civilian officials, FMLN members or military commanders, judges, or civilians—should be disqualified from holding any public office for a period of no less than ten years. The Commission added that these persons should also be 'disqualified permanently from any activity related to public security or national defence.' Finally, the Commission recommended that all Supreme Court judges should resign from office to permit the designation of new judges untainted by illegal conduct.

The Commission made a series of recommendations designed to promote national reconciliation. It proposed, *inter alia*, the construction of a national monument listing the names of all victims of the Salvadoran conflict; a national holiday honoring them; and the creation of a Forum for Truth and Reconciliation, comprising representatives of all sectors of Salvadoran society, to address the conclusions and recommendations of the Truth Commission with a view to promoting their implementation. The Commission also recommended the establishment of a fund to compensate all victims of serious acts of violence. Calling on foreign governments to assist El Salvador with these payments, the Commission urged that at least one percent of all international assistance received from abroad be earmarked for such compensation.

. . .

A few days after the publication of the *Report*, the government of President Cristiani and the national legislature controlled by his party granted an across-the-board amnesty to all individuals charged with serious acts of violence. This measure did not, however, nullify the Commission's work or have a serious effect on it. The amnesty merely prevented those identified by the Commission as responsible for acts of violence from being tried in Salvadoran courts and resulted in the release from prison of a few others who had been convicted earlier in that country on similar charges. . . . [T]he amnesty did not affect the Commission's recommendations or override those calling for the dismissal from their positions of individuals named in the *Report*. . . .

[The remaining excerpts from the article deal with the problem of 'naming names' in the Report.]

. . . [T]he Parties to the Peace Accords wanted 'the complete truth be made known.' For that purpose, they empowered the Commission to investigate the 'serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.' How could we make known 'the complete truth' about a murder or massacre, for example, without identifying the killers if we knew their identity?

. . .

The attitude of the government began to change dramatically as it became known that the Commission had gathered incriminating evidence against high-ranking government officials. . . . [T]he Truth Commission was going to present evidence and make public its Report, which posed a . . . serious threat. Moreover, some of the officers, particularly General Ponce, had been instrumental in convincing his military colleagues to go along with the Peace Accords. . . . Together, [members of an elite and powerful group in the military known as the *tandona*] had the power to make life very difficult for President Cristiani and to impede, if not scuttle, his efforts to proceed with the implementation of the Peace Accords.

The power and influence of the *tandona*, rumors that 'naming names' would lead to a military coup in El Salvador, and claims by many well-intentioned individuals in El Salvador and outside the country that the publication of names by the Truth Commission would make national reconciliation very difficult—that it would be like pouring gasoline on a smoldering fire—prompted the government to mount a fierce diplomatic campaign to force us to omit names from the Report. President Cristiani led the campaign by urging various Latin American leaders, the United States, and the UN Secretary-General to use their power and influence to prevent the publication of names. He also sent a ministerial delegation to meet with us in New York for the same purpose. . . . The government also attempted to convince the FMLN to agree with its position. The FMLN and the government together, as the Parties to the Peace Accords, presumably had it in their power to amend the Commission's mandate and to require us not to publish any names. Some in the FMLN leadership were quite sympathetic to this effort and implied as much in conversations with us; a majority was opposed. Eventually, after a lengthy and apparently acrimonious debate within the FMLN high command, the FMLN informed the Commission that the Peace Accords required the publication of names.

The diplomatic campaign mounted by the Salvadoran government against the publication of names by the Truth Commission made it necessary for the Commissioners to explain our position to government leaders in the United States, Europe, and Latin America who were being lobbied by the Salvadorans. . . . The Commission's stature also established the requisite credibility to explain why we believed that our mandate required us to name names and why in our judgment this action would promote rather than impede national reconciliation in El Salvador. . . . In the *Report*, we explained our decision as follows:

> . . . [T]he Commission was not asked to write an academic report on El Salvador, it was asked to investigate and describe exceptionally important acts of violence and to recommend measures to prevent the repetition of such acts. This task cannot be performed in the abstract, suppressing

information (for example, the names of person responsible for such acts) where there is reliable testimony available, especially when the persons identified [continue to] occupy senior positions and perform official functions directly related to the violations or the cover-up of violations. Not to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end.

. . . What was often not generally known and what engendered acrimonious debates was who committed the acts and who ordered them to be committed. The search for the 'intellectual authors' of these offenses was a national obsession. Many of the intellectual authors were still holding influential positions. To refrain from exposing them would have amounted to yet another cover-up. In our view, national reconciliation would be harmed rather than helped by a Commission report that told only part of the truth. If there had been an effective justice system in El Salvador at the time of the publication of our Report, it could have used the Report as a basis for an independent investigation of those guilty of the violations. In these circumstances, it might have made some sense for the Commission not to publish the names and, instead, to transmit the relevant information to the police or courts for appropriate action. But one reason for establishing the Commission was that the Parties to the Peace Accords knew, and the Truth Commission had ample evidence to confirm, that the Salvadoran justice system was corrupt, ineffective, and incapable of rendering impartial judgments in so-called 'political' cases.

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JOSE ZALAQUETT, BALANCING ETHICAL IMPERATIVES AND POLITICAL CONSTRAINTS: THE DILEMMA OF NEW DEMOCRACIES CONFRONTING PAST HUMAN RIGHTS VIOLATIONS

43 Hastings L. J. 1425 (1992), at 1432.

. . .

With the inauguration of President Aylwin in March of 1990, Chile became the last of the Southern Cone countries ruled by similarly minded military dictatorships to achieve a restoration of democratic government. . . .

Unlike Argentina, the transition to democracy in Chile took place after the new government negotiated rules to the game with a united, undefeated military that continued to enjoy considerable, albeit minority, political support. Despite this difference, the Argentinean case was telling for Chileans. It proved the importance of a systematic effort to reveal the truth. It also showed the extent to which a government can lose authority when it raises expectations it cannot fulfill.

Uruguay also provided an example for Chile in that the transition there was made under conditions similar to those present in Chile. But in Uruguay the government took too cautious an approach, avoiding not only trials for past state crimes but also any significant official disclosure about past violations. . . .

Taking these lessons into account, the Aylwin government decided to follow a course it could sustain. It adopted the guiding principle that reparation and prevention must be the overall objectives of the policies regarding past human rights violations. Righting a wrong and resolving not to do it again is, at its core, the same philosophy that underpins Judeo-Christian beliefs about atonement, penance, forgiveness, and reconciliation.

At a societal level, the equivalent of penance is criminal justice. Yet the Chilean government's assessment of the situation led it to conclude that priority ought to be given to disclosure of the truth. This disclosure was deemed an inescapable imperative. Justice would not be foregone, but pursued to the extent possible given the existing political restraints. Forms of justice other than prosecuting the crimes of the past, such as vindicating the victims and compensating their families, could be achieved more fully. The underlying assumption, which I share, was that if Chile gave truth and justice equal priority, the result might well have been that neither could be achieved. Fearing that official efforts to establish the truth would be the first step toward widespread prosecutions, the military would have determinedly opposed such efforts.

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To establish the truth, President Aylwin appointed the National Commission for Truth and Reconciliation, a panel of eight people from across the political spectrum. . . .

. . .

In February of 1991, the commission presented a 1,800-page unanimous report to the president including its decisions in each of the individual cases, several chapters of historical, political and legal references, and a detailed section containing recommendations for both reparations and preventions. It proposed pensions for the families of the dead and 'disappeared,' measures designed to commemorate the events and honor the victims, and other forms of relief. It further proposed legal, institutional, and educational reforms aimed at enhancing the promotion and protection of human rights. In a televised address to the nation, President Aylwin presented the commission's findings and, as the head of State, atoned for the crimes committed by its agents.

. . .

For me, as for many of my friends and colleagues in the human rights movement in Chile, an eighteen-year period is coming to a close. It began the

moment we started to organize the defense of human rights in Chile after the coup d'etat of September 1973, and has continued through our present efforts to overcome this dark chapter in our country's history.

Of the many lessons learned, I will refer to one. Back in the hazardous days of late 1973, all of my friends and colleagues in the human rights movement had to face danger on a daily basis. None of them ever claimed to have been endowed with innate bravery. They realized that courage was just another name for learning how to live with your fears. Eighteen years later, we all have come to realize that under changed circumstances, a less striking form of courage is called for. It is the courage to forgo easy righteousness, to learn how to live with real-life restrictions, but to seek nevertheless to advance one's most cherished values day by day to the extent possible. Relentlessly. Responsibly.

QUESTIONS

1. Recall the discussion by Szasz, p. 1077, *supra*, about amnesty as part of a peace settlement in the Former Yugoslavia. Suppose that leaders of one or several of the ethnic groups who have been or might be indicted demand an amnesty with respect to prosecutions before the ICT as a condition to an agreement ending hostilities. Should the Security Council grant their request through one or another type of decision that effectively bars prosecutions? If an amnesty were granted, are there other paths that the UN could follow that might achieve some of the same goals as convictions and prison sentences?

2. 'All instrumentalist justifications for prosecution of those violating international criminal law are speculative. We simply don't know how much or whom convictions or the threat thereof will deter, or whether convictions will achieve reconcilation and ongoing stability. We know as little about the long-run effects of amnesties. Much depends on particular and changing contexts, on factors and emotions and mass psychology that we cannot predict. We do know, however, what justice requires. We should act on that knowledge, on principle, not on the basis of some dubious cost-benefit reckoning about how to achieve certain goals. From the perspective of justice, there can be no retreat from the necessity of serious punishment following serious crime.' Comment:

3. What do you view as the advantages and disadvantages of truth commissions as alternatives to prosecutions or amnesties?

