



# ILSA Journal of International And Comparative Law

## INTERNATIONAL PRACTITIONER'S NOTEBOOK

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ASSOCIATION

"THE PRACTICAL APPLICATIONS OF PUBLIC AND PRIVATE  
INTERNATIONAL LAW IN ADMINISTRATIVE, ARBITRAL,  
DIPLOMATIC, JUDICIAL AND OTHER PROCEEDINGS"

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# CAN A STATE COMMIT A CRIME? DEFINITELY, YES!

*Alain Pellet*

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## I. INTRODUCTION

As is well known, the International Law Commission (ILC) decided in 1976 to include an article in its Draft Articles on State Responsibility that makes a distinction between *normal* international wrongful acts, which it called *delicts*, on the one hand, and exceptionally grave breaches of international law which it called *international crimes*, on the other hand. Thus, the ILC followed a suggestion made by its then Special Rapporteur, Roberto Ago, who, as soon as 1939, suggested such a distinction.

The ILC maintained this distinction when it completed the first reading of its draft last year, in spite of strong (and probably growing) and passionate opposition, as this evening's debate will probably show. However, it is my deep conviction that:

1. the distinction between what are called *delicts* and what are called *crimes* answers an indisputable need and must be maintained;

2. the definition of crimes given in Article 19 of the ILC draft articles is acceptable, although perhaps unduly sophisticated;
3. the legal regime of these crimes as envisaged by the ILC is debatable since the method adopted to establish it has been grossly unsatisfactory; and
4. by way of conclusion, the word *crime* might be misleading, but the concept is indispensable in contemporary international law.

Let me take each of these four arguments separately.

## II. THE DISTINCTION BETWEEN *DELICTS* AND *CRIMES* ANSWERS AN INDISPUTABLE NEED

Although part of the doctrine, lawyers (especially French international lawyers) and some States (including France) challenge this definition, the definition of *responsibility* deriving from Articles 1 and 3 of the ILC draft can hardly be challenged. In the modern, *post-Ago*, meaning of the term, responsibility is the situation resulting from an international wrongful act committed by a subject of international law or attributable (imputable if you prefer) to it.

Now, if this is so, it implies a differentiation in the legal regime of responsibility. It is absolutely unacceptable to assimilate purely and simply a genocide and an *ordinary* breach of international law, say a breach of bilateral-trade agreement. Both are, indeed, international wrongful acts, and both entail, therefore, the responsibility of their author. But it seems obvious, evident, necessary, and indispensable that the consequences deriving from each be clearly differentiated. And this is the case for a very good reason. The breach of the trade agreement, even though regrettable as any other violation of international law, only concerns the relations between the two (or more) State parties to the treaties, while genocide threatens international society as a whole, the very basis of the still fragile international community.

If this is so, international lawyers will immediately have in mind the celebrated *dictum* of the International Court of Justice in its famous 1970 Judgment in the *Barcelona Traction* case:

An essential distinction should be drawn between the obligations of States towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the

importance of the rights involved, all States can be held to have a legal interest; they are obligations *erga omnes*.<sup>1</sup>

Can we infer from this that a crime is a violation of an obligation *erga omnes*? Probably not, and this leads us to my second proposition.

### III. THE DEFINITION OF CRIMES GIVEN IN ARTICLE 19, PARAGRAPH 2, OF THE ILC DRAFT IS ACCEPTABLE, ALTHOUGH PROBABLY TOO SOPHISTICATED

I recall this definition: An international wrongful act which results from the breach by a State of an obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as crime by that community as a whole constitutes an international crime.

This definition involves clearly three elements: First, a crime is an international wrongful act; on this, we all agree. Second, this internationally wrongful act results from the breach of an international obligation which is essential for the protection of fundamental interests of the international community. Third, it must be recognized as a crime by that community as a whole.

It is this last point which has attracted the biggest number of opponents. To say so would make the whole notion uncertain and *subjective*, all the more so as the very notion of *international community* would itself be subject to uncertainty. With respect, this is simply rubbish. Those who negate the concept of crime do not, as far as I know, contend that custom does not exist or should not exist. However, custom can hardly be said to be more precisely defined than crimes. It is, just to recall the widely accepted formula of Article 38, paragraph 1(b), of the Statute of the ICJ evidence of a general practice accepted as law. This does not even tell us who must accept the practice. At least Article 19 of the ILC draft tries to give a precision; the international community as a whole must give recognition.

And the formula is not that new. It has already been accepted in Article 53 of the Vienna 1969 Convention on the Law of Treaties, which defines *jus cogens* and only gives a supplementary precision by indicating that the *international community* is the international community *of states*; if this can help, let's include this in the second draft reading.

Now, does this mean that a crime is a breach of a peremptory norm of general international law? In 1976, the ILC, still in accordance with its Special Rapporteur, denied it for rather obscure theoretical

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1. Barcelona Traction, I.C.J. 32 (1970).

reasons. I would rather suggest that the real reasons for that were *prudential* and *political*. Ago and the Commission were probably afraid that affirming bluntly that a crime is a violation of a norm of *jus cogens* would prevent wide acceptance of the concept of crime as a consequence of the defiance against *jus cogens* in some circles and from certain States (among which France was certainly the most decided opponent and is still the most persistent objector).

More than twenty years later (and thirty years or so after the drafting of the Vienna Convention), this caution seems no longer necessary. If you leave Asterix (France) aside, no one seriously contests anymore that norms of *jus cogens* have a real specificity among international law rules and the past objections against the concept have proved unfounded. The feared abuses have not occurred and, as has been aptly written about peremptory norms, "the vehicle does not often leave the garage."<sup>2</sup>

I, therefore, urge that it would be easier and more convenient to define an international crime as a breach of a norm of *jus cogens*. Indeed, this would not, in fact, change the existing definition since all three elements that I have noted would still exist:

- 1) a crime would still be an international wrongful act (a breach);
- 2) the breach would still be of an essential obligation towards the international community as a whole; and
- 3) the *subjective* (or *psychological*) element would still be present since, according to the very definition of *jus cogens*, a peremptory norm of general international law must be recognized as such by the international community of States as a whole.

Let me open a parenthesis here. Bob Rosenstock has complained in a recent interesting and most debatable article appearing in the ILC book, published as a contribution to the United Nations decade for international law that "the acceptance of the notion of *jus cogens* was conditioned on . . . express acceptance of the role of the International Court of Justice, while there is no comparable institution for denominating certain actions as criminal."<sup>3</sup> Very well. This is precisely why, at my suggestion, the Commission sought to include an article in the draft which would have been copied on Article 66 of the Vienna Convention of the Law of Treaties and would have provided for the compulsory jurisdiction

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2. IAN BROWNLIE, CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 10 (1988)

3. *International Law on the Eve of the twenty-first Century-Views from the International Law Commission*, U.N. Doc. E1F97.V4272 (1997) E/F 97.V4, 272 (1997).



of an arbitral tribunal or the ICJ in case of a dispute concerning the existence of a crime. For obscure reasons, the Commission, while not rejecting the proposal, has decided not to include it in the first draft and to come back to it during its second reading. Curiously enough, I understand (I was absent from the debate) that my friend, Bob Rosenstock, was among the firmer opponents to such a provision.

One last word on this second point: if it is accepted that a crime is a breach of a norm or *jus cogens*, couldn't it be said as well that it is a breach of an *erga omnes* obligation? It might help in the sense that *erga omnes* obligations are less contested than *peremptory norms*. However, I have strong doubts since if all norms of *jus cogens* certainly are *erga omnes*, there is no reciprocity, and one can think of many obligation *erga omnes*, which could hardly be seen as deriving from peremptory norms. Just to give an example, this is the case of the right of passage in international straits or international canals.

This draws attention on something very important, which is, exactly like peremptory norms, that crimes are to be extremely rare in the present state of the world; the international community does exist, but the solidarity on which it is based is still limited, which means that obligations essential for the protection of its fundamental interests are unavoidably very limited both in number and in scope. And in this respect, paragraph 3 of Article 19 of the ILC draft is far from convincing.

Paragraph 3 is the provision in which the ILC has endeavored to give examples of crimes. I have no time to enter into a lengthy discussion on this provision. Suffice it to say that: first, it is a bad method of codification to give *examples* in a codification instrument; second, this partial enumeration is all the more regrettable since it fixes rules which are and must stay in constant evolution; and third, and above all, the examples given are themselves highly debatable or, at least, too wide and imprecise. But if there are grounds to delete this list of examples, this would not be a reason to throw the baby out with the bath-water.

#### IV. THE LEGAL REGIME OF CRIMES ESTABLISHED BY ARTICLES 51 TO 53 OF THE ILC DRAFT IS UNCONVINCING (TO SAY THE LEAST)

I now come to my third proposition. Here again, I have no time to explain in detail why the legal regime of crimes contemplated by the ILC draft is subject to criticism. I have done it unfortunately in French, in my own contribution to the ILC book for the United Nations decade of

international law that I have just mentioned.<sup>4</sup> The main weaknesses of the draft in this respect are twofold: on the one hand, the special consequences attached to the commission of a crime are very limited and cast doubt on the usefulness of the very notion of *crimes* itself; but, on the other hand, the general consequences that the draft attaches to the *delicts* are themselves too wide and include elements which should be limited to the crimes.

Apparently these two criticisms are mutually exclusive. In fact these defects are cumulative here and this is a result of the wrong method followed by the ILC and its Special Rapporteur, Professor Arangio-Ruiz. Let me explain briefly.

When he assumed his functions of Special Rapporteur, Professor Arangio-Ruiz kept saying that he did not know what crimes could be and he proposed, in his first report on the subject, in 1988, to focus on the consequences of delicts, leaving for a later stage the codification of the consequences of a crime. However, at the same time and very unfortunately, the Special Rapporteur has drafted his reports as if the distinction did not exist, taking his examples more than not in the field not of delicts, but of crimes, and particularly studying the consequences of the illegal use of force, a crime *par excellence*. In spite of some protests (mainly from myself), the Commission has followed his suggestion and has not challenged the examples he has given.

As a result, the consequences of an international wrongful act (that is, in fact, of delicts) exposed in Articles 41 to 46 of the draft include several consequences which are (or should be) limited to crimes, such as punitive damages in Articles 42, paragraph 2, and 45, paragraph 2 (c) or the obligation for the State which has committed the international wrongful act to give assurances or guarantees of non-repetition contemplated in Article 46. This is even more true for the rules applying to counter-measures in Articles 47 to 50. They are well fitted to crimes but absolutely unacceptable as far as simple *delicts* are concerned since they facilitate much too much recourse to counter-measures, a means of reacting to internationally wrongful acts, which, by the nature of things, is reserved to powerful States. I can understand that the United States (and my friend Bob Rosenstock) are very enthusiastic about them; Chad is not; nor am I!

A consequence of this excessive severity against simple delicts is that, when the Commission arrives, at last, at the consequences of crimes, which, as the Commission rightly says in Article 51, must be added to all

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4. ALLAIN PELLET, VIVE LE CRIME! REMARQUES SUR LES DEGRES DEL'ILLCITE EN DROIT INTERNATIONAL 287-315.

the other consequences of any other internationally wrongful act, not much can be added, and this explains the poor content of Articles 52 and 53.

However, this certainly does not mean that the concept of crime is an empty shell. In the first place, as I have just tried to explain, several consequences that the Commission draws from all international wrongful acts should certainly be reserved to the sole crimes and do not apply to simple delicts. In the second place, some very important consequences of crimes have unfortunately been omitted from the draft. At least one of these is what I would call the *transparency* of the State having committed a crime. This means that when an international crime is committed, not only the State itself is responsible, but also the natural persons who have decided, committed, planned, directed, incited, etc. such a crime.

An important warning is necessary here. I do not mean that a crime by a State and a crime against peace and security of mankind are a sole and unique notion. What I mean is, simply, that when a crime in the meaning of Article 19 of the draft on State responsibility is committed, then, and only then, can the individual responsibility of the individuals concerned be entailed. This explains why, according to Article 7 for the draft Code of crimes against the peace and security of mankind, the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Now, the responsibility of the individual through whom the State has committed the crime is obviously a *penal* or *criminal* responsibility, but what about the responsibility of the State itself? To answer this question, I come to my fourth and last proposition.

#### V. THE WORD *CRIME* MIGHT BE MISLEADING, EVEN THOUGH THE CONCEPT IS DEFINITELY INDISPENSABLE IN CONTEMPORARY INTERNATIONAL LAW

In order not to exceed my time too much, I'll try to make my point briefly.

I am among those who think that States can be held *criminal* in a sense which is close to the penal meaning of the term. Nazi Germany or Sadam Hussein's Iraq can be called *criminal States* and have been treated as such by the international community.

This being said, I am also among those who think that, in international law, analogies with domestic law are rarely helpful and usually misleading. International responsibility is neither civil nor penal; it is simply *international*. It is the least penal of all since, within the State, penal responsibility presupposes the existence of tribunals, which have

jurisdiction to establish it, a condition which is not fulfilled in international law. Hence, my firm conviction that the word *delict* to designate *simple* international wrongful acts is particularly inappropriate.

Now, what about the word *crime*? For the reasons I have just explained, it seems less shocking than the word *delicts*. After all, when a State breaches an international obligation essential for the interests of the international community as a whole, it never acts by chance or unintentionally. Therefore, the elements of intent and fault, which are not necessarily present in other international wrongful acts, are part of the crimes exactly as they are part of penal infractions in domestic laws. Moreover, even without a judge, the reactions of the international community to a crime clearly include punitive aspects.

However, this is not terribly important for me. The word *crime* is defensible as it has acquired its legitimacy since 1976 and is very widely used. Now if the analogy with domestic law seems really excessive and repulsive, it may be abandoned. But the reality will remain, as I said at the beginning of this statement, a genocide cannot be compared with a breach of a trade agreement; it is different in kind, by its very nature. Call it *breach of peremptory norm* or *violation of an essential obligation*, or call it *butterfly* or *abomination*. The fact remains, we need a concept and a name for this concept!

# TIME TO TRY MEDIATION OF INTERNATIONAL COMMERCIAL DISPUTES

*Harold I. Abramson \**

How many attorneys in the audience have ever participated in a domestic mediation? I see the hands of about four out of about a hundred people in attendance. How many attorneys in the audience have ever participated in an international mediation? I see two people raising their hands. This is a larger percentage of people than I had anticipated! (laughter)

This unscientific survey provides a segue for me to cite an amazing fact about international mediation: despite the fact that mediation works and that mechanisms for handling international mediations are in place, mediation is rarely used.

Mediation has proven itself as an extraordinarily successful settlement process when conducted by a skilled mediator. The impressive settlement record of domestic mediations has been documented. Disputes channeled into mediation settle at a very high overall rate of about seventy percent.<sup>1</sup>

Mediation is much different from the more familiar settlement conferences conducted by judges. Mediation is a structured negotiation conducted by a specially trained expert known as a mediator. The mediator brings to the structured negotiation critical skills for managing the process, including the ability to diagnose impasses as the structured negotiation unfolds. The mediator guides the parties and their attorneys through each distinct stage in the mediation. Every step by the mediator has a purpose, beginning when the mediator requests each party to prepare a position paper,<sup>2</sup> a paper that is designed to orient the parties toward settlement. At

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1. See, e.g., Jeanne M. Brett, Zoe I. Barsness, & Stephen B. Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers* NEG. J., 259, 261 (July 1996) (overall settlement rate of 78%); Robert C. Meade & Philip Ferrara, Ph.D, *An Evaluation of the Alternative Dispute Resolution Program of the Commercial Division: Survey Results and Recommendations*, 4-5 (July 1997) (overall settlement rate of close to 70% for the Alternative Dispute Resolution Program of the Commercial Division of the Supreme Court, Civil Branch, New York County, New York State).

2. Information to be included in a position paper can vary. The type of information requested may include a party's definition of the critical factual and legal issues in dispute, a

the mediation, a mediator usually starts the session with an opening statement that is geared toward shaping the expectations of the disputants. The mediator then manages a structured discussion that encourages the disputants to collaborate in settling the dispute. The mediator guides the disputants by posing open-ended and focused questions, re-framing issues, and using strategies to defuse tensions and overcome impasses. The mediator may use private caucuses and brainstorming. The more skilled mediators will also assist parties in designing processes to resolve any unsettled issues.

For international mediations, a mechanism for conducting the process is in place. Virtually every major international arbitration organization offers the option of mediation. Each organization offers mediation rules, procedures for selecting mediators, and administrative support for conducting mediations. These organizations are very well known and well established. They include the International Chamber of Commerce (ICC), American Arbitration Association (AAA), International Center for Settlement of Investment Disputes (ICSID), Center for Public Resources (CPR), China International Economic and Trade Arbitration Commission (CIETAC), World Intellectual Property Organization (WIPO), Commercial Arbitration and Mediation Center of the Americas (CAMCA), and more. For non-administered international dispute resolution processes, even United Nations Commission on International Trade Law has issued (UNCITRAL) conciliation rules.

One important explanation for the little use of international mediation is that parties and attorneys without experience in mediation are reluctant to use it. In contrast, people with experience in mediation are much more receptive to trying mediation. Only when disputants gain more experience will we see greater use of mediation. The challenge is to break the cycle of no experience, no use. I hope that this panel today on international mediation will give attorneys a little more confidence to give mediation a try.

The propitious moment for discussing mediation is before you need it. Any experienced international business lawyer knows that the best time to discuss dispute resolution options is when parties are negotiating the business deal. Everyone is forward thinking and optimistic. However, this does not mean that parties want to discuss dispute resolution methods. They are not usually in the mood to think about what to do if the deal goes sour. Yet, deals go bad. Economic and political circumstances change. Personality conflicts emerge. Joint ventures are especially notorious for their short lives. Over fifty per cent of joint ventures terminate within five years, and most terminate within ten years.

In international business, it is especially important to negotiate a dispute resolution clause. Without the clause, parties must rely on the uncertainties of transnational litigation in foreign national courts. At least when a clause is omitted in a domestic business deal the court alternative is very much a known and stable method of dispute resolution. International litigation, in contrast, is fraught with uncertainties about procedure, substantive law, and enforcement, uncertainties that fortunately can be minimized with a well-crafted dispute resolution clause.

The most widely adopted method of international dispute resolution is arbitration. However, international arbitration is not viewed as an alternative dispute resolution process (ADR).<sup>3</sup> Instead, international lawyers and arbitrators view arbitration for international disputes as attorneys view courts for domestic disputes. International arbitration appears to be the equivalent of going to court for domestic disputes, with many of the same advantages and disadvantages. As with domestic courts, international arbitration is expensive, lengthy, formal and adversarial. So what is ADR in the international arena? It is not arbitration. One ADR method is surely the use of mediation, which is informal, quicker, less costly, and gives the parties control over the outcome of the process.

What should be included in a mediation clause? There are a number of key features that should be addressed in a mediation clause. Today, I will consider five provisions.

First, the definition of mediation should be given special attention in order to avoid a cross-cultural misunderstanding. Parties from different countries may envision different variations of mediation. This is a familiar problem in domestic mediations where many variations also can be found. However, much effort is being made these days to draw sharper distinctions among different styles of domestic mediation. Different styles have been labeled as facilitative, evaluative, transformative, bargaining, therapeutic and non-caucus.<sup>4</sup> All these styles at least fall within a range of familiar possibilities. In international mediations, more commonly referred to as conciliations, the ranges of possibilities are broader and less familiar. One unusual variation envisions each party appointing a conciliator and the conciliators meeting to negotiate a settlement. As international norms of dispute resolution evolve, the risk of parties discovering a startling variation

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3. CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 141-42 (1996) (survey of practitioners with extensive experience in international business disputes - respondents consisted of arbitrators, attorneys, and in-house counsel from 17 countries).

4. See S. Silbey & S. Merry, *Mediator Settlement Strategies*, 8 *LAW & POLICY* 7 (1986); L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *ALTERNATIVES* 111 (1994); R. BARUCH BUSH & J. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

is falling. Nevertheless, it is prudent to discuss the style of mediation envisioned when drafting an international mediation clause.

Second, parties should establish a clear obligation to try mediation before resorting to an adjudicatory option such as arbitration. This provision should be drafted in a way to guard against at least two problems: a reluctant party who is trying to avoid mediation and a party using mediation to unduly delay resorting to adjudication. One approach is to draft an obligation clause with clear, objective benchmarks against which it is easy to assess compliance. The provision also should be designed to promote meaningful participation without unduly delaying the arbitration. One obvious solution, *to agree to participate in good faith*, will likely generate collateral litigation over whether a party acted in good faith. Instead, other devices should be considered. For example, a clause could establish a clear and complete procedure for selecting a mediator; each party could agree to participate in at least one mediation session; each institutional party could agree to select a client representative with settlement authority; a timetable could be established for initiating and completing the mediation process; and clear consequences for breach should be formulated such as a liquidated damage clause and recovery of legal fees.

Third, parties should consider whether the mediator can also serve as an arbitrator in the same dispute. International mediation rules generally prohibit mediators from serving as arbitrators in the same dispute unless the parties agree to this arrangement. This is a complicated issue because the function of a mediator is radically different from the function of an arbitrator. The concern is that when the same person serves both roles, the third-party neutral may not be able to keep the two roles separate, making it difficult for the neutral to maintain the integrity of each process. The parties' confidence in the neutral also may be undermined by the confusion created by the same person switching between two different roles. On the other hand, a more efficient process may be possible when the same person moves from one role to the other instead of the parties losing time and momentum in retaining and educating a second person. Two of the other panelists will elaborate on the risks and opportunities offered by the same person serving as mediator and arbitrator.

Fourth, parties are prudent to study and adapt an off the shelf set of mediation rules to serve the needs of the parties. One of the advantages of creating your own private dispute resolution system is the opportunity it gives you to create a system that best suits your needs. However, starting from scratch can take an enormous amount of time and effort to end up creating a private system which others have already done and tested. It is more efficient to select a pre-packaged process and then adapt it to your special needs. The parties also may want to select an institution to administer the process to ensure the smooth running of the mediation.



Fifth, a mediation provision should be part of a broader dispute resolution clause that includes a compulsory back up dispute resolution process. This is important in order to assist parties in enforcing a settlement agreement. When arbitration is the back up, the settlement agreement can be incorporated into a "consent arbitration award" which can then be enforced under the relatively reliable New York Convention which establishes procedures for enforcing arbitral awards in foreign courts.<sup>5</sup> The back-up system is also needed in case the mediation does not settle all the issues. Your private dispute resolution system needs to establish the next step in the process of dispute resolution.

In conclusion, mediation works. I tried today to present the contours of a path to greater use of mediation. This session did not provide sufficient time to illuminate the full path. However, I hope we were able to shed enough light on the path to encourage attorneys to give mediation a try. You might even like it!

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5. The New York Convention is formally the United Nations Convention on Recognition and Enforcement of Arbitral Awards.

# MEDIATION IN INTERNATIONAL COMMERCIAL ARBITRATION: SOME PRACTICAL ASPECTS

*David W. Plant\**

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## I. INTRODUCTION

In international commercial arbitration, some disputes cry out for informal resolution by the parties themselves. In assessing their response, parties, arbitrators and arbitral institutions must have in mind fundamental, practical and ethical considerations. This paper addresses some of the practical and provocative issues raised in these circumstances.

## II. SOME QUESTIONS

An immediately apparent, practical question in international commercial arbitration concerns the role the arbitrator may play in assisting the parties to resolve their dispute by way of settlement discussions. Often, the parties have not considered, much less agreed,

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what the arbitrator's role should be in this regard. This question gives rise to further questions, viz.

- 1) Is the arbitrator's sole responsibility to assure that the arbitral process results in an enforceable award arrived at in a fair, efficient and expeditious way?
- 2) Does the arbitrator's responsibility extend to assisting parties to arrive at the most equitable resolution of their differences at the earliest, practicable time in the most efficient and effective way?
- 3) Does the arbitrator have a responsibility to assure that arbitration in general, as an institution, provides the parties a menu of processes that may assist the parties in resolving their disputes in the most efficient and effective way?
- 4) If it is appropriate for an arbitrator to suggest, or to participate in, settlement discussions, what is the appropriate degree of participation, in what kinds of cases, when, and subject to what ground rules?
- 5) Will the availability of mediation on some basis assist in de-escalating contentiousness and over-lawyering in international commercial arbitration?

It will come as no surprise to some that this paper favors permitting, indeed encouraging, arbitrators to suggest and to participate in settlement discussions between the parties under appropriate circumstances. It is to some of those circumstances that the balance of this paper is devoted.<sup>1</sup>

### III. SOME OBSERVATIONS

Regardless of the provisions of (or practices under) specific arbitral rules,<sup>2</sup> some practitioners have asserted that arbitrators should never

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1. A comprehensive and thoroughly instructive discussion of this subject appears in Christian Buhning-Uhle, *Arbitration and Mediation in International Arbitration*, KLU. L. INT'L (1996). This paper draws primarily on my own experience, but it clearly benefits from some of the thoughts in Buhning-Uhle's excellent treatise.

2. One way or another, rules of international arbitration are often viewed as discouraging participation by arbitrators as mediators, conciliators or amiable compositeurs (e.g., UNICITRAL Conciliation Rules art. 19, *but cf.* art. 1(2) (1980)); ICC Rules of Arbitration art. 17(3) (1998); ICC Rules of Conciliation art. 10 (1998); WIPO Mediation Rules art. 13 (1994); WIPO Arbitration Rules arts. 59(a) and 65(a) (1994); AAA Rules of International Arbitration art. 28(3) (1997). Other rules that plainly contemplate a more pro-active role of arbitrators and mediators or conciliators are the CIETAC and the Hong Kong rules of arbitration. Also, German arbitrators may feel entirely comfortable in participating relatively thoroughly in settlement discussions in light of the practice of judges in German courts (*cf.* GERMAN CODE OF CIV. P. § 279). Swiss and French arbitrators may feel a similar level of comfort.

participate in settlement discussions between the parties. But all rules have exceptions, and all absolute rules absolutely have exceptions, as we shall see below.

Before turning to that discussion, I believe that it will be useful to settle an issue of vocabulary. Because mediation, conciliation and facilitation are likely to mean different things to different people, thus engendering confusion, I shall attempt to discuss the issues posed here in terms of the kind and degree of participation by the arbitrator in settlement discussions. This may assist in reducing miscommunication and in enhancing understanding among practitioners, whether from the same or different cultural and experiential backgrounds.

### III. SOME PRACTICAL CONSIDERATIONS

#### A. *The Dilemma*

One fundamental issue is whether, and if so how, an arbitrator can effectively participate in settlement discussions and at the same time preserve the integrity of the arbitral process.

Stated differently, the question is how can an arbitrator be transformed into a participant in off the record settlement discussions and then back into an arbitrator.

#### B. *The Kind of Dispute*

If the arbitration looks backward (e.g., who breached a contract in the past?) and the settlement discussions look forward (e.g., can a relationship be preserved or reformulated in the future?), an arbitrator may find it entirely appropriate to participate in settlement discussions.

On the other hand, if both the arbitration and the settlement discussions look in the same direction (e.g., quantum of past damages, quantum of future lost profits, schedule of future payments), it may be less appropriate, or more difficult, for an arbitrator to participate in settlement discussions.

The reasons for the foregoing distinction are relatively straightforward. If the settlement discussions can be separated in time or subject matter from the issues in the arbitration, the arbitrator is much less likely to be infected from the settlement discussions with off the record information or impressions that may affect the arbitrator's view of the merits of the issues being arbitrated on the record. Concomitantly, the larger the overlap between the subject of the settlement discussions and the issues being arbitrated, the greater the likelihood of the arbitrator's being affected by what the arbitrator sees or hears in the settlement discussions.

However, even where both the settlement discussions and the arbitration look in the same direction, if the parties expressly agree with each other and with the arbitrator on specific ground rules, it may be perfectly acceptable for the arbitrator to participate in the settlement discussions, e.g., *infra* Section V.

### *C. Cultural and Experiential Factors*

The cultural, business, legal, and other experiences of parties, counsel and arbitrators (and of the arbitral institution, if there is one) are important.

The synopsis of the selected rules and practices appearing in footnote two above demonstrates the wide difference in approaches among arbitral institutions and practitioners. These differences will materially affect the willingness and ability of parties, counsel and arbitrators to consider, to say nothing of arranging for, an arbitrator's participation in settlement discussions.

Such differences in personal backgrounds will also affect the kind and degree of participation that may be agreed upon among counsel and arbitrators. And those differences will affect the conduct of the arbitrators in connection with settlement discussions.

In fact, those differences may clearly, and not unexpectedly, emerge in different arbitrations under the same arbitral rules — simply because different cultures and experiences are represented on different arbitral tribunals operating under identical institutional rules, most notably with respect to the chairs of three person tribunals.

### *D. Timing*

A substantial number of international commercial arbitrations settle before an award is rendered. As in litigation, the likelihood of settlement increases as the arbitral proceedings evolve.

It is reasonable to assume that if settlement talks were facilitated earlier rather than later in arbitration, in some cases settlement might occur earlier. This seems to be a sufficiently real possibility to encourage arbitrators (and arbitral institutions) to make available facilities for enabling settlement discussions to commence and to continue at all stages of an arbitration.

Some will argue on the basis of experience that an arbitration, like a lawsuit, may have to proceed through an irreducible number of discrete stages before the environment becomes conducive to settlement. Nevertheless, that environment may be rendered more hospitable if a facility is available from the beginning to enable settlement discussions to

commence with ease.

### *E. What Is an Appropriate Role for an Arbitrator in Settlement Discussions?*

It is probably fair to assume that under any regime, an arbitrator may inquire as to whether or not the parties have engaged in settlement discussions. This calls only for a yes or no answer, does not compel the parties to disclose what in fact has occurred, and does not compel the parties to pursue settlement discussions.

Further inquiry or participation by an arbitrator raises the kinds of issues already alluded to. For example, can an arbitrator explore the status of past or current settlement discussions? Inquire as to what next is expected to occur in settlement discussions? Participate in such discussions? Communicate with parties and counsel in joint sessions? Conduct *ex parte* discussions with one party and its counsel? Hint at a probable outcome in the arbitration? Render an evaluation of the issues on the basis of information available to the arbitrator from the arbitral record? Propose a settlement formula?

And with a three-person arbitral tribunal comprising party-appointed arbitrators and a chair, should all three arbitrators meet with the parties jointly? May the chair meet with a party and its counsel on an *ex parte* basis? May a party-appointed arbitrator meet *ex parte* with the party who appointed that arbitrator? May that arbitrator meet *ex parte* with a party that did not appoint that arbitrator?

These are illustrative of questions the parties and their arbitrator should ponder before the arbitrator engages in settlement discussions.

### *F. What Is Going on in an Arbitration, Anyway?*

In those arbitrations where the parties are quarreling over who breached a joint development, partnership, construction, licensing, or other arrangement in which the parties were not acting entirely at arms length, it is frequently apparent to the arbitrator that the arbitrator is not hearing the full story, and it is destructive and wasteful for the parties to be challenging each other's conduct and *bona fides* rather than working on repairing or restructuring their relationship. If either or both of these impressions of the arbitrator is consistent with the facts, the arbitrator may well ask whether or not he or she ought to be performing another role, *viz.* facilitating the repair or restructuring of the relationship.

The arbitrator often does not know the full story because what the arbitrator hears is defined by the pleadings, terms of reference, evidence the parties elect to adduce and the relevant legal principles. This

constricted formal framework within which the issue of who breached what and how many times seldom permits the real interests and needs of the parties in connection with the dispute to be revealed. This may concern an arbitrator who senses that regardless of the arbitrator's ultimate resolution of the issues in the arbitration, there may be no winner in the sense that the relationship between the parties may be destroyed, and with it, the possibility of creating value if the relationship is preserved or reformulated. Thus, for the arbitrator who is sensitive to this situation, there may well be a compelling (and justifiable) motive to inquire about, if not participate in, forward looking settlement discussions between the parties.

### *G. Two Illustrative Situations*

Two recent international commercial arbitrations may serve to illustrate some of these concerns.

In an ICC arbitration, the three arbitrators participated in settlement discussions between the parties. The arbitration arose out of the breach of a development contract. Claimant claimed substantial damages, injunctive relief, and specific performance. During the evidentiary hearings on liability, it became apparent that the arbitration was backward looking, and if any settlement discussions were to occur at that stage they would be forward looking, for example, directed to preserving the parties' relationship in order to create value. The arbitrators were unaware of any settlement discussions, and the arbitrators did not participate in any at that stage.

After three weeks of evidence and two interim awards on liability, and during a fourth week of evidence on relief (including quantum), the parties agreed that the three arbitrators would participate in settlement discussions. After preliminary *ex parte* meetings with parties and their counsel (party appointed arbitrators conferred with their respective parties), senior management, counsel, and three arbitrators met for one day of settlement discussion. The goal was to settle the issue of quantum and to structure a schedule for payments. All three arbitrators participated. However, the driving force was the chair of the arbitral tribunal. At the end of the day, the parties had reached agreement in principle and initialed a heads of agreement. A detailed settlement agreement to be embodied in award on consent was tendered to the tribunal with one financial issue left for resolution by the arbitrators.