4. Consider the decision of the Inter-American Commission on Human Rights on the Uruguayan law:

a. Are you persuaded that the provisions of the American Convention relied on by the Commission should be interpreted to invalidate the law? Does the Commission's interpretation show any awareness of the dilemma in which democratic governments may find themselves in relation to the amnesty issue?

b. Why should not the plebescite have settled the issue, as an expression of the will of the people? Would no expression of popular will have satisfied the Commission?

5. How, if at all, can Zalaquett's views based on the Chilean experience be reconciled with those expressed in categorical terms by Amnesty International and the UN Special Rapporteur?

6. Buergenthal suggests that the decision to 'name names' in the Report on El Salvador was justified in part by the knowledge that the Salvadorean justice system was incapable of honest investigation and impartial judgment. Are there nonetheless problems in a report that includes names of violators? What form of investigation and what methods or standards of proof and judgment would you recommend for a truth commission that intended to publish such names?

16

Development and Human Rights

The spacious title of this chapter embraces a multitude of subjects. Like the two other chapters in Part F, it selects a few among them to illustrate the kinds of problems that have been discussed under the broad rubric of 'development' and human rights. The chapter notes but does not examine other contemporary concerns about a 'right to development,' such as the complex relationship between development and environment, the distinction between the development of a state and of its people, and the policies of international financial organizations like the International Monetary Fund that are meant to assist in the process of development.

Ever since the first UN World Conference on Human Rights, held in Teheran in 1968, the relationship between human rights and development has occupied a prominent place in the international discourse of rights. Since 1977 the debate has been pursued with increasing vigor under the rubric of 'the right to development'. That debate brings together several important themes raised in earlier chapters. They include the legal foundations of the classical human rights and the basis for recognition of new rights, the priority to be accorded to the different sets of rights, the links between human rights and democratic governance, the extent to which the international community bears some responsibility for assisting states whose resources are inadequate to ensure the human rights of their own citizens, and the relationship between individual and collective rights (including 'peoples' rights'). In addition, an examination of the concept of the right to development and its implications in the 1990s cannot avoid consideration of the effects of the globalization of the economy and the consequences of the near-universal embrace of the market economy.

The list of internationally recognized human rights is by no means immutable. Just as the British sociologist T.H. Marshall characterized the eighteenth century as the century of civil rights, the nineteenth as that of political rights and the twentieth as that of social rights,[1] so too have some commentators over the past two decades put forward claims for the recognition of the new rights, in particular a category known as the 'third generation of solidarity rights'. By analogy with the slogan of the French Revolution these rights have been said to correspond to the theme of *fraternité*, while first gen-

[1] T.H. Marshall, Citizenship and Social Class 14 (1950).

eration civil and political rights correspond with *liberté* and second generation economic and social rights with *egalité*. Karel Vasak's list of solidarity rights includes 'the right to development, the right to peace, the right to environment, the right to the ownership of the common heritage of mankind, and the right to communication.'[2]

Far more significant has been the impact of the right to development. First recognized by the UN Commission on Human Rights in 1977, it was enshrined by the General Assembly in the 1986 Declaration on the Right to Development. It has never ceased to be controversial among governments as well as among academic and other commentators. Efforts to secure its recognition raised the question of the process by which new human rights should be recognized. Some commentators emphasized the need for the catalogue of rights to keep pace with new developments and to be responsive to new challenges. Others argued that the third-generation approach of rights of peoples was a flawed way of seeking to meet such needs.

> Not only is proliferation of rights considered to be dangerous, but also the use of the term 'generation' implies, the detractors say, that the rights belonging to earlier generations are outdated. It is also frequently said that the rights of the new generation are too vague to be justiciable and are no more than slogans . . . .[3]

In 1984 Philip Alston identified a large number of rights whose recognition had been proposed by various sources.[4] They ranged from the right to sleep and the right to social transparency to the right to co-existence with nature and the right to tourism. He examined whether the United Nations could or should adopt substantive criteria to be satisfied before a new human right could be recognized. His conclusion was that such an approach was unworkable within an inter-governmental setting. Instead, he proposed that procedural requirements should be met. These included formal acknowledgement of an intention to accord recognition, followed by a detailed analytical study by the Secretary-General, comments by governments, examination by a specialist committee, and formal endorsement by both the UN Commission on Human Rights and the General Assembly.

Two years later the General Assembly responded by adopting the following guidelines that states were to 'bear in mind' in developing human rights instruments.

> (a) Be consistent with the existing body of international human rights law;
> (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;

[2] K. Vasak, For the Third Generation of Human Rights: The Rights of Solidarity, Inaugural Lecture, Tenth Study Session, International Institute of Human Rights, July 1979, at 3.

[3] Stephen Marks, Emerging Human Rights: A New Generation for the 1980s?, 33 Rutgers Law Rev. 435, 451 (1981).

[4] Alston, Conjuring Up New Human Rights: A Proposal for Quality Control, 78 Am J. Int. L. 607 (1984).

(c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
(d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems;
(e) Attract broad international support. . . .[5]

A. THE RIGHT TO DEVELOPMENT AS A NEW HUMAN RIGHT

In the readings below, Alston explains the context in which the debate on a right to development unfolded within the United Nations; Abi-Saab and Bedjaoui then present the case for the existence of such a right in international law; in contrast, Jack Donnelly concludes that the right is not only without foundation but is dangerous as well.

PHILIP ALSTON, REVITALISING UNITED NATIONS WORK ON HUMAN RIGHTS AND DEVELOPMENT

18 Melb. U. L. Rev. 216 (1991), at 218.

. . . The concept [of the right to development] was first mooted in 1972. It was another five years before serious and sustained debate began in the Commission on Human Rights. But by 1981, the topic had become so entrenched that the debate was 'institutionalized' through the establishment of a separate Working Group of Governmental Experts on the Right to Development . . . Five years after the Working Group's creation, the General Assembly adopted the Declaration on the Right to Development and left the Commission to work out what procedures or institutional arrangements ought to be put in place to follow up on the Declaration.

. . . [In 1993 the Commission established another Working Group to clarify the concept and to suggest ways of making it operational. As of July 1995 the Group had achieved no significant breakthroughs.]

But while the chronology is simple, the political currents influencing the evolution of the concept are much less so. Briefly stated, the emergence of a numerically dominant group of developing countries, as a result of the wave of decolonization that peaked in the late 1960s, led to the elevation of economic development goals to the top of the international agenda. Given the level of resentment over the negative consequences of the colonial experience and the reticence of the former colonial powers to recognize continuing obligations towards the peoples concerned, the assumption that reparations were

[5] G.A. Res. 41/121 (1986).

payable was never far below the surface. In terms of the U.N.'s human rights debate, these concerns translated into demands that greater attention be paid to economic and social rights (cultural rights being largely neglected in this setting), that colonialism and neo-colonialism be recognized as gross violations of international law and that some forms of development co-operation should be seen as entitlements rather than as acts of welfare or charity.

The Eastern Europeans provided significant and enthusiastic political support for all of these demands, but they did so on the basis of several rather convenient understandings: that the pursuit of centrally-planned socialism was the best and perhaps the only effective guarantee of economic and social rights; that they themselves had never been involved in colonialism or the denial of self-determination to any peoples; and that large-scale aid transfers were owed only by the former colonizers to their victims and not by the industrialized countries in general. Thus understood, the issues involved in the right to development enjoyed the enthusiastic support of the Eastern Europeans and their allies in their collective struggle against the capitalist West.

The West, for its part, presented a less than united front, but in general there was significant support for the proposition that economic and social rights had been accorded insufficient. attention by the United Nations. Moreover, the obligation to co-operate to promote Third World development was accepted by many Western states in general terms, although by no means in the form of a legally binding obligation to provide specific transfers of capital, technology or other goods and services. Even the United States, which from 1981 onwards was to become an implacable opponent of the right to development, was, under President Carter, open to many of the goals and even some of the means contained in the demands for the establishment of a new international economic order.

But the West, supported by a reasonable number of Third World states, also had other concerns, at least in terms of human rights doctrine in the United Nations context, if not in terms of their own practice. Issues of equity and distribution, which manifested themselves in the development debate of the 1970s, under the guise of the 'basic needs strategy' . . . translated into support for a particular vision of economic and social rights which did not necessarily coincide with that of some of the Third World proponents of those rights. Similarly, the view that respect for civil and political rights was indispensable for the achievement of human development, as appropriately defined, was firmly held by virtually all Western states.

. . .

. . . [N]either the North nor the South (in so far as such general descriptive terms are analytically valid) were prepared to accept the logical conclusions which could reasonably be drawn from their general negotiating positions in the debate. The North, for its part, was anxious to insist that the development process should be predicated upon full respect for human rights and that economic and social rights should be taken seriously, but was not prepared to

accept that these positions might have direct implications for its own policies towards Third World countries, especially in terms of aid and trade. The South, on the other hand, was anxious to demand concessions from the North and to constrain it in respect of various of its policy options, but was unprepared to accept any constraints on its own freedom of action. While these positions, even in their extreme forms, were hardly surprising, they also helped to ensure a relatively unproductive debate within the Commission on Human Rights.

GEORGES ABI-SAAB, THE LEGAL FORMULATION OF A RIGHT TO DEVELOPMENT

in Academy of International Law, The Right to Development at the International Level 159 (1980), at 163.

[Abi-Saab begins by noting that, for the right to development to be considered a legal right, it must be possible to identify the active and passive subjects of the right and its content. But those elements depend on the legal basis of the right, which in turn depends on whether the right is an individual or collective one.]

It is possible to think of different legal bases of the right to development as a collective right. The first possibility . . . is to consider the right to development as the aggregate of the social, economic and cultural rights not of each individual, but of all the individuals constituting a collectivity. In other words, it is the sum total of a double aggregation of the rights and of the individuals. This version . . . has the merit of shedding light on the link between the rights of the individual and the right of the collectivity; a link which is crucial. . . .

Another way . . . is to approach it directly from a collective perspective . . . by considering it either as the economic dimension of the right of self-determination, or alternatively as a parallel right to self-determination, partaking of the same nature and belonging to the same category of collective rights.

What can be the content of a right to development? And is it really possible to give a legal rendering of development whether in terms of municipal or international law? This is a very difficult task, but not an impossible one. . . .

. . . [W]hen we speak of global development, most emphasis is put on the development of the less developed countries (LDCs), because of the increasing awareness that this is the major and most urgent problem and the *conditio sine qua non* for the harmonious development of the international community as a whole.

What are these policy measures? . . . [The author then considers the evolution of international development law through the UN Development Decade Strategies, the sessions of the UN Conference on Trade and Development

(UNCTAD) and the program for the achievement of a New International Economic Order (NIEO), endorsed by the UN General Assembly in 1973–75.]

Briefly, these measures can be classified into four or five clusters each addressing itself to a major problem in North–South economic relations: the question of stabilizing commodity prices at an equitable level; the question of changing the international division of labour in order to give a greater opportunity for industrialization to the less developed countries and a greater share in international trade to their industrial or manufactured products; the question of transfer of technology; the question of redirecting the monetary and financial flows in a manner more compatible with the imperatives of development, etc.

The measures are either of a purely economic content (such as the integrated commodity programme, the generalized preference scheme, the fixing of targets for public aid) or of a political-normative nature which aims at the strengthening of the bargaining power of less developed countries (or rather at re-equilibriating to some extent the great disparity in power between them and the developed countries within the international economic system) such as the reaffirmation and extension of the principle of permanent sovereignty over natural wealth and resources, the legitimatization of producers' associations, the claim for more effective participation in decision-making in monetary and financial institutions, etc.

. . .

Whether this bundle of policy measures we now call the NIEO is in fact conducive to global development is another question, however; a question which is subject to much theoretical controversy. Indeed, the NIEO has been criticized both from the Right and from the Left: from the Right as being an incoherent amalgam of 'uneconomic' policies which would bring about chaos and disorder by destroying the market mechanisms; from the Left the NIEO is attacked by the supporters of the strategy of 'self-reliance' and 'de-linking', as consolidating the patterns of dependence of the South and its control by the North, and for ignoring the vital issue of a more equitable internal distribution of income and thus working for the exclusive benefit of the oppressive élites, who are the objective allies and the guardians of the interests of the North in the South.

But the crucial fact remains that now, as in 1974, as in 1964, this bundle of policy measures is the platform that has been officially, consistently and staunchly put forward by the countries of the Third World, and which is gradually (though only partially and in a piecemeal fashion) commanding a widening acceptance on the part of the Western industrialized countries. . . In other words, the NIEO reflects the long maturing and increasingly shared conception of a large majority of the international community of what constitutes the necessary and sufficient means of achieving equitable global development.

Thus, if we envisage the question from the perspective of law-formation, i.e., of the prospects of a legal right to development, it is this generally shared

concept—whatever one's own evaluation of the NIEO—which constitutes the emerging social value within the body-politic of the international community, and which alone stands a chance of eventually being transformed or hardened into law. In other words, only social—i.e., widely shared—values, not individual desiderata, can become legal rules. For law is neither pure ideas, ideals or ideology, nor sheer social power or brute force. It is ideas backed by a sufficient amount of social power . . . .

. . .

. . .[I]t is very unlikely that the right to development will emerge exclusively through the spontaneous process of custom-formation, or out of one legal instrument which covers all its facets and provides it with the necessary legal sanction. Rather, the whole will gradually emerge from its parts.

But if negotiations on the parts produce different types of legal instruments with varying legal nature and effect, the right to development is emerging from them through the process of custom-formation. For it is through the cumulative effect of these policy measures, legal instruments and underlying principles that the right to development is slowly but surely taking shape and asserting itself.

As far as the beneficiaries or active subjects are concerned, the first answer that comes to mind is that they are those societies possessing certain characteristics which lead the international community to consider them wanting in terms of development and to classify them as 'developing' or 'less developed' countries (LDC). . . .

. . .

. . . Up to now, we have used societies, communities, countries and States as interchangeable, which they are not. In fact, here as with self-determination, the common denominator of these different ways of describing the beneficiary collectivity is the 'people' they designate, which constitutes the socially relevant entity or group in this context. . . . Suffice it to say here that the distinction between 'people' and 'State', though in theory it is as important in relation to the right to development as to the right of self-determination, in practice it is not . . . .

. . .

. . . [T]he passive subject of the right to development can only be the international community as such. But as the international community does not have at its disposal the means (organs, resources) of directly fulfilling its obligations under the right to development, it can only discharge them through a category of its members, that of the 'developed' States . . . .

. . .

. . . [S]atisfaction of the collective right is a necessary condition, a condition-precedent or a prerequisite for the materialization of the individual rights.

Thus without self-determination it is impossible to imagine a total realization of the civil and political rights of the individuals constituting the collectivity in question. Such rights can be granted and exercised at lower levels, such as villages and municipalities, but they cannot reach their full scope and logical conclusion if the community is subject to colonial or alien rule . . . .

The same with the right to development, which is a necessary precondition for the satisfaction of the social and economic rights of the individuals. And here, even more than in the case of self-determination, the causal link between the two levels is particularly strong; for without a tolerable degree of development, the society will not be materially in a position to grant and guarantee these rights to its members, i.e., of providing the positive services and securing the minimum economic standards which are required by these rights.

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MOHAMMED BEDJAOUI, THE RIGHT TO DEVELOPMENT

in Bedjaoui (ed.), International Law: Achievements and Prospects 1177 (1991), at 1182.

. . .

III. ELEMENTS FOR THE DEFINITION AND IDENTIFICATION OF THE 'RIGHT TO DEVELOPMENT'

14. The right to development is a fundamental right, the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights, in short it is the *core right* from which all the others stem. . . .

. . . .

15. . . . In reality the international dimension of the right to development is nothing other than *the right to an equitable share in the economic and social well-being of the world.* It reflects an essential demand of our time since four fifths of the world's population no longer accept that the remaining fifth should continue to build its wealth on their poverty.

. . .

IV. BASIS OF THE RIGHT TO DEVELOPMENT

19. The most essential human rights have, in a sense, a meta-juridical foundation. For example, the right to life is independent both of international law and of the municipal laws of States. It pre-exists law. In this sense it is a 'primary' or 'first' law, that is to say a law commanding all the others. . . . Thus

the right to development imposes itself with the force of a self-evident principle and its natural foundation is as a corollary of the right to life. . . .

20. . . . Certain lawyers consider the right to development to be a legal concept and principle enshrined in the Charter and find its basis both in the preamble, in Article 1, paragraph 3, and, above all, in Article 55. These are commendable efforts at textual exegesis to which the remarkable flexibility of this exemplary instrument lends itself so generously. But the results of these efforts are necessarily limited since in 1945, and in the context of that time, 'the ideology of development for all' was still vague and its legal expression in the Charter necessarily still timid.

22. The 'right to development' flows from this right to self-determination and has the *same nature*. There is little sense in recognizing self-determination as a superior and inviolable principle if one does not recognize *at the same time* a 'right to development' for the peoples that have achieved self-determination. This right to development can only be an 'inherent' and 'built-in' right forming an inseparable part of the right to self-determination.

23. . . . [This makes the right to development] much more a right of the State or of the people, than a right of the individual, and it seems to me that it is better that way.

. . .

26. The present writer considers that international solidarity means taking into account the interdependence of nations. One may identify three stages in this search for the foundation of the right to development based on international solidarity:

(i) interdependence, the result of the global nature of the world economy;
(ii) the universal duty of every State to develop the world economy, which makes development an international problem *par excellence*;
(iii) preservation of the human species as the basis of the right to development.

. . .

V. CONTENT OF THE RIGHT TO DEVELOPMENT

34. . . . [This right] has several aspects, the most important and comprehensive of which is the right of each people freely to choose its economic and social system without outside interference or constraint of any kind, and to determine, with equal freedom, its own model of development. . . .

35. Where the elementary bases of independent national control over economic planning are non-existent because they have been expropriated in a more or less covert way by foreign powers, it is impossible to speak of the sovereign equality of States or of State sovereignty without lapsing into fiction. It is thus clear, and even blindingly obvious, that not all States can be equally

sovereign. Furthermore, one can demonstrate with perfect clarity the fact that the right to development is an imperative of sovereignty. There is thus a *necessary relationship* between authentic sovereignty and the right to development, between true sovereignty over the wealth of a country and that country's right to development. For any inequality in development gives rise to the effects of domination and dependence which compromise sovereignty.