The potential risk here was that, if the parties had failed to settle, the information shared with the tribunal during the settlement discussions would have related directly to the issues of relief that the arbitrators, upon

resuming their original roles, would have had to decide. For their own good reasons, the parties agreed to accept this risk and to attempt to settle the money issues with the arbitrators as facilitators. Fortunately, it worked.

In another ICC arbitration, after two weeks of evidentiary hearings on liability and damages, the parties agreed that the three arbitrators should participate in settlement discussions. This arbitration also concerned a development agreement and was backward looking in its perspective. Claimants sought substantial damages plus injunctive relief and specific performance. The goal of the settlement discussions was to look forward and attempt to work out a new relationship between the parties. After two sessions, each about one and a half days in duration, the parties elected to have the arbitrators resume their original roles and to render an award. All of the arbitrators were present during joint and private sessions with the parties and their counsel. Because the settlement discussions were forward looking, information shared with the arbitrators did not bear on the merits of the dispute and did not affect the subsequent preparation of the award by the arbitrators.

## V. SOME GROUND RULES

The foregoing discussion focuses on post-dispute situations in which arbitration has ensued and the parties have not previously agreed that the arbitrator can perform any role other than the conventional role of arbitrator. From the discussion emerge some ground rules which parties, counsel, and arbitrators might consider. First, because the arbitrator's role is defined by the parties, whether ad hoc or by way of agreed upon institutional rules, the parties must agree expressly and in writing as to the role of the arbitrator in settlement discussions between the parties. Second, the arbitrator must agree to participate in settlement discussions only with the express written agreement of the parties and only in accordance with the terms and conditions of the parties agreement. Third, in the event the arbitrator must resume the arbitral role after participating in settlement discussions, the arbitrator should undertake to decide the matter only on the merits and only on the record. The arbitrator must take especial care not to add subconsciously to the arbitration record as a result of information acquired informally and off the record during settlement discussions. Fourth, the parties must expressly agree in writing or on the record that the arbitrator's participation in settlement discussions will not be asserted by any party as grounds for disqualifying the arbitrator or for challenging any award rendered by the arbitrator (unless, for example, on its face it is apparent that award is based on information outside the record



and learned by the arbitrator during settlement discussions). Fifth, all aspects of the settlement discussions will be kept confidential unless all parties and the arbitrator expressly agree otherwise in writing. Sixth, during settlement discussions, the arbitrator will not hint at the arbitrator's view of the evidence or the likely outcome if the arbitration goes forward. Seventh, the arbitrator must not judge the credibility of any witness on the basis of a) the witness having been a party representative during settlement discussions or b) anything said about or attributed to the witness during settlement discussions. This is important whether the settlement discussions occur before or after the evidentiary hearing where the witness testifies, or before or after filing of a written statement by witness. Eighth, the arbitrator must not judge a party's case in light of an intractable position of the party during settlement discussions, especially where the arbitrator perceives an apparently valid, objective basis for resolving the parties' differences. In other words, the arbitrator must not permit his or her impartiality to be compromised.

## VI. CONCLUSION

Participation by an arbitrator in settlement discussions raises knotty issues. But they can be effectively addressed.

Adversarial processes like arbitration cause parties to rush to the underlying contracts to find every conceivable breach, every basis for claims of bad faith, and every hint of deceit and fraud. The pathology of the process takes over. The process drives the parties. The parties do not drive the process.

If an appropriate procedure was available in connection with each administered arbitration whereby arbitrators could learn of each party's real interests and needs, a forward looking resolution might be facilitated, rather than having arbitrators focus solely on the past. If such a service was provided by arbitral institutions, it could indeed be salutary in appropriate cases.

If arbitral institutions, arbitrators, and counsel were to agree that they share some responsibility for assuring that the parties resolve their differences in the most expeditious and value-creating way, the time will have come to provide policies and procedures pursuant to which arbitrators and counsel can in appropriate circumstances feel free to discharge that responsibility.

# SOFTWARE PROTECTION: COPYRIGHTS, PATENTS, TRADE SECRETS AND/OR *SUI GENERIS*

*Karl F. Jorda*

What is the best form of protection for software has been and still is a most unsettled and vexing — and hence very topical — issue in intellectual property (IP) law and practice.

Congress, of course, did amend our copyright law in 1980 to make it clear that software is copyrightable.<sup>1</sup> Likewise, legislation was enacted in foreign countries and the European Union in past years, stipulating that software is only copyrightable, i.e. not patentable. Trade Related Intellectual Property (TRIP) also requires that copyright protection be provided by World Trade Organization countries. Thus, it is not surprising that Ralph Oman, the former Register of Copyrights, and others maintain that an international consensus in favor of copyright protection has emerged, even though many believe that copyright protection is an *artificial construct* inasmuch as the aims of copyright law and computer programming are diametrically opposed, the former stressing subjective, individualistic, creative elements, and the latter, objective, technical and scientific systematization. Software is functional, non-literal by nature as it performs a task or generates an output.

Thus, there are many authors and practitioners here and abroad who believe that copyright laws are inappropriate as forms of protection and it is patent law and/or *sui generis* systems which would offer better protection for software. And more and more countries follow the lead of the United States and sanction the patenting of software. Headlines of recent articles bear this out; to wit *The Case for Software Patent Protection; Software Patents Come of Age; and Patents, Not Copyright, Poised for Bigger Byte of Software*. But there are significant problems with software patents as illustrated by the following titles: *Now You See It, Now You Don't: Was It a Patentable Machine or an Unpatentable 'Algorithm?'*; *Software Patent Protection: Debugging the Current System*, etc. According to Professor Hollaar (University of Utah) it is high time that Congress "clarify the patentability of software-based inventions."<sup>2</sup>

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1. 17 U.S.C. § 117 (1994).

2. See Hollaar, *Justice Douglas Was Right: The Need for Congressional Action on Software Patents*, 24 AIPLA Q. J. 283, 305 1996.

The shift to patents is also influenced by the recent decisional trend limiting the scope of copyright protection on the one hand, while expanding the scope of patent protection for software on the other hand.

With software protection being a practitioner's nightmare (as one article bemoans) and with both patent and copyright forms of protection being *Procrustean Beds*, it shouldn't come as a surprise that the notion of a *sui generis* form of protection for software, in lieu of or in addition to present routes of protection, has considerable appeal.

Professor Samuelson's 1994 *Manifesto Concerning the Legal Protection of Computer Programs*<sup>3</sup> comes immediately to mind as well as Richard Stern's *sui generis* utility model law proposal, launched in 1993.<sup>4</sup> Indeed, I remember well that the first impulse by the IP profession back in 1965 when the issue first arose, was to provide a *sui generis* form of protection, as was fashioned (improvidently according to some practitioners) in 1984 for semiconductor chips via the Semiconductor Chip Protection Act<sup>5</sup> and will likely be done in the near future for databases.

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3. SAMUELSON, MANIFESTO CONCERNING THE LEGAL PROTECTION OF COMPUTER PROGRAMS (1994).

4. See generally Richard Stern, *sui generis* utility model law proposal (1993).

5. SEMICONDUCTOR CHIP PROTECTION ACT of 1984, 17 U.S.C. § 901 (1994).

# COPYRIGHT PROTECTION FOR SOFTWARE

*Ralph Oman\**

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The United States blazed the trail in giving copyright protection for software. Until just recently, many other countries favored *sui generis* protection for software, but that argument was finally settled in GATT/TRIPs and last December's World Intellectual Property Organization Copyright Treaty. Copyright is now universally seen as the preferred means of protection. To try to make certain that we all have a clear idea of the metes and bounds of protection for computer software in the United States, let me start with a few copyright basics.

Copyright protects the authors of original works of authorship. You know what they are: sculpture, novels, poems, paintings, newspapers, newsletters, jewelry, fabric designs, recipe books, motion pictures, sound recordings, maps and charts, architectural works, cartoons — the list goes on and on. The copyright law does not normally protect useful articles. Generally the patent law protects useful articles. Copyright protects a lamp base in the shape of a Balinese dancer that is artistic. But it doesn't protect the design of the lamp as a whole. Even so, copyright in fact has always protected useful works. Maps and charts have been protected since 1790, so it comes as no surprise that copyright also protects computer programs, very useful creations that are essentially operating instructions for a machine. The courts have played a major role in defining the scope of copyright protection. After deciding the basic issues of *copyright-ability* of software, they got into the tough issues. Under United States law, computer programs are literary works. As with other literary works, the law protects both literal and non-literal features of a program.<sup>1</sup>

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1. *Literal* refers to the actual source code or object code or the computer screens or the user interfaces, and *non-literal* refers to the SSO, the plot, the flow of elements one into another, and the relationship of the elements one to another.

## I. THORNY ISSUES

But it's not quite so simple. What's protected? What's copyrightable? What's not, particularly on the non-literal side?

Copyright, of course, protects only the *expression* of ideas, not the ideas themselves. In copyright cases, the defense often claims that it has only borrowed un-protectable ideas, rather than protectable expression. In *Morrissey v. Procter & Gamble*, a 1967 non-software case involving written instructions for entering a promotional contest, the circuit court stated the general principle: if a work is so simple and so straightforward as to leave available only a severely limited number of ways to say something, the expression would be un-copyrightable, even if it was very creative.<sup>2</sup> The idea and the expression had *merged*. Since we use computer programs in a functional context, the idea/expression argument is often transformed into an inquiry as to whether or not copyright in a program gives the copyright owner a monopoly over a technological function.

In an early series of cases, *Whalen v. Jaslow*, the most famous, the courts developed a reasonably simple approach to this issue.<sup>3</sup> To see if somebody had copied expression or ideas, the judges determined whether or not other programs could be written that performed the same function as the copyrighted program. If another program could be written to perform the same function, then that program is an *expression* of the idea and protected from copying. The idea is very general: in this case, the organization of a dental office. Everything else is expression, including SSO. Of course independent creation of an identical program is okay. This simple approach has not survived, particularly in the most difficult area of the law trying to figure out if somebody infringed not the actual computer code, the *literal* aspects of the program, but the non-literal aspects, the SSO.

In 1997, the Court of Appeals in New York decided *Computer Associates v. Altai*. The case deals with the question of whether the scope of protection of the *non-literal* aspects of a computer program may be protected by copyright.<sup>4</sup> What is an *idea* and what is *expression*?

The decision rejects the broad approach I just described. The *Altai* court declined to find infringement even when faced with strong evidence of copying of non-literal elements. The defendant, Altai, had admitted copying the actual code of one version of the plaintiff's program and paid

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2. *Morrissey v. Procter & Gamble*, 262 F. Supp. 737 (D. Mass. 1967).

3. *Whalen v. Jaslow*, 609 F. Supp. 1307 (E.D. Pa. 1985).

4. *Computer Assoc. v. Altai*, 126 F.3d 365 (6th Cir. 1997).

damages of \$350,000. The real dispute concerned a second, so-called *clean* version of the program that Altai programmers created without seeing all of plaintiff's source code. For this *clean* room version, the appeals court found that there was no copying of the literal computer code. The court then looked for copying of the structural or organizational (the non-literal) elements of the program.

It looked for substantial similarity between the non-literal elements of both programs. Substantial similarity, of course, is the standard the courts apply in finding whether or not infringement has taken place. It found none. Any SSO that was very similar was not copyright infringement. In its analysis, the court applied what we called the *abstraction test* to determine whether or not the non-literal aspects of computer programs are substantially similar. The court also drew on the doctrines of merger, *scenes'-faire*, and public domain, which I will explain.

Under the *merger doctrine*, of course, since the expression is inseparable from the idea, you can not get protection. The *scenes'-faire* doctrine holds that certain stock or standard literary devices are not copyrightable.

Applying these doctrines, and the principles of non-protection for public domain elements, the court reached its most critical conclusion regarding the similarity between the plaintiff's and defendant's programs. The court said that the similarity in the structure between the plaintiff's and Defendant's program was dictated by the nature of other programs with which it was designed to interact, and thus, is not protected by copyright. The court did not ask the tough question: Is it independently created or does the similarity result from copying?

It is important to note, however, that the *Altai* court accepts the principle that copyright protection can extend to a computer program's non-literal structure. The amount of protection due structural elements, in any given case, will vary according to the protectible expression found in the program at issue.

Let's see how the *Altai* court applies the abstraction test. Step-by-step, it analyzes both programs in order of increasing generality from object code, to source code, to parameter lists, to services required, to general outline. Object code and source codes are protected as literal elements. Then the court moves further down the spectrum of abstraction and as it goes it filters out protectible expression from non-protectible elements to determine the scope of the plaintiff's copyright in the non-literal structure of a computer program. The court filters out the elements dictated by efficiency, function, the programming techniques that all programmers use, external factors (interoperability), or elements taken from the public domain. Finally, the court compares the remaining

protectible expression in Computer Associates' program with *Altai's* program to see whether or not the defendant copied any aspect of protected expression, any of the remaining golden nuggets.

Using this three-step abstraction-filtration-comparison test, the *Altai* court has a much narrower view of exactly what components of the program are subject to copyright protection. Under this test, quite a bit of copying is tolerated, perhaps more than would be allowed in true literary work. With a clearer idea of what is protected, generally speaking, the source code, object code, the golden nuggets of the program's non-literal aspects, let's look at a few related controversies. These too, are literal aspects of a computer program. We see them and hear them and touch them on the screen.

A battle arose over the protectibility of screen displays and other *user interfaces*. As with other works, to be protected, computer screens must contain more than *de minimis* copyrightable authorship. Some computer screens only record information, and they are often not copyrightable because they are just blank forms, or just lists of common words, and lack enough original expression to support a claim to copyright. Even so, in 1993 a district court in Boston, in *Lotus v. Borland*, found that a menu tree contained enough originality to be copyrightable.<sup>5</sup> Even though functional considerations played a part in the creation of the menu, the court found that function did not dictate the final version of Lotus' menu on the screen. The court pointed out that a great variety of possible words and phrases could accomplish the desired function. The court gave three reasons for its finding. First, Lotus' format depends on the programmer's personal judgments and preferences among many possible choices. Second, even the user of the program can change the menu tree, so how can it be dictated by function? And third, the court noted that many other spreadsheet programs used different menu trees, and mere functionality did not account for these differences. In conclusion, the court found that Borland's menu tree was sufficiently similar to Lotus' to constitute copyright infringement.

That decision did not survive the appeal. In March of 1995 the First Circuit overturned the district court's decision and held that Lotus' menu tree, made up of words and phrases, is un-copyrightable subject matter as a matter of law. Citing Section 102(b) the 1976 Copyright Act, the court found that textual menus (as opposed to complex graphic or animated user interfaces) are simply a *method of operation*, for which Section 102 explicitly prohibits copyright protection.<sup>6</sup> The court explained,

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5. *Lotus v. Borland*, 831 F. Supp. 223 (D. Mass 1993).

6. Pub. L. No. 94-553, 90 Stat. 2541-2602 (1976).

“we think that method of operation . . . refers to the means by which a person operates something, whether it be a car, a food processor or a computer . . . .”<sup>7</sup> In many ways, the Lotus menu command hierarchy is like the buttons used to control, say, a videocassette recorder, or like the dashboard of a car.

In a 4-4 decision last year, the Supreme Court upheld the First Circuit’s decision, without an opinion that would have helped clarify the law.

Enough on copyrightability. Let me discuss one last controversy:

## II. REVERSE ENGINEERING

A very significant issue on the infringement side is whether or not someone can reverse engineer a copyrighted program to produce a competing program. Let me explain. By reverse engineering, somebody can figure out the physical composition or electrical properties of electronic, mechanical, chemical, and other industrial products. As applied to computer programs, reverse engineering refers to the whole range of activities, from the study of publicly available sources of information about a program to the process of creating *pseudo-source code*, as well as *decompilation* or *disassembly*, breaking down the program to its component parts and then rebuilding it sentence by sentence.

We have to keep coming back to the same basic premise, copyright protects expression, and not ideas. Copyright does not protect the functionality of a program. Nothing in the copyright law prevents someone from analyzing program code, then taking the ideas, algorithms, or methods used in the program to create another program.

Anyway, the reconstruction of the original source code from the object code is like doing a puzzle. You use a decompiler or disassembly program to search the original for known or anticipated instructions. One method used to separate idea from expression is the so-called *clean room* approach used by Altai. With this approach, you would attempt to extract only the ideas from a competing program in order to replicate its functions. A *dirty room* team actually *copies* the original program and decompiles it to develop a pseudo-source code. The team studies the code to identify interfaces and document ideas. They then prepare detailed written descriptions of the design elements of the original program without using actual code, and programmers in the *clean room* take that intermediate product, that detailed script, and work from its description to imitate the original program. One problem in this approach is that if too much actual

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7. Lotus v. Borland, 73 F.3d 355 (1st Cir. 1995).



detail from the original program gets into the *clean room*, even structure, sequence and organization, the non-literal elements, they may wind up scrapping the end product as *too dirty*, or *too infringing*.

But the basic question remains: does decompilation appropriate more than unprotected ideas in the attempt to accomplish the same functions of another program? Decompilation does involve the copying of a computer program if only as an intermediate step and, is, therefore, a *prima facie* infringement. The primary rebuttal argument relies on the fair use defense, codified in Section 107 of the United States copyright law. Decompilation for academic research, such as a computer science professor performing classroom analysis with his students is, in all probability, within the fair use privilege. Decompilation for commercial purposes normally stands on a different footing. Copyright owners argue that the decompilation of a program to produce a competing product fails all four of the fair use factors:

- 1) the nature and purpose of the use is entirely commercial;
- 2) the copyrighted source code, as an unpublished work, is subject to a very narrow scope of fair use;
- 3) the entire work is copied;
- 4) harm to the market for the original is presumed with commercial use.

Decompilers reject this claim. They say their purpose which is to gain access to ideas, is a socially valuable one. They argue that software is the first and only copyrightable work that is not transparent, that is not read or played when it is used, and as such, does not clearly reveal its *ideas* or *expression*. Since copyright does not protect ideas, the argument goes, they should be available to the public, and decompilation is one of the few ways to accomplish this. In *Lotus v. Borland*, the First Circuit discussed the economic implications of interoperability, and concluded that software compatibility has a beneficial public impact that should be encouraged.<sup>8</sup>

Decompilers also argue that the market factor weighs in their favor since the end result is non-infringing; any market loss is attributable to the appropriation of idea, not expression, and to the building of a better product. They may have an unfair competitive advantage since they did not have to pay for the original innovative development costs.

On the other hand, others point out that although most copyrighted works disclose their ideas on inspection, this is not a requirement, since copyright protects unpublished works. And, Copyright Office regulations

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8. *Id.*

let people deposit copies of programs with the trade secret portions blocked out, which blocks access to ideas as well as expression.

So we have reached the point in our history where we have more questions than answers. How have the courts resolved the related issue of interoperability? Let's look at one case decided by the Court of Appeals for the Federal Circuit.

Judge Rader of the Federal Circuit in *Nintendo v. Atari*, found that the unlocking program contained protectible expression. He affirmed the lower court's holding that Nintendo would likely establish that Atari infringed its locking program by copying the literal elements of the source code. However, Judge Rader noted an important qualification. He specifically reversed the lower court's finding that Atari's intermediate copying of the locking program for the purpose of reverse engineering infringed Nintendo's copyright. The court found such intermediate copying was *fair use*: in Judge Rader's words, "[r]everse engineering object code to discern the unprotectible ideas in a computer program is a fair use."<sup>9</sup> Of course, the court did not say that the fair use doctrine authorizes unrestrained reverse engineering. One can reproduce the software only to the extent necessary to understand uncopyrightable portions of the work. In the words of Judge Rader, any reproduction of protectible expression must be strictly necessary to ascertain the bounds of protected information within the work.

So I have given you the basics and the hot issues. Winston Churchill once said that democracy is the worst form of government, except for all the others. In many ways, copyright is the worst form of protection for software, except for all the others. Although patent protection shows some limited promise for break through ideas, copyright will continue as the primary means of protecting software for the foreseeable future.

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9. *Atari v. Nintendo*, 1993 WL214886 (N.D. Cal. 1993).

# PEACE AND DEMOCRACY: THE LINK AND THE POLICY IMPLICATIONS

Valerie Epps\*

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## I. INTRODUCTION

The United Nations Charter prohibits “the threat or use of force against the territorial integrity or political independence of any state.”<sup>1</sup> This is the great *peace principle* of international law, described by Professor Thomas Franck as “the apex of the global normative system . . . .”<sup>2</sup> States then may be entitled to peace, and if — a very large *if* — collective security systems can be made fully operative, states may be

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\* Professor of Law, Suffolk University Law School, Boston. This paper was first delivered at the International Law Association’s (American Branch) International Law Weekend in New York City on November 7, 1997.

1. U.N. CHARTER art. 2, para. 4.

2. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AMER. J. INT’L L. 46, 88 (1992).

entitled to "protection against aggression . . . ." <sup>3</sup> Though the leap from states rights and obligations to individual rights and obligations is not one that international law makes very often, we may be moving towards a legal regime where individuals can claim a right to peace. The purpose of this panel is to examine how this peace might be secured. The focus of the discussion rests on the question of the link between a particular methodology of governance, namely democracy and peace.

## II. THE CAUSES OF WAR AND PEACE

For centuries mankind has examined the causes of war. Each age has brought its own theories. One of the newer observed phenomenon which has heavily engaged political scientists, is the observation that "[d]emocracies almost never fight each other." <sup>4</sup> This empirical statement leads to an examination of whether there is something inherent about the nature of democracy that produces peace, at least when interacting with other democracies, and if so, whether the promotion of democracy could secure a more lasting peace.

## III. THE PROPOSITION THAT DEMOCRACIES ALMOST NEVER FIGHT EACH OTHER

First, let us look at the proposition that democracies almost never fight each other. A brief examination of the voluminous literature brought to bear on this statement reveals that every aspect of the sentence has received microscopic examination using global data from about 1815 onwards. What do we mean by democracy? Surely there weren't any true democracies until well into the twentieth century. How long does a democratic government have to remain in power for the government to be counted as democratic? <sup>5</sup> What do we mean by *fight*? Should we count threats of force? Do we require a certain number of bodies before we are willing to count the conflict as a *fight*? <sup>6</sup> All of these variations have been examined and yet, as Professor Bruce Russett carefully demonstrates, the "research result is extremely robust, in that by various criteria of war and militarized diplomatic disputes, and various measures of democracy, the

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3. *Id.*

4. BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD 3 (1993).

5. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205-35 (1983).

6. See RUSSETT, *supra* note 4, at 12, & n. 1 - ch. 1.

relative rarity of violent conflict between democracies still holds up.”<sup>7</sup>

Another observation is also relevant. “Democracies are not necessarily peaceful . . . in their relations with other kinds of political systems [such as autocracies].”<sup>8</sup> The observation about peaceful relations between democracies does not generally include any observations about civil wars, the wars which have killed far more people since World War II than inter-state wars, nor does it look at relative homicide rates within particular societies or covert actions, so the empirical statement is only one facet of the overall picture of the use of force. One suggestion I have for the social scientists that might prove fruitful in filling the gaps is that they identify which states have had the longest periods of no war at all against any states, whatever their form of government — that they study these states and see whether they find any common characteristics. Conversely they could also study those countries that are most frequently engaged in international conflict and inquire about the possible characteristics that cause this perpetual belligerency. Nonetheless, the observation that *democracies hardly even fight each other* is an interesting statement. The essential question then is whether peace among democracies is “a result of some features of democracy, rather than being caused . . . by [other factors which may or may not be] correlated with democracy.”<sup>9</sup>

First, what do we mean by democracy? Professor Samuel P. Huntington describes its essential feature as “[e]lections, open, free and fair . . . .”<sup>10</sup> In the past century the West’s experience with democracy has also been accompanied by the steady development of other features of government that appear to go along with open elections: “the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property, . . . [w]hat might be termed constitutional liberalism . . . .”<sup>11</sup> In the latest edition of *Foreign Affairs*, Fareed Zakaria reminds us that democracy, in the sense of guaranteed elections, does not necessarily go hand in hand with the other pieces of constitutional liberalism or vice versa. He points to numerous examples of popularly elected leaders who “bypass their parliaments and rule by presidential decree, eroding basic constitutional practices.”<sup>12</sup> Conversely, he points to Hong Kong, under British rule, which had almost no electoral

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7. *Id.* at 10.

8. *Id.* at 11.

9. *Id.*

10. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 7, 9 (1991).

11. Fareed Zakaria, *The Rise of the Illiberal Democracy*, 76 *FOR. AFF.* 22 (1997).

12. *Id.* at 23.

participation, except in the last few years, and yet had a fair court system, and a relatively uncorrupt bureaucracy that protected citizens' basic rights.<sup>13</sup> There has been a huge rise in the number of states with elected governments, particularly in the last 20 years. By some estimates, "118 of the world's 193 countries are [now] democratic,"<sup>14</sup> but this rise in elections has not been accompanied by a rise in the other institutions of limited constitutional government. Whether the basic proposition, that democracies almost never fight each other, will remain true in an era where an increasing number of elected governments deny basic civil liberties remains to be seen.

Thomas Jefferson understood the distinction between elections as such and the other necessary features of limited government when he observed: "an elective despotism was not the government we fought for."<sup>15</sup> Immanuel Kant, in his essay on *Perpetual Peace* also expanded upon the link between democracy, peace, and human rights.<sup>16</sup> Indeed he may be hailed as the modern era's father of this debate.

#### IV. DOES DEMOCRACY ENCOURAGE PEACE?

##### A. Theoretical Challenges

Those who espouse the view that "one way to promote universal and perpetual non-aggression, probably the best and, perhaps, the only way, is to make democracy an entitlement of all peoples"<sup>17</sup> have to contend with competing theoretical challenges and with other alternative explanations of the phenomenon of the democratic peace. The overarching theoretical challenge comes from the structural realists such as Kenneth Waltz<sup>18</sup> and John Mearsheimer.<sup>19</sup> They believe that the behavior of states is governed by "the structure of the international system and [a particular state's] position in that structure."<sup>20</sup> They bemoan the end of the Cold War

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13. *Id.* at 29.

14. *Id.* at 23.

15. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Penden ed. 1954) (1787).

16. IMMANUEL KANT, PERPETUAL PEACE 107-39 (T. Humphrey rev. ed. 1983) (1795).

17. Franck, *supra* note 2, at 88.

18. KENNETH WALTZ, THEORY OF INTERNATIONAL RELATIONS (1979).

19. John Mearsheimer, *Back to the Future: Instability in Europe After the Cold War*, 15 INT'L SEC. 5-56 (1990).

20. RUSSETT, *supra* note 4, at 24.

because it gave “order . . . to the anarchy of international relations.”<sup>21</sup> They believe that “the prospects for international peace are not markedly influenced by the domestic political character of states, that it is the character of the state system, not the character of the individual units composing it, that drives states towards war . . . .”<sup>22</sup> “The nature of states’ internal systems of government is seen as nearly irrelevant . . . .”<sup>23</sup>

Believing that there is something inherent about democracy itself, or democracy combined with liberal constitutionalism, which restrains states from engaging in war is a direct challenge to the structural realists. The most obvious conclusion is that the phenomenon that democracies don’t fight each other (but do fight other political systems) must arise from the normative structure of democracy at least when it interacts with other democracies but a number of alternative suggestions have been offered to explain the democratic peace that do not rely on the nature of democracy or its attendant institutions.

### *B. Alternative Suggestions to Explain the Democratic Peace*

There is only time to mention a few of the alternative explanations but I would suggest that some of them are wrong and neither of them is a sufficient explanation of the democratic peace. I will briefly discuss only four prominent alternative explanations for the democratic peace.

#### 1. Similar Political Cultures Don’t Fight

This explanation posits that it is the similarity of the political culture that restrains war not the particular characteristics of the political framework. This is simply incorrect. Autocracies fight each other quite frequently so it cannot be the similarity of the political culture as such that restrains war.

#### 2. Distance Makes the Heart Grow Fonder

Until 1945 democracies outside Western Europe were few and far between. Since wars most often occur between neighboring states it is not surprising that there were few wars between democracies. The problem with this suggestion is that even where democracies were neighbors they did not fight, and in the post World War II period, where there are far more proximate democracies, the phenomenon of the democratic peace still holds up.

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21. John Mearsheimer, *Why We Will Soon Miss the Cold War*, THE ATLANTIC MONTHLY, Aug. 1990, at 37.

22. *Id.* at 38.

23. RUSSETT, *supra* note 4, at 24.

### 3. Belonging to Common Intergovernmental or Supra-National Institutions is What Prevents War

There are two replies to this argument. One is that democracy and liberal constitutionalism encourages "independent centers of power"<sup>24</sup> such as common interstate institutions, so the rise of the institutions themselves may be seen as incident to the democratic process. The other reply is that peaceful relations must necessarily precede the creation of the common institutions. In other words, the institutions arise out of peace; they do not themselves cause it, though no one doubts that they may help maintain the peace.

### 4. Riches Ensure Peace

This explanation holds that the richer a state, the more it has to lose in the devastation of war, thus the less likely it is to engage in war. Democracies, at least until the last decade or two, have usually been wealthy, thus between themselves there are double disincentives against conflict. This argument is much like the argument that "trade and investment make peace."<sup>25</sup> The problem with both these arguments is that there are plenty of counter examples. Peace often exists between states with weak economic ties and between poor states. Also both trade and wealth can generate competitive aggression.

## V. WILL PROMOTING DEMOCRACY PROMOTE PEACE?

If neither of the alternative explanations is sufficient, what is it about democracy itself that may persuade us that promoting democracy will promote peace? Are democracies more *dovish* in general than other political systems either because "the political culture favor[s] . . . the peaceful resolution of disputes"<sup>26</sup> or because governments have to answer to the population, especially during wars, which produces the restraint we seek? The answer sadly has to be *no*. "[D]emocracies are about as war-prone and disputatious in general (not towards other democracies) as are other kinds of states."<sup>27</sup>

What are "the basic norm[s] of democratic theory"<sup>28</sup> that may restrain war? "[V]oting equality, egalitarian rights to human dignity, the notion that disputes can be resolved without force, the idea of the consent

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24. *Id.* at 26.

25. *Id.* at 28.

26. *Id.* at 30.

27. RUSSETT, *supra* note 4, at 30.

28. *Id.* at 31.



of the governed, [and] the idea that resort to force is illegitimate . . . to secure . . . rights because the institutions linked with liberal democracy will secure those rights without force."<sup>29</sup> Political opposition and open discussion are also seen as necessary for good and legitimate policy making. When other nations are seen as also possessing these political norms they are perceived as legitimate, possessing restraints on governmental excesses and not likely to be out to dominate us. We in turn do not wish to dominate them because their conduct conforms with our professed norms. The perceived legitimacy of the fellow democratic state operates as a powerful restraint on any impulse to overthrow such a government both internally and internationally. When democracies fight authoritarian states on the other hand, the conflict is often waged in the name of overthrowing an illegitimate leader. The Gulf War against Iraq and the United States invasion of Panama are two examples, though ironically the Gulf War also had to the effect of restoring an autocracy to power in Kuwait.

There are of course scholars who challenge the very emphasis on democracy and civil and political rights and question whether those human rights "should be given priority over economic, social and cultural rights."<sup>30</sup> Professor Anne Orford "question[s] the assumption that the powerful international institutions operating in the economic and security areas [which might be seen as, or used for, promoting democracy are indeed] the bearers of even . . . limited liberal versions of democracy and rights in the post-Cold War era."<sup>31</sup> These scholars are not about to jump on the bandwagon of international institutional intervention.

One scholar who has perhaps tried the hardest to separate out other possible influences on conflict is Professor Bruce Russett. Through a series of calibrated tables he has looked at the influence of a variety of factors as well as the fact of democracy itself on conflict. He tests such factors as wealth, economic growth, alliances, contiguity, and military capability ratio. What he finds is that "the effect [of democracy] is continuous, in that the more democratic each member of [any two possible warring states] is, the less likely is conflict between them."<sup>32</sup> He also looks at such variables as political stability, structural/institutional constraints, normative cultural restraints, and even the levels of deaths resulting from political conflict within countries. From his studies he

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29. *Id.*

30. Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L. J. 443, 464 (1997).

31. *Id.*

32. RUSSETT, *supra* note 4, at 86.

concludes that:

The more democratic are both members of a pair of states, the less likely is it that a militarized dispute will break out between them, and the less likely it is that any disputes that do break out will escalate. This effect will operate independently of other attributes such as the wealth, economic growth, contiguity, alliance or capability ratio of the countries.<sup>33</sup>

Russett concludes that the "results do suggest that the spread of democracy in international politics . . . can reduce the frequency of violent conflicts among nations."<sup>34</sup>

Perhaps, in the end we also have to proclaim boldly what amounts to a moral belief, namely that we think voting and respect for individual rights is simply a preferable system. The studies seem to indicate that democracy will engender peace, if enough states follow the same pattern, but it may in any event be worth promoting for its own sake. If the premise *democracies don't fight each other* remains true even in the era of "The Rise of Illiberal Democrac[ies],"<sup>35</sup> promoting democracy will be a useful means to peace. If on the other hand the premise breaks down, as the voting aspect of democracy becomes divorced from liberal constitutionalism, we shall be forced to look at the broader institutional framework to find the causes of peace.