. . .

44. . . . [A] people may in no case be deprived of its own means of subsistence. . . .

. . .

47. This right [to develop] which is due from all parties to the State which possesses the right has, in the present writer's view, two aspects which might be stated thus:

to each his due;
to each according to his needs.

48. The first point means that the State seeking its own development is entitled to demand that all the other States, the international community and international economic agents collectively *do not take away from it what belongs to it, or do not deprive it of what is or 'must be' its due in international trade.* In the name of this right to development, the State being considered may claim a *'fair price'* for its raw materials and for whatever it offers in its trade with the more developed countries.

The claim of such a State goes something like this: 'Before giving me charity or offering me your aid, give me my due. Perhaps I shall then have no need of your aid. Perhaps charity is no more than the screen behind which you expropriate what is due to me. Such charity does not deserve to be so called; it is my own property you are handing back to me in this way and, what is more, not all of it'.

49. This second meaning of the right to development which is due from the international community seems much more complex. It implies that the State is *entitled if not to the satisfaction of its needs at least to receive a fair share of what belongs to all, and therefore to that State also.*

This raises two questions:

(a) What things belong to the international community and may be claimed by any State in the context of the right to development?
(b) What is a 'fair' share which may be due to such State by virtue of the maxim 'to each according to his needs'?

50. As far as the first question is concerned, the satisfaction of the needs of a people should be perceived as a right and not as an act of charity. It is a

right which should be made effective by *norms and institutions*. The relation between the donor and the recipient States is seen in terms of responsibility and reciprocal rights over goods that are considered as belonging to all. There is no place in such an analysis for charity, the 'act of mercy', considered as being a factor of inequality from which the donor expects tokens of submissiveness or political flexibility on the part of the receiving State. The concept of charity thus gives place to that of justice. *The need*, taken as a criterion of equity, gives greater precision to the concept of '*equitable distribution*' which would otherwise be too vague.

51. To each according to his needs means that the '*fair price*' cannot be tied to the *market price*. The desirable objective of an equitable relationship between the producer and the consumer could be attained only through price manipulation, by means of other compensatory measures, to the advantage of the less developed country. This would signify a transfer of resources to the poorest countries. The fair price would be calculated according to the general principle of responsibility towards the most needy countries. It would be conceived as being a price which allows for amortization of the costs of production, including social costs, to ensure the well-being and minimal development of the developing countries.

52. What belongs to the international community and is 'the common heritage of mankind' should be shared among all States in accordance with the maxim '*to each according to his needs*'. . . .

There can be no denying that this innovative concept, the common heritage of mankind, is capable of giving world-wide solidarity a wealth of practical expression. It might prove especially productive for the future of world relations and be applied not only to the resources of the sea-bed and of space (those of the moon and celestial bodies), as is already the case, but also to the land, the air, the climate, the environment, inert or living matter and the animal and vegetable genetic heritage, the wealth and variety of which it is vital to preserve for future generations.

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VI. DEGREE OF NORMATIVITY OF THE RIGHT TO DEVELOPMENT

53 Learned opinion is divided in its view of the legal validity of the right to development. Many writers consider that while it is undoubtedly an inalienable and imperative right, this is only in the moral, rather than in the legal, sphere. The present writer has, on the contrary, maintained that the right to development is, by its nature, so incontrovertible that it *should* be regarded as belonging to *jus cogens*.

. . .

55. It is clear, however, that a right which is not opposable by the possessor of the right against the person from whom the right is due is not a right

in the full legal sense. This constitutes *the challenge which the right to development throws down to contemporary international law* and the whole of the challenge which the underdevelopment of four fifths of the globe places, in political terms, before the rulers of the world. . . .

. . .

JACK DONNELLY, IN SEARCH OF THE UNICORN: THE JURISPRUDENCE AND POLITICS OF THE RIGHT TO DEVELOPMENT

15 Calif. Western Int. L. J. 473, at 482 (1985).

III. LEGAL SOURCES OF THE RIGHT TO DEVELOPMENT

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. . . If the right to development means the right of peoples freely to pursue their development, then it can be plausibly argued to be implied by the Covenants' right to self-determination. However, such a right to development is without interest; it is already firmly established as the right to self-determination.

A substantially broader right to development, however, cannot be extracted from this right to self-determination. The right to self-determination recognized in the Covenants does not imply a right to live in a developing society; it is explicitly only a right to *pursue* development. Neither does it imply an *individual* right to development; self-determination, again explicitly, is a right of peoples only. In no sense does it imply a right to be developed. Thus the claim that the right to development is simply the realization of the right to self-determination is not based on the Covenants' understanding of self-determination.

It might also be argued that because development is necessary for self-determination, development is itself a human right. Such an argument, however, is fallacious. Since we will come across this form of argument again, let us look briefly at this 'instrumental fallacy.' Suppose that A holds mineral rights in certain oil-bearing properties. Suppose further that in order to enjoy these rights fully, she requires $500,000 to begin pumping the oil. Clearly A does not have a right to $500,000 just because she needs it to enjoy her rights. . . . The same reasoning applies to the link between development and the right to self-determination. Even assuming that development is necessary for, rather than a consequence of, full enjoyment of the right to self-determination, it simply does not follow that peoples have a right to development.

Allowing such an argument to prevail would result in a proliferation of bizarre or misguided rights. . . .

. . .

The second promising implicit source of a right to development is Article 28 of the Universal Declaration: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized.'

. . .

Unlike most other provisions of the Declaration, however, Article 28 was not confirmed by a parallel provision in the Covenants, which were drafted precisely to give the force of treaty law to the standards of the Universal Declaration. This absence of a passage equivalent to Article 28 is most plausibly interpreted as representing its tacit renunciation. . . .

More substantively, one might question whether 'development' falls under the notion of a social and international order referred to in Article 28. 'Development' suggest a process or result; the process of development or the condition of being developed. 'Order,' by contrast, implies a set of principles, rules, practices or institutions; neither a process nor a result but a structure. Article 28, therefore, is most plausibly interpreted as prohibiting *structures* that deny opportunities or resources for the realization of civil, political, economic, social or cultural human rights. . . .

. . .

Suppose, though, that Article 28 *were* to be taken to imply a human right to development. What would that right look like? It would be an *individual* right, and only an individual right; a right of persons, not peoples, and certainly not States. It would be a right to the enjoyment of traditional human rights, not a substantively new right. It would be as much a civil and political as an economic and social right—Article 28 refers to *all* human rights—and would be held equally against one's national government and the international community. . .

Continuing our review of alleged legal sources, we find that other provisions of the International Bill of Human Rights are unquestionably inadequate as a source of a legal right to development. For example, Article 22 of the Universal Declaration provides for the 'realization, through national effort and international cooperation and in accordance with the organization and resources of each [S]tate' of basic economic, social and cultural rights. This implies at most a right to a fair share of available resources, not a right to development. . . .

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V. SUBJECTS OF THE RIGHT TO DEVELOPMENT

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If human rights derive from the inherent dignity of the human person, collective human rights are logically possible only if we see social membership as an

inherent part of human personality, *and* if we argue that as part of a nation or people, persons hold human rights substantively different from, and in no way reducible to, individual human rights. This last proposition is extremely controversial. . . .

The very concept of human rights, as it has heretofore been understood, rests on a view of the individual person as separate from, and endowed with inalienable rights held primarily in relation to, society, and especially the state. Furthermore, within the area defined by these rights, the individual is superior to society in the sense that ordinarily, in cases of conflict between individual human rights and social goals or interests, individual rights must prevail. The idea of collective *human* rights represents a major, and at best confusing, conceptual deviation.

I do not want to challenge the idea of collective rights *per se* or even the notion of peoples' rights; groups, including nations, can and do hold a variety of rights. But these are not *human* rights as that term is ordinarily understood. . . .

. . .

A further problem with collective human rights is determining who is to exercise the right; the right-holder is not a physical person, and thus an institutional 'person' must exercise it. In the case of a right held by a people, or by society as a whole, the most plausible 'person' to exercise the right is, unfortunately, the state. Again this represents a radical reconceptualization of human rights—and an especially dangerous one.

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VI. THE SUBSTANCE OF THE RIGHT TO DEVELOPMENT

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The political dangers of subordinating human rights are especially great when development or the NIEO appear as *preconditions* for the realization of human rights, or when the right to development itself is presented as a precondition to the enjoyment of traditional human rights. Since satisfaction of these preconditions is a long way off, such arguments readily lend themselves to claims that Third World regimes ought not be held to international human rights standards. As preconditions multiply, we reach a situation where it appears as if the world would need to be 'transformed into an earthly paradise' before human rights could be realized.

The right to development and its preconditions thus lend themselves to use as an excuse not to act on human rights now. This, I would argue, is the central contemporary political fact about the right to development. . . .

The right to development, therefore, in its substance as in other aspects, is subject to both relatively defensible and entirely undefensible interpretations.

The problem is that the defensible interpretation, as an individual right to full personal development in all areas of human life, is rather innocuous, while the indefensible interpretations are quite dangerous. In other words, the dangers posed by the right to development far outweigh its benefits.

. . .

DECLARATION ON THE RIGHT TO DEVELOPMENT

General Assembly Res. 41/128 (1986).

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

. . .

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

. . .

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

. . .

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.

. . .

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution in income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

. . .

QUESTIONS

1. Judge Bedjaoui, the President of the International Court of Justice, characterizes the right to development as the 'core right' from which all others stem, and as a pre-condition of liberty and justice. Other rights, such as that to self-determination, have also been labelled 'core rights.'

a. What do you think the notion means? An essential condition (but there may be many essential conditions)? The only essential condition? The logical source of all other rights? How would you flesh out any such argument?

b. Could free speech be a 'core right'? Freedom from torture?

2. 'Scholars search for a foundation in sacred human rights texts for a new right, as if a right declared by the UN depends for its legitimacy on a clear pedigree from the UDHR or ICCPR. Why must this be so? Rights change as times change, and if times demand amendments to older rights or the legislation of new ones, so be it. Let a General Assembly vote for a declaration together with state support thereof suffice.' Comment.

3. Based on the Declaration on the Right to Development, what do you take to be the components of this right? What are the key ideas? Are they unified within one conception?

4. Do you perceive actual or potential contradictions between this right and other rights in the human rights corpus? For example, does the Declaration indicate how to resolve what might be competing claims for economic growth and for preservation of the environment—or how to resolve what might be competing claims for aggregate economic growth that is independent of distributional concerns, and for growth consistent with maintenance of a certain level of welfare support?

5. Compare the right of peoples to self-determination, considered in Chapter 14(A), and the right to development. What similarities and differences?

6. 'This "Declaration" may be significant as a rallying point, as powerful and official rhetoric expressing a hope of developing states and their populations. It has nothing to do with "rights." Whose rights are they—an individual's, a people's, a state's? Against whom are they asserted, and through what agency

if we talk of peoples' rights? Like most rights of the so-called third generation such as the so-called right to peace, the Declaration is better understood as aspiration, desire, need and claim. Within that understanding, it makes sense as a political and moral statement.' Comment.

7. To what extent does the Declaration bear out the hopes expressed by Abi-Saab and Bedjaoui, and the concerns expressed by Donnelly?

B. THE INTERDEPENDENCE OF THE TWO SETS OF RIGHTS

The question of the interdependence of civil and political rights on the one hand, and economic, social and cultural rights on the other, figured in the examination in Chapter 5 of the second set of rights, and in Chapter 13 of the prospects for advancement and equality for women. During the Cold War, the nature of this relationship was a constant bone of contention, both between East and West and between North and South. In order to preserve the formal consensus reflected in the International Bill of Rights, all governments continued to pay lip-service to the notion that the two sets of rights are 'interdependent, indivisible and interrelated.' UN human rights organs have regularly endorsed such assertions. Although this consensus may be both necessary and desirable in intergovernmental settings, it means that the complex nature of the theoretical and practical relationships among different rights is not open to exploration in those settings.

Compare in the following readings the position put to the Vienna World Conference on Human Rights by the Committee on Economic, Social and Cultural Rights with the viewpoint expressed by Amartya Sen.

STATEMENT TO THE WORLD CONFERENCE ON HUMAN RIGHTS ON BEHALF OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

UN Doc. E/1993/22, Annex III.

. . .

3. . . . [F]ull realization of human rights can never be achieved as a mere by-product, or fortuitous consequence, of some other developments, no matter how positive. For that reason, suggestions that the full realization of economic, social and cultural rights will be a direct consequence of, or will flow

automatically from, the enjoyment of civil and political rights are misplaced. Such optimism is neither compatible with the basic principles of human rights nor is it supported by empirical evidence. The reality is that every society must work in a deliberate and carefully structured way to ensure the enjoyment by all of its members of their economic, social and cultural rights. . . .

4. Just as carefully targeted policies and unremitting vigilance are necessary to ensure that respect for civil and political rights will follow from, for example, the holding of free and fair elections or from the introduction or restoration of an essentially democratic system of government, so too is it essential that specific policies and programmes be devised and implemented by any Government which aims to ensure the respect of the economic, social and cultural rights of its citizens and of others for whom it is responsible.

. . .

12. [Some] Governments in the industrialized countries tend to assume that the existence of a genuinely democratic system and the generation of relatively high levels of per capita income are sufficient evidence of comprehensive respect for human rights. Yet, the Committee's experience shows that such conditions are perfectly capable of coexisting with significant areas of neglect of the basic economic, social and cultural rights of large numbers of their citizens. High infant mortality rates, a significant incidence of hunger or malnutrition, mass unemployment, large-scale homelessness and high drop-out rates from educational institutions are all indicators, at least prima facie, of violations of economic, social and cultural rights and hence of human rights.

AMARTYA SEN, FREEDOMS AND NEEDS

The New Republic 31 (Jan. 10 and 17, 1994), at 32.

. . .

. . . Do needs and rights represent a basic contradiction? Do the former really undermine the latter? I would argue that this is altogether the wrong way to understand, first, the force of economic needs and, second, the salience of political rights. The real issues that have to be addressed lie elsewhere, and they involve taking note of extensive interconnections between the enjoyment of political rights and the appreciation of economic needs. Political rights can have a major role in providing incentives and information toward the solution of economic privation. But the connections between rights and needs are not merely instrumental they are also constitutive. For our conceptualization of economic needs depends on open public debates and discussions, and the guaranteeing of those debates and those discussions requires an insistence on political rights.

. . .

Those who are skeptical of the relevance of political rights to poor countries would not necessarily deny the basic importance of political rights. Some of them would not even deny my contention that the nastiness of the violation of liberty can go well beyond other forms of disadvantage. Instead their arguments turn on the impact of political rights on the fulfillment of economic needs, and they take this impact to be firmly negative and overwhelmingly important.

The belief abounds that political rights correlate negatively with economic growth. Indeed, something of a 'general theory' of this relationship between political liberty and economic prosperity has been articulated recently by that unlikely theorist Lee Kuan Yew, the former prime minister of Singapore; and the praise of the supposed advantages of 'the hard state' in promoting economic development goes back a long way in the development literature. . . .

. . .

It is true that some relatively authoritarian states (such as Lee's Singapore, South Korea under military rule and more recently China) have had faster rates of economic growth than some less authoritarian states (such as India, Costa Rica and Jamaica). But the overall picture is much more complex than such isolated observations might suggest. Systematic statistical studies give little support to the view of a general conflict between civil rights and economic performance. In fact, scholars such as Partha Dasgupta, Abbas Pourgerami and Surjit Bhalla have offered substantial evidence to suggest that political and civil rights have a *positive* impact on economic progress. Other scholars find divergent patterns, while still others argue, in the words of John Helliwell, that on the basis of the information so far obtained 'an optimistic interpretation of the overall results would thus be that democracy which aparently has a value independent of its economic effects, is estimated to be available at little cost in terms of subsequent lower growth.'

There is not much comfort in all these findings for the 'Lee Kuan Yew hypothesis' that there exists an essential conflict between political rights and economic performance. The general thesis in praise of the tough state suffers not only from causal empiricism based on a few selected examples, but also from a lack of conceptual discrimination. Political and civil rights come in various types, and authoritarian intrusions take many forms. It would be a mistake, for example, to equate North Korea with South Korea in the infringement of political rights, even though both have violated many such rights; the complete suppression of opposition parties in the North can hardly be taken to be no more repressive than the roughness with which opposition parties have been treated in the South. Some authoritarian regimes, both of the 'left' and of the 'right', such as Zaire or Sudan or Ethiopia or the Khmer Rouge's Cambodia, have been enormously more hostile to political rights than many other regimes that are also identified, rightly, as authoritarian.

The processes that led to the economic success of, say, South Korea are now reasonably well understood; a variety of factors played a part, including the use of international markets, an openness to competition, a high level of literacy, successful land reforms and the provision of selective incentives to encourage growth and exports. There is *nothing* to indicate that these economic and social policies were inconsistent with greater democracy, that they had to be sustained by the elements of authoritarianism actually present in South Korea. The danger of taking *post hoc* to be *propter hoc* is as real in the making of such political and strategic judgments as it is in any empirical reasoning.

Thus the fundamental importance of political rights is not refuted by some allegedly negative effect of these rights on economic performance. In fact, the instrumental connections may even give a very positive role to political rights in the context of deprivations of a drastic and elementary kind: whether, and how, a government responds to intense needs and sufferings may well depend on how much pressure is put on it, and whether or not pressure is put on it will depend on the exercise of political rights (such as voting, criticizing, protesting and so on).

Consider the matter of famine. I have tried to argue elsewhere that the avoidance of such economic disasters as famines is made much easier by the existence, and the exercise, of various liberties and political rights, including the liberty of free expression. . . . But famines have never afflicted any country that is independent, that goes to elections regularly, that has opposition parties to voice criticisms, that permits newspapers to report freely and to question the wisdom of government policies without extensive censorship.

. . .

Why might we expect a general connection between democracy and the nonoccurrence of famines? The answer is not hard to seek. Famines kill millions of people in different countries in the world, but they do not kill the rulers. The kings and the presidents, the bureaucrats and the bosses, the military leaders and the commanders never starve. And if there are no elections, no opposition parties, no forums for uncensored public criticism, then those in authority do not have to suffer the political consequences of their failure to prevent famine. Democracy, by contrast, would spread the penalty of famine to the ruling groups and the political leadership.

There is, moreover, the issue of information. A free press, and more generally the practice of democracy, contributes greatly to bringing out the information that can have an enormous impact on policies for famine prevention, such as facts about the early effects of droughts and floods, and about the nature and the results of unemployment. . . . Indeed, I would argue that a free press and an active political opposition constitute the best 'early warning system' that a country threatened by famine can possess.