The complex issues of how any state, and in particular the United States, might go about promoting democracy, the dangers of intervention, and the hazards of various forms of aid, I will leave to my fellow panelists.

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33. *Id.* at 72-3.

34. *Id.* at 92.

35. Zakaria, *supra* note 11, title.

# THE RULE OF LAW INITIATIVE AT THE UNITED STATES INSTITUTE OF PEACE

*Charles Duryea Smith\**

Thank you so much, Valerie, for the invitation to join you today. I have chosen what I think is an important part of the larger subject of *Peace and Democracy: The Link and the Policy Implications*; it is the rule of law.

In 1984, Congress passed the United States Institute of Peace Act. In early 1986, the presidentially-appointed, Senate-confirmed Board of Directors met and hired the first staff, including me as general counsel. Four years later, in 1990, the Board created the Rule of Law Initiative and turned to me, as the lawyer on the staff, to direct it. Advocating for this program at this free-standing federal educational institution were a number of your colleagues: the board chairman, John Norton Moore, and board members Max Kampelman, Richard Schifter, and Morris Leibman, all lawyers; and historians Elspeth Rostow and Allen Weinstein. I would like to use my time today to describe the development of this program and indicate where it stands today. In so doing, I will point to certain historical changes and philosophical issues that are directly reflected in the life of the institute and this program and that may help inform our discussion today about war and peace and the role of democracy in moderating, if not ending, international war and creating more peaceful nations.

When the Institute's Rule of Law Initiative began, George Bush was President, Mikael Gorbachev led the Soviet Union, and the Berlin Wall had fallen, but the Cold War was still not history. In hindsight, we know now that we were in the endgame of the Cold War. But no-one knew this then for sure. This is the historical context in which the United States Institute of Peace designed its Rule of Law Initiative.

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Interestingly enough, when the Board decided to establish the Rule of Law Initiative — a legal program that would focus on changes happening in both the communist world and a number of third world countries — they encountered a classic dilemma as the Cold War died: what I would term the clash between the Hans Morgenthau, Henry Kissinger power politics view of the world and the normative view of change exemplified by the law. Taking the Cold War as the post-World War II exercise of conventional power politics, one could see that normative or value-driven rule of law concerns would not be on that table. Yet, it was precisely those concerns — captured by the phrases *peace with justice* and *peace with freedom* and including civil and human rights as well as democratic forms of governance — that informed the Board's view that a rule of law initiative was not only timely but was a necessary component of a new federal institution devoted to exploring, as stated in the Institute's enabling act, the means to promote international peace and the resolution of conflicts among the nations and peoples of the world without recourse to violence.

So, when the Initiative was set up, I faced not only the immediate question of how to allocate enough time from my principal role as general counsel in order to get the program off its feet but also the corollary question of identifying an individual who could help get it going. I was fortunate in attracting Neil Kritz as the rule of law staffer, and today he is the director of the Rule of Law Initiative. Kritz brought energy, Washington experience, good contacts in the human rights community, and a particular view of the rule of law that influenced directly what we did together and my thoughts today on where this type of initiative might go. Specifically, Kritz has deep interest in international law and in the question of how law can play a role in developing peace out of wartime situations.<sup>1</sup>

As we developed it, the Rule of Law Initiative has two basic parallel lines or conceptual maps. First, is the concept of negative peace: peace as the absence of war. This work evolves directly out of armed conflict. Second, is the concept of positive peace: peace as quality of life. This is what Fareed Zakaria describes as the content of liberal democracy in his recent essay in Foreign Affairs entitled *The Rise of Illiberal Democracy*. Along the lines of his essay, it is interesting to note that, while the Rule of Law Initiative did not establish a separate category for the electoral side of democracy-building, its programming ended up

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1. See generally Neil J. Kritz, *The Rule of Law in the Postconflict Phase: Building a Stable Peace*, in *MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT* (Chester A. Crocker and Fen Osler Hampson with Pamela Aall, United States Institute of Peace Press, Washington, D.C., 1996).

distinct from the election programs sponsored by the United States Agency for International Development or the National Endowment for Democracy. Let me now turn to both views, negative and positive peace, and illustrate how they work in the Institute's Rule of Law Initiative.

Negative peace, peace as the absence of war, begins out of war. Its predicate is violent conflict — whether international or within a state. It is important to keep in mind that, today, some ninety percent of violent political conflict is occurring within states, not between states. That is, the international world is essentially peaceful; domestically, the world is at war. This domestic violence includes state violence against people: the kind of violence spelled out so movingly by R.J. Rummel in *Death by Government*.<sup>2</sup> It includes Cambodia, Haiti, Rwanda, Zaire, and it includes the lawlessness of Central America: post-conflict violence against the populace by gangs of soldiers and guerrillas uncontrolled by at best rudimentary police forces and legal institutions in El Salvador, Nicaragua, and Guatemala.

At the Institute, the most prominent negative peace project is called *Transitional Justice*. I believe that this is the project which to date has defined the Institute's Rule of Law Initiative. Transitional justice addresses the question of how a formerly totalitarian society that is becoming democratic can judge the actions of the former government. The principle, in psychological terms, is that, unless issues of the past are brought to the surface and confronted, the country will be unable to come to grips with its history. The complementary principle is that countries emerging from totalitarian pasts need not feel isolated, as if no-one else has ever dealt with such complex problems. The project in 1995 produced a three-volume edited study, published by the United States Institute of Peace Press, entitled *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume One, *General Considerations*, has a number of background essays on such subjects as criminal and non-criminal sanctions, moral responsibility, victim compensation, and commissions of inquiry. Volume Two, *Country Studies*, offers case studies of post-World War II transitional justice in twenty countries from Germany and France after Nazism to South Korea, Argentina, Uganda, Czechoslovakia, and Russia. Volume Three, *Laws, Rulings, and Reports*, includes laws and reports for commissions of inquiry and on such topics as privacy protections and prosecutions. In my mind, it is the most important because it contains original material. In draft, these volumes were used in creating the South African truth commission, among others. In addition, a number of Institute grants have supported the work of such commissions

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2. R. J. RUMMELL, *DEATH BY GOVERNMENT* (Transaction Publishers 1994).

and their academic advisors. A principal governmental mechanism has been selective prosecutions of the most serious offenders of human rights — the torturers, the Eichmanns — and through truth commissions the creation of histories where there had been suppression and silence, as in South Africa today. I believe this represents the negative peace foundation for the rule of law. The work continues with impact and immediacy, as Neil Kritz is in Bosnia today meeting officials about steps the nations of the former Yugoslavia might take to establish a joint truth commission.

The second activity for the Rule of Law Initiative has focused on positive peace. Zakaria lists components of this under the heading *liberal democracy*. They include a political system marked not only by free and fair elections but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property. This latter bundle of freedoms he writes might be termed constitutional liberalism and is theoretically different and historically distinct from democracy, which he views as identified by elections, not by the content of individual liberties and protections. The Institute has supported this strand of work, the positive peace side, through grants for American scholars and practitioners assisting new democracies in constitution-drafting and in judicial development and for a range of scholars from the United States and around the world who are looking at general and quite specific issues surrounding the rule of law in theory in specific countries. In addition, individual scholars and diplomats such as Louis Sohn, Max van der Stoep, and Bereket Habte Selassie have won fellowships for a year of work at the Institute focusing on rule of law issues. It is particularly important, I think, to note the World Bank, surely an important bell-weather indicator for important change in international policies, is becoming increasingly focused on positive peace questions beyond a strictly economic appraisal of its work. Perhaps the best example of how the rule of law is taking root is the Bank's interest in factoring problems of corruption into its lending and review policies.<sup>3</sup> This recognition cannot help but make the wider range of rule of law matters increasingly central to securing a world at peace with justice and freedom.

In closing, I'm pleased to report that, as we look back on the Cold War and forward into the new millennium, the Rule of Law Initiative at the United States Institute of Peace has become an important American

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3. See, e.g., *Restraining Arbitrary State Action and Corruption*, in *THE STATE IN A CHANGING WORLD: WORLD DEVELOPMENT REPORT 1997, SELECTED WORLD DEVELOPMENT INDICATORS* (The World Bank, June 1997); *THE WORLD BANK'S EXPERIENCE WITH GOVERNANCE* (The World Bank, May 1994, second printing April 1996); *HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK* (The World Bank, Sept. 1997).

actor in rule of law matters, both negative and positive peace, with special expertise on commissions.<sup>4</sup>

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4. I would recommend that any of you interested in grant or fellowship support for work in the area contact the Institute's headquarters in Washington, D.C. The phone number is (202) 457-1700.

**FOREIGN CORRUPT PRACTICES ACT:  
COMPLIANCE ISSUES FROM A GERMAN AND  
EUROPEAN PERSPECTIVE**

*Dr. Andreas G. Junius\**

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**I. INTRODUCTION**

Corruption has become a major topic of almost daily attention within the media. It has been of varying degrees of concern in different countries. Historic and cultural differences play a role. In some Asian or Arab cultures, for instance, the *bakshish* mentality is a way of life and is socially accepted. In other countries, partly due to a lack of strength on the part of the government and to the power of organized crime, bribery is

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notorious and overwhelming. Thus, in recent years, sensational bribery cases concerning bribery of politicians, as well as of government officials, have been covered by the international press and have been dealt with in the different jurisdictions.

Examples of such bribery include the cases of top Italian politicians being accused and tried for receiving money from the Mafia, as well as the case in Singapore about the public official who was sentenced to fourteen years of prison after it was proven that, in exchange for confidential information in regard of government orders, he had received at least ten million dollars over the years from international companies.<sup>1</sup> Politicians around the world are accused of using their offices for the benefit of their political parties.

It has always been obvious, but seems to become more commonly understood, that international corruption harms domestic economies because it creates unnecessary expense, as well as losses for those competitors that attempt to market their products on a fair basis.

#### A. IBA Study Concerning Corruption

The Standing Committee on International Legal Practice, Section on Business Law of the International Bar Association (IBA), has recently published a comparative analysis of answers by lawyers from thirteen mostly industrialized jurisdictions (Australia, Belgium, Canada, Chile, Denmark, England, France, Germany, Italy, Japan, the Netherlands, Sweden, and the United States) to a questionnaire regarding the respective legal settings of corruption.<sup>2</sup> It led to interesting results. While there is a substantial consistency among the different jurisdictions in their criminal law approach to fighting corruption on a domestic basis, the treatment of international corruption, for example, the bribery of foreign public officials, wherever it may take place, reveals important differences. Only five of the questioned states declare some form of international corruption a criminal act, while just three of these five do not require that the bribe be committed within their own territory.<sup>3</sup> That leaves the remaining eight

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1. See Mark Pieth, *Internationale Bestechungsfälle und ihre strafrechtliche Verarbeitung*, SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 313 (1996).

2. Sietze Hepkema & Willem Booyen, *Bribery of Public Officials: An IBA Survey*, INT'L BUS. LAW, Oct., 1997, at 415-16.

3. The five countries first referred to are England, Sweden, the Netherlands, the United States, and Australia (New South Wales), whereas Sweden, the Netherlands, and the United States make up for the jurisdictions referred to in the latter part. Hepkema & Booyen, *supra* note 2, at 415-16.

jurisdictions without the possibility to prosecute and punish international bribery under their criminal statutes.<sup>4</sup>

Interesting distinctions were found with respect to the tax treatment of payments to public officials as well. Only five jurisdictions were found to explicitly deny the deductibility of bribery payments as legitimate business expenses under their respective tax laws.<sup>5</sup> That leaves the other questioned states allowing the deduction of international bribe payments by the concerned private business organizations.

### B. Corruption in Germany

Germany has traditionally enjoyed a relatively low degree of corruption. At least, that is the perception. One can only speculate why:

1) The system of governmental employment, *civil service*, has provided for highly (some say overly) paid public officials with considerable social standing and absolute job security in exchange for an almost fiduciary relationship with the state/employer; and

2) Traditionally, there has been less opportunity for bribery, due to a comparatively low level of state owned industries; however, where opportunity exists (for instance with building permit procedures, public procurements), bribery has been present also in Germany.

These conditions have changed in particular since reunification with the former East Germany:

1) The public service sector is no longer as highly respected as before. Budget deficits led to pay freezes and outsourcing, and high unemployment has caused *envy* and has led to reduced respect for the civil service; and

2) In order for Germany to fulfill the convergence criteria for participation in Europe, there are increased opportunities due to privatization in eastern Germany and in Germany as a whole.

As a response to the rapidly growing influence of corruption on German society and economy,<sup>6</sup> prompt action became necessary to combat the

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4. Belgium, Canada, Chile, Denmark, France, Germany, Italy, and Japan. Switzerland has to be added to this group of countries. Pieth, *supra* note 1, at 315.

5. Canada, England, Chile, Italy, and, under certain limitations Denmark. Hepkema & Booyen, *supra* note 2, at 415-16. In Denmark those payments are only deductible if they are considered a customary and necessary means for conducting business in the relevant foreign jurisdiction. *Id.*

6. Estimated total economical damages per annum are \$300-350 billion. *Korruption ist ein Kontrolldelikt*, [Interview with Wolfgang J. Schauptsteiner, the Senior District Attorney

further spread of that cancerous disease. It also follows that in Germany corruption as a problem has become a focal point now.

## II. INTERNATIONAL EFFORTS FOR IMPROVEMENT AND STANDARDIZATION

As long as domestic laws do not globally prohibit international corruption, one major practical argument against *international corruption efforts* is the *level playing field* defense: we do not want to put our exporters at a competitive disadvantage from competitors in corruption-permissive countries.

To change that situation and because of the disadvantages already mentioned, political (mainly from the United States) as well as (private) economic pressure have led to different and independent, but nevertheless very strong and hopeful efforts to ban corruption on an unified or harmonized international basis. What are those international efforts?

### A. EU Convention

On May 26, 1997, the Council of the European Union (EU), acting under Title VI (Article K.3 (2) (c)) of the Treaty of the European Union, adopted the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (EU Convention). Following its signing as the next step, all European Union (EU) member states are to ratify the Convention and to adjust their criminal laws concerning corruption accordingly. To date (February 1998), no member state has ratified the EU Convention. The EU Convention will only enter into force ninety days after notification by the last member state that its domestic ratification procedures are completed.

In Articles 2 and 3, the EU Convention distinguishes between passive and active corruption, a common distinction under all domestic laws concerned. Thus, the main and decisive innovation will relate to the scope of coverage. It will include with regard to bribe actions with officials of other EU countries as well as EU officials. That transborder effect has been lacking under most domestic jurisdictions, which is even more disturbing in the EU since the interdependence among the EU member states has grown to previously unknown proportions, and since virtually domestic market conditions exist. Furthermore, punishment of

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and Special Corruption Officer of the District County of Frankfurter am Main, by Dr. Norbert Copray], LAY REPORT 6 (1997). According to Schaupensteiner, police statistics provided by the German F.B.I. counted since the first year of its official listing in 1994 documented there were 1557 bribery cases already. (on file with author) [hereinafter LAY REPORT].

corruption will not be dependent on its success, but instead on the intent to bribe.

Extensive concern is placed on the harmonization of domestic laws in the member states and on cooperation of criminal enforcement authorities. Article 6 deserves special recognition in that it requires members to potentially make heads of businesses vicariously liable under penal laws for acts of their employees within their business units.

Notwithstanding the innovative and important approach to extend the domestic criminal laws to international bribery, the EU Convention is also limited in two regards. First, only bribery action vis-à-vis public officials, not private individuals, is targeted. Second, the prescribed changes exclusively concern criminal legal measures. Other areas of the law, like tax legislation or administrative measures, are not addressed by the articles of the Convention.

### *B. OECD Measures*

The Organization for Economic Cooperation and Development (OECD) differs from the EU in many aspects, but, to our concern, it is the difference in membership (including non-EU members such as the United States, Australia, Canada, Japan) that becomes crucial for the combat of international bribery. At this point, almost thirty states are members in the OECD.

The Council of the OECD decided upon a Convention on Combating Bribery of Foreign Public Officials (OECD-Convention) as of May 23, 1997. This convention was signed by the OECD member states on November 20, 1997. The Convention shall enter into force on the sixtieth day after five of the ten member states with the highest exports share, representing sixty percent of the total export share of these ten countries, have ratified it.

Although the scope of both Conventions is similar, the OECD-Convention differs in important material respects from the EU-Convention. The main distinctions, some of a narrowing nature, others extending the field of application of the OECD-Convention,<sup>7</sup> are:

- 1) Only active corruption, such as bribing an official, is included, not passive bribery committed by an official (Article 1).
- 2) Only bribe payments in order to obtain or retain a concrete business deal are considered criminal. Thus, the so-called

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7. The following analysis is based on the latest available proposal for the draft convention. During the final adoption process certain changes may have been made.

*facilitating payments* preceding the business relationship itself might still be tolerated.

3) In contrast to the EU-Convention, not only governmental officials in member countries of the organization, but all officials in foreign government functions as well as all officials in international organizations are going to be included.

4) Lastly, it is not clear whether prosecution has to be made or if national law may leave discretion for the respective domestic enforcement organs to decide about criminal action when international bribe actions become known. Ultimately, under good faith principles a party may not use this discretion to circumvent its obligations to combat bribery in accordance with the OECD Convention.

Still, considering the less than hopeless attempts by the United Nations in the 1970s to create an Anti-Corruption Convention, it is a major success for the OECD to form a global alliance to combat international bribery. It must be seen as a starting point on which future efforts can be built.

Prior to the adoption of, and in addition to the above-described OECD-Convention, the Council of the OECD released an official recommendation "On Combating Bribery in International Business Transactions."<sup>8</sup>

Apart from referring to the desired criminalization of international bribery in the member countries, the recommendation comprises many different measures. It addresses topics like tax deductibility, accounting requirements, auditing methods, internal company controls, public procurement, and others. Due to its informal nature, the effects of the recommendation may lead to precise government action in the member states, but shows an international consensus to fight corruption and also might precede future OECD actions with more authoritative strength.

### *C. Council of Europe Action and Other International Efforts*

The Council of Europe, which is an organization that is distinct from, and less integrated than, the EU membership with a much wider membership, has been working on the subject of international bribery as well. Mainly by cooperation provisions referring to the Council of Europe in the Treaty of the European Union, the linkages between both international organizations have tightened. As a result, the importance of the Council of Europe has grown considerably.

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8. OECD Doc. (C (97) 123/final) (May 30, 1997).

The efforts by the Council of Europe are meaningful for mainly one reason. In contrast to the European Union, the membership of the Council of Europe includes most former communist Eastern European States. For the purpose of reaching a *level playing field* throughout Europe, the inclusion of the Eastern European economies, which provide for many problems in the context of corruption and organized crime in the EU-member states, seems necessary.

Other organizations that have been dealing with international bribery are the Organization of American States (OAS)<sup>9</sup> and the World Trade Organization (WTO) in the context of its rules of Public Procurement.

### III. CURRENT LEGAL SITUATION IN GERMANY

Bribery can be dealt with under criminal, civil, tax, and administrative law. At the annual German Lawyers' Congress 1996 in Karlsruhe, one focus was organized crime and corruption. Following those discussions, and after surprisingly similar bills were introduced by all parties and legislative organs of German government, the German legislature became active. In August 1997, the *Bundestag* (the lower House in the German Parliament) passed an anti-corruption act<sup>10</sup> to tighten criminal law as well as other segments of the German legal system on the wide field of corruption.

#### A. Criminal Law

The Anti Corruption Act does not criminalize international bribery. According to sections 3, 5, 6, and 7 of the German Penal Code (known as the *Strafgesetzbuch* (StGB)), German criminal laws, like most other criminal laws, only apply in cases with a close domestic connection. A specific provision for the punishment of international bribery does not exist yet.

The Anti Corruption Act of this year did not alter this concept. Thus, only domestic, but not international bribery remains criminalized, unless such conduct otherwise falls within the scope of fraud, embezzlement, or tax evasion. However, many if not most situations of

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9. Organization of American States: Inter-American Convention Against Corruption, 35 I.L.M. 724 (1996); Manfred Möhrenschräger, *Strafrechtliche Vorhaben Zur Bekämpfung der Korruption auf Nationaler Und Internationaler Ebene*, JURISTENZEITUNG 822, 831 (1996).

10. The Act on the Combat of Corruption and other Measures for Fighting Corruption entered into force on August 20, 1997. (BGBl. I, S.2038) [hereinafter the Anti-Corruption Act].

international bribery do not fulfill the code definition of bribery or the ancillary crimes.

Despite those shortcomings, there are a number of positive changes under German criminal laws that are worth mentioning:

1) The definition of government official was broadened to include employees of public entities organized under private law, and it now matches the EU-Convention's definition described above. For example, not the form of the entity by which the person is employed, but the substantive scope of the occupation in question determines the quality as potential addressee and potential perpetrator of passive bribery.

2) In contrast to the former law, the favor being sought by the private party does not have to refer to a specific action by the official, but it is sufficient that the favor is granted within the context of the official's duties.

3) This amendment reflects the statutory purpose of maintaining the trust of the public in the Public Administration. Formerly, the official had to benefit at least indirectly from his or her wrongdoing (e.g., donation to official's sport club); under the amendment, benefits to third parties not directly related to the official are sufficient (e.g., donation to the church).

4) The potential punishment was raised to a maximum of ten years for severe bribery. The minimum sentence for certain actions such as when bribery leads to illegal acts of the influenced officials, was raised to one or to two years, which is the threshold to become a felony (in contrast to a misdemeanor).

5) Under the amendment, protection of free competition has been emphasized much more by moving the provisions into the Penal Code and by increasing the punishment. Among the more interesting provisions rank the prohibition of illegal agreements in the context of public procurement<sup>11</sup> and in bribery in private business dealings.<sup>12</sup>

As a result, it has to be emphasized that there still remains a decisive distinction from the United States Foreign Corrupt Practices Act

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11. § 298 StGB.

12. § 299 StGB (formerly and with less severity included only in section 12 of the Gesetz gegen den unlauteren Wettbewerb (UWG), which stands for the Act Against Unfair Competition). For a detailed look at all the changes, see Matthias Korte, *Kampfansage gegen die Korruption*, 39 NEUE JURISTISCHE WOCHENSCHRIFT 2556, 2557 (1997).

because under current German law it is not illegal to bribe foreign public officials.

### B. Civil Law

For many years, the German Federal Supreme Court has held that contracts resulting from bribery actions are void under section 138 BGB, the German Civil Code, as conflicting with "bonos mores."<sup>13</sup> Thus, a party that formerly paid *under the table* is not only hindered from enforcing its seemingly contractual claim, but it also has to bear all the consequences resulting from the nullity of the contract in concern. In addition, bribe payments can lead to the obligation to pay damages under the intentional fraud provisions of the Civil Code, section 826 BGB.

### C. Tax Law

Under German tax law, it is, in principle, possible to deduct foreign bribe payments as necessary business expenses.<sup>14</sup> However, there are limitations to that rule. For instance, according to section 4 (as amended) of the German Income Tax Code, the deduction is disallowed if the concerned action has led to prosecution or sentencing under the German criminal code.<sup>15</sup>

Since under the current criminal code actions of international bribery are not included, those expenses do not fall within section 4. Thus, they remain deductible, at least for now.

In addition, tax procedure rules give the tax authorities the right to require precise disclosure of the recipient and the circumstances of the deductible expense. This feature, combined with exchange of information procedures between certain countries under their double taxation treaties with Germany, can be expected to have a desirable impact on foreign bribery activities.

### D. Administrative Measures

It is important to note that companies and other judicial persons cannot be criminally liable under German law. Hence, other measures have to be found to *get to* the companies.

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13. 94 BGHZ 268, 271.

14. Press release 20/94 by the BdF (Federal Treasury) as of March 21, 1994. *Bestechungs- und Schmiergelder*, 5 RECHT DER INTERNATIONALEN WIRTSCHAFT 436 (1994).

15. § 4 Abs. 5 S. 1 Nr. 10 EstG. For details, see Wolfgang Joecks, *Abzugsverbot für Bestechungs- und Schmiergelder*, 27 DEUTSCHE ZEITSCHRIFT FÜR STEUERRECHT 1025 (1997).



To strengthen the effects of new legislation, (and also the upcoming efforts to combat international bribery) administrative measures like so called *black lists* have been put into place.

Companies that get caught in bribe actions have been listed with the effect that they are banned from government orders for varying periods of time. One German federal state, Hesse, came up with that procedure in 1995 and, in 1996, listed more than sixty enterprises.<sup>16</sup> The names on these lists are kept strictly confidential from the public, but not to the companies concerned. Just the number of companies being listed is published on a frequent basis. Public agencies intending to contract with mainly private construction companies have to check with the Hessian County Government to make sure that the company with whom they wish to enter into a contract is not banned from government orders.

Similar methods are used abroad. It appears that this feature has become very effective. For instance, in connection with an action that led to imprisonment of a public official, one major German corporation was banned from Singaporean government orders for five years.<sup>17</sup>

#### IV. COMPLIANCE EFFORTS BY THE INDUSTRY

There is growing concern among enterprises to make sure by internal measures that corruption, including international bribery, is contained. Experts are convinced that despite the necessity of tougher criminal laws, international bribery can be successfully limited only by the industry itself.<sup>18</sup> Companies have to install effective internal revision procedures and sanction mechanisms to be able to control and stop bribery payments.

In an attempt to raise that topic and to help standardize those internal means, the Bundesverband der Deutschen Industrie e.V. (BDI), the German Industry Association, recently published a pamphlet with recommended guidelines of conduct.<sup>19</sup> There is a common understanding that the often made statement, "not companies, but their employees are corrupt" does not reflect the true situation.<sup>20</sup> Since, mainly higher level management and representatives are able to participate in illegal antitrust

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16. *Litwin*, Maßnahmen zur Bekämpfung der nationalen und internationalen Korruption, *Zeitschrift für Rechtspolitik* (ZRP) 1996.

17. Reiner Scholz, *Uternehmen Schwarze Liste*, *DIE ZEIT*, Mar. 7, 1997, at 30, 31.

18. See LAY REPORT, *supra* note 6.

19. BUNDESVERBAND DER DEUTSCHEN INDUSTRIE EMPFEHLUNGEN AN GESCHÄFTSFÜHRUNGEN UND VORSTÄNDE DER GEWERBLICHEN WIRTSCHAFT ZUR BEKÄMPFUNG DER KORRUPTION IN DEUTSCHLAND, 3 [hereinafter BDI].

20. BDI, *supra* note 19; LAY REPORT *supra* note 6, at 6.

agreements, sales agents and foreign branch representatives being involved in such actions, typically receive orders from higher ranking management. Therefore, it is necessary to provide for role model behavior by the boards and leaders of the German companies operating in international business, and by that, also to avoid the spectacular criminal trials we have seen in recent years. Article 6 of the EU-Convention calling for criminal liability of business heads when making bribery related decisions, must be seen in this context.

In evaluating the BDI guidelines' recommendation of strict observance of the German criminal law as the most important measure, the question of the non-criminalization of international bribery must be raised. So far enterprises have been able to hide behind the existing gap in German statutory law,<sup>21</sup> an aspect United States companies have been complaining about for a long time.

For the EU, the possibility to corrupt foreign officials and to escape criminal liability will be gone with the new legislative act in 1998. However, there will always be the difficulty to obtain knowledge of foreign bribery payments. The OECD Convention, by requiring that the member states secure their accounting and bookkeeping rules prevent bribery payments from being covered up, will be a major step forward. However, it appears to fall short of expressly prohibiting tax deductibility. A realistic chance to achieve a certain control over bribery abroad, is the strict implementation of internal company measures like specific training and education of the employees, job rotation in positions with increased exposure to the possibility of bribery, to create alternatives in the supply chain, and so as to avoid dependencies, effective revision methods and better cooperation among the concerned company departments.

## V. OUTLOOK

In the context of growing concern about international corruption, Germany will quickly attempt to tighten its legislative and administrative measures. The Anti-Corruption Act of 1997 should be followed by new legislative measures in 1998 to close the gap to the efforts by the EU and the OECD. As it appears right now, a new legislative act will be presented to the German parliament by April 1998 that should contain the prescribed changes by the EU. Since all domestic parties agree in substance, there should be no problem in passing that bill. It remains to be seen, though, if the new act will be limited to the measures prescribed by the EU-Convention or if it goes beyond, which seems possible, for

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21. The cited pamphlet still leaves the door open for international bribe payments. BDI, *supra* note 19, at 6.

example, by banning tax deductibility of foreign bribe payments. This should apply also to the efforts to adopt legislation in accordance with the OECD-Convention.<sup>22</sup>

It is safe to say that there exists an almost unique coalition among the opposing parties in the German Parliament, the Association of Chambers of Commerce (known as the Deutscher Industrie-und Handilstag (DIHT)), and the Federation of the German Industry (BDI) to combat international bribery. That kind of common effort has become possible since the awareness has grown that corruption is not only unethical, but also harms the export industries with higher costs and unfair competition, and thus, a level playing field would be beneficial for all involved.

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22. BT-Drs. (Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament] 13/8082 from June 26, 1997.

# THE CRIMINALIZATION OF TRADE SECRET THEFT: THE ECONOMIC ESPIONAGE ACT OF 1996

*Pamela B. Stuart*

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The collapse of the Soviet Union has resulted in far-reaching changes in the global environment. One of the immediate effects of the demise of what Ronald Reagan dubbed the Evil Empire was the need to

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find useful work for the army of FBI agents who formerly were assigned to counter-intelligence. Because they would no longer be sitting for hours in unmarked vehicles in full surveillance mode, those agents were available for reassignment. According to intelligence agencies, FBI agents were not the only ones looking for work. The reduction in East-West tensions enabled intelligence services in allied nations to devote greater resources to collecting sensitive United States economic information and technology.

While its full implications are not yet apparent, the passage of the Economic Espionage Act of 1996 might be viewed as the FBI agent full employment act. The government will now make use of sophisticated investigators hitherto employed at rooting out spies, waste, fraud, abuse, and other criminal activities in an effort to protect something else that is vital to our national security and prosperity — the nation's trade secrets. It is yet one more step in the progress of the effort to criminalize conduct that was formerly of interest only to commercial lawyers.

## I. BACKGROUND

The Economic Espionage Act of 1996, 18 U.S.C. § 1831 *et seq.*, became effective on October 11, 1996. Its passage was prompted by concern over the efforts of foreign businesses and governments to conduct industrial espionage against United States businesses both at home and abroad. United States intelligence reports established that there was a continuing threat of economic espionage that was emanating mostly from such allies as France, Japan, and Israel. Oddly enough, the businesses most routinely at risk were those in the defense industry. Apparently the R&D costs involved in home-grown defense technology were too high for our foreign friends. Rather, they wanted cutting-edge weapon systems technology at a cut-rate price.

The Act also provided American businesses with the prospect of federal assistance in the effort to prevent competitors from stealing their intellectual property. While twenty six states had legislation on the books to prevent trade secret theft, the federal law provides protection for businesses in the states without appropriate legislation and provides another option for aggrieved businesses in the states where trade secret acts were already in place. The federal law does not preempt or displace other remedies.<sup>1</sup>

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1. 18 U.S.C. § 1838 (1996).

## II. THE DIMENSIONS OF THE PROBLEM

A 1994 Report to Congress on Foreign Acquisition of and Espionage Activities Against United States Critical Technology Companies reported that the intelligence organization of one ally ran an espionage operation that paid a United States government employee to obtain United States classified military intelligence documents. Citizens of that ally were found to be stealing sensitive United States technology used in manufacturing artillery gun tubes within the United States. Other agents of that ally stole design plans for a classified reconnaissance system from a United States company and gave them to a defense contractor in their home country. A company based in the territory of the ally was suspected of surreptitiously monitoring a Defense Department telecommunications system in order to obtain classified information for the intelligence organization of its government. Citizens of that country were investigated for passing advanced aerospace design technology to unauthorized scientists and researchers.

According to the 1994 report, another country that did not maintain its own intelligence service relied on private companies to do that kind of work. Those firms operate abroad and collect data for their own purposes, but also gather classified documents and corporate proprietary information for the use of their government. For example, electronics firms from that nation directed their data gathering efforts at United States firms in order to increase the market share of companies in that country in the semiconductor industry. With friends like that, who needs enemies?

The magnitude of the problem is substantial. The White House Office of Science and Technology estimated that business espionage cost United States companies \$100 billion annually in lost sales.<sup>2</sup> The most likely targets are companies involved in one or more of the technologies named on its National Critical Technologies List (NCTL). These include sophisticated manufacturing technology, materials, information, and telecommunications. Also included are biotechnology, aeronautics, surface transportation, energy, and environmental technologies. Loss of proprietary information related to these products would be likely to undermine the United States strategic industrial position according to the FBI.

According to the National Counterintelligence Center and the State Department, seventy-four corporations reported more than 400 incidents of suspected foreign intelligence incursions against their business last year.

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2. Ed Jopeck and Ken Sawka, *Foreign Espionage: Is your Business at Risk?* (visited Oct. 30, 1997) <<http://www.execpc.com/~mhalign/indict.html>>.

Slightly more than half of these incidents involved technologies on the NCTL. So, much of American commercial activity is potentially at risk.

### III. DOESN'T EVERYBODY DO IT?

The CIA has repeatedly denied that the Agency will engage in corporate spy work.<sup>3</sup> However, apparently if the information turns up, the Agency will pass it along to interested parties. The CIA is reportedly providing the government with information about Japanese auto technology that may be of support to President Clinton's effort, in cooperation with Ford, General Motors, and Chrysler, to produce a more fuel-efficient car through the Partnership for a New Generation of Vehicles. While much of the data on the current state of auto technology abroad may be gathered from publicly available sources, some of it is gathered clandestinely and is classified. Battery technology in Japan is of particular interest according to Matt Dzieciunch, a project engineer at the government-Big Three cooperative effort known as the United States Advanced Batteries Consortium.<sup>4</sup>

For the most part, American companies do not need the government's help to spy on their competitors. The vast majority of business and competitive information may be obtained legally and ethically from newspaper articles, trade publications, SEC filings, specialized databases, and from materials readily available at trade shows. Sensitive or restricted data include financial information, manufacturing processes, customer lists, and other information not normally shared with those outside a business.

The CIA has long monitored data on such world economic issues as oil production, crops, world trade, foreign government economic policies, and technology. After the Clinton Administration formed the National Economic Council in January 1993, the CIA's role in economic intelligence grew in support of enhancing United States competitiveness in the world. By forming a cooperative among the Big Three auto makers, the government facilitated the sharing of information gathered through foreign industrial spying. When Stansfield Turner was Director of Central Intelligence, the agency would brief United States corporations about its findings of the acquisition plans of foreign governments through seminars at the Commerce Department. Information sharing has been practiced with private defense contractors under a number of administrations. Laws designed to permit American companies to gain access to the work product

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3. Robert Dreyfuss, *Company Spies, Mother Jones Mo Jo Wire* (visited Oct. 30, 1997) <<http://www.mojones.com/motherjones/MJ94/dreyfuss.html>>.

4. *Id.*

of United States government laboratories and to avail themselves of cooperative ventures without fear of the antitrust regulators also facilitated United States government assistance to the military-industrial complex.<sup>5</sup>

#### IV. THE ECONOMIC ESPIONAGE ACT OF 1996

The Act treats those who steal on behalf of a foreign government or knowing that the offense will benefit a foreign government, foreign instrumentality, or foreign agent differently from those who merely appropriate trade secrets or business information for domestic use. It also punishes organizations who engage in the prohibited skullduggery more harshly than individuals.

##### A. Penalties for Criminal Violations

Those who steal trade secrets with the intent or knowledge that they are doing so for or will benefit the foreign entities or agents may be imprisoned up to fifteen years and fined not more than \$500,000. If an organization gets into the foreign intrigue business and steals trade secrets, it makes itself liable for a fine not to exceed ten million dollars.

Those who merely want to rob Apple to benefit Bill Gates will be imprisoned not more than ten years or fined not more than the schedule in 18 U.S.C. § 3571 (1987) permits or both. An organization that limits the influence of its thefts to United States territory may be fined not more than \$500,000.

Perhaps of more far-reaching significance, the Economic Espionage Act includes a provision that permits the forfeiture to the United States of:

any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of the violation; and any of the person's property used, or intended to be used, in any manner or part, to commit or facilitate the commission of the offense . . . .<sup>6</sup>

The forfeiture provisions make such forfeiture an option within the discretion of the court, as part of the sentencing process, "taking into consideration the nature, scope, and proportionality of the use of the property in the offense."<sup>7</sup> Thus, it is within the power of the court to order what in effect would be a corporate death sentence for a new company

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5. *Id.*

6. 18 U.S.C. § 1834 (a)(1), (a)(2) (1996).

7. 18 U.S.C. § 1834 (a)(2) (1996).



established on the basis of purloined information in the possession of its founders.

### *B. Civil Remedies*

Of course, in the business context, the conniving trade secret thief must be concerned about civil suits, which can result in injunctive relief to stop the production line, damages, seizure of unjust profits as well as attorneys fees. This has been the traditional means of stopping the unlawful conversion of trade secrets. Prior to the enactment of the Economic Espionage Act of 1996, twenty six states had anti-trade secret theft laws on the books. Common law theft and conversion statutes also applied.

The Economic Espionage Act of 1996 permits the Department of Justice to get involved on the civil side as well,<sup>8</sup> and it provides that the Attorney General may obtain appropriate injunctive relief against any violation of the Act in federal district court.

### *C. Extraterritorial Application of the EEA*

This power potentially may have far-reaching effects, as the law provides that it is applicable to conduct outside the United States if the offender is a United States citizen or permanent resident alien or an organization organized under the laws of the United States government or a state government or an act in furtherance of the offense was committed in the United States.<sup>9</sup> Thus, if a multinational corporation incorporated in Delaware engages in trade secret theft in England or hires someone to do the evil deed abroad on its behalf after a meeting in the company's offices in New York to plan the theft, the offense may be punished in the United States.

Likewise, if an American investigator is hired by a foreign company to commit economic espionage abroad, he may be prosecuted in the United States (as well as in the country where the crime was committed, assuming that country prohibits trade secret theft).

### *D. Economic Espionage and Trade Secret Theft Defined*

A *trade secret* is defined as:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including

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8. 18 U.S.C. § 1836 (1996).

9. 18 U.S.C. § 1837 (1996).

patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

the owner thereof has taken reasonable measures to keep such information secret; and

the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public.<sup>10</sup>

Thus, in order for the theft to be actionable under this law, the owner must have taken some measures that objectively would be reasonable under the circumstances to protect the confidentiality of the trade secret information at issue, and the government must demonstrate that the secret has some economic value as a result of its confidentiality. Thus, it behooves corporate America to add to the compliance programs established to mitigate any punishment imposed under the Federal Sentencing Guidelines for Organization a program of trade secret protection. Attorneys who practice in this field will have to figure out what is *reasonable* in terms of protection and will have to keep up with what the courts are saying on the subject. On the defensive side, the company caught in this sort of conduct may wish to minimize the protective efforts of its competitive adversary in order to demonstrate that what appeared to be a trade secret was really readily available and thus, not a trade secret.

The intent required in order to be guilty of criminal conduct under the act is different, depending upon whether the theft has foreign ramifications or not. For economic espionage to be actionable under 18 U.S.C. §1831(a) (the foreign economic espionage offense), the offending individual or entity must have taken the trade secret knowingly “intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent.”<sup>11</sup> For the domestic theft of trade secrets offense, 18 U.S.C. §1832(a), the offender must knowingly have

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10. 18 U.S.C. § 1839 (3)(A), (3)(B) (1996).

11. 18 U.S.C. §1831(a) (1996).

intent to convert a trade secret, that is related to or included in a produce that is produced for or placed in interstate or foreign commerce, to the economic benefit or anyone other than the owner thereof, and intending or knowing that the offense will injure any owner of that trade secret.<sup>12</sup>

Thus, for a conviction of the domestic trade secret crime, the government must show not only the theft but also, in effect, that the theft would damage the owner and would economically benefit someone other than the owner. The government must also show that the theft occurred with respect to a product that is in interstate commerce.

In this regard, the Fifth and Seventh Circuits have articulated a doctrine of *inevitable disclosure* of trade secrets in subsequent employment, which simplifies proof of what is a theft. Under this theory, a change of employment will result in a theft of a trade secret when the two employers involved are competitors; the new position taken by the departing employee is comparable to or would inevitably involve knowledge gained in the previous position; the new employer did not do enough to protect against disclosure of trade secrets, and there was some evidence of intent to disclose trade secrets.<sup>13</sup> The First and Eighth Circuit have considered and rejected the doctrine.<sup>14</sup>

The law also will punish those who receive, buy, or possess the stolen trade secret information, knowing that it has been stolen or obtained without authorization.<sup>15</sup> Attempts and conspiracies to commit trade secret theft are also offenses under the Act.<sup>16</sup>

It is unclear what the status of reverse engineering will be under this new statute. Silicon Valley entrepreneurs have made fortunes by moving from company to company and using their knowledge acquired on their previous job for the benefit of their new employers. A disgruntled former employer, when anticipating a suit, for example, for sex discrimination, might launch a pre-emptive strike by suing for theft of trade secrets under the Economic Espionage Act. Likewise, when a group of disgruntled auto mechanics leaves dealership A for more remunerative

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12. 18 U.S.C. §1832(a) (1996).

13. See *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1192 (5th Cir. 1984); *PepsiCo Inc. v. Redmond*, 54 F.3d 1262, 1268 (7th Cir. 1995).

14. See *Campbell Soup Co. v. Giles*, 47 F.3d 467 (1st Cir. 1995) and *IBM Corp. v. Seagate Technology, Inc.*, 1991 U.S. Dist. Lexis 20406 (D. Minn. 1991), *remanded for a more specific statement of relief*, 962 F.2d 12 (8th Cir. 1992).

15. 18 U.S.C. § 1832 (a)(3) (1996).

16. 18 U.S.C. § 1832 (a)(4), (5) (1996).

work at dealership B and makes off with the list of loyal service customers, dealership B may end up vicariously liable if the new employees send out marketing letters to their old customers.

It is notable that this statute is broader in scope than most previous trade secret laws. By covering *business information*, the act covers data that may not be economically useful except by a competitor seeking financial information or expansion plans or other corporate intelligence. It also covers attempts to steal trade secrets and conspiracies to steal trade secrets.<sup>17</sup>

Perhaps because of the ambiguities of the statute and the situations to which it might be applied, Attorney General Janet Reno personally assured Senator Orrin Hatch prior to passage of the law that for five years following its effective date, any prosecution undertaken pursuant to the Act would have to be personally approved by the Attorney General, the Deputy Attorney General, or the Assistant Attorney General in charge of the Criminal Division. Traditional standards of case selection are likely to be applied in determining whether to go forward with a particular prosecution. Thus, the Department is likely to look at the economic value of the damage to the victim from the theft, the clarity of the proof of criminal intent, the measures in place to protect the secrecy of the information purloined, and the availability of civil remedies to redress the harm short of prison, huge fines, and forfeiture.

### *E. The EEA Does Not Preempt Other Laws*

The statute provides that it should not be construed as preempting or displacing any other civil or criminal remedies provided by any United States federal, state, commonwealth, possession, or territorial law for the misappropriation of trade secrets. It also does not affect the disclosure of information under the Freedom of Information Act.<sup>18</sup>

Thus, a corporate victim of trade secret theft may have an array of possible avenues of retaliation available to it. Attorneys must be careful, however, in selecting the remedies and considering a possible call to the FBI or the Department of Justice, not to run afoul of state bar ethical rules by improperly threatening criminal prosecution in order to gain advantage in an ongoing civil matter. It would be better to merely alert the FBI and let the government's investigation take its course without threatening the other side.

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17. 18 U.S.C. § 1832(a)(4), (5) (1996).

18. 5 U.S.C. § 552 (1996).

### F. Protecting the Trade Secret from Disclosure in Litigation

The statute anticipates that the proof of the offense may require the disclosure, in whole or in part, of the hitherto secret and valuable trade secret information. Corporate counsel should seek the benefit of 18 U.S.C. § 1835 and petition the court at the outset of the matter for an order to preserve the confidentiality of the trade secrets at issue. Should the court not understand the sensitivity of the issue and order its disclosure, the United States has the right to lodge an interlocutory appeal with the Court of Appeals to forestall such missteps.

### G. Enforcement Actions To Date

#### 1. United States v. Worthington<sup>19</sup>

Patrick Worthington, a maintenance supervisor at PPG Industries' fiberglass research center, misappropriated diskettes, blueprints and other types of confidential research information and offered them to the chief executive officer of Corning Glass, which is PPG's chief competitor. The Corning Glass CEO alerted PPG and the FBI. An undercover FBI agent met with Worthington and his brother, Daniel, to provide them with a \$1,000 down payment for the trade secrets. Both Patrick and Daniel Worthington were indicted under the Economic Espionage Act.<sup>20</sup> Patrick Worthington pled guilty and was sentenced on June 5, 1997 to fifteen months in jail. His brother, Daniel, who was in the deal for \$100, was sentenced to five years probation, including six months of home detention.

#### 2. United States v. Kai-Lo Hsu<sup>21</sup>

Kai-Lo Hsu, a technical director for Taiwan's Yuen Foong Paper Co., and Chester S. Ho, a biochemist and professor at a university in Taiwan, were arrested as part of an FBI sting operation at the Four Seasons Hotel in Philadelphia on June 14, 1997. An agent, posing as a corrupt Bristol-Myers scientist and a technology information broker, met with Mr. Kai-Lo Hsu and Mr. Ho. The objective was to steal trade secrets relating to Bristol Myers' anti-cancer drug, Taxol. Reportedly Mr. Ho was present at the meeting to verify the value of the Taxol technology which was confidential while Kai-Lo Hsu and Jessica Chou agreed to pay

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19. R. Mark Halligan, *Reported Criminal Arrests Under the Economic Espionage Act of 1996* (visited Mar. 28, 1998) <<http://www.execpc.com/~mhalign/indict.html>> (citing *United States v. Worthington*, Criminal No. 97-9 (W.D. Pa. 1996)).

20. 18 U.S.C. § 1832(a)(1), (3), (5) (1996).

21. Halligan, *supra* note 19 (citing *United States v. Kai-Lo Hsu*, Criminal No. 97-323 (E.D. Pa. 1997)).

\$400,000 for it. Ms. Chou is reportedly in Taiwan which does not have an extradition treaty with the United States. Kai-Lo Hsu and Chester Ho have been indicted under 18 U.S.C. § 1832(a)(4) for attempted theft of trade secrets and 18 U.S.C. § 1832(a)(5) for conspiracy to steal trade secrets.

### 3. United States v. Pin Yen Yang<sup>22</sup>

Pin Yen Yang and his daughter, Hwei Chen Yang (a/k/a Sally Yang) were arrested on September 4, 1997 at Cleveland's airport as they were about to embark on a trip to New York. Mr. Yang, age seventy, is the president of Four Pillars Enterprise Company, Ltd. of Taiwan. The company manufactures and sells pressure-sensitive products in Taiwan, Malaysia, the People's Republic of China, Singapore, and the United States. Sally Yang is an officer of the company which has more than 900 employees and annual revenues of more than \$150 million. The arrest followed conversations by Mr. Yang and his daughter with an employee of Avery Dennison Corporation, of Pasadena, California, which manufactures adhesive products such as postage stamps and mailing labels. The Yangs wanted to obtain Avery's trade secrets from the employee, who worked at Avery Dennison Corporation's facility in Concord, Ohio. The Avery employee cooperated with the FBI. Federal prosecutors estimate that the research and development costs expended to develop the information obtained by the defendants from Avery Dennison prior to their arrest at between \$50 and \$60 million. The Yangs were charged with mail and wire fraud, conspiracy to steal trade secrets under the Economic Espionage Act, money laundering, and receipt of stolen goods under 18 U.S.C. §§ 1341, 1343, 1832, 1956, and 2315 (1994).

### 4. United States v. Steven Louis Davis<sup>23</sup>

Steven Davis, a process control engineer for Wright Industries in Nashville was assigned to be the lead process control engineer when Gillette Company retained Wright Industries to assist in developing a new generation of razor systems. After working on the project for a few months, Wright Industries, at the request of Gillette, removed Davis from the project in late September 1996. Davis thereafter sent highly confidential engineering drawings to competitors of Gillette, including Bic Corporation, American Safety Razor, and Warner Lambert. Davis contacted potential purchasers by facsimile and E-mail and represented that he had 600 megs of Gillette's product, equipment, and assembly drawings for sale. In addition to violations of the Economic Espionage Act, 18

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22. United States v. Pin Yen Yang, Criminal No. 1:97MG0109 (N.D. Ohio 1997).

23. United States v. Steven Louis Davis, (M.D. Tenn. 1997).

U.S.C. § 1832(a)(2) and (3), Davis has been charged with wire fraud under 18 U.S.C. § 1343.

#### V. CONCLUDING THOUGHTS

The Economic Espionage Act of 1996 is one more step in the relentless march of the Congress toward criminalizing behavior hitherto considered the subject for civil litigation only. The Act provides a powerful new tool to protect the industrial and intellectual patrimony of corporate America. It also raises the stakes when a company fires an employee or hires a disgruntled employee of a competitor, acquires another company in the same or a related industry, or even when it trains its own employees on internal trade secrets. Corporate counsel should well develop procedures to guard against inadvertent violations.

# ASSET FORFEITURE: HOME AND ABROAD

*Steven L. Kessler*

Good intention will always be pleaded for every assumption of power. . . . [T]he Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

-Daniel Webster

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There are more than two hundred different forfeiture statutes, covering literally everything from soup to nuts. Each state has at least two forfeiture provisions, *i.e.*, one civil and one criminal, with some states having more. New York, for example, boasts no fewer than fifteen

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A graduate of the Cornell Law School, Mr. Kessler serves as a member of the House of Delegates of the New York State Bar Association and as editor of *One on One*, the award-winning publication of the 5,000-member General Practice Section of the New York State Bar Association. He is a member of the White Collar Crime Committee of the American Bar Association, the Criminal Justice Section of the New York State Bar Association, and the Forfeiture Abuse Task Force of the National Association of Criminal Defense Lawyers, and serves as co-chair of the Forfeiture Law subcommittee of the New York State Association of Criminal Defense Lawyers. An Adjunct Professor of Law at New York Law School, Mr. Kessler the author of *CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE* (Clark Boardman Callaghan 1993 & Supp. 1998) (3 volume treatise), and *NEW YORK CRIMINAL AND CIVIL FORFEITURES* (Gould Publishing 1998), and he is listed in *Who's Who in American Law*.



separate forfeiture statutes, fifteen different ways for the government to seize and forfeit your property.

The civil forfeiture statutes have been the most controversial and have caused most of the stir during the last several years. In general, they provide to law enforcement agencies or assistant United States Attorneys the authority to file a civil lawsuit against the offending property in civil term.

### I. HISTORY OF CIVIL FORFEITURE

Civil forfeiture laws are actually an anomaly in American law. They empower law enforcement agencies to seize money or other property they believe has been used in, is intended to be used in, or is proceeds of criminal activity. There is no need for a conviction before seizure or forfeiture. In fact, the property owner does not have to be charged with a crime. Civil forfeiture prosecutions are brought *in rem* against the culpable or guilty property. Since the property is guilty of the criminal activity, the legal fiction goes, the property is being seized and punished. No *individual* is being prosecuted. Therefore, fundamental constitutional protections such as the presumption of innocence, having the *government* convict *you* of the charge instead of you proving your innocence, and the right to be free from unjust private property *takings* by the government quite simply do not apply. Compounding this is that the procedures claimants must follow to contest a forfeiture are remarkably complicated, even for seasoned attorneys, and therefore give the government every advantage.

Unlike *criminal* forfeiture statutes, which require a conviction before property can be taken from an individual, civil forfeiture laws require only a showing that agents have probable cause to believe that the property was used or intended to be used to facilitate a crime, or that it represents the proceeds of a crime. It is difficult to conceive of a lower standard relating to criminal law. Civil forfeitures, after all, are criminal proceedings, no matter what the Supreme Court has held, with the government as plaintiff, a crime forming the basis of the action, and the property being guilty of involvement in a crime. This is especially troubling when you realize that, by and large, seizures are premised upon the essentially unchecked discretion of a cop.

Where did these laws come from? Despite being relatively new to us, the concept of civil forfeiture was acknowledged even before the Greeks. Some cite to the Bible. In Exodus, chapter 21, verse 28, it is written: "If an ox gore a man or a woman that they die, then the ox shall be surely stoned, and his flesh shall not be eaten. But the owner of the ox

shall be quit." The perfect civil forfeiture? Not really. Unlike in a true civil forfeiture, the Biblical sovereign did not acquire the offending property or its value. Nor did society benefit by eating the ox. Rather, this was social justice, meted out to discourage revenge from the deceased's family.<sup>1</sup>

As our predecessors traveled through the generations, they adopted many of the Biblical practices. Revenge was the common thread.<sup>2</sup> Rome had its Twelve Tables.<sup>3</sup> The Greeks followed closely behind.<sup>4</sup> And Britain had its common law. Indeed, at common law, civil forfeitures were in the nature of a deodand, the *spiritual predecessors of forfeiture statutes*.<sup>5</sup> Derived from the Latin phrase *Deo Dandum*, meaning, "to be given to God,"<sup>6</sup> the deodand itself originated in pre-Judeo-Christian practices.<sup>7</sup> These practices, similar to the Talmud's interpretation of the *goring ox* passage, reflect the view that the instrument of death is the accused and that religious atonement is required. Property or its value was given to the

1. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeiture, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 169, 180-181 (1973). Of course, were the owner aware of the dangerous propensity of the ox, the result would be different, both today and in Biblical times.

But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death.

*Exodus 21:29.*

According to the Talmud, the use of the phrase "and its flesh shall not be eaten" is intended as a prohibition against receiving benefit from the animal. This prohibition becomes effective from the moment the offending animal is convicted, even prior to its stoning. See TALMUD, TRACTATE BABA KAMMA 41a. Thus, the Biblical source for the notion of forfeiture does not contemplate a scheme under which a governing body or agency benefits from the use of the guilty property. See Steven L. Schwarcz & Alan E. Rothman, "Civil Forfeiture: A Higher Form of Commercial Law?", 62 FORD. L. REV. 287, 290 (Nov. 1993).

2. OLIVER W. HOLMES, THE COMMON LAW 34 (1881).

3. 1 SCOTT, THE CIVIL LAW 69 (1932). See also W. DURANT, STORY OF CIVILIZATION, (1972). "If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall . . . surrender the animal that caused the injury." 7 TWELVE TABLES 1, translated in 1 SCOTT, THE CIVIL LAW 69 (1932).

4. "We banished beyond our borders sticks and stones and steal, voiceless and mindless things, if they chance to kill a man; and if a man commits suicide, bury the hand that struck the blow afar from the body." Aeschines the Greek (389-314 B.C.E.) as quoted in the DRUG AGENTS' GUIDE TO FORFEITURE 2. See also OLIVER W. HOLMES, THE COMMON LAW (1881); *Ex Parte Lange*, 85 U.S. 163, 168 (1873).

5. OLIVER W. HOLMES, THE COMMON LAW (1881); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974). See, Note, *Bane of American Forfeiture Law — Banished at Last?*, 62 CORNELL L. REV. 768, 770 (1977).

6. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.16 (1974).

7. OLIVER W. HOLMES, THE COMMON LAW 1-38 (1881).

Crown "with the belief that the king would provide money for masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses."<sup>8</sup> For the kings, however, the motivation was hardly spiritual. It was pure, unadulterated greed. Sound familiar?

In medieval times, the scope of forfeiture was absolute. Known as "forfeiture of estate," it deprived the offender of all personal and real property.<sup>9</sup> Subsequently, under the guise of redressing a loss caused by criminal activity, civil forfeiture became a premium source of revenue for the Crown in common law England.<sup>10</sup> Centuries later, long after the religious purpose of the deodand had ended, the practice remained a source of revenue for the Crown and was further supported as a deterrent to negligence.<sup>11</sup> The final justification, however, remained revenue, and lots of it. It was fundraising at its best. Things were so frustrating for the commoner, and lord alike, in merry old England that, bowing to their pressure, one of the concessions granted in the Magna Carta was the creation of what was called the "year and the day" rule: The king held real property for non-treasonous offenses of one year and a day, after which time the property would revert to a tenant's lord.<sup>12</sup> Personality, however, would escheat to the Crown.

When the British left home and settled a New World called America, they brought with them many of their old, indeed despised, customs. Remarkably, too, when a custom, formerly distrusted, was seen from the opposite side of the fence for the first time, it looked much better. This was true with forfeiture. The first Congress of the United States abolished forfeiture of estate for federal offenses in 1790,<sup>13</sup> and the Federal Constitution protected property through both the Due Process Clause<sup>14</sup> and a specific limitation on the scope of forfeiture in the context of treason.<sup>15</sup> Nevertheless, the forfeiture tradition was maintained in the colonies

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8. *Pearson Yacht*, 416 U.S. at 681. Deodand was abolished by Parliament in 1846, and remedies for wrongful death developed in its place, with damages paid to those harmed by a person's death rather than to the State through the forfeiture of the offending property.

9. *United States v. Grande*, 620 F.2d 1026, 1038-1039 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980).

10. Finkelstein, *supra* note 1, at 169.

11. Torrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable Interests and Procedural Due Process*, 62 N. C. L. REV. 57 (1983).

12. MAGNA CARTA, cl. 32.

13. Act of Apr. 30, 1790, § 24, 1 Stat. 117. This provision is currently codified at 18 U.S.C. § 3563.

14. U.S. CONST. amend. V.

15. U.S. CONST. art. III, § 3, cl. 2 ("prohibiting [f]orfeiture except during the life of the person attained").

through the maritime and customs laws, the reason why some of today's more powerful federal forfeiture laws are codified in the admiralty laws.<sup>16</sup> The founding of a new nation did little to change these ancient traditions. Almost immediately following the adoption of the Constitution, ships and cargo were made subject to forfeiture under federal law.<sup>17</sup> The concept made sense then. Our fledgling Republic depended on customs duties for almost all of its revenue, and the ship owners who failed to pay the import duties on the cargo were the same people from whom we had just declared our independence! They were our enemies, not our citizens, and most of them were half a world away. In that context, there could be little to debate regarding the propriety of seizing and forfeiting their property.

Forfeiture quietly remained on the books until, one day, President Reagan's staff figured out that these laws could be used and abused as high powered weapons by law enforcement in the *War on Drugs*. The rest, as they say, is history.

## II. THE DRIVING FORCE BEHIND TODAY'S FORFEITURE: MONEY

One of the most alarming aspects of our current forfeiture scheme is that it permits law enforcement agencies to keep the proceeds of their forfeitures. This creates an overwhelming financial incentive for abuse, one that would tempt even the most honest cop. Probably the most remarkable example comes from Arizona. In one county, a statute provides that a police officer will receive a salary as long as there are enough funds in the forfeiture account to pay his salary. The local media coined this *collars for dollars*. Enough said.

Among the many courts that have expressed grave concern about these and other forfeiture practices is the Second Circuit Court of Appeals. In 1992, the Court, traditionally very conservative, said it was "enormously troubled by the governments' increasingly and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."<sup>18</sup>

Other federal and state courts have echoed similar concerns. In *United States v. One Parcel of Property*,<sup>19</sup> the Eighth Circuit stated: "We

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16. The English Navigation Acts in the 1600s required that all commodities shipped to the colonies be transported on British vessels. A violation of these laws resulted in the forfeiture of the illegally carried goods as well as the ships that transported them, a dear price to pay for an upstart industry in the colonies.

17. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 683 (1979).

18. *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2nd Cir. 1992).

19. *United States v. One Parcel of Property*, 964 F.2d 814, 818 (8th Cir. 1992).

are troubled by the government's view that any property, whether it be a hobos hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction." Abuse also was a concern in *Jones v. United States Drug Enforcement Administration*,<sup>20</sup> where the district court held that "the statutory scheme as well as its administrative implementation provides substantial opportunity for abuse and potentiality for corruption." The court continued with a pointed, and telling, observation: "The law enforcement agency has a direct financial interest in the enforcement of these laws. . . . The obviously dangerous potentiality for abuse extant in the forfeiture scheme should trigger, at the very least, heightened scrutiny by the courts when a seizure is contested."<sup>21</sup>

On the state level, at least one high court, familiar with forfeiture matters, has noted its concern. In *Wohlstrom v. Buchanan*,<sup>22</sup> the Arizona Supreme Court recounted the threat of forfeiture statutes upon an individuals due process rights.<sup>23</sup>

Yet, it has remained for two other courts to put the facts of the instant case in perspective. The Fourth Circuit observed:

One of the most potent weapons in the government's war on drugs is its ability to obtain the civil forfeiture of property that aids violations of the drug laws. . . . Congress has given this weapon increased power, expanding the war to every piece of real property involved in the narcotics trade. Yet even warfare is conducted by rules. It is the judiciary's responsibility to ensure that the civil forfeiture penalty falls only those property interests which spring rightly and justly into its reach. While we do not doubt that the anomalous circumstances of this case

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20. *Jones v. United States Drug Enforcement Administration*, 819 F.Supp. 698, 724 (M.D. Tenn. 1993).

21. *Id.*; see also *United States v. \$191,910 in United States Currency*, 16 F.3d 1051, 1069 (9th Cir. 1994) (disparity between government's and claimant's burdens in forfeiture proceedings "involves a serious risk that an innocent person will be deprived of his property"); *United States v. That Certain Real Property*, 798 F. Supp. 1540, 1553 (N.D. Ala. 1992) (discussing inherent problematic due process issues relating to civil forfeiture and government's *unchecked use* of civil forfeiture statutes).

22. *Wohlstrom v. Buchanan*, 884 P.2d 687 (Ariz. 1994).

23. See also *In re 1986 Chevrolet Corvette, Ariz.* Lexis 78, 169 Ariz. Adv. Rep. 30 (Ariz. 1994) (expressing concern over the government's increasing power in the area of forfeiture).

render it something of a *rara avis*, even the rarest of species deserve shelter under the law's aegis . . . .<sup>24</sup>

Most notably, the United States Supreme Court recognized the government's direct pecuniary interest in the outcome of forfeiture proceedings. In *United States v. James Daniel Good Real Property*,<sup>25</sup> Associate Justice Clarence Thomas, one of the Supreme Courts most ardent conservatives and the government's strongest supporters, wrote of his "distrust of the Government's aggressive use of broad civil forfeiture statutes." "I am disturbed," he continued, "by the breadth of the new civil forfeiture statutes . . . which subjects to forfeiture all real property that is used, or intended to be used, in the commission, or even the facilitation, of a federal drug offense."<sup>26</sup> Notably, the Justice went on, "ambitious modern [forfeiture] statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture."<sup>27</sup> Hence, "it may be necessary . . . to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture."<sup>28</sup>

Sadly, there is good reason for the distrust. Under the guise of attempting to recoup the *costs* of crime and crime prevention, from 1985 to 1996, the federal government has secured more than \$5 billion in forfeited proceeds, with another \$1.5 billion in the pipeline.<sup>29</sup> The United States Attorney's office in the Southern District of New York collected more than \$420 million between 1985 and 1994. Indeed, in 1994 alone, they brought in close to \$50 million, \$17 million *more than their annual budget*. The Eastern District of New York, during the same period, collected more than \$31 million, plus another \$70 million in civil judgments, settlements, criminal fines and assessments. Their operating budget is \$26 million. Even our deficit-oriented government has figured out that when your \$26 million investment shows a \$100 million return, you are doing something right. In short, the forfeiture laws have permitted the government to become a "full financial partner and participant in what is unquestionably the largest *business* in the country."<sup>30</sup>

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24. *United States v. Two Tracts of Real Property*, 998 F.2d 204, 213-214 (4th Cir. 1993) (emphasis supplied).

25. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

26. *Id.*

27. *Id.*

28. *Id.*

29. Susan Adams, *Forfeiting Rights*, FORBES MAGAZINE, May 20, 1996, at 96.

30. STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE § 1.01, 1-2 (Clark 1993 and Supp. 1998), quoting Sinoway, et al., *Current Trends in Asset Forfeiture* (California Attorneys for Criminal Justice, 1992).

The extent of the government's financial stake through the use of the forfeiture statutes came to light through released Department of Justice memoranda. In 1989, the Acting Deputy General, Edward S. G. Dennis, Jr. sent a memorandum indicating the need to meet the department's forfeiture budget: "If inadequate forfeiture resources are available to achieve the above goal, you will be expected to divert personnel from other activities or to seek assistance from other United States Attorneys offices, the criminal division and the executive office for United States Attorneys."<sup>31</sup>

In 1990, Attorney General Dick Thornburgh warned all federal prosecutors that the department was far short of its projection of \$470 million in forfeiture deposits with only 3 months remaining in fiscal 1990, and that they must increase the volume of forfeiture actions:

We must significantly increase production in order to reach our budget target. . . . Failure to achieve the \$470 million projection would expose the Departments forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.

Federal prosecutors realized the conflict of interest and skewing of priorities created by the forfeiture statutes. In 1993, after a new administration was installed at the Department of Justice (DOJ), the former director of the DOJ Asset Forfeiture Office, Michael Zeldin, remarked:

The intelligent thing to have done would have been to pick our cases more carefully and not overreach. We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws as a matter of pure law-enforcement objectives.<sup>32</sup>

In addition, the Department of Justice gives positive recognition and incentives to United States Attorneys offices on the basis of the amount of assets they seize. As Myles Malman, a former federal prosecutor from Florida, said: "There is nothing inherently wrong with rewarding people for the assets they seize. But there has to be clear communication that they

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31. Stephen Labaton, *Seize Property in Crime Cases Causes Concern*, N.Y. TIMES, May 31, 1993, at A1.