The connection between political rights and economic needs can be illustrated in the specific context of famine prevention by considering the massive Chinese famines of 1958–61. Even before the recent economic reforms, China

had been much more successful than India in economic development. The average life expectancy, for example, rose in China much more than it did in India, and well before the reforms of 1979 it had already reached something like the high figure—nearly seventy years at birth—that is quoted now. And yet China was unable to prevent famine. It is now estimated that the Chinese famines of 1958–61 killed close to 30 million people—ten times more than even the gigantic 1943 famine in British India.

The so-called 'Great Leap Forward,' initiated in the late 1950s, was a massive failure, but the Chinese government refused to admit it, and continued dogmatically to pursue much the same disastrous policies for three more years. It is hard to imagine that this could have happened in a country that goes to the polls regularly and has an independent press. . . .

The lack of a free system of news distribution even misled the government itself. It believed its own propaganda and the rosy reports of local party officials competing for credit in Beijing. Indeed, there is evidence that just as the famine was moving toward its peak, the Chinese authorities mistakenly believed that they had 100 million more metric tons of grain than they actually did. . . .

. . .

. . . [o]f course, there is the danger of exaggerating the effectiveness of democracy. Political rights and liberties are permissive advantages, and their effectiveness depends on how they are exercised. Democracies have been particularly successful in preventing disasters that are easy to understand, in which sympathy can take an especially immediate form. Many other problems are not quite so accessible. Thus India's success in eradicating famine is not matched by a similar success in eliminating non-extreme hunger, or in curing persistent illiteracy or in relieving inequalities in gender relations. While the plight of famine victims is easy to politicize, these other deprivations call for deeper analysis, and for greater and more effective use of mass communication and political participation—in sum, for a fuller practice of democracy.

. . .

It is important to acknowledge, however, the special difficulty of making a democracy take adequate notice of some types of deprivation, particularly the needs of minorities. One factor of some importance is the extent to which a minority group in a particular society can build on sympathy rather than alienation. When a minority forms a highly distinct and particularist group, it can be harder for it to receive the sympathy of the majority, and then the protective role of democracy may be particularly constrained.

. . .

. . . The comprehension and the conceptualization of economic needs themselves may require the exercise of political and civil rights, open discussion and public exchange.

Human lives suffer from miseries and deprivations of various kinds, some more amenable to alleviation than others. The totality of the human predicament would be an undiscriminating basis for the social analysis of needs. There are many things that we might have good reason to value if they were feasible, maybe even immortality; yet we do not see them as needs. Our conception of needs relates to our analysis of the nature of deprivations, and also to our understanding of what can be done about them. Political rights, including freedom of expression and discussion, are not only pivotal in inducing political responses to economic needs, they are also central to the conceptualization of economic needs themselves.

QUESTIONS

1. Can the appropriate relationship between the two sets of rights be determined on the basis of either instrumentalist arguments or empirical studies, or is the question rather a matter of political axiom and faith?

2. If Sen's position is accepted, what are the implications for economic and social rights within the international human rights framework? Does it follow that the emphasis in developing countries under authoritarian rule should clearly and consistently be placed upon civil and political rights?

3. How do you relate the Committee's stress on forming programs on economic and social rights (as opposed to emphasis on averting disasters through a free press and public debate) to Sen's argument?

C. IS THERE AN OBLIGATION TO ASSIST?

Many observers believe that the single most important objective of the proponents of the right to development is to establish an obligation on the part of wealthier countries to provide financial and other types of assistance to poorer countries. This issue has also been prominent in relation to the obligations contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In the next reading, Alston and Quinn consider the implications of the provision in that Covenant relating to 'international assistance and co-operation.' The argument that there is an obligation to provide assistance is sometimes linked to human rights in general and sometimes directly to the right to devel-

opment. It also arises in the general literature on economic and social development. In the readings that follow by Bedjaoui, and by Griffin and Khan, the authors put forward proposals designed to ensure automatic assistance to poor countries.

The furthest that any of the international human rights bodies has gone in linking respect for human rights to the role of international cooperation is a General Comment adopted by the UN Committee on Economic, Social and Cultural Rights. The key parts of that statement are provided below.

PHILIP ALSTON AND GERARD QUINN, THE NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS UNDER THE ICESCR

9 Hum. Rts. Q. 156 (1987), at 186.

. . .

The Covenant contains three provisions that could be interpreted as giving rise to an obligation on the part of the richer states parties to provide assistance to poorer states parties in situations in which the latter are prevented by a lack of resources from fulfilling their obligations under the Covenant to their citizens. The first is the phrase ['individually and through international assistance and co-operation, especially economic and technical'], which appears in Article 2(1). The second is the provision in Article 11(1) according to which states parties agree to 'take appropriate steps to ensure the realization of this right [to an adequate standard of living], recognizing to this effect the essential importance of international co-operation based on free consent.' Similarly, in Article 11(2) states parties agree to take, 'individually and through international co-operation,' relevant measures concerning the right to be free from hunger.

Almost inevitably, dramatically diverging interpretations of the significance of these provisions have been put forward. On the one hand they have been said to give rise to quite specific international obligations on the part of industrialized countries and to provide the foundations for the existence of a right to development. On the other hand, the Carter administration, in seeking the advice and consent of the U.S. Senate to U.S. ratification of the Covenant, proposed a reservation to the effect that: 'It is also understood that paragraph 1 of article 2, as well as article 11 . . . import no legally binding obligation to provide aid to foreign countries.'

. . .

The principle of international cooperation is recognized in Articles 55 and 56 of the United Nations Charter. . . .

. . .

During the preparatory work [for the Covenant] it was conceded by virtually all delegations that the developing states would require some forms of international assistance if they were to be able to promote effectively the realization of economic and social rights. . . .

. . . [T]he U.S. representative considered it 'quite essential for the article . . . to indicate the necessity of international co-operation in the matter.' The consensus, however, did not extend much, if at all, beyond that general proposition.

Those arguing in favor of imposing a strong obligation on the developed countries invoked a wide range of justifications. Perhaps the least controversial was the argument based on interdependence. . . .

On occasion, however, this argument was closely linked to the view that international cooperation was owed to the formerly colonized states in reparation for 'the systematic plundering of their wealth under colonialism.' As another representative put it, 'nations that were or had been colonized did not go begging, but called for the restoration of their rights and property.' . . . It was also argued that the absence of a provision relating to international cooperation would render the undertakings of developing countries 'purely academic' because they would be unable to afford to implement them.

The only formal suggestion of the existence of a binding obligation came from the Chilean representative who observed 'that international assistance to under-developed countries had in a sense become mandatory as a result of commitments assumed by States in the United Nations.'

The arguments against that proposition took a variety of forms and came from a significant range of states. France argued simply that 'multilateral assistance could not be mandatory' and an almost identical argument was made by the Soviet Union. In the view of the representative of Greece 'developing countries like her own had no right to demand financial assistance through such an instrument; they could ask for it, but not claim it.'

Other representatives opposed the reference to international cooperation on the grounds that it would enable states seeking to evade their obligations to invoke the inadequacy of international development assistance as an excuse. . . .

. . .

Thus, on the basis of the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular state to provide any particular form of assistance. It would, however, be unjustified to go further and suggest that the relevant commitment is meaningless. In the context of a given right it may, according to the circumstances, be possible to identify obligations to cooperate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant.

NOTE

Consider the following comments of Mohammed Bedjaoui:[6]

> . . . [W]e are advocating that 'the world food stocks' essential to life, that is to say principally *grain* stocks, be declared to be 'the common heritage of mankind' so as to guarantee every people the vital minimum of a bowl of rice or loaf of bread in order to eradicate the hunger which kills fifty million human beings a year. We are not suggesting this out of moral idealism but out of a concern to avoid a dangerous impasse in international relations. . . .
>
> . . .
>
> Why, for example, should not the twentieth century also be equal to the spirituality of the seventh century when the Koran announced to all mankind that 'all wealth, all things, belong to God' and thus to all members of the human community and that consequently the 'Zakat', the act of charity, should be seen rather as a compulsory institutionalized act, a manifestation of human solidarity, making it every man's duty to give away one tenth of his wealth each year?
>
> Is the twentieth century incapable of matching the principles of solidarity stated by the lawyer Emeric de Vattel in 1758 when he affirmed that each nation must contribute, by every means in its power, to the happiness and perfection of the others?
>
> . . .
>
> How can we make the world food stocks, which are essential to survival, the common heritage of mankind? How should this '*new world food order*' be brought into being? It is a matter for politicians, economists, lawyers and financiers to think about. An immediate and provisional first step might be the creation of a *universal agency*, provided with an operational administration, which could be called the 'International Fund for Food Stocks' (IFFS). It would have a budget with funds provided from a tax levied in each State on a number of manufactured products of high added value made of raw materials from the countries of the third world, or (and) by a one per cent tax on military budgets.

[6] The Right to Development, in Bedjaoui (ed.), International Law: Achievements and Prospects 1177, 1196 (1991).

KEITH GRIFFIN AND A.R. KHAN, GLOBALIZATION AND THE DEVELOPING WORLD

(1992), at 90.

. . .