32. *Id.*

shouldn't sacrifice good judgment and conscionability for statistics. The system is subject to abuse."<sup>33</sup>

This aggressive forfeiture policy has caused and continues to cause abusive results. The Pittsburgh Press published a series of articles in August 1991. Following a ten-month investigation, the paper uncovered more than 400 instances of innocent people who had to forfeit money or property to federal authorities. More recently, the Arizona Tribune and the Orlando Sentinel have uncovered similar abuses.<sup>34</sup> Representative Henry Hyde, R-Ill., recently estimated that about eighty percent of the people losing property under federal civil asset forfeiture laws *are never even charged with a crime*.<sup>35</sup> Despite a potential claimant's lack of a nexus to illegal activity, the forfeiture process goes on simply because many claimants do not have the resources to challenge federal authorities. Economist Sam Staley, President of the Urban Policy Research Institute, noted that "[m]any [claimants] lack the resources and sophistication to fight a prolonged court battle . . . ."<sup>36</sup> This comes as no surprise to federal authorities, since, statistically, if they seize and hold the property, the forfeiture process itself will force the claimant to abandon his or her claim more than *eighty percent* of the time.

This government-sanctioned policy directing an agency, whenever possible, to seize property to meet budget projections is reflected in the Department of Justice's incentives for using this process and the statistical knowledge that at least eighty percent of the claimants run out of the financial resources and energy to fight the government and go away. This has resulted in all seizing agencies retaining seized property even if an investigation reveals that the property involved is not associated with illicit activity or the property owner is an innocent owner. Not only is this policy *de facto* outright theft, but it also amounts to a clear violation of the Fifth Amendments Due Process Clause.

The broad campaign of the Justice Department to abuse the forfeiture statutes indicates a systematic conspiracy to indiscriminately deny the due process, equal protection and First and Fourth Amendment rights of citizens. This is possible because the forfeiture statutes do not put the initial burden on the government to institute proceedings promptly, upon notice, with an opportunity to be heard, and show not only probable cause, but lack of innocent ownership or other defense *by proof beyond a*

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33. *Id.*

34. See KESSLER, *supra* note 30.

35. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (The Cato Institute, 1995).

36. Carl Horowitz, INVESTORS BUSINESS DAILY, Dec. 9, 1993, at 1.



*reasonable doubt*. Given the cumulative abuses, the statutes are unconstitutional as applied.

### III. PROPOSED LEGISLATIVE FORFEITURE REFORM

After the Supreme Court last term made a mockery of our Constitution in *Bennis v. Michigan*<sup>37</sup> and *United States v. Ursery*,<sup>38</sup> House Judiciary Chairman Henry Hyde, a Reagan Republican from Illinois, introduced the Civil Asset Forfeiture Reform Act (H.R. 1835).<sup>39</sup> He and Representative John Conyers, a Carter Democrat from Michigan and the ranking Democrat on the Committee, have joined hands on this one, in an attempt to remedy some of the worst problems affecting federal civil forfeiture laws.

Some of the important changes in the new bill are:

- 1) Place the burden of proof on the government to prove that, by clear and convincing evidence, the property is subject to forfeiture.
- 2) Provide for the appointment of counsel for property owners who cannot afford lawyers to challenge forfeitures, paid for from the Federal Asset Forfeiture Fund.
- 3) Clarify the innocent ownership defense, most specifically to state that an owner who takes reasonable steps to prevent others from using the property for criminal activity can get his property back.
- 4) Eliminate the requirement that owners post a bond before being allowed to challenge the action. What a concept! Your house has been seized, your business has been shut down, all of your money has been seized or frozen, and, before you are permitted to challenge the seizure, you have to post a bond of \$5,000 or ten percent of the property's value, whichever is less.
- 5) Extend from 10 to 30 days the time for property owners to file a claim for the return of their property.

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37. *Bennis v. Michigan*, 116 S.Ct. 994 (1996).

38. *United States v. Ursery*, 116 S.Ct. 2135 (1996).

39. This is the successor to H.R. 1916.

- 6) Require the government to institute judicial forfeiture proceedings within ninety days after the filing of a claim
- 7) Permit property owners to sue the government for negligence in handling or storage of their property, if the property is not ultimately forfeited.
- 8) Provide federal courts with the ability to grant possession of the contested property to the owner during the pendency of the forfeiture proceeding, *if* possession by the government during the action would cause the owner to suffer substantial hardship (such as preventing the functioning of a business or leaving an owner homeless).

As originally enacted, this bill goes a long way toward correcting the abuses experienced under the current structure. Not surprisingly, the Department of Justice has fought Congress, and fought hard, to change the bill, introducing its own version of a reform measure. No hearings have been conducted regarding the DOJ-drafted H.R. 1965, nor has the bill been subjected to public scrutiny or intensive committee review. At sixty-nine pages, it is fifty-four pages longer than H.R. 1835. Quite simply, it mocks the reform effort of H.R. 1835.

It is noteworthy that H.R. 1965 is supported by no organizations other than the Department of Justice and its client agencies, all of whom have a direct interest in expanding their forfeiture powers. As illustrated above, forfeited assets serve as supplemental budget funds which go directly into the agencies coffers.

A review of the following passages in H.R. 1965 reveals that its passage is worse than no reform at all.

- 1) It permits the government to seize and hold private property even *without* probable cause, while it uses depositions, interrogatories and other discovery mechanisms to justify its seizure and after-the-fact filing of a complaint. This also imposes costly pre-trial discovery burdens on the innocent private property owner.
- 2) It defines proceeds so broadly as to include gross receipts of an offense, without any allowance for the cost of legitimate goods and services provided by the offender, *e.g.*, the otherwise innocent merchant. The only relief provided is in unduly limited number of fraud cases. But this does not apply to wire and mail fraud, where RICO or money laundering activity is involved

Congress charges that are prevalent in a large number of regulatory and other white collar crime indictments.

3) It permits the *pre-trial restraint of substitute assets*. This restraint has never before been authorized by statute and has been specifically rejected under numerous theories by every circuit court addressing the issue since 1991. Among other things, this would prevent the charged individual from retaining counsel and paying for the defense with his or her own assets before being found to have committed the crime with which he or she has been charged.

4) It limits the definition of innocent owner or third party to purchasers of goods and services, thereby expressly seeking to overturn Supreme Court precedent including donees, banks and other innocent, bona fide *sellers* of goods and services.

5) It restricts the appointment of counsel for indigent claimants to cases meeting Star Chamber procedural requirements, an anathema to American law. The claimant requesting court-appointed counsel must submit to wide open cross-examination by the federal prosecutor, on *any* issue, including the merits of the case, before an appointment can take place.

The DOJ proposal is abusive and unfair. If reform is indeed desired, H.R. 1965 should be rejected in Congress, and the bi-partisan supported H.R. 1835 should be adopted.

#### IV. FORFEITING ASSETS OUTSIDE THE UNITED STATES

So how *do* these expansive laws affect assets outside the United States? The major case in this area is *United States v. All Funds on Deposit in Any Accounts*.<sup>40</sup>

In *All Funds*, the government sought funds on deposit in the claimant's name in bank accounts in England. The District Court found that it had *in rem* jurisdiction over foreign accounts, and granted summary judgment for the government. Claimant appealed. The Second Circuit affirmed, holding that: actual or constructive control of property was required for *in rem* jurisdiction, and the district court had constructive control and therefore properly asserted *in rem* jurisdiction over funds in the United Kingdom.

What was the basis of the courts decision? Indeed, *in rem*

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40. *United States v. All Funds on Deposit in Any Accounts*, 63 F.3d 148 (2d Cir. 1995).

jurisdiction over property that isn't even in your *country* that's absurd! Not according to the Second Circuit.

The court began with the statute. In response to the inability of a district court to effect service outside its state's borders, Congress enacted 28 U.S.C § 1355(d), which provides that a district court "with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action." This national service of process provision clearly conferred *in rem* jurisdiction on district courts in forfeiture proceedings with respect to property located within another judicial district in the United States.<sup>41</sup> But no published opinion had applied § 1355 to property located in a foreign country.

The government argued that § 1355 obviated the need for a district court to exercise any degree of control over property to sustain a forfeiture proceeding. According to the government, the only relevant inquiry under § 1355 is whether any of the conduct giving rise to the forfeiture proceeding occurred in the district in which the action was commenced, even if the property is located in a foreign country.

The Second Circuit rejected this argument. Although Congress certainly intended to streamline civil forfeiture proceedings by amending § 1355, even with respect to property located in foreign countries, the court did not believe that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdiction. The circuit cited the Supreme Court decision in *United States v. James Daniel Good Real Property*,<sup>42</sup> where the Court said that "to institute and perfect proceedings *in rem*, . . . the thing should be actually or constructively within the reach of the Court."<sup>43</sup> This control is required in addition to the requirements of subject matter jurisdiction and venue. Therefore, the issue for the Second Circuit was *control*: whether the property was within the actual or constructive control of the district court in which the action is commenced.

So where was the court's control? Brooklyn to Buckingham Palace? The claimant argued that the District Court lacked any degree of control because England was not obliged to remit the seized funds to the United States. There was no legal entitlement of the United States to the

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41. See *United States v. \$633,021.67*, 842 F. Supp. 528, 531-32 (N.D. Ga. 1993); *United States v. Contents of Account No. 2033301*, 831 F. Supp. 337, 340 (S.D.N.Y. 1993).

42. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

43. See also *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, (1992) ("the court must have actual or constructive control of the res when an *in rem* forfeiture suit is initiated").

funds, either under British law or a bilateral treaty, which might require the British authorities to turn over the confiscated funds to the United States. Since neither existed, claimant argued, there is no constructive control.

But the Second Circuit disagreed. Notwithstanding the absence of a binding obligation on the part of England to relinquish the funds, the Court concluded that the district court had constructive control of the funds by virtue of the demonstrated cooperation of the British government pursuant to the 1988 Treaty and the Drug Trafficking Offenses Act. In 1990, the British High Court issued a restraining order freezing the funds based solely on a request by the United States. In September 1993, at the request of the United States Marshals Service, British law enforcement officials served copies of the forfeiture complaint and warrant on the British banks holding the funds. And in 1994, the 1990 restraining order was continued by the High Court.

Therefore, the British courts and law enforcement acted essentially as agents of the United States for purposes of this forfeiture action. Every action of the British law enforcement officials was in direct response to requests from American authorities. Although the Second Circuit refused to delineate the precise scope of what will constitute constructive control in future cases — *and probably why this case has not been followed* — the court was satisfied that at least under *these* facts, the government met its burden of demonstrating that the British government would turn over at least a portion of the seized funds to the United States, thereby vesting the district court with the requisite constructive control over the funds.

Noteworthy of review is *In re F*,<sup>44</sup> a situation reversing the facts of *All Funds*. In *In re F*, the British High Court enforced a forfeiture order from an American court against British assets. The court ruled that enforcing the American order would not be contrary to the interests of justice pursuant to section 26(A)(1)(c) of the Drug Trafficking Offenses Act of 1986. The court noted the importance to recognize the seriousness and scale of drug trafficking, the underlying criminality in the forfeiture proceeding, and the sophistication of asset concealment and money laundering. The Vienna Drug Convention and the United States-United Kingdom bilateral agreement of assisting in proceedings for the freezing, seizure and forfeiture of the proceeds of drug trafficking require international cooperation while simultaneously ensuring the maintenance of

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44. This decision, dated November 29, 1996, is discussed extensively in *British Court Enforces U.S. Civil Forfeiture Order*, 13 INTERNATIONAL ENFORCEMENT LAW REPORTER, 362 (Sep. 1997), and in *US Civil Forfeitures Now Enforced in England, British Dependent Territories*, 1 ASSET PROTECTION INT'L 9 (Aug. 1997).

the basic concepts of English justice.

The British court had no problem upholding the reversal of the burden of proof in the American proceeding regarding standing or the underlying issue of whether the funds were the proceeds of drug trafficking. The court did not find these procedures so contrary to the English concepts of justice as to prevent the court from reaching a conclusion that enforcement of the forfeiture order is not contrary to the interests of justice.

The bottom line regarding the law in this country on the forfeiture of foreign assets in domestic litigation is that there appears to be no legislative or judicial gloss or guidance other than the cases discussed. Prosecutors cite *All Funds* as gospel, permitting the seizure and forfeiture of foreign assets. Defense attorneys distinguish *All Funds* quite properly, I think, on the facts, as, in fact, the Second Circuit did. What the courts will do in the future is anyone's guess. What is interesting, however, is the absence of any other published decision since August 1995. It appears that neither side is willing to take the chance on this one just yet, preferring instead to work out some compromise.

This area promises to be an exciting one to watch. Given the questions relating to the constitutionality of civil forfeiture in normal, run-of-the-mill situations in the United States, including the burden of proof, admissibility of hearsay, Eighth Amendment concerns, questions of standing, and protections more in line with criminal prosecutions, expanding the results of these already questionable procedures could have a chilling effect upon the Constitution as we know it. It remains to be seen how far the courts are willing to bend to support the Executive Branch's seemingly insatiable appetite in the name of the War on Drugs.

# FACILITATING ACCOUNTABILITY: THE POTENTIAL VALUE OF INTERNATIONAL GUIDELINES AGAINST IMPUNITY

*Madeline Morris\**

We strive to overcome impunity for international crimes such as genocide, war crimes, and crimes against humanity. Our reasons may include a vision of justice and perhaps a hope for deterrence.

Notwithstanding our aspirations to establish a regime of accountability, impunity remains a recurrent pattern. Where an effort at accountability is undertaken at all, it consistently is approached through a second-best alternative to full and complete accountability — some form of partial accountability and, hence, partial impunity. I will begin by briefly examining the reasons for this consistent pattern of compromise and then consider what contribution international guidelines on accountability might make in moving toward a regime of consistent and meaningful accountability.

Holding perpetrators fully accountable for their crimes would include appropriate trial and punishment of each individual responsible for the crimes committed, together with appropriate reparations made by perpetrators to victims. In many contexts, one would wish also to utilize some form of truth commission to ensure the credible and authoritative revelation, documentation and memorialization of the events in question as a comprehensive whole.

But that ideal of full accountability for international crimes is never, in practice, attained. National and international efforts at achieving accountability for such crimes typically resort to means designed to render something less than full accountability. This occurs for three identifiable reasons.

First, the resources required to achieve full accountability often are prohibitive. The offenses in question typically involve large numbers of perpetrators and victims. Prosecutions and other accountability mechanisms as well as victim compensation schemes all therefore demand extensive financial, physical, and human resources. Often, those demands arise in post-conflict contexts in which the nations affected suffer from a

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dearth of resources. Rwanda provides perhaps the most extreme example. There, tens of thousands are suspected of participation in genocide. The Rwandan judiciary, along with much of the national infrastructure, was destroyed in the course of the 1994 genocide and war. The resources required to achieve full accountability in each case in Rwanda would quickly overwhelm national capacities.

The second reason for the pattern of compromise is that political considerations may constrain the extent to which accountability is pursued. Such constraints arise from the need to continue to live with (and perhaps to share power with or even to work toward reconciliation with) the perpetrator population or constituency. Argentina and South Africa exemplify two faces of this phenomenon. In Argentina, threats of military insurrection halted the Alfonsín government's prosecutorial efforts to hold accountable perpetrators of human rights abuses committed under the former military regime. In South Africa's transition from apartheid, a negotiated settlement to a political conflict that had already involved bloodshed and had the potential to involve much more included a rather robust amnesty provision. Such precarious balances of power, sometimes involving military threats, often place political constraints upon the degree of accountability to be sought.

Third and finally, all too often accountability fails for lack of will at national or international levels. In such cases, there may be a denial that the crimes were committed or crimes may be acknowledged, but resource limitations or political constraints such as those just discussed may be used as a pretext for inaction that is actually born of a lack of will. Failures of will at the international level clearly have impeded the efficacy of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R) since their inception. Lack of commitment to the success of the ICTY/R on the part of elements of the international community has been reflected in a paucity of funding, failure to arrest indictees, and other forms of obstructionism.

Because of these factors of resource limitations, political constraints, or lack of will (or some combination of the three), national and international bodies charged with the handling of international crimes typically adopt a compromise or second-best approach. That approach usually is comprised of some or all of the following elements. First, a decision may be made to pursue accountability only for some subset of the individuals responsible for the crimes. The ICTY/R, for example, is expected to prosecute at most a few hundred of the thousands of perpetrators in the former Yugoslavia and Rwanda. The remaining bulk of the perpetrators will have to be prosecuted in national courts or not at all. And in South Africa, for instance, an amnesty is made available under



specified conditions to all perpetrators of the relevant crimes except for some few whom the amnesty-granting authority determines committed crimes disproportionate to their political purpose.

A second element of a compromise approach may be some form of plea-bargaining. Rwanda, for example, has passed specialized legislation offering all but the most culpable category of perpetrators a substantial sentence reduction in return for a full confession and guilty plea.

Third, a sentence-reduction may be provided for *all* perpetrators, quite *apart* from a plea-bargain program. This may be done to relieve the state of the long-term burden of supporting a massive prison population or may be done in the interests of reconciliation.

Fourth, legal action may be taken against perpetrators for lesser offenses than the genocide, war crimes or crimes against humanity actually committed. One version of this is prosecution for ordinary crimes (such as murder or rape) where national legislation provides only for such offenses and not for the greater, international crimes. Another frequently used mechanism for taking legal action for a lesser offense is deprivation of citizenship or immigrant status and, possibly, deportation on the ground that the individual violated immigration regulations by failing to disclose his criminal acts when applying for immigrant status or citizenship.

Second best approaches are taken not only in place of full criminal prosecution but also in place of civil reparations from perpetrators to victims. One such compromise is the award of an unenforceable (or probably unenforceable) civil judgment (for example, where the perpetrators' assets are outside of the country). Another compromise approach to reparations is where a successor government (or the international community) provides reparations to victims rather than the perpetrators being made to do so. While often indispensable for purposes of acknowledgment and rehabilitation of victims, this approach makes no inroads against the impunity of perpetrators.

Finally, there are those approaches to accountability that are not inherently compromises but are second-best when adopted in lieu of, rather than in conjunction with, other mechanisms for accountability. These include lustration and truth commissions, both of which may serve important functions, but since they provide neither for criminal liability nor for reparations, they cannot provide anything approaching full accountability.

An array of compromise approaches to accountability thus has been employed over the years by international as well as national entities. Each compromise renders an outcome of partial accountability and, hence, partial impunity. The draft Statute for an International Criminal Court also does not offer a panacea of accountability, having strictly limiting

jurisdictional provisions, and making only a weak mention of anything approximating victim reparations. Accountability, thus, has not been and will not in the foreseeable future become an all or nothing question, but rather must be viewed as a matter of degree.

In sum, there is a spectrum of possible outcomes between complete impunity and full accountability. As I have discussed, outcomes that fall short of full accountability often are attributable to resource limitations and political constraints as well as to a lack of will. It is with these points in mind that I want now to consider the advisability of developing international guidelines on accountability.

Given the predictable obstacles to accountability and the spectrum of possible outcomes between complete impunity and full accountability, we must ask, in considering guidelines on accountability, what forms of accountability such guidelines would mandate. The guidelines might provide that the type and extent of accountability that states are obliged to establish would vary depending upon specified factors, which I will discuss. The guidelines might also very usefully include a set of *facilitative provisions* that would delineate mechanisms for the provision of assistance to the states bearing the primary responsibilities for accountability in order to facilitate their overcoming the predictable obstacles to accountability.

Several factors would be relevant in determining in each context the type of accountability mechanisms required of states and the extent of their necessary scope. The most obvious of these factors would be the nature of the offenses committed. Presumably, genocide, crimes against humanity and grave breaches of the Geneva Conventions would give rise to the strictest accountability requirements in guidelines that address a range of international crimes.

Additional factors determining the type and extent of accountability required would relate to the three chronic obstacles to accountability: resource limitations, political constraints, and lack of will. Resource limitations and political constraints may diminish the degree of accountability and redress that a state can realistically be required to achieve in a given context. For example, where the number of perpetrators is high and availability of resources is low, the number of defendants to be prosecuted may be smaller than the total number of perpetrators. However, a diminution in standards of accountability should be the very last resort, not the first response, to such obstacles. The first line of response should be the provision of international *facilitation* in overcoming those obstacles in order to achieve the greatest possible measure of accountability. Thus, rather than only clarifying and reiterating the mandate to achieve accountability, it may be useful for

guidelines on accountability to include facilitative provisions that focus on providing assistance in overcoming the predictable obstacles to accountability.

In this regard, the guidelines could delineate responsibilities of member states to facilitate the efforts of those states bearing the primary responsibility for accountability by providing resources (financial, human or physical) to a specified extent when delineated conditions arise warranting such assistance. In particular, the guidelines might provide for the creation of a judicial rapid reaction force or international legal assistance consortium prepared to reinforce, supplement, and assist in the rehabilitation of post-conflict national justice systems. Such an entity would be prepared to respond quickly with the specialized expertise required to help ensure accountability and judicial rehabilitation in a post-conflict environment.

The guidelines' facilitative provisions might also address what I will term a lack of political resources, which may often hamper national efforts at establishing accountability. A lack of political resources would be reflected in difficulties in gaining extradition, in obtaining evidence outside the country, or in gaining access to perpetrators' assets that are outside the country. The guidelines' facilitative provisions could help to overcome political resource limitations by providing for forms of judicial cooperation including special extradition or transfer arrangements, mechanisms for evidence provision, and methods for freezing and accessing perpetrators' offshore assets.

Addressing the second of the three major obstacles to accountability, *political constraints*, will be more complex. The parties might undertake to provide mediation or even military intervention to foster accountability under some circumstances. One can readily envision limits to what would be possible in this regard. The mixed results of peacekeeping and related missions trace those limits all too graphically. Nevertheless, diplomatic and military interventions can be effective in some contexts, and could be brought much more to bear in the cause of accountability.

A special problem, falling within the category of political constraints, is the risk of bias or the appearance of bias in the national accountability process. Where the regime administering accountability does so after prevailing in a conflict with those now being brought to justice, the reality or appearance of victors' justice may taint the proceedings, undermining their claim to legitimacy. One form of international facilitation that may help to ameliorate this potential problem would be the provision of international monitoring to help ensure the impartiality of the

accountability process. If the monitoring agency has the confidence of the parties (particularly of the party fearing bias), then the monitoring function may be valuable in minimizing the potential problem of bias or the appearance of bias in the accountability process.

Finally, the guidelines could address a lack of will to pursue accountability. A specific delineation of the extent and form of accountability mandated under specified conditions would clarify the parties' obligations. With obligations clarified, pressure for compliance could be brought to bear. At the same time, assuring assistance in overcoming resource limitations and political constraints would render those obstacles less readily available as pretexts for inaction actually born of a lack of will.

A set of guidelines on accountability could, in its preamble, articulate the aspiration of eliminating impunity. In their substantive provisions, the guidelines could clarify and articulate what is required nationally and internationally in the pursuit of accountability. The facilitative provisions could ensure assistance in overcoming the predictable obstacles to accountability. By doing all of that, the guidelines could eliminate ambiguities, obstacles and excuses so that appropriate pressure could be brought to bear on those who would otherwise lack the will to pursue accountability. By crafting guidelines that clarify national and international responsibilities to establish accountability and that also provide for facilitation and assistance to states bearing primary responsibility for establishing that accountability, the likelihood is heightened that some substantial measure of accountability will, in fact, be achieved. The key in drafting guidelines on accountability would be to facilitate as well as to demand the greatest degree of accountability that is realistically possible in order to maximize the degree of accountability achieved in each instance in which perpetrators must be called to account.

# THE FACILITATION OF NATIONAL AND INTERNATIONAL ACCOUNTABILITY MECHANISMS: THE CREATION OF THE INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM (ILAC)

*Mark S. Ellis\**

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In early 1997, Professor M. Cherif Bassiouni<sup>1</sup> assembled a group of individuals to discuss the creation of a set of guiding principles for combatting impunity for international crimes. The group included myself, Professor Michael Scharf,<sup>2</sup> Professor Paul Williams,<sup>3</sup> and Professor Madeline Morris.<sup>4</sup> During a period of six months, this group worked on drafting a set of guidelines that would prohibit states from granting amnesty, pardons, or token sentences to persons responsible for committing international crimes. Once completed, the guidelines would be provided to the international and United Nations community for consideration and possible adoption.

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2. Michael Scharf is an Associate Professor of Law and Director of the Center for International Law and Policy, New England School of Law.

3. Paul Williams is an Associate Professor of Law at American University; Senior Associate, Carnegie Endowment for International Peace; and Executive Director of the Public International Law and Policy Group.

4. Madeline Morris is a Professor of Law at Duke University School of Law.

One component of the proposed guidelines is the creation of a mechanism to facilitate and coordinate international efforts in bringing the perpetrators of international crimes to justice and in rehabilitating the national judicial systems of affected states. Madeline Morris and I were assigned to draft this section of the guidelines.

## I. INTRODUCTION

Justice systems are among those institutions that suffer most during violent conflicts. The collapse of state institutions like the judiciary is a fundamental cause for the subsequent failure of the legal system and the general breakdown of the rule of law. In a post-conflict intervention, the international community must focus its efforts beyond peacekeeping and humanitarian missions. There must be comprehensive efforts to support structures that will ensure a lasting peace. Ensuring accountability and rehabilitating the judicial system are fundamental to this effort.

There is a general consensus that the United Nations, international agencies, Non-Governmental Organizations (NGOs), and individual governments providing post-conflict assistance in the justice sector need to better coordinate their activities and ensure that programs are complementary and collectively meeting the needs of the host country. There is currently no international mechanism to bring together NGOs, national governments, and United Nations agencies for post-conflict accountability and judicial rehabilitation. There is also a need to react rapidly to a post-conflict situation in order to gain credibility and separate support from local NGOs. At two recent international conferences,<sup>5</sup> individuals representing NGOs, national governments, international organizations, and academia met to recommend ways to improve the international community's approach to ensure accountability for war criminals and met for assisting countries in judicial rehabilitation during a post-conflict period. One suggestion that emerged from the first conference and was further discussed at the second conference was the creation of a *judicial response unit* that could quickly respond to the immediate and somewhat longer-term needs of judicial systems in post-conflict environments.

This memo sets forth a framework for the creation of the International Legal Assistance Consortium (ILAC). In essence, ILAC, in the aftermath of violent conflicts, would be able to facilitate and coordinate NGO, government, and United Nations efforts in two crucial areas:

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5. Both the March, 1997 and the October, 1997 conferences were organized by the Stanley Foundation.

bringing war criminals to justice, and rehabilitating the national judicial and legal systems.

ILAC would work closely with international peace keepers, who assume *de facto*, if not *de jure*, involvement in law enforcement functions during a post-conflict situation. To date, peace keepers, civilian police, and international police monitors have been forced to operate in environments where the local criminal justice system has been decimated or is simply non-existent.

ILAC would enter the post-conflict environment simultaneously with, or as a close follow-up to, peacekeeping operations. Serving as a locus of international legal assistance and domestic NGO involvement, ILAC would coordinate the efforts of specialized agencies, NGOs, and donor governments. Bringing together ideas and people, ILAC would mobilize forces to sign onto a common set of principles and goals and to operate in a coordinated and efficient manner.

ILAC would also focus on pressuring national governments to pursue war crimes and human rights abuse prosecutions. Countries emerging from domestic or international conflict are generally fragile and are almost certainly grappling with the traumatic effects of recently committed war crimes and human rights abuses. Often, members of emerging ruling governments have themselves violated international humanitarian law and are thus more likely to advocate for a general policy of amnesty, or other form of impunity, rather than a policy of accountability. Governments in a post-conflict environment will frequently argue that impunity and quick reconciliation are the only possible avenues, considering that the destroyed judicial system is not capable of prosecuting the alleged human rights abuses. ILAC will foster governments' compliance with their international obligations to prosecute alleged war criminals and human rights violators. In addition, ILAC's presence may help to deter further violations of international humanitarian law.

## II. THE ILAC MISSION

ILAC will be an association of international NGOs working together to promote the rule of law throughout the world. ILAC will work closely with local NGOs in affected States to ensure their immediate involvement in the assistance projects.

Realizing that an independent and effectively run judicial system is the *sine qua non* of the rule of law, ILAC will provide technical legal assistance focused on the prosecution of alleged war criminals and human rights abusers and on judicial restructuring in countries emerging from domestic or international armed conflict, and it will be committed to

effectuating the appropriate enforcement of humanitarian law and to rebuilding their legal systems. Where appropriate, ILAC will also provide services to facilitate the interaction of national and international criminal jurisdictions.

Because ILAC is comprised of international NGOs experienced in analyzing the state of legal systems and providing assistance to countries developing their national judicial systems, it will be able to respond quickly and effectively in providing needed post-conflict legal assistance.

ILAC will be firmly committed to the principles of national sovereignty. ILAC will not seek to promote a particular legal system, realizing that a broad-minded spirit towards other cultures and awareness of the strengths of different legal systems are necessary to achieve the goal of establishing effective judicial systems throughout the world.

ILAC will be premised on the belief that assistance in developing judicial systems must be undertaken with the consent of national governments. Cooperation between ILAC and national governments is necessary if ILAC assistance is to be beneficial.

ILAC will be politically neutral, and it will conduct its work in a manner that is transparent to the international community.

ILAC will be committed to a system of continuing self-evaluation, and it will reform its practices in order to best meet the needs of the victims of human rights abuses and to further the principles of justice and fairness within the international community.

### III. THE STRUCTURE OF ILAC

ILAC will be a separate non-profit entity comprised of international NGOs who are actively engaged in the development of national judicial systems (*e.g.*, the American Bar Association's Central and East European Law Initiative (CEELI), the International Bar Association, Réseau des Citoyens, International Judges' Association, Soros, and Netherlands Association for the Judiciary). It will be particularly important for ILAC to be comprised of a full range of international NGOs who have proven themselves to be capable of taking on the complex and time-consuming responsibilities of post-conflict judicial reconstruction.

Pursuant to ILAC's by-laws, ILAC's members will elect an Executive Board. The Board will be comprised of five permanent members (to ensure geographical and program diversity), six rotating members, and three Government/Agency Advisory Council members.

ILAC will have a permanent headquarters and a full-time staff, consisting of a Director (who will oversee all ILAC operations); an Administrative Assistant (who will assist the Executive Director); a Fund



Raiser/Development Director (responsible for securing administrative and programmatic funding); an Outreach Coordinator (responsible for maintaining contact with members and securing personnel support for program implementation); a Program Director (responsible for all logistical support for implementing the two Rapid Response Programs, including training mission participants); a Research Director (responsible for preparing briefing papers for the ILAC missions); and an Accountant (responsible for the overall financial management of the project).

ILAC members may decide to send personnel to the permanent headquarters.

#### IV. THE GOVERNANCE OF ILAC

In order for ILAC to effectively accomplish its mission, particularly the provision of on-ground technical legal assistance, ILAC must gain international stature and authority. This will allow ILAC to more easily mobilize national and international support for its work and to achieve legal standing to quickly implement its programs in a host country.

The United Nations (*e.g.*, U.N. DPKO, U.N. Human Rights Center) may be an appropriate agency to undertake a cooperative role with ILAC. There is already a close working relationship between United Nations agencies and international NGOs. ILAC will also have to secure close working relations with States, which may be called upon to intervene in a post-conflict situation.

The cooperation between the United Nations and ILAC, and support for ILAC's work, could be part of a larger United Nations Standby Agreement (focused on international legal NGOs) that would permit the United Nations to utilize ILAC when responding to affected States. The paramount issue would be to ensure that ILAC could mobilize and engage rapidly under United Nations auspices.

States may also want to utilize ILAC in their unilateral response to a post-conflict situation. For instance, the United States Agency for International Development (USAID) may want to call upon ILAC to assist the agency in providing immediate assistance to a State emerging from conflict. An affected State may also appeal directly to ILAC for assistance.

#### V. COORDINATING MECHANISM FOR ILAC

The main programmatic objective of ILAC will be to rapidly and effectively provide assistance to post-conflict national judicial systems. In fulfilling its mission, ILAC will be able to provide two teams of legal experts to assist the host country in the post-conflict environment. ILAC

will be capable of sending two different types of teams of legal experts to assist the host country in the post-conflict environment. Depending on the needs of the affected State, one or both types of teams may be utilized.

#### *A. Judicial Accountability Response Unit*

The Judicial Accountability Response Unit (JARU) will support international efforts to bring war criminals and human rights offenders to justice. The JARU will be comprised of legal experts selected by ILAC. The JARU will work closely with the ICC or any *ad hoc* tribunal established to prosecute suspected war criminals and violators of international humanitarian law.