The most important issue linking human development and international capital revolves around the role of foreign aid. Foreign aid includes the highly concessional loans and outright grants to developing countries from the OECD and other rich countries, channelled both bilaterally and through multilateral development agencies such as the World Bank and the Regional Development Banks. It is often taken for granted that foreign assistance actually assists developing countries. Often, alas, this is not the case. The Committee for Development Planning reflects an emerging consensus when it states that

> far too much aid serves no developmental purpose but is used instead to promote the exports of the donor country, to encourage the use of (imported) capital-intensive methods of production or to strengthen the police and armed forces of the recipient country.

But while agreeing that much aid in the past has been wasted, there is evidence that when donor and recipient act responsibly, foreign aid can indeed be of benefit.

The first thing that needs to be done is to depoliticize aid by bringing it under the control of a supranational authority operating under clearly defined and agreed principles. These principles should include both the mobilization and allocation of aid funds. It may be too much to expect that the leading donor countries would agree to channel all foreign assistance through a supranational authority, but it should be possible to reach agreement to channel most foreign aid through such an authority while leaving individual countries free to supplement multilateral assistance with bilateral programmes if they wish to do so. This would not be a radical departure from present practice although it would change the balance decisively in favour of multilateral assistance.

Agreement among donors might be facilitated if it were understood that all multilateral aid would be allocated to countries representing the poorest 60 per cent of the world's population. This implies that only countries with a per capita income of about 700 US dollars or less would be eligible for assistance. Having determined which countries are eligible, the next step is to agree on how the available funds would be distributed among the recipients. We suggest that the criteria for determining the amount of aid to be allocated to eligible countries reflect (a) the severity of poverty as measured by the shortfall of real per capita income from the agreed threshold of 700 US dollars; (b) the degree of commitment to human development as demonstrated by recent success and current programmes; and (c) the size of the population.

The desired total amount of foreign aid available for distribution might be set as an agreed proportion of the combined GNP of all potential recipients. The burden of financing this total should be distributed among the donor countries progressively so that a richer country contributes a higher proportion of its per capita income than a less rich country. This would make the total volume of aid predictable and the distribution of its burden among the contributors equitable.

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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT NO. 2

UN Doc. E/1990/23, Annex III.

International technical assistance measures (Article 22 of the Covenant)

1. Article 22 of the Covenant establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies any matters arising out of reports submitted under the Covenant 'which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the . . . Covenant'. While the primary responsibility under Article 22 is vested in the Council, it is clearly appropriate for the Committee on Economic, Social and Cultural Rights to play an active role in advising and assisting the Council in this regard.

2. Recommendations in accordance with Article 22 may be made to any 'organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance'. The Committee considers that this provision should be interpreted so as to include virtually all United Nations organs and agencies involved in any aspect of international development co-operation. It would therefore be appropriate for recommendations in accordance with Article 22 to be addressed, *inter alia*, to the Secretary-General, subsidiary organs of the Council such as the Commission on Human Rights, the Commission on Social Development and the Commission on the Status of Women, other bodies such as UNDP [the UN Development Programme], UNICEF [the UN Children's Fund] . . ., agencies such as the World Bank and IMF [International Monetary Fund], and any of the other [UN] specialized agencies . . . .

. . .

6. . . . United Nations agencies involved in the promotion of economic, social and cultural rights should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. In negative

terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches which contribute not only to economic growth or other broadly-defined objectives, but also to enhanced enjoyment of the full range of human rights.

7. . . .[D]evelopment co-operation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of 'development' have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.

8. Despite the importance of seeking to integrate human rights concerns into development activities, it is true that proposals for such integration can too easily remain at a level of generality. Thus, in an effort to encourage the operationalization of the principle contained in Article 22 of the Covenant, the Committee wishes to draw attention to the following specific measures. . . .

(*a*) As a matter of principle, the appropriate United Nations organs and agencies should specifically recognize the intimate relationship which should be established between development activities and efforts to promote respect for human rights in general, and economic, social and cultural rights in particular. . . .

(*b*) Consideration should be given by United Nations agencies to the proposal, made by the Secretary-General in a report of 1979, that a 'human rights impact statement' be required to be prepared in connection with all major development co-operation activities;

(*d*) Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.

9. A matter which has been of particular concern to the Committee in the examination of the reports of States parties is the adverse impact of the debt burden and of the relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances,

however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as 'adjustment with a human face' or as promoting 'the human dimension of development' requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, *inter alia*, international co-operation. In many situations, this might point to the need for major debt relief initiatives.

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NOTE

Para. 9 of the Committee's General Comment discusses adjustment measures that are meant to alleviate the debt burdens of developing states. This problem has become a major issue of contention between international financial institutions and states benefiting from their assistance. The term 'structural adjustment programs' describes policies advocated by institutions such as the International Monetary Fund and by individual governments in order to enable beneficiary states to achieve an improved balance of payments. In the case of the IMF, such states must agree to implement those policies in order to qualify for future assistance. The policies generally involve a move toward greater market ordering relative to government planning, and one or another degree of fiscal austerity through heightened taxation and reduction of governmental subsidies and spending (including reduction in government employment and provision of welfare).[7]

QUESTIONS

1. Is there any foundation in the UN Charter, the UDHR, the ICESCR or other international instruments with which you are familiar for the following views put to the U.S. Senate Committee on Foreign Relations in 1979 by an opponent of ratification by the U.S. of the ICESCR? Phyllis Schlafly argued that the ICESCR 'would obligate us to take steps by all measures, including legislation, to distribute food all over the world and to finance a rising standard of living' for other nations?

[7] See Sigrun Skogly, Structural Adjustment and Development: Human Rights—An Agenda for Change, 15 Hum. Rts. Q. 751 (1993).

2. Is Bedjaoui's proposal justified by reference either to the ICESCR or the right to development? How do you assess it with respect to its effect on human rights?

3. Consider the relation between developmental aid on the one hand, and humanitarian assistance in crisis situations on the other.

a. Is there a correlative obligation on any state claiming an expansive right to development and to the financial assistance necessary for development to accept assistance of a humanitarian nature (as in cases of civil conflict) for which there is a clearly demonstrated need?

b. Conversely, can a provider country, which claims that there is an obligation upon a developing state to accept urgently needed humanitarian assistance, maintain with logical consistency that it is under no obligation to provide developmental aid?

4. Are the views in the General Comment adopted by the Committee on Economic, Social and Cultural Rights adequate to meet the concerns of developing countries that have figured in the debate over the right to development? If not, what more should the General Comment have stated, and on the basis of what authority?

D. THE SPREAD OF THE MARKET ECONOMY AND GLOBALIZATION: CONSEQUENCES

Developments since the fall of communism in Central and Eastern Europe and the spread of one or another form of a (regulated) market economy have brought about some important consequences for the enjoyment of human rights. Civil and political rights have been greatly strengthened in many countries. Nonetheless, related contemporary phenomena—including privatization, deregulation, the expanded provision of incentives to entrepreneurial behavior, and structural adjustment programs and related pressures from international financial institutions and developed countries—have had mixed, and sometimes seriously adverse, effects on the enjoyment of economic and social rights.

In the first reading below, Yash Ghai explores the consequences of recent developments for the debate in Asia over human rights. His ideas further develop issues introduced in Section C of Chapter 4, on cultural relativism and Asian critiques of universal human rights. In the next reading, Steven Lukes responds to another scholar's analysis of why the Solidarity-led Government,

elected in Poland to replace the Communist regime, opted for a 'market utopian approach'.

YASH GHAI, HUMAN RIGHTS AND GOVERNANCE: THE ASIA DEBATE

15 Aust. Y. B. Int'l L. 1994, 1 (1995), at 2.

. . .

. . . Much effort has gone into the establishment of markets in Eastern Europe and formerly communist States in Asia; indeed a veritable and diverse profession has developed around this enterprise. In some respects these efforts represent an extension of privatisation and structural adjustment policies that had been adopted by or imposed on various States in Africa, Asia and Latin America, the effect of which was to diminish the economic role of the State. The marketisation of domestic economies was paralleled by the globalisation of capital, markets and services, as national barriers to investments and trade were removed (under pressure from world economic institutions). The thrust of globalisation came largely from the West, and served to increase its economic influence and hegemony over the rest of the world. But it was presented, instead, principally in terms of the virtues of entrepreneurship, economic rationality and an efficient legal regime marked by security, predictability and transparency. The links of these developments to human rights were sought to be established through claims of increased choices for investors, consumers and workers, the restrictions on State power and the emergence or strengthening of civil society. So democracy, marketisation of economies, the promotion of human rights and the emergence of civil society were declared to be all of a piece.

The result of the approach of the West was to bring out clearly the implications of the human rights work steadily . . . developed through the United Nations and its agencies. It brought to the fore the responsibility of the international community for the protection of human rights everywhere, and thereby highlighted the ways in which national sovereignty has been qualified by the UN Charter and the human rights conventions. . . . International relations themselves are increasingly mediated through human rights discourse and practice. Aid conditionalities, unthinkable a decade ago, have become common place. . . . However, not all governments have taken kindly to the internationalisation of human rights and democracy, although many of them are unable to carry their opposition to it to international fora because of their fragile political and economic systems and the dependence on external donors. Several Asian countries, particularly in Southeast and East Asia, have offered a spirited rebuttal of this internationalisation. They resent the interposition of the international community (and particularly the hegemony of particular countries within it) in their relations with their citizens, in an ever increasing

number of areas. They also resent the leverage it has given these other countries (and international institutions) over their policies, and see the new approach as attempts to undermine their moral authority, disrupt their political stability, and retard their economic progress. Rather than, as in some other regions, withdraw from the debate, they have sought to provide an alternative framework for the discourse of human rights and democracy.