The JARU will remain in country and focus on the following:

- 1) Assist the government in designing a systematic approach for prosecuting war criminals and human rights offenders;
- 2) Assist the government in implementing the investigation and prosecution of war criminals and human rights offenders (including assistance to judges, prosecutors and defense attorneys);
- 3) Support the creation of local human rights NGOs which can sustain advocacy work;
- 4) Assist in mobilizing support from the international community for investigations and prosecutions, including financial assistance and cooperation in gaining evidence and extradition of indicted persons outside the country's territory;
- 5) Monitor the government's performance in implementing the system of accountability for war criminals and human rights offenders (including trial monitoring);
- 6) Serve as an objective source of information and deter the dissemination of misinformation and disinformation;
- 7) Create mechanisms to provide protection to potential witnesses fearful of physical violence;
- 8) Work with the Judicial Development Response Unit (see section *B* below) in developing a judicial system that will initiate an effective system of accountability, including assistance in building judicial infrastructure, training legal personnel, and reforming laws;
- 9) Create a *Rules of the Road* project to ensure that the process of detaining individuals by the government for serious

violations of international humanitarian law is consistent with international legal standards; and

10) Provide liaison and coordination services where appropriate to facilitate the interaction of the national justice system and the ICC or any *ad hoc* international tribunal.

### *B. Judicial Development Response Unit*

The Judicial Development Response Unit (JDRU) will be comprised of legal experts selected by ILAC. The JDRU will be responsible for assessing the current state of the judicial system in the host country. The JDRU will use a predetermined judicial assessment model to identify which areas of the judicial system are intact, functional, and which areas need to be re-deployed, recreated or redesigned. Based on this assessment, ILAC will coordinate an outreach campaign among ILAC members and donors so that they may undertake a more long-term program of assistance and development.

The JDRU will serve as a bridge between initial peacekeeping activities and long-term assistance. Once long-term ILAC members arrive in the host country, the JDRU will continue to provide on-ground coordination during the initial phase of operation. However, once ILAC members establish their own coordinating mechanism to accomplish long-term judicial restructuring, the JDRU will relinquish involvement with the judicial restructuring program.

Long-term judicial restructuring could address the following:

- 1) Identify revisions to legislative and constitutional mandates necessary for a truly independent and effective judiciary;
- 2) Determine whether comprehensive jurisdiction is set within the judiciary on all matters relating to the application of laws, including violations of international humanitarian law;
- 3) Determine whether there is sufficient financial support for the judicial system;
- 4) Determine whether there exists a sufficient number of trained attorneys, judges, and court personnel to participate in a revitalized judicial system; and
- 5) Determine whether there are sufficient court facilities to allow the judicial system to function.

## VI. CONCLUSION

There will undoubtedly be detractors of the ILAC concept. Some will say that it is simply not needed. Others will suggest that States, not NGOs, best handle post conflict rehabilitation. Still others will argue that NGOs simply are not capable of coordinating their programs in any meaningful way.

Yet, we believe ILAC is an idea whose time has come. The recent experience in Bosnia and Rwanda demonstrates that there is a vast void in a post-conflict situation, where the breakdown of the rule of law is systemic, and the need for rapid post-conflict accountability and judicial rehabilitation is essential. ILAC can become a crucial component to the international community's response to the devastation of conflict within or between states.

# TRUTH AND RECONCILIATION COMMISSIONS

*Angelika Schlunck*

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Truth and reconciliation commissions have played a critical role in a number of countries that had to come to terms with a past marked by protracted conflict, civil strife, violence, and massive human rights abuse. The most widely known example is the Truth and Reconciliation Commission established in 1995 in South Africa to examine Apartheid-Era crimes.<sup>1</sup> In the past, truth commissions were used to investigate human rights violations in a variety of countries. In particular the commissions were used after countries had undergone major political changes, namely transition from an authoritarian regime to democratic rule, be it in the wake of violent internal conflicts, or a gradual *peaceful revolution* when civilian leadership took over from a military regime.<sup>2</sup>

The International Human Rights Law Institute at DePaul University in Chicago undertook an empirical study on international and non-international conflicts since World War II. This study shows that

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1. National Unity And Reconciliation Act, No. 1111, (July 26, 1995) (available on the internet, Truth And Reconciliation Commission Home Page <<http://www.truth.org.za/>>).

2. Priscilla Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, in 1 GENERAL CONSIDERATIONS 225-61, 600-11, 613-33, 635-55 (Neil J. Krutz ed. 1994).

from 229 international and internal conflicts, excluding the classic interstate armed conflicts, nine were the subject of a truth commission, and twenty-four were the subject of a national inquiry commission, while twenty-two were the subject of domestic prosecution and two of international prosecution. For many of these conflicts, of course, there were no redress mechanisms in place.<sup>3</sup> A large number of new democratic governments, namely in Latin America, vested in truth commissions to examine human rights violations after they came to power.<sup>4</sup> In some cases, the establishment of a commission seemed to give proof of the government's political will to bring human rights offenders to justice, but the decision-makers changed their policy shortly after and granted amnesties for the perpetrators.<sup>5</sup> In other countries, the legislature had already enacted blanket amnesties for human rights abuse. Later, a new government set up a commission to investigate those crimes and to provide reparation for victims.<sup>6</sup> In connection with the collapse of the Soviet Union, many Eastern European countries adopted democratic political systems and found themselves confronted with the human rights abuses of their former communist regimes. Truth commissions are not as popular in Eastern Europe as they have been in Latin-America. Only a few states set up investigative commissions, for instance, Lithuania, in 1991, to investigate collaboration with the KGB,<sup>7</sup> or Germany, in 1992, to examine the impact of communist dictatorship on society and to foster the process of German unification.<sup>8</sup> These examples show the wide range of different

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3. Jennifer Balint, *An Empirical Study on Conflicts (of an international and non-international character, civil conflicts and tyrannical regime victimization) and their outcomes since WWI*, REPORTS ON THE UNITED STATES MEETING OF EXPERTS ON REIGNING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF HUMAN RIGHTS, (Apr. 13, 1997) held in Washington D.C., International Human Rights Law Institute DePaul University College of Law, Chicago.

4. To investigative commissions in Latin-America, see Margaret Popkin Sampers & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79 - 115 (1995).

5. For example, Argentina - National Commission on Disappeared Persons established in 1983, the Full Stop Law (Law No.23.492, Dec. 3, 1986, N.E.D.L.A., 1986-B, at 1100) limits prosecution and the Due Obedience Law (Law No. 23.521, June 4, 1987, B.O., June 9, 1987) refers to *acting under superior orders* as a defense.

6. For example, Chile National Commission of Truth and Reconciliation established in 1990, the Decree-Law No. 2191, Apr. 18, 1978, granted amnesty for all criminal acts from Aug. 11, 1973 to Mar. 10, 1978 (Diario Oficial No. 30.042, Apr. 19, 1978).

7. The parliamentary commission was set up on December 17, 1991 to the purge of KGB agents. See Jozef Darski, *Police Agents In The Transition Period*, in UNCAPTIVE MINDS, IV, 27-28 (Winter 1991-92).

8. Enquete-Kommission zur Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland.

political and cultural backgrounds of states that use the instrument of a truth commission to cope with their abusive past.

### I. WHAT DO WE TALK ABOUT WHEN WE TALK ABOUT TRUTH AND RECONCILIATION COMMISSIONS?

*Truth commission* is a catchy name, mostly used generically, for a wide variety of bodies set up to investigate a past history of human rights violations in a given country. There is no such thing as a standard truth commission; the set-up, design, responsibilities, and mandate vary significantly from case to case. Although the word truth commission may convey an imprecise, even misleading image, investigating commission might be a more adequate title, because it refers more accurately to what a commission does. I will use the term truth commission because it is still the most frequently used one.

Priscilla Hayner, who is an expert on truth commissions in the United States, has come up with four primary constituting elements to define a truth commission which I find very helpful:

A truth commission focuses on the past.

A truth commission does not concentrate on a specific event in the past but attempts to paint an overall picture of certain human rights violations over a period of time.

A truth commission exists for a pre-determined period of time and ceases to exist when its mandate ends, usually with the submission of a report of its findings; and finally

A truth commission is vested with certain authority.<sup>9</sup>

This is a description of the common features. Other features vary. Truth commissions can be established as national commissions by a national legislator or by an act of the executive.<sup>10</sup> They can be set up as the outcome of a negotiated peace accord and conducted by an international panel like the Commission on the Truth for El Salvador in 1992.<sup>11</sup> An

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9. Hayner, *supra* note 2, at 227-28.

10. For instance, in Bolivia, the National Commission of Inquiry into Disappearances was created by presidential decree, so was the Argentinian National Commission on the Disappeared in 1983: Uruguay established the Investigative Commission on the Situation of Disappeared People and its Causes through act of parliament in 1985.

11. Created through the Peace Accord between FMLN and the Salvadoran government under the mediation of the United Nations, signed at Chapultepec Castle in Mexico City on Jan.

alternative to the case-by-case negotiated or established commission was a Permanent International Truth Commission which would provide for a ready-made framework that could be brought to life if so requested by a state.<sup>12</sup>

National funds or international organizations could sponsor these organizations. Exceptional is the case of the 1993 commission of inquiry in Rwanda. A coalition of four non-governmental organizations, Africa Watch (United States), Centre International des Droits de la Personne et du Developpement Democratique (Canada), Federation Internationale des Droits de l'Homme (France), and Union Inter africaine des Droits de l'Homme et des Peuples (Burkina Faso) set up the International Commission of Investigation on Human Rights Violations.<sup>13</sup>

They range from elaborate multi-body commissions such as the 1995 Truth and Reconciliation Commission in South Africa<sup>14</sup> to one-man-commissions with very limited resources as in Honduras.<sup>15</sup>

## II. WHAT IS THE PURPOSE OF A TRUTH COMMISSION?

A truth commission usually serves many different purposes. Its main function is to investigate past human rights abuses, not with an aim to prosecute individuals, but to find out *the truth* about certain events, for example, when and where did what happen? Who was involved, as a perpetrator, or as a victim? A truth commission is first of all an instrument to examine the facts about the crimes and atrocities that have occurred in a country. The second important purpose is to give a report of these findings, publish it, and confront the public with *the truth*. This exposure to the facts is supposed to have a cathartic and educational effect on the society in transition. The impact of such a record would be the basis for the third important purpose of a truth commission: which is the acknowledgment of the past. Acknowledgment in this context means that

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16, 1992; report of the Commission submitted to the United Nations on Mar. 13, 1993, U.N. Doc. S/25500.

12. See Michael P. Scharf, *The Case For A Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375-410 (1987).

13. Hayner, *supra* note 2, at 243, n.78.

14. *Supra* note 1. According to chapter 2, section 3, paragraph 3 of the Act, the South African Truth and Reconciliation Commission consists of three separate commissions with different functions: the Commission of Human Rights (ch. 2, sec. 3, para. 3, sub-para. (a)), the Commission for Amnesty, (ch. 2, sec. 3, para. 3, sub-para. (b)), and the Commission for Reparation and Compensation (ch. 2, sec. 3, para. 3, sub-para. (c)).

15. National Commissioner for the Protection of Human Rights in Honduras, preliminary report: *The Facts Speak For Themselves — The Preliminary Report on Disappearances of the National Commissioner for the Protection of Human Rights in Honduras*, CENTER FOR JUSTICE & INTERNATIONAL LAW (CEJIL), HUMAN RIGHTS WATCH/AMERICAS (1994).



the government admits the misdeeds of the past, and that the society accepts its involvement and recognizes the consequences of its involvement.<sup>16</sup> Acknowledgment is finally the first step to reconciliation. It is the key to the healing process in a conflict stricken society. Additionally, truth commissions would have the mandate to offer recommendations for rebuilding society, for instance recommendations on how to improve the judicial system of a country or to protect human rights in the future more effectively.

### III. WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF TRUTH COMMISSIONS?

The success of a truth commission depends upon the political will, financial resources, and support of the society. If the political leadership in a country is determined to examine human rights violations and has the tenure to promote such an undertaking within society and against the resistance of opposing stakeholders, a truth commission will be a valuable tool to start the recovery process. The beauty of a commission is that it can be established almost instantly at a relatively low cost. It is a temporary institution with a limited mandate that can be designed according to the specific needs of a society.

The proceedings before a commission do not have to follow the rigid rules of the law of criminal procedure. A commission is therefore more flexible in hearing and accommodating witnesses, and in evaluating evidence.<sup>17</sup>

Although human rights literature mostly favors criminal prosecution as the best guarantee against human rights violations in the future,<sup>18</sup> atrocities of the past cannot comprehensively be captured by the means of criminal proceedings. The reason for a criminal trial is to judge the guilt of an individual upon the evidence presented with the result of either acquitting or convicting that individual. However, we are talking about crimes of a much larger scale than a murder case before a district court. Genocide, crimes against humanity, and serious human rights violations usually occur in a certain social climate of political oppression and racial prejudice toward minorities. A court is not supposed to give an

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16. To the issue of acknowledgment see Luc Huyse, *Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 L. & SOC. INQUIRY 51-78 (1995).

17. An illustrative report on the hearings before the Truth and Reconciliation Commission in South Africa see Michael Ignatieff, *Digging up the Dead*, THE NEW YORKER, Nov. 10, 1997, at 84-93.

18. Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

account about the circumstances of the historic, economic, and political reasons for a crime, nor about the involvement of different groups in the society or political influence from the outside which may have encouraged the perpetrators and fostered hatred and violence that made crimes such as disappearances, torture, and mass killings possible. Giving an account, providing explanations, and offering recommendations for a better future are exactly the purposes of a truth commission. Thus, a truth commission can serve purposes which a criminal trial usually cannot.

However, as much as flexibility is the strength of a truth commission, it is its salient weakness. Contrary to a court, a truth commission has to be vested with authority by the political decision-makers that may not have an interest in establishing an independent and resourceful investigating commission. Authorities may deny access to information and confidential material. Potential witnesses before the commission may be reluctant to testify if they are not guaranteed protection against alleged perpetrators or members of a violent and abusive former regime who regain political power.<sup>19</sup>

Even if commissions come up with comprehensive reports, their findings can only have an impact if the public takes notice and if the policymakers allow for significant changes. Those changes include institutional reforms, protection of human rights in the future, and exclusion of wrongdoers of the past from positions of power, if not criminal prosecution. Many truth commissions, namely in Latin-America, that have done remarkable work investigating human rights abuses were often ridiculed by national parliaments that enacted amnesty laws for former government officials or military personnel.<sup>20</sup> Divergent interests, scarcity of resources, and impunity laws are certainly not only a challenge to the work of a truth commission, but they also affect judicial proceedings as well.<sup>21</sup> However, truth commissions are inherently vulnerable to changes in political willingness. Therefore, national truth commissions are hardly an effective policy option in weak civilian societies or countries ravaged by civil strife. An international truth commission provided by the international community and conducted by experts from the outside, operating in a safe environment, may be an alternative in those cases.

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19. In Argentina, victims find themselves confronted with police-officers who tortured them and still are on duty, see Calvin Sims, *Argentina's Bereft Mothers: And Now, a New Wave*, N. Y. TIMES, Nov. 18, 1997, at A4.

20. Argentina, *supra* note 5.

21. On the problems of the International Tribunal for Rwanda see James C. McKinley Jr., *On 1994 Blood Bath in Rwanda, Tribunal Hews to a Glacial Pace*, TIMES, Nov. 21, 1997, at A1. To the situation of the national judiciary in Rwanda by the same author, *Massacre Trials in Rwanda Have Courts on Overload*, TIMES, Nov. 2, 1997, at A9.

However, without a geographical link to the conflicting society, it may not serve its cathartic purpose as well as its national commission.<sup>22</sup>

Besides its dependence on the good-will of the political decision-makers, a truth commission carries the risk of too high expectations. Victims who testify before the commission may have to go through the agony of their traumatizing experiences without obtaining relief or even tangible benefits.<sup>23</sup>

#### IV. COMBINATION OF SEVERAL ACCOUNTABILITY MECHANISMS

Reconciliation of conflicting groups is a long-term process which requires complex and multifold strategies. There is no simple strategy to healing the wounds of the past. Accordingly, decision-makers should make use of a variety of policy options rather than focus on either criminal prosecution or truth commission. Accountability mechanisms such as tribunals, investigative commissions, and illustration procedures are not mutually exclusive. All of these strategies should be combined as parts of a comprehensive conflict management scenario.

From the perspective of a decision-maker who thinks hard about the several policy-options and strategies for conflict management, truth commissions are tempting because they can be tailor-made. However, they do not fit into every situation, and an emerging democracy will have to deal with many more urgent issues and problems than just coming to terms with its violent past. However, they are a flexible instrument that can be adjusted according to the specific needs of a country. There are at least five reasons that make truth commissions particularly valuable for the reconciliation process. First, when implemented with the necessary legal powers and responsibilities, they are an effective tool to give an accurate record of human rights abuses in the past, and to inform the public about what happened. Second, besides the truth-telling function, a commission can be an adequate forum to decide issues such as reparation, rehabilitation, and compensation for victims.<sup>24</sup> Third, a commission may serve as a basis for further in-depth investigation for criminal prosecution.<sup>25</sup>

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22. Alfred P. Rubin, *Dayton, Bosnia, and the Limits of Law*, THE NATIONAL INTEREST (Winter 1996/97), at 41-46, 44.

23. Suzanne Daley, *In Apartheid Inquiry, Agony is Relieved but Not Put to Rest*, N. Y. TIMES, July 17, 1997, at A1.

24. An example is the Commission for Reparation and Compensation in South Africa (see National Unity and Reconciliation Act, July 26, 1995, ch. 2, § 3, para. 3, sub-para. (c), ch. 5) (National Unity and Reconciliation Act, *supra* note 1).

25. The Commission of Experts Established Pursuant to Security Council Res. No. 780 (1992), examined human rights abuse in Former Yugoslavia. Its report provided the prosecutors of the International Criminal Tribunal for the Former Yugoslavia with valuable information about

The fourth argument is that it can be a very valuable instrument to fight impunity, provided that the political leadership will not compromise justice. Even if a country is not capable of immediately prosecuting alleged perpetrators of violent crimes committed under the auspices of the former regime, the findings of the commission would lay the ground for criminal prosecution. Finally, the documentation about the crimes will educate future generations. This is especially important if those who have lived through the nightmares of the atrocities, whether as a victim or as a perpetrator, refuse, for whatever reason, to deal with the conflict.

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the events to be further investigated. The report is reprinted in CHERIF BASSIOUNI, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 65-198 (1996); this commission was not a truth commission, however, a truth commission could, among others, serve the same purpose.

# ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

*Steven J. Gerber*

It cannot be overemphasized how historic the negotiations to establish a permanent International Criminal Court (ICC) have been. Over 120 states have participated in the process and not one of them questions the need for a permanent ICC to try individuals accused of the most serious international crimes of genocide, crimes against humanity or serious violations of the laws and customs of war (war crimes). In addition, hundreds of non-governmental organizations (NGOs) participate in the NGO Coalition for an International Criminal Court (CICC).<sup>1</sup>

Over the last several months, some of the most supportive governments, known among themselves as the like-minded,<sup>2</sup> and many of the NGOs have become increasingly dissatisfied with several positions taken by the United States government in the negotiations to establish an ICC. These positions include the role of the United Nations Security Council in the Court's jurisdiction, and whether the Court will have an Independent Prosecutor authorized to initiate investigations and prosecutions on his or her own initiative.

In fact, there have been comparisons between the ICC negotiations and the campaign to ban landmines. In the case of the landmine treaty, the NGO coalition and the states pushing for the treaty made a strategic decision to get what they considered to be the best treaty, even if the United States would not sign. A similar strategy, to push for the most effective and fair court even if the United States will not join, has been discussed as a possible route if the United States does not change its positions on several key issues.

Unfortunately, an ICC without United States participation is unlikely to succeed. It will not have a police force of its own to enforce its decisions and apprehend indicted individuals. The court will depend on the

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J.D., M.A., Director of the International Criminal Court Project of the World Federalist Association and Coordinator of the Washington Working Group on the ICC.

1. For more information on the Coalition for an ICC, see <http://www.igc.apc.org/icc>, call (212)599-1320 or write CICC, 777 U.N. Plaza, New York, NY 10017.

2. The like-minded countries are a group of approximately forty countries that have pushed ICC negotiations forward and include many United States allies, such as Canada, Australia, Germany, Italy and other countries located in Europe, Latin America and Africa.

cooperation of states party to the treaty establishing the Court. The negotiating states have still not determined what to do when a state fails to cooperate with the Court.

The ICC will be effective only if the political will of the international community is behind it. One of the most important methods to enforce compliance will be for other states to pressure the non-complying state to meet its treaty obligations. If the United States government does not participate in the ICC, who will apply political pressure to cooperate with the Court?

After all, it is the United States that has done the most to arrest indicted war criminals in the former Yugoslavia. The European states who are pushing for the best possible treaty, regardless of United States participation, have done little to force the states of the former Yugoslavia to cooperate with the International Criminal Tribunal for the Former Yugoslavia.

The United States has also provided more financial support, seconded personnel, and equipment for the two ad hoc tribunals for the former Yugoslavia and Rwanda than any other country.<sup>3</sup> If the United States does not participate in the ICC, which countries will provide adequate resources?

Of course, some have argued that even if the United States does not ratify the treaty establishing the ICC, it could still support the work of the court — that it would still be in the interest of the United States to support the ICC. Unfortunately, the United States Senate has already indicated on several occasions that it would consider any effort to cooperate with the court without the Senate's advice and consent to ratification as an attempt to bypass the Senate's constitutional role and would oppose this.<sup>4</sup>

It is true that an effective court, as defined by NGOs, could be created without United States involvement, but such a court is unlikely to be effective. If such a court were created and failed because of lack of United States participation, it would be even worse than if the court had

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3. In 1994 and 1995 the:

Several states have contributed assistance to the Tribunal in the form of a loan of personnel to the Office of the Prosecutor. As of 29 May 1995, the Tribunal was receiving seconded personnel from the following states: United States (21 personnel); United Kingdom (5); Netherlands (3); Denmark (2); Norway (2); Sweden (2). . . . In addition, the United States made a contribution of computer systems and related services for the Office of the Prosecutor valued at up to \$2,300,000. The United Kingdom has also made a contribution of equipment valued at approximately \$30,500.

4. 1997 State Department Authorization bill (not passed).

never been created. It would set back the attempt to enforce international humanitarian law.

# LOST IN PARADISE: LOBBYING STRATEGIES FOR PUBLIC INTERNATIONAL LAW ISSUES

*Bruce Zagaris\**

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## I. INTRODUCTION

Increasingly in an interconnected world, Americans and people throughout the world are encountering situations in which their human rights are abused abroad. People are traveling to exotic parts of the world that have not experienced the extent of foreign penetration. Simultaneously, the enormous gaps between wealthy and impoverished countries and peoples are exacerbated by the ever present media, so that the less fortunate people are reminded daily of the huge differences that exist.

The rise of transnational organized crime groups enables such groups to dominate and control the action of governments. Faced with this menace, well-meaning law enforcement agencies have persuaded legislatures and governments to compromise civil liberties and human rights. In other cases, law enforcement agencies sometimes take extralegal shortcuts to achieve their goals. The *ends justify the means* syndrome can have especially dangerous consequences in emerging countries. In many cases, lack of or insufficient legal infrastructure and legal traditions result in persons being detained arbitrarily and are unable to obtain due process

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or obtain redress.

In increasing cases where United States persons are improperly detained abroad and the host country's legal machinery is insufficient, defendants must resort to the assistance of the United States government or international human rights machinery. For reasons well known, the machinery is quite limited. Hence, counsel designing lobbying strategies to rescue such persons must be quite inventive.

To provide some concrete examples of lobbying strategies to resolve international criminal and human rights issues, I will use the case of Jim and Penny Fletcher of Huntington, West Virginia. This is a recent case on which I worked that received some media attention. The Fetters were detained in October 1996, charged with the murder of Jerome Joseph, a water taxi driver on the island of Bequia. Eventually, their case went to trial, and the court dismissed all charges and finally released them in August 1997. In this introduction, a chronology of essential events will be set forth.<sup>1</sup>

This paper alludes in the title to *Paradise Lost*, which became a theme at the end of the case. It took the theme from a quote in Senator John Kerry's recently written book on transnational crime.<sup>2</sup> The phrase "Paradise Lost" refers to how the beauty of the islands and the tourism potential are squandered by the penetration of St. Vincent by transnational organized crime.<sup>3</sup> The resulting corruption increasingly impacts tourists and foreign visitors.

Having taught at the University of the West Indies Faculty of Law and having participated as a consultant in several administration of justice projects in the region, I was acquainted with the legal system and legal professionals in St. Vincent. From the beginning, my trip to St. Vincent in January 1997 and my conversations with legal professionals showed me that the detention and prosecution of the Fetters was the result of an apparent personal vendetta engendered by altercations that Penny Fletcher had had with some prominent people in St. Vincent, exacerbated by efforts to approach them for a bribe. This approach was aborted as a result of the

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1. For an excellent chronology of events, see *The Fletcher Story Unfolds*, THE HERALD DISPATCH (Huntington, W.Va.), Aug. 9, 1997, at 8B, col. 1., on which this account relies heavily.

2. See, e.g., SENATOR JOHN KERRY, *THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA'S SECURITY* (1997). In the cover, Kerry quotes: "Let none admire. That riches go in Hell." JOHN MILTON, *PARADISE LOST* 690-91 (1667).

3. *Id.*

notoriety and media attention given to the Alan Heath case.<sup>4</sup>

After Heath's wife was brutally murdered as they were sleeping on their yacht in waters off the St. Vincent coast, Heath was detained for approximately three weeks and had his passport taken. The St. Vincent government received detailed information and intensive cooperation from the South African government on the close and loving relationship between the couple. Still, the St. Vincent government did not release Heath. Instead, according to Heath, one of Heath's attorneys in St. Vincent solicited a bribe for \$25,000 (U.S.), the amount of the life insurance policy on her — information transmitted by the South African government to the St. Vincent government. Eventually, after strenuous intervention by the South African government and on the very day Heath paid the requested money, Heath was released.<sup>5</sup>

His release triggered a massive press campaign by Heath with the cooperation of the South African government to expose the injustices he and his wife had experienced.<sup>6</sup>

We had witnesses and written reports, documenting exactly with whom and when the Fletchers' interrogations and initial detentions occurred, including a report from a former high-level police official who served as our investigator. Just as important, my personal conversations with St. Vincent law enforcement officials, politicians, civil servants, and the legal community convinced me that from the start the St. Vincent government had no information implicating the Fletchers in the murder, but that the highest level of the government wanted to prosecute them to serve other agendas.<sup>7</sup> As the case continued, my investigation showed that, notwithstanding the State Department's denials, their own documents confirmed their suspicions of my same thesis. Additional documentation would show many other cases of sham detentions, extortions and attempted

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4. Kathy Moloney, *Yachtsman Heath Warns Would-Be Travellers to St. Vincent*, THE MERCURY (S. Africa), Dec. 2, 1996, at 3; Kathy Moloney, *Heath Vows to "Kill" St. Vincent Tourist Trade*, THE MERCURY (S. Africa), Dec. 12, 1996, at 3.

5. Alan Heath's description of his order with documents showing payments (undated) (on file with author). The diplomatic notes also confirm and supplement his version (on file with author).

6. *Bribe?*, THE NEWS (Kingstown, St. Vincent), Dec. 20, 1996 at 1, col. 1; Kiva Clarke, *Wife Killed, Husband Bribes His Way Out of Jail*, SUNDAY MIRROR (S. Africa), Jan. 19, 1997; P.C. Hughes, *Corruption in High Places*, THE VINCENTIAN, Jan. 3, 1997, at 16; Editorial, *Heath Heats Up Tourism Ministry*, SEARCHLIGHT, Jan. 10, 1997; *Visitor Vows to "Kill" St. Vincent Tourist Trade*, THE NEWS (Kingstown, St. Vincent), Feb. 2, 1997; Editorial, *Scandals and Tourism*, THE NEWS, Jan. 10, 1997, at 6; *Ministry Denies Bribery Charge*, THE NEWS (Kingstown, St. Vincent), Jan. 31, 1997, at 1.

7. For more details on the involvement by high-level St. Vincent Government officials, see Jim Flannery, *Killers Or Victims*, SOUNDINGS (Essex, Ct.), Aug. 1997, at A14.

extortions, egregious violations of rights of defendants, and attempts to manipulate the media.

In addition, to my surprise, the evidence of significant penetration of St. Vincent government by organized crime became more abundant as the case and our investigations continued. On February 25, 1997, a preliminary inquiry (P.I.) for the Fletchers was held and was completed on approximately March 10, 1997. The magistrate found that, although only extremely limited circumstantial evidence existed, probable cause existed to bind the Fletchers over for trial.

On May 2, 1997, ABC News aired a Nightline program about the case. Two days later, Inside Edition, a national program, aired an exposé. Shortly thereafter, Extra, a daily tabloid program, regularly aired developments in the case, including information on the deteriorating medical conditions of the Fletchers.

The St. Vincent Prime Minister personally responded. In a radio interview aired in the United States on May 5, 1997, the Prime Minister castigated ABC News and characterized its program as unjust and trying to interfere with a fair trial. He defended his government's handling of the Heath case, denied any corruption, and said in reference to the Heath case "[t]his is a country where you can't come and murder your wife . . . ."<sup>8</sup>

On May 10, 1997, President Clinton, meeting Caribbean leaders in Barbados, discussed the case with the St. Vincent Prime Minister and urged him to assure that they be accorded full due process.

On May 11, 1997, a lawyer for Penny Fletcher said the St. Vincent officials had denied her medical treatment for what could be the onset of cervical cancer. St. Vincent authorities claimed they could not allow treatment because they feared she would escape.

On May 27, 1997, on the only government-owned radio station, the St. Vincent Prime Minister read a letter, stating that "this couple has an unsavory reputation and their behavior . . . was bizarre and offensive." He went on to read the letter, stating "[t]here certainly appears to be very strong circumstantial evidence that they were involved in this tragedy, and many of us believe they are guilty."<sup>9</sup>

On June 6, 1997, Senator Rockefeller sent a letter to United States Secretary of State Madeleine Albright, expressing outrage at the Prime

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8. Transcript of Radio Interview with Prime Minister of St. Vincent, May 5, 1997, at 2 (on file with author). The unofficial transcript was prepared by THE NEWS (Kingstown, St. Vincent), from a video obtained from the St. Vincent Government Television.

9. Transcript of excerpts related to that of the Fletchers' from Prime Minister Mitchell's News Conference, Kingstown, St. Vincent & the Grenadines (May 27, 1997) (on file with author). The unofficial transcript was prepared by THE NEWS (Kingstown, St. Vincent), from a video obtained from the St. Vincent Government Television.

Minister's remarks and seeking strident action. On June 13, 1997, six members of Congress wrote a similar letter to the St. Vincent Ambassador. By now, the media had become increasingly interested in the diplomatic ramifications of the case.

In the Spring of 1997, medical reports confirmed that Penny Fletcher had a precancerous condition of the cervix. Penny first complained of her problems in November 1996. After many months of almost daily heroic efforts to obtain treatment for her by the Consul General's Office, United States Embassy in Barbados, she was eventually able to obtain a colposcopy. It confirmed the diagnosis, and she then underwent cryosurgery in an effort to freeze the cancerous cells. Against the doctor's order, Penny was not allowed to stay overnight in the hospital. After she passed out on her return to prison, the St. Vincent government allowed her to return to the hospital. In the meantime, the St. Vincent government, through its Prime Minister and its press agent, was reporting that both Fletchers were in excellent medical condition and received excellent treatment in prison. The media and even members of Congress zoomed into the fray, burrowing through the public reports, and depicted the tragedy in growing sympathetic tones.<sup>10</sup>

On July 9, 1997, as the trial started, an angry Judge Dubar Cenac delayed the trial until after a hearing on pre-trial publicity was conducted. Prosecutor Karl Hudson-Phillips, a Trinidadian attorney, attacked the Fletchers and their counsel, claiming they had initiated a smear campaign against the St. Vincent legal system.

On July 11, 1997, prosecutors asked Judge Cenac to delay the trial until October and to grant a request for a worldwide gag order on coverage of the trial and criticism of the St. Vincent legal system.

On July 14 and 16, 1997, the court held hearings on the request. On July 16, 1997, St. Vincent Police Commissioner Randolph Toussaint sued West Virginia reporter Mark Truby for writing about the allegation of the extortion attempt concerning the Fletchers' release.

On July 16, 1997, the St. Vincent Prime Minister appeared on the CNN Court Television Program, *Burden of Proof* to rebut allegations of corruption and unfairness in the *Fletcher*, *Heath*, and other cases.<sup>11</sup> His decision to appear and his performance were failures that gave rise to more pressure to allow the Fletchers to have a fair trial immediately.

On July 17, 1997, the United States Ambassador to St. Vincent

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10. See Mark Truby, *Mitchell's Comments Anger Rockefeller*, THE HERALD DISPATCH (Huntington, W. Va.), June 10, 1997.

11. *PM on Burden of Proof Today*, THE HERALD OF ST. VINCENT, July 16, 1997 (on file with author).

visited with the Fletcher family in Kingstown, and then the highest ranking official in St. Vincent, in a move symbolizing the growing interest of the United States government in the case.

On July 18, 1997, Judge Cenac ordered the Fletchers' trial to start July 28 and denied the motion for the gag order. St. Vincent Police Commissioner, Toussaint, resigned without explanation.

On July 28, 1997, the trial started. At the beginning of the trial, CNN's Burden of Proof did a program on the case. I appeared on the program. Although I refused to discuss the facts of the Fletchers' case, citing concern to provide new ammunition for the prosecution to delay the case, I did point out that our investigation indicated that at least fifteen persons had been subjected to extortion or attempted extortion in criminal cases in St. Vincent. When asked what travelers to foreign destinations should consider, I noted that, in the case of journalists traveling to St. Vincent, they had to be aware that the St. Vincent government does not hesitate to detain, deport, and otherwise harass such journalists. At the time, the St. Vincent government and its supporters were furious about these remarks.

Ironically, the Police Commissioner's filing of a libel case against Mark Truby (the lead foreign reporter on the case), the efforts to prevent him from leaving the country during the trial's recess, threats to bring a libel action against John McWethy, the refusal to allow the government owned radio to interview Dr. Gonsalves (the Vincentian defense counsel) about the Heath and Fletchers' cases, and the Prime Minister's public warnings to the Vincentian people about talking to foreign media concerning the case, all underscored the importance of the media during the Fletchers' case and similar cases. It is painfully transparent when governments try to cover up their actions and prevent coverage by the media.

On July 31, 1997, a juror complained of receiving threatening phone calls at work by a male with a foreign accent who warned that he better return a verdict of not guilty. Word of the threat was not announced in opened court. Trial was recessed early, and Cenac promised to explain to the jury what had occurred. The prosecutor used the incidents to move for a mistrial and request a postponement of the trial. Again, Judge Cenac denied the request.

On August 1, 1997, Cenac ordered the trial to continue, despite a threat to a juror revealed on July 31 and another that surfaced the following day.

On August 8, 1997, at the end of the prosecutor's case, Judge Cenac directed the jury to acquit the defendants without need for the

defense to put on its case.<sup>12</sup>

## II. EXECUTIVE BRANCH

Initially, the United States government, through the State Department's Consular Affairs Office and the United States Embassy in Bridgetown, Barbados, assured the family, inquiring members of Congress, and counsel that the case was handled by the St. Vincent and United States governments in a normal fashion and with no imperfections. Unfortunately, the United States government also from the start followed the standard it follows in other cases of Americans detained abroad: as long as the Fletchers were treated the same as Vincentian detainees, then the United States government could not press the St. Vincent government.

From a policy perspective, the evidence of penetration of the St. Vincent government by transnational organized crime was one element that enabled the defense team to argue vociferously for more proactive measures to help the Fletchers. Evidence existed in official<sup>13</sup> and unofficial United States government reports, anecdotal media reports,<sup>14</sup> and cable traffic. The reports in United States Embassy and State Department cables that the victim's murder was drug-related also gave rise to the importance of the involvement of transnational organized crime throughout the case. According to United States official reports, the Grenadines have been a "pipeline for drugs transiting to the United States and the French Islands. Substantial local trafficking organizations engaged in large scale

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12. For comprehensive background on the verdict, the trial, and the entire ordeal, see a series of articles in the Aug. 9, 1997 issue of THE HERALD-DISPATCH (Huntington, W.Va.) at 1A, by Mark Truby, *Finally, Freedom: Fletchers Head for Home After Judge Directs Not Guilty Verdict*.

13. *E.g.*, Cable Secretary of State, United States Dept. of State, *DAS Hrinka's Meeting with Vincentian Opposition Figure Gonsalves*, (May 1993) (discusses how the St. Vincent Government's obstinacy in cooperation with the United States in the investigation of a cocaine shipment on the *Lucky Star*, a Vincentian-flagged vessel, came from the fear of possible drug traffickers' reaction) (on file with author).

14. The media reported the underground economy in St. Vincent, protection by the St. Vincent Government of criminals caught in law enforcement investigations, and corruption in government supported projects had apparent participation by criminal elements. *See, e.g.*, P.C. Hughes, *E.C.G.C. Fiasco, Etc.*, THE VINCENTIAN, May 23, 1997, at 15 (discusses the failure on ill-advised construction projects in the Grenadines due in part to corruption and irregularities); *Government Continues Talks on Failed Marina Project*, THE ST. VINCENT HERALD, June 16, 1997 (discusses the failed Otley Hall project due partly to the bankruptcy of its Italian investors); P.C. Hughes, *This Most Hideous N.D.P. Tyrant*, THE VINCENTIAN, May 9, 1997, at 15 (concerns the \$30 million Campden Park Container Terminal Project and its approval without advice of the cabinet).

acquisition, storage, and transshipment of cocaine, often in ton lots.”<sup>15</sup> The problem of cocaine transiting through the Grenadines<sup>16</sup> and allegations of corrupt payments and loans to public officials have increased.<sup>17</sup>

The facts of the case should have been reason to invoke 22 United States Code section 1732. It provides:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.<sup>18</sup>

Defense counsel argued that the irregular circumstances of the Fletchers' arrest and detention, in conjunction with the abusive treatment and the absence of any evidence to corroborate the charges, together with the police's admissions of lack of evidence and apologies when they arrested the Fletchers, required President Clinton to initiate action under the provisions of section 1732.

Defense counsel called on the United States government to consider further action, including the imposition of sanctions, in the event the government of St. Vincent did not release the Fletchers or did not provide sufficient reasons for their detention.<sup>19</sup> The Fletchers' counsel

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15. U.S. DEPT. OF STATE, INT'L NARCOTICS CONTROL STRATEGY REPORT 197 (Mar. 1995).

16. U.S. DEPT. OF STATE, INT'L NARCOTICS CONTROL STRATEGY REPORT 220 (Mar. 1997).

17. U.S. DEPT. OF STATE, INT'L NARCOTICS CONTROL STRATEGY REPORT 548 (Mar. 1996).

18. 22 U.S.C. § 1732 (1997).

19. The measures the President can take, once he finds wrongful detention, are all that will bring pressure on the offending foreign nation short of war. For instance, the House bill encourages the President to “suspend in part, or wholly, commercial relations with the said Government” since the statute allows “such means not amounting to acts of war and not

sought action under section 1732 in vain since mid-December 1996. We argued that today the scope of the statute's protection is just as broad as courts have recognized its applicability to varied situations, including the unjust detention and incarceration of an American citizen by the criminal justice system of a foreign government.<sup>20</sup> The State Department took the position that this 1868 statute is rarely invoked and gives it wide discretion. Therefore, in practice, the State Department ignores the provision. We pressed the judicial precedents that the President and the State Department must make inquiry upon the type of information made public in the *Fletchers'* case. We noted that in the *Flynn* case, involving an American citizen sentenced to a six-year term of imprisonment in Mexico, the court stated: "[T]he language and legislative history of the Hostage Act convince us that Congress placed a judicially enforceable duty on the Executive to inquire into the circumstances of an American citizen's extended detention abroad."<sup>21</sup>

United States consular officials must use their "best efforts in protecting the citizen's legal and human rights."<sup>22</sup> They are required to use their "own creative approach" in achieving these goals.<sup>23</sup>

Defense counsel requested the United States government to review the *Fletchers* case in light of the documents that the South African government, on its own initiative, shared with respect to corruption in St. Vincent in the context of the *Heath* case. The South African government initiated the exchange because of its concern about the abuse of rights of the *Fletchers*. The actions of the South African government were quite extraordinary.

Sandra Ingram, a foreign service officer and attorney in the United States Embassy in Barbados, attended the preliminary investigation (P.I.) and wrote a report.<sup>24</sup> Although the *Fletchers'* counsel and family knew the report was favorable to their contentions of procedural irregularities, and although the *Fletchers* had executed a privacy waiver, suddenly the State Department officials claimed that the report was protected. On the last day

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otherwise prohibited by law." Or if economic sanctions fail, "to order the arrest and to detain in custody any subject or citizen of such foreign Government, who may be found within the jurisdiction of the United States." *American International Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 452 (D.C. Cir. 1981), citing 46 CONG.GLOBE 4205.

20. *See, e.g.*, *Flynn v. Schulz*, 748 F.2d 1186, 1195 (7th Cir. 1986).

21. *Id.*; *see also* *Smith v. Reagan*, 844 F.2d 195, 199 (4th Cir. 1988) (citing *Flynn* with approval).

22. U.S. DEPT. OF STATE, 7 FOREIGN AFFAIRS MANUAL 400, 401 (on file with author).

23. *Id.*

24. Memorandum from Sandra Ingram, United States Consul General, United States Embassy to Barbados, *Fletcher Preliminary Inquiry* (March 12, 1997).



for the State Department to furnish the Fletchers' counsel's report prior to filing a lawsuit under the Freedom of Information Act, it allowed Congressional staffers to view the report. The next day, *The Herald-Dispatch* in Huntington, W.V. leaked some sensational parts of the report. As a result, the State Department decided to release the report in its entirety rather than with redactions.

The report would turn out to be a critical document. The conduct of the State Department after the preliminary hearing had been alarming. Until April 24, 1997, the State Department refused to accede to requests to furnish the Ingram report. Until then, it had regularly furnished documents requested by the defense counsel, although it only summarized its diplomatic notes. In the meantime, in March 1997, the State Department sent a cable to interested members of Congress, characterizing the P.I. as containing no abnormal procedures. The information and overall characterization by the cable was in sharp contrast to the Ingram report and even to the diplomatic note sent by the United States government dated April 16, 1997. In fact the cable even stated that "the Prime Minister assured her (the United States Ambassador) that the case will proceed in accordance with Vincentian law and pledged that the Fletchers would receive medical attention whenever they needed it."<sup>25</sup> The United States Embassy cable made these statements even though they knew that the Ingram report expressed deep concerns about the fairness and outside influence on the judicial process, especially since the defense counsel had constantly informed them since December 1996 of the outside influence by the Prime Minister.

As a result of the United States government's action from March 12 until April 24, 1997, interested members of Congress and other policymakers had been under the wrong impression that the United States government believed the procedure was normal and fair.

The Ingram report noted that "anyone who owned a .22 handgun and .22 ammunition and was on Bequia the night Joseph was murdered could be the murderer. At least one witness testified he owned more than three .22 guns and ammunition and was on Bequia the night of October 6."<sup>26</sup>

The statements that "[t]he Magistrate's decision flies in the face of all reason" and "[t]here is not one scintilla of physical evidence connecting the Fletchers to Jerome Joseph's murder" were important. Usually much physical evidence is present in circumstantial cases.

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25. THE INGRAM REPORT, Mar. 12, 1992, at 3 (unpublished government report obtained by a request under the FREEDOM OF INFORMATION ACT) (on file with author).

26. *Id.*

The report depicted that “[f]ear, intimidation and interference from ‘higher authorities’” were factors in this case.<sup>27</sup> According to the Ingram report, “decisions regarding the Fletchers were being made by ‘higher authorities.’”<sup>28</sup>

The Ingram Report characterized the prosecution as a “witch hunt”<sup>29</sup> and cautioned that it was highly unlikely for the Fletchers to receive a fair trial in St. Vincent.

At the preliminary hearing, the arresting officer, Sgt. Ernest James, admitted that at the time of charging the Fletchers he did not have evidence of their guilt: no witness; no weapon; no fingerprints; no blood; no ballistics; and no motive.

Apparently, because of tensions between the St. Vincent government and the United States government, due to drastically reduced United States foreign aid, the action by the United States in the WTO to end preferential access for bananas, St. Vincent’s main export, to the European Union (EU) (60% of its foreign exchange), pressure to eradicate marijuana (the second best potential earning potential for the same growers), and the perceived snub by President Clinton of Prime Minister Mitchell when a meeting with CARICOM Prime Ministers was scheduled after more than two years of waiting, the United States government did not have the courage to carry out its legal responsibilities.<sup>30</sup>

One stroke of fortune involving the Executive Branch was that President William J. Clinton, in May 1997, was making his first and only official visit to the Caribbean during his presidency. Because of the eventual involvement of key politicians, including the 1996 West Virginia Democratic gubernatorial candidate Charlotte Pritt, Senator Jay Rockefeller (D.-W.V.), the media, and others, President Clinton publicly raised the predicament of the Fletchers and whether their legal and medical rights were being safeguarded at the Caribbean Summit when he met privately with St. Vincent Prime Minister James F. Mitchell.

### III. LEGISLATIVE BRANCH

A key factor in the eventual resolution of the case was involvement and pressure from the United States Congress. Initially, some members sent expressions of interest in the case to the United States Ambassador to St. Vincent.

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27. *Id.*

28. *Id.*

29. *Id.*

30. For background see the series of articles by Mark Truby, *Voyage to a Nightmare*, THE HERALD-DISPATCH (Huntington, W. Va.), April 13, 14, 1997.

Due to the Fletcher family's desire to heed the advice of their Vincentian counsel, the United States Embassy's desire to allow the Vincentian criminal procedure to operate without fear of any outside pressure, and the assurances from the Executive Branch that the case was proceeding normally and in accordance with the law, we initially had difficulty interesting members of Congress or their staff to follow, let alone agitate for more action by the Executive Branch.

Normally, and even under the most urgent circumstances, persuading the legislative branch to become actively involved in a foreign case is difficult. Members of Congress are inclined merely to send a letter to the United States ambassador about a case. However, they can do a lot more. They can inquire of and urge the executive branch to become more active. They can ultimately hold hearings in the nature of oversight or even enact new legislation. They hold the power of the purse, an increasingly important discretionary authority, especially when the Republican party controls Congress. They can also approve ambassadors and/or foreign service officers nominated for another post, and they can also lobby for disciplinary action to be taken against United States officials who have misbehaved. They can communicate with foreign leaders and even visit the detained Americans in the foreign country.

In the *Fletchers'* case, some members of Congress phoned a few of the international human rights organizations and urged them to consider involving themselves in the case.

Members of Congress can visit and/or write letters to the executive branch and/or foreign officials and make such letters available to the media. Members can make public statements, criticizing United States and/or foreign officials and urging compliance with the international and/or domestic laws.

A few events in the *Fletchers'* case enabled us eventually to involve more members and have some of them become active. Most importantly, we had to find a champion in each chamber of Congress. Through Ed Stoner, Esq., a partner with the Pittsburgh office of Reed, Shaw, McLay, and Smith and Jim Fletcher's classmate from undergraduate days, we were able to interest a senior staff person in Congressman Lee Hamilton's (D-Ind.) office. Congressman Hamilton is the lead minority person on the House Committee on International Relations. The fact that Stoner and Fletcher attended DePaul College in Indiana and had other Indiana ties also helped.

Just as important, constant pressure on West Virginia members of Congress, a visit from Charlotte Pritt, visits from Sally and Rod Duncan (Jim Fletcher's sister and nephew respectively), phone calls from J. Robert and Kathlyn Fletcher (Jim Fletcher's parents), and jawboning in the media

resulted in both Sen. Rockefeller (D-W.V.) and Congr. Nick Rahall's (D-W.V.) active involvement in the case. Because Senator Rockefeller is one of the leading members of the Democratic Party in the Senate, works with the Clinton Administration on many issues, and personally socializes with the Clintons and Gores, he was a formidable ally. In addition, Bob Fletcher, Jim's father, had served on the board of the university in West Virginia during Senator Rockefeller's tenure as that university's president.

Members of Congress started critically questioning the handling of the case by the State Department and even eventually started a dialogue with President Clinton. Subsequently, joint letters were sent to the St. Vincent government and on one occasion by Sen. Rockefeller to Secretary of State Madeleine Albright.

During the trial, when The Herald-Dispatch reporter Mark Truby's ability to depart St. Vincent was in jeopardy, Senator Rockefeller personally phoned United States Ambassador Jeanette Hyde, thereby thwarting the use of a libel suit to prevent Truby from leaving St. Vincent and to force him to jail. Intimidation of the media was a frequent tactic during the case, thereby underscoring the importance of the media.

At critical junctures either Sally or Rod Duncan, or both, made visits to Washington to galvanize the legislative branch. Thereafter, the extended Fletcher family (including Penny Fletcher's two sisters in Kentucky and Ohio) constantly contacted members of Congress. At another critical juncture, Arturo Diaz and I visited staff persons in Congress and briefed them on the development in the case. Personal contact is critical to ensure involvement of many key members of Congress, that staff persons focus on the human element and actually review the documents and facts of the case.

#### IV. ROLE OF THE MEDIA

The media played a critical role in galvanizing support and preventing the St. Vincent government from denying the Fletchers a trial. In particular, the *Prisoners in Paradise* package of articles published by The Herald-Dispatch in Huntington, West Virginia, ran on both the Gannett News Service and the Associated Press wires. The media has reported that Truby's courage and thorough reporting kept the Fletchers alive, moved federal officials in the United States to action on the Fletchers' behalf, and, finally, lead to their acquittal in a free and fair trial.<sup>31</sup> Indeed, the media, especially Mark Truby and John McWethy,

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31. For fuller discussion, see Robert C. Gabordi, Editorial, *Freedom of the Press Key to Fletchers' Release, Pursuit of Justice*, THE HERALD-DISPATCH (Huntington, W.VA.), Aug. 12, 1997.

ABC-News, had enormous and invaluable importance in the case. While McWethy's role was a catalyst at one important time, Truby's role was constant, tireless, penetrating, and courageous (especially due to the still pending libel suit brought by the now former Police Commissioner of St. Vincent).

### A. *Mainstream Media*

The first major break was when Nightline decided to cover the P.I. Here the contact was Ed Stoner. John McWethy, Chief, National Security Correspondent, ABC-News, knew Stoner from DePaul College where they simultaneously served as editors of the school newspaper and head of radio, respectively. Subsequently, the Freedom of Information Act (FOIA) documents revealed that Nightline's involvement and some critical inquiries helped motivate the Executive Branch to take the case more seriously and justify the absence of more forceful action to protect the rights of the Fletchers.

The decision by Nightline to cover the case enabled us to interest other media outlets. The live media that covered the case, included: Inside Edition, which did two major pieces; Extra, which did over fifteen stories; CNN, whose Burden of Proof covered the case twice, and whose World News and Headline News ultimately covered the case; CBS Morning News (both television and radio); NBC World News; and then various local affiliates of the major networks, especially in West Virginia, Kentucky, Ohio, and Illinois, where some members of the Fletcher family resided.

An important development was that in May 1997, Julia Fletcher, the fourteen-year-old-daughter of Jim Fletcher, along with her step-sisters Wendy Franzen and Kathy Fletcher, called a news conference, shown on network news reports, criticizing the St. Vincent government and warning *The Whole World Is Watching*, which subsequently came to be an often repeated theme of the defense.

In the print media an early break was the intensive, thorough, and balanced coverage by The Herald-Dispatch and a reporter named Mark Truby. Although coming from the Fletchers' hometown, the coverage by Truby was not just one-sided, but exposed some of the criticisms of the Fletchers, especially of their drunkenness and rowdy behavior in the period leading up to the murder accusations. The Herald-Dispatch was part of the Gannett chain, a major United States media organization whose products include USA Today.

Sometime after the Nightline story, other major newsprint became

interested. They included The Los Angeles Times, The Miami Herald,<sup>32</sup> the San Francisco Chronicle,<sup>33</sup> and Cox newspaper chain. Eventually, the Associated Press and other syndicated print media were covering the case. The story started appearing throughout the country. In particular, the case even started appearing in the tourism and yachting periodicals and in the Caribbean regional media — print media very friendly to St. Vincent. Nevertheless, no matter how friendly they might have been in their coverage, the exposure of the St. Vincent government's denials of allegations of improper arrests, failure to administer basic medical treatment to prisoners, human rights abuses, corruption, and muzzling the media, were all adverse to the St. Vincent government and created pressure on the government to accord the Fletchers better treatment.

### *B. Tourism/Sailing-Related Media*

In the *Fletchers'* case, the travel media and the tourism and travel industry were important. With the slow demise of banana production, tourism was quickly becoming the number one industry and foreign exchange earner in St. Vincent. Politically, travel and tourism, especially the sailing industry, were important to St. Vincent. The St. Vincent Prime Minister was from Bequia in the Northern Grenadines and had based his economic and political strategy on attracting sailing, developing marinas, small hotels, and sailing-based tourism (i.e., adventure and ecotourism).

Because the predicaments of both the Heaths and the Fletchers derived from sailing in St. Vincent and the Grenadines, news of their cases and the patterns of abuses and corruption could have devastated the St. Vincent travel and tourism industry. Our investigations indicated that many other tourists and sailors encountered violence, extortion from the police, and human rights abuses. Almost weekly we documented each of these incidents with citations, sending them to the State Department and Congress in support of our continuing requests for action under 22 United States Code section 1732. Apparently they sometimes found their way to selected media outlets.

Incredibly, despite the many incidents of crime and corruption encountered by tourists to St. Vincent, the United States Department of State's consular bulletin on St. Vincent, including the one prepared in January 1997, only mentioned as potential crime problems that on occasion

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32. Juan O. Tamayo, *A Murder, A Rich Couple- And a Scandalized Nation*, THE MIAMI HERALD, July 24, 1997, James Anderson, *Scientific Evidence in Murder Trial*, THE MIAMI HERALD, Aug. 7, 1997.

33. Chronicle News Service, *A Bullet, a Dead Man and Two American Party Animals*, SAN FRANCISCO CHRONICLE, Aug. 2, 1997, at C1.

tourists have had things taken on the beach and/or from boats (e.g., petty thefts).

When the United States executive branch refused to issue an updated travel bulletin that more accurately reflected the circumstances, the defense team prepared and issued its own, entitled *Between the Devil and the Deep Blue Sea: Improper Detention, Extortions, and Other Nefarious Activities in St. Vincent and the Grenadines*. Albeit only one page, it provided websites, chat group sites, and ways to gain more information. It also was a plea for persons to contact the defense team and/or persons in the St. Vincent government; it helped galvanize persons whose only connection with the case was watching it on television.

Just as importantly, the defense team started to contact the sailing and ecotourism media. Here, Ed Stoner was important because he is a sailor and has a boat similar to the *Carefree*, the Fletchers' boat. Again, persuading the sailing media that the Fletchers had suffered injustices at the hands of the St. Vincent government was difficult.<sup>34</sup> The sailing and ecotourism magazines are designed to promote sailing and ecotourism as a fun, safe, and enjoyable activity.<sup>35</sup> Such magazines will not curry favor with Caribbean and Vincentian officials or their advertisers by underscoring the negative attributes and corruption encountered by sailors there. Eventually, the accumulation of attention and publicity by the mass media, interest by President Clinton, the legislative branch, and the international human rights groups, and continued transmission of information by the defense team made them interested in investigating the accusations.<sup>36</sup>

## V. INVESTIGATION

In cases in which Americans are detained and charged with crimes abroad and in which lobbying and the media are to play roles, information is essential. Many ways exist to assemble information, including: official

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34. For some of the early stories in the sailing media, see *Murder and Extortion in Paradise*, 236 *LATITUDE* 38, 94, (Feb. 1997) (on file with author).

35. For a typical reaction of the sailing and tourism media, see Bill Barich, *Death by Tourism*, *OUTSIDE* 75-83 (Nov. 1997)

Jim Fletcher's family had an attorney massaging the State Department in Washington and working the international media, and so many charges of corruption and mistreatment had been tossed out helter-skelter that it was impossible to decipher the truth. The people who live in St. Vincent and the Grenadines — or SVG, as it's known — were frankly in shock.

*Id.*

36. See, e.g., Jim Flannery, *Killers Or Victims*, *SOUNDINGS* (Essex, Ct.), Aug. 1997, at A14.

reports by the United States government on human rights<sup>37</sup> or on the criminal justice system of a country, information received through responses to Freedom of Information Act requests, research from various United States data banks, including the Foreign Information Broadcast Service reports (summaries of television and radio media from the country and/or region concerned), the hiring of investigative firms in the United States and/or in the country concerned, criminal justice documents, and international human rights reports.

With respect to international human rights reports, there was a local Human Rights Group in St. Vincent. Although this author personally visited St. Vincent and then phoned the head of the Vincent human rights organization, the head of the organization was not willing to exchange information or even confirm that his organization had a newsletter. Further research indicated that the Harvard Law Library did have the newsletters. We visited the Harvard Law Library and reviewed the reports, which proved quite useful in confirming, documenting, and elaborating to the State Department and executive branches the pattern of human rights abuses and irregularities in the operation of the Vincentian criminal justice system.<sup>38</sup>

The media can provide an excellent source of information when undertaking investigation. In many cases, if the media investigate and report over time on a case and perceive abuses and injustices, they can become allies and will provide the defense counsel with various leads.

In the case of St. Vincent, the abuses and human rights

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37. See, e.g., U.S. DEPARTMENT OF STATE, ST. VINCENT AND THE GRENADINES HUMAN RIGHTS PRACTICES 1992 (1993) (it discusses the calls for investigations into fatalities resulting from police shootings in 1992 although no investigations occurred); U.S. DEPARTMENT OF STATE, ST. VINCENT AND THE GRENADINES HUMAN RIGHTS PRACTICES 1995 (1996); U.S. DEPARTMENT OF STATE, ST. VINCENT AND THE GRENADINES HUMAN RIGHTS PRACTICES 1994, 1 (Mar. 1995) (on file with author) (it discusses the high number, estimated at ninety percent by the regional human rights group, Caribbean Rights, of convictions by confessions and the use of unwarranted police practices, including the use of physical force during detention, illegal search and seizure, and not properly informing those arrested of their rights; it also discusses the absence of any instances of the SVGs successful conviction and punishment of police officers involved in such abuses).

38. See, e.g., its discussion of a United Nations report criticizing prison conditions as violating the U.N. Standard Minimum Rules. VINCY RIGHTS: BULLETIN OF THE ST. VINCENT AND THE GRENADINES HUMAN RIGHTS ASSOCIATION (St. Vincent and Grenadines Human Rights Association, S. Africa), Sept. 1989, at 5 (on file with author); *SVG-HRA Reviews The Administration of Justice in St. Vincent and the Grenadines*, VINCY RIGHTS: BULLETIN OF THE ST. VINCENT AND THE GRENADINES HUMAN RIGHTS ASSOCIATION (St. Vincent and Grenadines Human Rights Association, S. Africa), July 1990, at 1-2 (on file with author). (criticizing the police conduct in criminal cases and calling for an independent review board or Citizen's Committee to inquire into complaints made by citizens of abuse and criminal behavior committed by the police).



deprivations had occurred over a long period of time. As a result, this author persisted in developing a dialogue with a variety of people, such as former high-level Vincentian politicians, media reporters and commentators in St. Vincent,<sup>39</sup> Vincentian politicians and law enforcement officials, United States government officials who deal with St. Vincent, diplomatic officials from other countries who deal with St. Vincent, and concerned Vincentian business persons. They provided sympathy, verified and supplemented much information, and gave us many new leads. For instance, a Vincentian lawyer and op-ed author characterized the *Fletchers'* and *Heath* cases as important because they brought attention to atrocities suffered by poor and virtually defenseless Vincentians at the hands of the police. In fact, he said the violations were so frequent that he coined the phrase *illegal normality* to describe them.<sup>40</sup>

Our investigation was aided by a book written by a former editor of a sailing magazine, whose book *Sitting Ducks* chronicles the intrigues that started when she and her husband (her boyfriend at the time) were startled one night when their yacht was boarded by a naked local native armed with a machete. The intruder stabbed her husband, but was then maced and caused no further harm. The book discusses the difficulties her husband had in obtaining medical treatment (e.g., his father removed him from the local hospital to a private doctor's clinic after he became infected in the hospital). Most importantly, her book discusses police ineptitude and corruption.<sup>41</sup> It mentions how the Mitchells' (James F., only a member of Parliament at the time, and his wife, at the time, Pat) acknowledged the police problems and then introduced the author to Nolly Simmons, who served as the local criminal investigator. Sure enough, Simmons located the culprit and had him arrested. Local law enforcement and the judicial community, however, protected the assailant and misled her repeatedly about the proceedings, so that even after she initiated many phone calls,

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39. E.g., Frank E. Da Silva, *Hans Matadial, Our Millstone*, THE VINCENTIAN, May 30, 1997 at 15, col. 1 (it discusses the role of the alleged bag-man for high-level officials in the St. Vincent Government in arranging illegal pay-offs. He is the person to whom Alan Heath allegedly paid \$25,000).

40. Cecil Blazer Williams, *Television, Police and Justice*, THE NEWS (Kingstown, St. Vincent), May 17, 1997; Cecil Blazer Williams, *Police Excesses*, THE NEWS (Kingstown, St. Vincent), April 19, 1997; and Cecil Blazer Williams, *Dat Bad-Dat Good*, THE NEWS (Kingstown, St. Vincent) March 1, 1996.

41. BETSY HITZ-HOLMAN, SITTING DUCKS 133-34 (1984) (it provides details of proactive means that the St. Vincent Criminal Investigation Division canvassed yachts and homes of foreigners on the pretext of checking passports, visas and cruising permits, while planting drugs on unsuspecting travellers. Upon *discovering* the drugs, the agents would typically demand on-the-spot payoffs or sexual cooperation from women, threatening their victims with exposure and stiff fines if convicted).

the case was dismissed.<sup>42</sup> One of the greatest problems for the Fletchers was that the main protagonist and witness against them was Nolly Simmons. More importantly, Penny Fletcher's altercations with Pat Mitchell (the Prime Minister's former wife), Nolly Simmons, and other friends of the Prime Minister apparently had solidified the desire of the St. Vincent government to turn the screws on them.

Sitting Ducks also discusses the murder of Carl Schuster, an American yachtsman who was killed aboard his boat *Zig Zig* in or around 1978 by a machete in the same harbor where the Heaths' yacht was attacked in October 1996. The attacker was never prosecuted. The book notes how the Vincentians were mainly concerned about the potential adverse impact his death would have on tourism.<sup>43</sup>

## VI. INTERNATIONAL HUMAN RIGHTS FORA

In cases where United States citizens are illegally detained abroad and subject to violations of international human rights treaties, counsel should consider what, if any, recourse there may be to international human rights fora. In the *Fletchers'* case, documenting abuses of their international human rights was pivotal. I immediately determined that the St. Vincent government had ratified the Civil and Political Covenant and even the optional protocol, thereby authorizing individual victims to bring petitions. I finally documented and briefed each incident in which an abuse occurred, noting the provisions of the Civil and Political Covenant that were breached.

In particular, counsel for such persons may be able to bring an action before either the Inter-American Court of Human Rights or the United Nations Human Rights Committee. Neither of these avenues will produce a quick judgment or order for the host government to release the individuals. Nevertheless, they can be powerful mechanisms to focus the attention of the public, international organizations, nongovernmental organizations, and policymakers in the host and other interested governments. The filing of an action in an international human rights fora will make policymakers, both in the host government and in the United States government, focus on the particularities of the alleged abuses, making the host government answer the allegations.

Just as important, the preparation and filing of a petition can help mobilize the media and other interested persons. The filing and acceptance by an international human rights fora of a complaint will itself indicate that

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42. *Id.* at 117-18.

43. *Id.*

the claims of the alleged victim(s) may have substance.

Unfortunately, although this author did prepare a petition for filing in an international human rights fora, he was not actually able to file the petition. Politics intervened. Dr. Ralph Gonsalves, the lead counsel in St. Vincent for the Fletchers was also the leader of the opposition party. If he helped and was associated with the filing of a petition alleging that his executive and judicial branches were participants in depriving persons of their fundamental human rights, he apparently perceived his political standing would be compromised. Because a petition in an international human rights fora (i.e., United Nations Human Rights Committee) requires a certification from local counsel that local remedies have been exhausted, his cooperation and approval was required. Theoretically, we could have obtained a certification from other counsel, but the use of a third local counsel would have been impolitic, although this avenue was explored. His unwillingness to sign the certification blocked use of this potential mechanism.

Still another avenue was to enlist an international human rights nongovernmental organization (NGO) in the case. This author sought out several international human rights organizations. The difficulty of obtaining help from an international human rights NGO is that they have few resources for the number of their projects and commitments. Furthermore, the Commonwealth Caribbean is traditionally viewed as having a comparatively strong human rights position and therefore not in need of interventions from international human rights NGOs.

International human rights NGOs that work in the Western Hemisphere focus primarily on Central America, the Andes, and countries in which thousands of persons are suffering endemic and systemic violations. In the Caribbean, they tend to focus on countries such as Haiti or Cuba. The comparative absence of traditional reporting on human rights problems in St. Vincent, except the national newsletter which has an extremely limited circulation, made most organizations hesitate to believe such abuses could exist. Such NGOs also prefer to help indigent and defenseless people. Persuading NGOs to help wealthy, white Americans posed an additional obstacle, since they understandably prefer to concentrate their limited resources on the oppressed, underprivileged, and poor.

Eventually, the Lawyers Committee on Human Rights (LCHR) did become involved and issued a Lawyer-to-Lawyer letter. Immediately before the P.I., one of their lawyers almost attended the P.I. as an observer. Through constant dialogue with the LCHR, the latter was able to follow the mounting international human rights violations suffered by the Fletchers. Just as important, defense counsel gained knowledge about

the types of international human rights the LCHR prioritized. Eventually, overreaching by the St. Vincent government triggered the LCHR's involvement.