STEVEN LUKES, IS THERE AN ALTERNATIVE TO MARKET UTOPIANISM?

in Christopher Bryant and E. Mokrzycki (eds.), The New Great Transformation? Change and Continuity in East–Central Europe 218 (1994).

In the previous chapter Maurice Glasman asks three related but unfashionable questions[8] . . .

First, he asks why the West German post-war settlement, with its distinctive form of welfare state and system of co-determination, successfully combining liberal-democratic institutions and considerable trade-union power, has been so comprehensively ignored in the post-communist transitions in Eastern and Central Europe, among actors, advisers, and observers alike, both within and outside the region.

It is an excellent question, though many will think that there are several answers and that they are rather obvious. They will point to various factors that, they will claim, make the comparison between the two transitions dubiously relevant. There is, first, the enormous change that has intervened in the relationship between the international and the national political economies, above all in respect of the impact of international financial markets on domestic economic policies. There is an ever-diminishing scope for the pursuit of national social and economic policies, in the face of the ever-present threat of capital flight, as the French socialists discovered in the early 1980s. Second, there are the massive changes in the class structure and the division of labour, both nationally and internationally, the fragmentation and feminization of many areas of work, the growth of the service sector, and the secular decline in the manual working class, leading to the declining role of trade unions. Third is the difference in the climate of expectations: post-war Europe was widely held to be ripe for social reconstruction, after the ravages of the Depression and the War, while post-communist Eastern Europe is seen to be in need of social deconstruction and the dismantling of obstructions to economic development. The social interest groups and institutions, if not the personnel, of the Nazi regime perished with its defeat, whereas communism has left behind it a legacy of patterns of interest, dependency and state dependency which at best constitute a constraint and at worst a blocking mechanism upon

[8] [Eds.] This article by Lukes is a comment on an article in the same book: Maurice Glasman, The Great Deformation: Polányi, Poland and the Terrors of Planned Spontaneity.

the privatization and marketization of the economy, and overcoming them becomes a central priority. Fourth is the different international climate: as the cold war set in, the securing of social consensus and stability in West Germany had a high priority for the Western allies, whereas such threats to consensus and stability as exist in various areas of the East, while arguably greater, are endogenous and widely seen as intractable.

At least some of these apparent objections are put into question by Glasman's argument itself, for it does not, as I read it, depend on the claim that the cases are analogous, and that the Poles could now implement a West German-style social market and welfare state. His case is rather that after the war the West Germans and their Western allies created (without designing it) a functioning capitalist order that built upon 'existing institutions and patterns of co-operation' which centred around the workplace and drew upon indigenous religious and working-class traditions. By contrast, and ironically, the Solidarity government in Poland sought to impose an alien and abstract model, at the behest of international financial institutions and under the influence of advisers with no local knowledge. His case, in short, is that the response of the West to the collapse of communism has been both narrow-minded and short-sighted, echoing and magnifying the reaction within, and failing to take into account the social context or 'embeddedness' of market relations, and thus failing to foresee the likely consequences of allowing it to be damaged further by too headlong a rush towards the implementation of a market utopia.

Here arises Glasman's second question: why has the market utopian 'model' . . . seemed so exclusively appealing to all the significant actors in the post-communist states of Eastern Europe, and of Poland in particular. Here he may be exaggerating. Contrary voices . . . have certainly been heard, even if they have not prevailed. Nevertheless he is right in broad terms: most of the debate has been over the speed of the proposed reforms, over the dosage of the medicine rather than over the availability of other cures or even an alternative medicine.

Here too many will think that several convincing answers are at hand. They will point to the discrediting of the alternatives—'real existing socialism' in the East and social democracy in the West. They will probably suggest . . . that realism was only delayed by long-lasting illusions about the latter . . . a misinformed and inappropriate longing for 'Sweden', as opposed to Sweden. And they will doubtless add that Sweden has in any case run out of steam, in terms of both efficiency and legitimacy. They will point to all the real failures of real socialism—not just the barriers to minimally efficient production and the massive surveillance system, but also the corruption and graft in the provision of welfare and the systematic destruction of self-esteem, trust and initiative. All these interconnected evils seem to call for a radically alternative system based on an alternative principle and indeed an end to the very idea of realizing social solidarity and social justice by design. From this standpoint, the aftermath of 1989 symbolizes the defeat of an indefensible system, not the failure

to defend some alternative defensible one. For a long time, in the last years of communist rule, and above all in East Germany in the phoney pre-election period, there was a hankering by many intellectuals for some supposed 'Third Way'. But they could never make clear what this was and came to be seen as timid trimmers whose life-experiences, professional qualifications and interests tied them to the old regime. Moreover, one could indeed argue that the very concept of the 'Third Way' embodied an ideological distortion, suggesting that capitalism was one way (when it in fact is indeterminately many ways) and that real socialism is a second way (when it is no way at all).

Yet here too Glasman's argument puts a question-mark beside these objections. For . . . he argues that the trouble with the market utopian model is that it is a utopia and a model—indeed that it is a utopia because it is a model—which abstracts from the historical realities of 'capitalism' as an entire socio-economic formation that can take innumerable forms. In particular it abstracts from the social and moral contexts in which markets can function compatibly with rights guaranteeing basic freedoms, social justice securing fairness for all but especially the weakest, and democracy, including economic democracy. He makes the bold claim that the Solidarity programme of 1981 set out the essentials of a non-utopian conception, that defines a historical alternative (capitalist) path that could have been taken but was not. His claim, in short, is that the programme was both feasible and legitimate since it drew upon still living Catholic and working-class traditions.

This leads to the third question which Glasman's chapter raises: was this path indeed feasible? Could one even imagine some future Polish government stumbling back onto it, thereby affording brighter prospects for the Polish transition—suggesting, indeed, that there might *be* a transition, rather than stagnation or disintegration?

. . . Here we return to the answers I listed above to Glasman's first question. To what extent did international economic and above all financial constraints set limits to the implementation of the Solidarity programme? To what extent did that programme take account of the changes in the class structure and the division of labour (albeit far less developed in Poland than in Western Europe)? To what extent were the constraints facing the first Polish governments ideological, confining them to a narrower range of options than was objectively available, and inducing them to perpetrate unnecessary social destruction in the name of economic progress? If this last suggestion is right, to what extent are such constraints conjunctural—the product of a particular time and place, and to what extent can they be overcome by developing theoretical and practical alternatives? Such questions are of the greatest theoretical interest and current political relevance.

QUESTIONS

1. The common theme of both preceding analyses is that the process of globalization, in so far as it constrains domestic freedom of action in the economic as well as other spheres, might frustrate efforts to develop an international consensus on human rights and in particular might prejudice the protection of economic and social rights in the growing number of countries subject to structural adjustment pressures.

a. 'Economic and social rights will necessarily bow to the demands of the market and economic growth. At least in this field, international human rights law has no option but to adapt itself to changing realities.' Comment.

b. If there is adaptation, what changes might be required? How do you assess para. 9 of the General Comment of the Committee on Economic, Social and Cultural Rights, p. 1138, *supra*?

2. 'To some extent, human rights have become for many developed countries a tool of foreign economic policy to pry open foreign markets for trade and investment and thereby permit competition by multinational enterprises in internal markets.' Comment.

3. The Director-General of the ILO, in a statement on 'the decline of the Nation-State,' notes that '[f]inancial regulation has left States dependent upon the world financial markets' and that

> the multinationalization of enterprises removes decision-making power further and further away from the workplace. . . . In their discussions with the State and with employers, workers often have the impression of dealing with agents who are neither very credible nor motivated to enter into firm commitments because they are so dependent upon an international economic environment over which they have less and less control. . . . Some political leaders are concluding that the concept of the State as a community with a single destiny has seen its day.[9]

If we accept the validity of the process of 'globalization' reflected in this analysis, should we conclude that domestic jurisdiction is a concept doomed to extinction? Or will there be a backlash against such trends, as suggested by this comment:

> [T]he very immensity of the global village will serve in the long run to alienate its citizens. . . . [E]stranged citizens will see the

[9] Defending Values, Promoting Change, Social Justice in a Global Economy: An ILO Agenda 15 (1994).

global community, and the national government that imposes international rules, as alien from them, and from what they care about.[10]

ADDITIONAL READING

Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law*?, 29 Neths. Int. L. Rev. 307 (1982); Kéba M'Baye, *Introduction*, in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* 1043 (1991), Adrien Nastase, *The Right to Peace*, *ibid.*, at 1219; Hector Gros Espiell, *The Right of Development as a Human Right*, 16 Texas Int. L. J. 189 (1981); Richard Kiwanuka, *Developing Rights: The UN Declaration on the Right to Development*, 35 Neths. Int. L. Rev. 257 (1988); Ian Brownlie, *The Human Right to Development* (1989); David Forsythe (ed.), *Human Right and Development: International Views* (1989); and Russell Barsh, *The Right to Development as a Human Right: Results of the Global Consultation*, 13 Hum. Rts. Q. 322 (1991).

[10] B. Friedman, Federalism's Future in the Global Village, 47 Vanderbilt L. Rev. 1441, 1479 (1994).