The few human rights books on the Caribbean proved an important source of information because they covered the suppression and manipulation by the existing St. Vincent government of the media and its coverage of criminal cases and related public policy issues.<sup>44</sup>

Through other investigation, we uncovered and exposed the detention and expulsion on August 26, 1986 of Cert Declercq, a Belgian reporter working with Trends Financial magazine, who was investigating alleged financial frauds perpetrated by offshore banks in St. Vincent.<sup>45</sup> Our exposure of this and similar incidents proved a precursor of the aggressive action by the St. Vincent government to influence the media coverage of the case.

On the publicly owned media, the St. Vincent Prime Minister made public statements, referring to the Fletchers as "classic ugly Americans" and stating that most Vincentians believed the Fletchers were guilty. These statements followed his promise to President Clinton of fair process and that the judiciary was independent. The Prime Minister, in a visit to the United States, criticized the United States media's reporting on the *Fletchers'* case and on charges of corruption in the *Heath* case, and said he still thought Alan Heath was guilty for his wife's brutal murder. He invited the media to interrogate the lawyers who represented Heath. When the government media arranged an interview with Dr. Ralph Gonsalves, counsel for both Heath and the Fletchers, the media abruptly cancelled the interview at the last minute, angrily citing orders from the St. Vincent government as reasons for the cancellation.

On the eve of trial two incidents spurred the involvement of the LCHR. On July 4, 1997, Ralph Gonsalves, the lead defense counsel in St. Vincent, was served with a summons for criminal contempt. The charges were based on his comments immediately after the P.I., on March 10, 1997, in which he characterized the magistrate's decision a "travesty of

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44. E.g., Rickey Singh, *Freedom of Expression in the Caribbean*, INTERNATIONAL HUMAN RIGHTS LAW IN THE COMMONWEALTH CARIBBEAN 179-81 (1991) (the former Attorney General of St. Vincent threatened legal action against the writer of a contentious article in the newspaper THE VINCENTIAN and extracted an apology and promise not to ridicule the integrity of a Vincentian judge in exchange for non-prosecution of the journalist).

45. See, *Immigration Officials Expel Belgian Journalist*, FOREIGN BROADCASTING INFORMATION SERVICE, Aug. 2, 1986, at S3 (citing the Caribbean Area News Association, Aug. 26, 1986).

justice.”<sup>46</sup> Similar comments by him were reported by the St. Vincent press and on an ABC-Nightline segment devoted to the case. The fact that the St. Vincent government waited four months later — specifically on the eve of the trial — to charge Gonsalves, and then set his trial for the very same day as the Fletchers’ trial, signalled the politicization of the criminal justice system.

On July 7, 1997, as he entered St. Vincent, Arturo Diaz, Esq., a lawyer with the firm Cancio Nadal Rivera & Diaz based in Puerto Rico, and who was in charge of the overall coordination of the defense team, was detained at the airport by St. Vincent Authorities. They interrogated him about a letter he had sent to the United States Consul general, at the consul’s request. The letter alleged conversations between Diaz and an individual purporting to negotiate on behalf of the St. Vincent government for the Fletchers’ release in exchange for a cash payment. On advice of counsel, Diaz refused to answer questions about the letter, and was released that day. Previously, an attorney and bagman for the St. Vincent Prime Minister and Police Commissioner had threatened to charge Diaz with criminal libel for comments he made about the apparent extortion solicitation relating to the case.

Already, at this time the St. Vincent Police Commissioner, who was the target of corruption accusations in this case and in the *Heath* case, had sued Mark Truby of The Herald-Dispatch for civil libel. Truby was clearly the leading journalist on the case in terms of the quantity and quality of pieces.

The LCHR issued and broadly disseminated its Lawyer-to-Lawyer letter, condemning the actions of the St. Vincent government. The LCHR cited Principle 16 of the United Nation’s Basic Principles on the Role of Lawyers. It states that “governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; and (b) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”

It recommended sending letters, urging authorities in St. Vincent and the United States that all measures be taken to guarantee a fair trial without additional hindrance against the legitimate activities of defense counsel.

The Lawyer-to-Lawyer network, combined with the many media pieces and Congressional interest and criticism, exerted pressure on the St.

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46. John McWethy & Ted Koppel, *Nightmare in Paradise* (ABC Nightline television broadcast, May 2, 1997) Transcript No. 97050201-jo7, at 7.

Vincent government, and most likely added credibility to many of the charges of the defense team and the media, even though the government denied that such pressure had any influence at the time.

## VII. POTENTIAL ROLES OF OTHER GOVERNMENTS

Other governments can play an important role in international criminal and human rights cases. Normally, governments cooperate with each other in the investigation and prosecution of a transnational criminal case. In an era where transnational criminal groups are playing important and growing roles, the number of law enforcement groups involved in the investigation and prosecution of cases has multiplied exponentially. As a result, the numbers, types, and levels of experience, sophistication, and honesty among law enforcement officials vary widely.

An important element in the Fletchers' detention was the inordinate influence in St. Vincent economics and politics of transnational organized crime. The defense team focused on this problem and its national security implications as reasons for action in support of the Fletchers. The concern about the penetration of St. Vincent by transnational organized crime seemed to be the reason for Joseph's murder. FOIA documents and reports from other government sources indicated that Joseph's murder was drug related. Prior reports by the United States government and the media of the increasing use of the Grenadines and St. Vincent for cocaine transshipment and money laundering seemed to be a reason that the St. Vincent government had to divert attention from this line of investigation, especially since it would have produced more pressure for the Vincentian government to take remedial action and would have damaged the political standing of an already fragile government.

When a United States person is arrested and prosecuted abroad, the United States government sometimes is the initiator and driving force behind the investigation. On other occasions the United States government is an important participant. In cases in which the United States government is an important participant in conducting investigations and prosecutions, its willingness to help may be more constrained than when it is not a participant. Nevertheless under 22 United States Code section 1732 and Sec. 400 of the Foreign Affairs Manual, the State Department has an obligation to protect the legal and medical rights of an American detained and to do everything possible, even using its creativity, to protect the rights of detained Americans. The same United States Embassy overseas that houses attaches from the Federal Bureau of Investigation, the United States Customs Service, the Drug Enforcement Administration, the Internal Revenue Service, the Immigration and Naturalization Service, and

other law enforcement agencies. The United States Embassy and these agencies cooperate with the United States agencies and host government on the very criminal investigations and prosecutions that result in the arrest of Americans. When the United States Embassy and its Consul General provide services to protect the legal and medical rights of American persons detained abroad, they may not be inclined to be as sympathetic, creative, and energetic as they would be in cases in which the United States government is not a participant in the investigation and prosecution.

In cases in which the United States government is not a participant in the investigation and prosecution, the ability and willingness of the United States government to take major steps toward pressuring the host government to protect the legal and medical rights of Americans may be colored by other foreign policy matters. As mentioned above, in the case of the *Fletchers*, the United States relationship with St. Vincent was already strained by many factors.

One problem was the litigation brought by the United States in the World Trade Organization to end illegal preferences extended to bananas from the Eastern Caribbean, including St. Vincent. The sale of bananas recently represented one-half of St. Vincent's foreign exchange. Because the St. Vincent Prime Minister comes from the Grenadine islands, an area ignored to such an extent before his election that Union Island had an armed rebellion, the current St. Vincent government is perceived as unduly favoring the Grenadines and not helping mainland St. Vincent, where the banana growing occurs. The next potential cash crop is marijuana. However, under heavy pressure and occasional criticism from the United States, the St. Vincent government has agreed to and facilitated eradication of the marijuana crop. The United States used to be a heavy provider of foreign assistance to St. Vincent, but has phased out almost all of its aid. The only aid that continues is related to narcotics, which is politically detrimental to the St. Vincent government. In addition, in the context of the issuance of the International Narcotics Control Strategy Report, the United States has commented on the corruption surrounding the efforts by St. Vincent to act on counternarcotics enforcement.

In other cases, such as the example presented by the United States citizens who accidentally crossed from Kuwait into Iraq after the Gulf War and were arrested and convicted of crimes, the realities of United States - Iraqi relations made it difficult for the United States to exert pressure on Iraq to release the two Americans.

Other governments can play important roles. In the case of the *Fletchers*, the South African government was key. It furnished important information that it could have kept confidential and provided enormous moral support. Its officials spent much time talking to defense counsel and

to the media.<sup>47</sup> The Heath family constantly sent communications in support of the Fletchers.<sup>48</sup> The defense team was able to show how identical much of the illegal behavior of the St. Vincent government officials was in both the *Heath* and the *Fletcher* cases. The outrage of South African government officials helped the Fletcher family and supporters, defense counsel, and ultimately the legislative branch understand the patterns of illegality. Interestingly enough, the United States executive branch maintained that the cases were different. The active support of the South African government undermined the credibility of the denials by the St. Vincent government officials.

In the *Fletchers'* case, the South African government's care and attention to detail and follow up in the diplomatic notes was much greater than that of the United States government. It enabled defense counsel to suggest that the United States government be equally as efficient in both the preparation of notes and insistence on replies and/or other action. The media underscored the similarity between the two cases and the contrasting conduct between the South African and United States governments in protecting their nationals.

Interestingly, in October 1997, the Durban South African police were able to conduct investigations in St. Vincent. As a result, one person confessed that he and another person had murdered Lorraine Heath. It happened precisely as Alan Heath claimed to the St. Vincent police and the media.<sup>49</sup>

In some cases, foreign governments, other than the United States and the host government, will be interested in the case. An example is the *Fletchers'* case, discussions of human rights abuses, corruption, and dangers to tourists in St. Vincent had an adverse impact on tourism, especially sailing tourism, in the Eastern Caribbean. Some people confuse Grenada with the Grenadines. Even if they understand the difference,

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47. Keith Ross, *Yachtie's Death Furore*, DAILY NEWS (Durban, S. Africa) May 16, 1997 (on file with author) (about the connection between the *Heath* and *Fletchers* cases and the cooperation between the two families).

48. See, e.g., Marvin Meintjies, *Caribbean Cruise Ordeal*, DAILY NEWS (Durban, S. Africa), May 29, 1997 (on file with author) (report of a meeting between Nigel Heath, brother of Alan Heath, and Rod Duncan, nephew of Jim Fletcher, comparing notes and showing photos of them).

49. Keith Ross, *St. Vincent Killers Identified*, DAILY NEWS (Durban, South Africa), Oct. 6, 1997 (on file with author); Keith Ross, *Don't Hang Them, Says Husband*, DAILY NEWS (Durban, South Africa) The articles state that Durban Supt. Todd Suomaroo and Supt. Allan Alford identified the murderers as wanted criminal Dalton Kiel and a man known only as *Muslim*. *Id.* Kiel is wanted by the police in Trinidad on five counts of armed robbery and other offenses. Mr. Kiel had confessed to an informant on the island that he and *Muslim* had committed the murder and robbery. *Id.*



many sailors who would visit the Grenadines, continue on to Carricou (an island which is part of Grenada and the first island south of the Grenadines chain) and Grenada. In addition, in the *Fletchers'* case, the St. Vincent Prime Minister, who is the longest sitting Prime Minister in the Caribbean Common Market and Community, characterized the case as an attack on the entire Caribbean and on the legal system of the region. This mischaracterization was a political move to develop active support from his political allies. Hence, defense counsel naturally had to explain to the diplomats from surrounding islands that our efforts were merely directed at saving the lives of two innocent Americans, attempting to obtain a speedy and fair trial for them in one country, and protecting their international human rights. We noted that a certain high level official of the St. Vincent government was trying, at every opportunity, to regionalize the case when it was in the best interests of the region to isolate it as St. Vincent's problem.

Governments can decide to become involved at various times in different cases. In a high visibility case, such as the efforts to prosecute the former Shah of Iran and Manuel Noriega, the efforts of foreign governments and even international organizations (e.g., the Organization of American States in the case of Noriega) are activated. The handling of the atrocities during the conflicts in the former Yugoslavia and Rwanda, and the efforts to bring to justice the persons allegedly responsible for the *Lockerbie* case, illustrate the involvement of the United Nations and other international organizations. The cases involving the former Yugoslavia and Rwanda even indicate the ability to create a new international organization: for the sole purpose of bringing justice to the investigations and prosecutions of those responsible for the atrocities.

#### VIII. LESSONS

An important lesson is to file early, and often, Freedom of Information Act requests for documents related to the case. In the *Fletchers'* case the requests produced a weekly flow of documents on both the handling of the *Fletchers'* case and the handling of other cases in St. Vincent. Even if the State Department does not respond timely, the administrative appeals and/or litigation normally will produce useful documents. The requests and appeals also create pressure on the executive branch whose obligations are to assist in protecting the legal rights of Americans detained abroad.

Personal contacts and family networks can be crucial. One cannot underestimate the enormous importance of fourteen-year-old Julia Fletcher in galvanizing the media to support her efforts in securing justice for her

father; the constant efforts of the extended Fletcher family's contacts and networks; and many individuals who responded to articles and participated in the lobbying efforts, even though they had no connection with the Fletchers or the family.

The ability to have someone design strategy with respect to the governments, media, and nongovernmental organizations, and then design and prepare communications, and help implement the strategy are essential. Because of the diversity of people involved, it can become complicated to manage the paper flow and to connect the various people.

A proper assessment of the interaction between domestic and international law, comparative law, and foreign policy is required. Just as important, someone must constantly monitor the strategy and its implementation, since it will need constant adjustment in accordance with events. Hence, a strategy reassessment is required every so often.

These cases often take time. Hence, deep pockets and patience are helpful. When a loved one is incarcerated overseas in difficult circumstances, tension and stress exist among family and friends. They all make sacrifices and cannot continue to make the sacrifices indefinitely. Sometimes, they require candid assessment for the predicament of their loved ones, so that they are able to deal with the predicament for the duration of the ordeal. For instance, most observers would not have expected the situation with the United States hostages in Iran after the takeover of the United States Embassy to have lasted for almost the bulk of the Carter Administration.

The family's budget is often a limiting factor. Hard decisions must be made based on the financial situation. In some cases, help from the executive and legislative branches and from non-governmental organizations can help leverage professional services when budgets are limited.

The reactions of the host government are important. On the one hand, the St. Vincent government underestimated the impact of the media and sympathy and interest in the case. On the other hand, when it became active, criticizing the media and then insisting on rebuttal time both personally and through a public relations firm,<sup>50</sup> it only focused more attention on the allegations. More recently, the reports of a confession by the alleged murderer of Lorraine Heath and the dismissal by the judge of the case, commenting there was no direct or indirect evidence against the Fletchers, undermined the government's efforts. Nevertheless, the St. Vincent government is still trying to restore its reputation by castigating

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50. *Government Hires P.R. Firm in Fletcher Case*, THE HERALD (Bequia, St. Vincent) June 12, 1997.

the media.<sup>51</sup>

In the *Fletchers'* case the facts were helpful because there was no evidence against the Fletchers with respect to the murder in question. A difficult element of the Fletchers' case was that the murder charge did not permit bail in St. Vincent. If the defendant from the United States or another country is a member of or knowingly working with a transnational organized crime group (not the case in either the *Fletchers'* or *Heath* cases), especially in the active commission of transnational crimes, then the lobbying work becomes more difficult. Even more difficult would be lobbying on behalf of a person charged with genocide or war crimes conducted over a long period of time.

Another important element in the *Fletchers'* case was that, after the P.I., the defense team retained Dr. Richard L. Johnny Cheltenham to represent Penny Fletcher. He was diligent in preparing technical legal motions, a brilliant orator, and tireless in his preparation. Politically, he had no ax to grind. He was a Barbadian, a member of Parliament, and a very distinguished and experienced lawyer who had defended many murder cases. His cooperation with Dr. Ralph Gonsalves, who was also an experienced criminal trial lawyer and brilliant orator, and the rest of the team proved a formidable combination.

Lobbying in public international law issues concerning serious transnational crimes is an art, not a science. It is not for the weak at hand. It requires investigative skills, an assessment of the many variables at play in the existing legal and diplomatic elements, and pursuit of a multi-faceted strategy that must be periodically reassessed and adjusted. When a loved one is lost in paradise in circumstances such as the Fletchers', international lawyers, governments, and others who believe in the rule of law must be involved.

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51. Associated Press, *St. Vincent Leader Attacks Media*, CHARLESTON DAILY MAIL, Aug. 15, 1997, at 7A; Dugie Joseph, *St. Vincent Leader Criticizes Media*, CHARLESTON GAZETTE, Aug. 15, 1997, at C1.

# CONGRESSIONAL SUPPORT FOR CUSTOMARY INTERNATIONAL HUMAN RIGHTS AS FEDERAL COMMON LAW: LESSONS OF THE TORTURE VICTIM PROTECTION ACT

*Ryan Goodman\**

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## I. INTRODUCTION

Transnational human rights litigation has succeeded at a steady pace since the Second Circuit’s 1980 decision, *Filartiga v. Pena-Irala*.<sup>1</sup> In *Filartiga*, the court construed an eighteenth century statute — the Alien Tort Claims Act (ATCA)<sup>2</sup> — as granting both a cause of action and jurisdiction to two Paraguayan citizens.<sup>3</sup> The ATCA provides: “[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or treaty of the United States.”<sup>4</sup> Accordingly, the Second Circuit permitted the *Filartigas* to file suit against a Paraguayan official for violating the customary

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1. *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).
2. 28 U.S.C. § 1350 (1982).
3. *Filartiga*, 630 F.2d at 876.
4. 28 U.S.C. § 1350 (1982).

international law against torture since the official had allegedly tortured to death Dr. Filartiga's seventeen year-old son. Over the years, the *Filartiga* ruling has achieved a strong following in several other circuits.<sup>5</sup>

Notably, the *Filartiga* line of cases was temporarily disturbed by a contrary District of Columbia Circuit decision *Tel-Oren v. Libyan Arab Republic*.<sup>6</sup> Congress effectively overturned that case by passing the Torture Victim Protection Act (TVPA).<sup>7</sup> The TVPA contradicts Judge Bork's position in *Tel Oren* that the ATCA could not establish a cause of action for modern customary international law.<sup>8</sup> The Statute enumerated two specific causes of action, torture and extrajudicial killing, leaving the remainder of the ATCA intact. Now several years after the TVPA, Section 1350 case law has continued to develop; with more circuits following the *Filartiga* decision and other causes of action being deemed appropriate for litigation.<sup>9</sup>

In this discussion, I analyze the TVPA and its legislative history to demonstrate the scope and consequence of Congress' endorsement of human rights litigation. This endeavor is undertaken primarily in response to an emergent challenge to transnational human rights litigation. That is, a handful of scholars have recently argued that the consensus view on international law includes an ill-founded maxim that customary international law is federal common law.<sup>10</sup> This critique, which has been called the *revisionist position*, potentially disrupts ATCA litigation. Specifically, if customary international law is not federal common law, the federal judiciary arguably could not elaborate other causes of action without specific political branch authorization.

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5. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 978 F.2d 493, 495-96 (9th Cir. 1992); *Xuncax v. Gramajo*, 886 F. Supp. 162, 189 (1995); *Forti v. Suarez-Mason I*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

6. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

7. Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 78, codified at 28 U.S.C. § 1350.

8. *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring).

9. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995) (genocide); *Doe v. Unocal*, 1997 U.S. Dist. LEXIS 5094, 32-35 (March 25, 1997) (slave trade).

10. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of Human Rights Litigation*, 66 FORDHAM L. REV. (1997); Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995) [hereinafter Weisburd, *State Courts*]; Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); Cf. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

Indeed, revisionists argue that customary international law should not be federal law without a prior political branch sanction due, in large part, to democratic accountability and separation-of-power concerns. In response, I take the position that the TVPA blunts the force of this criticism. In particular, the statute's text and legislative history demonstrate: that passage of the TVPA provides ample political branch authorization for the wider *Filartiga* doctrine if such authorization was indeed necessary; and that the TVPA legislative history indicates Congressional agreement with the conventional view that customary international law is federal common law absent political branch action.<sup>11</sup> The TVPA, thus, both immunizes the *Filartiga* doctrine from the revisionist challenge, and brings into question the merits of the revisionist position itself.

## II. READING THE TVPA: CHOOSING AN INTERPRETIVE METHOD

My discussion primarily relates to aspects of the revisionist critique presented by Professors Curtis Bradley and Jack Goldsmith, since their work both explicitly challenges *Filartiga* and also attempts to account for the TVPA. Notably, Bradley and Goldsmith's argument has evolved; that is, their position has increasingly hardened in response to their critics. Initially, they presented their argument that political branch authorization is necessary for federal courts to apply customary international law as federal law, but gave no indication of rules that would define such an authoritative signal. Derek Jinks and I argued that if such a political branch signal were necessary, it has been given: Congress, in passing the TVPA, endorsed the *Filartiga* line of cases.<sup>12</sup>

In rebuttal to our TVPA argument, Bradley and Goldsmith moved from an earlier, cursory discussion of the statute<sup>13</sup> to recognizing that the

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11. The present discussion directly builds on earlier work. See Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (Nov. 1997). This work should be consulted for its more encompassing analysis of the revisionist position within the context of the *Filartiga* doctrine. For other extensive criticisms of the revisionist position, see Derek P. Jinks, *The Federal Common Law of Universal, Obligatory, and Definable Human Rights Norms*, 4 ILSA J. INT'L & COMP. L. (forthcoming 1998); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. (forthcoming 1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM. L. REV. 371 (Nov. 1997); and Beth Stephens, *The Law of Our Land Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (Nov. 1997).

12. See Goodman & Jinks, *supra* note 11.

13. Indeed, the initial revisionist position only briefly mentioned the statute for the limited claim that the TVPA "[b]y creating a federal cause of action for torture . . . arguably provides a basis for federal question jurisdiction for suits involving torture." Bradley & Goldsmith,

TVPA definitely creates a cause of action for torture and extrajudicial killing. However, they claim that the TVPA should be read, first, as failing to endorse the *Filartiga* line of cases and, second, as a Congressional rejection of *Filartiga's* open-ended approach. The TVPA, they argue, should be construed to limit Section 1350 suits to only the enumerated causes of action, torture and extrajudicial killing. They conclude: that if Congress intended to sanction the federal courts' view that other causes of action are permitted under Section 1350, the text of the statute would have to stipulate such an endorsement explicitly. In short, this most recent articulation of their position effectively denies the very possibility of federal *common* law; since the Congress must specify by the full extent of the judiciary's interpretive domain.

Indeed, to avoid the TVPA destructive implications for the revisionist position, Bradley and Goldsmith implicitly now appear to embrace Justice Scalia's textualist approach to statutory interpretation. Conspicuously, Bradley and Goldsmith eschew discussion of any details of the legislative history. Instead, they perform a series of exercises that accord with the textualist approach: comparing the purposes of analogous statutes and making inferences from the structure of the statute as a whole. Most importantly, their suggested requirement of a clear textual statement closely accords with the central "radical"<sup>14</sup> principles of Justice Scalia's textualism. Ultimately, their approach departs from established conventions not only of international law but also of statutory interpretation.

In contrast to Bradley and Goldsmith's approach, I interpret the meaning and purpose of Section 1350 and the TVPA by including a close examination of the TVPA legislative history. The judiciary's general method of statutory interpretation encourages this use of legislative history.<sup>15</sup> And, my assessment of the TVPA, in particular, relies on the

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*Customary International Law*, *supra* note 10, at 873 n.356 (citing Weisburd, *State Courts*, *supra* note 10, at 3-4); *see also* Weisburd, *State Courts*, *supra* note 10, at 56 ("Congress can enact statutes creating federal causes of action for violations of international law, as it has done with respect to torture, for example.") This brief aside offered no indication of either the deep interconnections between the TVPA and Section 1350, or the extensive legislative history concerning congressional support of the *Filartiga* doctrine. Furthermore, claiming the TVPA *arguably* provides a cause of action for torture is unnecessarily ambiguous; and discussing the statutes application only to torture — when the body of the statute also deals extensively with extrajudicial killings — suggests a surface reading of simply the statute's title.

14. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

15. In 1983, Judge Patricia Wald remarked: "No occasion for statutory construction now exists when the Court will not look at the legislative history." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983). Although the frequency of the Court's reliance on legislative history has declined, nearly all the Justices still generally agree to the utility of legislative history in statutory

most authoritative aspects of the relevant record committee reports<sup>16</sup> and statements by the bill's sponsors.<sup>17</sup>

### III. LESSONS OF THE TVPA

An honest appraisal of the TVPA legislative history reveals clear Congressional support for the consensus position: that *Filartiga* was rightly decided and that customary international human rights law is federal common law. This assessment can be analyzed in three parts. That is, examining the TVPA text and legislative history establishes: a) Congress did not intend the TVPA to prevent the litigation of other causes of action under the ATCA; b) Congress' intent endorsed the *Filartiga* doctrine; and c) Congress agreed with the conventional view that customary international law is federal common law. I discuss each of these assessments in turn.

#### A. *The TVPA Should Not Limit Other ATCA Causes of Action*

A textualist would be hard pressed to prove the TVPA should limit the scope of the ATCA. Judges have read the ATCA to include a clear substantive component: a relatively open-ended cause of action for torts committed in violation of the law of nations. The TVPA provides no statement, clause, or provision to suggest Congressional disagreement with the prevailing judicial application of the ATCA. Moreover, a strong presumption rests against interpreting a subsequent statute to limit the effect of a prior statute, without a clear Congressional statement to such an

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interpretation. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 751 (2d ed. 1995) ("The Supreme Court still relies on committee reports (even if less than before), and in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991), all of the other Justices joined in a footnote explicitly rejecting Justice Scalia's general proposition that legislative history is irrelevant to proper statutory interpretation.").

16. Wald, *supra* note 15, at 201 ("Committee reports remain the most widely accepted indicators of Congress' intent."); ESKRIDGE & FRICKEY, *supra* note 15, at 743 ("Most judges and scholars agree that committee reports should be considered as authoritative legislative history and should be given great weight (i.e., a statement in a committee report will usually count more than a statement by a single legislator)."); *Id.* ("Committee reports appear particularly well-suited for the authoritative role they play. Most legislation is essentially written in committee or subcommittee, and any collective statement by the members of that subgroup will represent the best-informed thought about what the proposed legislation is doing.").

17. ESKRIDGE & FRICKEY, *supra* note 15, at 791 ("The qualms courts and commentators may have about relying on statements made during floor debates and in legislative hearings often disappear when the speaker is the sponsor of the bill or amendment that includes the statutory provision being interpreted.").



effect.<sup>18</sup> Indeed, examining the structure of the statute as a whole now with the codification of the TVPA at Section 1350 supports the consensus view: the statute encompasses more than jurisdictional issues. That is, the ATCA wing like the TVPA wing creates procedural jurisdiction, but also creates a substantive cause of action. Several federal courts, relying on their “reading of *the plain text* of Section 1350,” have recognized similar implications.<sup>19</sup> Notwithstanding these assessments, at worst, Section 1350 statutory construction is unclear. And, in the event of textual ambiguity, even a plain meaning rule would permit recourse to legislative history.<sup>20</sup>

The TVPA legislative history reveals one pervading concern in the Congressional deliberations: that passage of the TVPA should not disturb the ongoing development of ATCA litigation. Indeed, the House’s principal sponsor of the TVPA — Representative Gus Yatron — specially denounced interpreting the TVPA as a narrowing device:

International human rights violators visiting or residing in the United States have formerly been held liable to money damages under the Alien Torts Claims Act. It is not the intent of the Congress to weaken this law, but to strengthen and clarify it. Federal courts should not allow Congressional actions with respect to this legislation to prejudice positive developments, but rather to act upon existing law when ruling on the cases presently before them.<sup>21</sup>

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18. *Id.* at 645 (explaining the interpretive rule “that one provision of a statute should not be interpreted in such a way as to negate or perhaps even derogate from other provisions of the statute (to the extent that this is possible)”).

19. *See, e.g., In re Estate of Ferdinand Marcos, Human Rights Litigation II*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“Our reading of *the plain text* of §1350 is confirmed by the Torture Victim Protection Act of 1991, codified at this section.”) (emphasis added); *Beanal v. Freeport-McMoran*, No. 96-1474 1997 U.S. Dist. LEXIS 4767, \*54, \*55 (E.D. La. Apr. 9, 1997); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2nd Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 181, 185 (D.Mass. 1995).

20. Patricia U. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 AM. U.L.REV. 277, 285 (1990).

The Plain Meaning Rule basically articulates a hierarchy of sources from which to divine legislative intent. Text comes first, and if it is clearly dispositive, then the inquiry is at an end. Legislative history, therefore, still has an important role to play as long as statutory construction is not entirely plain.

21. *The Torture Victim Protection Act: Hearings on H.R. 1417 Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 100th Cong., 2nd Sess. 1 (1988) (Rep. Yatron). [hereinafter *TVPA House Hearings*].

In this regard, members of the House Subcommittee asked all the witnesses to give assurances that the legislation would endorse, rather than weaken, other Section 1350 litigation.<sup>22</sup> In short, the TVPA legislative history provides little, if anything, to suggest that the Congress thought the TVPA should be a device for *restricting* suits; rather, the evidence overwhelmingly supports the conclusion that Congress wanted to leave the *Filartiga* doctrine, at the very least, unimpeded.

### *B. Congress Adopted the TVPA to Endorse the Filartiga Doctrine*

The TVPA legislative history provides a surplus of evidence concerning Congress' endorsement of progressive developments in Section 1350 case law. In particular, the House Report provides language unequivocally supporting the *Filartiga* litigation, and emphasizes the acceptability of the judiciary's prospective incorporation of existing and evolving customary international law norms: "[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by Section 1350. The statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."<sup>23</sup>

Correspondingly, the Senate Report reiterates the House Report, explaining the reason Congress added the TVPA to Section 1350, rather than replace Section 1350, was to assure the continuation of other causes of action.<sup>24</sup> Additionally, the Senate Report specifically discusses ATCA cases involving other causes of action to underscore the view that: "[T]orture or summary executions do not exhaust the list of actions that may appropriately be covered by Section 1350."<sup>25</sup> Indeed, the Senate's principal sponsor of the bill, Senator Arlen Specter, explained that the TVPA was primarily a gap-filling device, meant to safeguard the ongoing litigation: "This bill closes a gap in the law. Under court decisions, aliens have the right to sue their torturers under the Alien Tort Claims Act, but not United States citizens. This bill would extend protection to United

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22. *TVPA House Hearings*, *supra* note 21, at 71-72 (Rep. Yatron) (asking all panelists to assure committee that TVPA would not weaken ATCA).

23. H. REP. NO. 367(I), 102D CONG., 1st Sess. 1991, 1992 U.S.C.C.A.N. 84, 86 1991 WL 255964 (Nov. 25, 1991).

24. S. REP. NO. 249, 102D CONG., 1st Sess., 1991 WL 258662 (Leg. Hist.) at 3 (Nov. 26, 1991) (emphasis added). ("Section 1350 has other important uses and should not be replaced.")

25. *Id.* at 4; ("For example, outside of the torture and summary execution context, several Federal court decisions have relied on Section 1350.") (citing *Von Dardel v. Union of Soviet Socialist Republics*, 623 F.Supp 246 (1985); *Adra v. Clift*, 195 F. Supp. 857, 864 (D. Md. 1961)).

States citizens *while retaining the current law's protection of aliens.*"<sup>26</sup> The TVPA was essentially understood as a measure to "eliminate any uncertainty here and would *compliment the ongoing litigation efforts under the ATCA.*"<sup>27</sup> In sum, Congress wanted to ensure that human rights litigation would not be bottlenecked by *Tel-Oren* and passed the TVPA to ensure the continued success of the *Filartiga* doctrine.

### C. *The TVPA Indicates Congress Joins the Consensus View that Customary International Law is Federal Common Law*

Perhaps most debilitating for the revisionist position is the Senate Report's language strongly supporting the position that customary international law is appropriately considered federal common law. In no uncertain terms, the Senate Report endorses this principle, with specific regard to the elaboration of international law in human rights cases:

While the legislation specifically provides Federal district courts with jurisdiction over these suits, it does not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases. As a practical matter, however, state courts are not likely to be inclined or well-suited to consider these cases. International human rights cases predictably raise legal issues such as interpretations of international law that are matters of Federal common law and within the particular expertise of Federal courts.<sup>28</sup>

The Senate Report dovetails with the House Report's emphasis on keeping the ATCA "intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."<sup>29</sup> In short, the Congress, itself, adheres to the maxim that *customary international law is federal common law*, especially in human rights cases.

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26. 137 CONG. REC. S1378, 1378 (Jan. 31, 1991) (Statement of Sen. Specter) (emphasis added); see also *TVPA House Hearings*, *supra* note 21, at 86-87 (Sen. Solomon) ("[The TVPA] will serve, in my judgment, to clarify a technical point in the existing law.")

27. Torture Victim Protection Act of 1989, Hearings before the Subcommittee on Immigration & Refugee Affairs of Senate Comm. on the Judiciary, 101 C., 2 S. 19 (1990) at 40-41 (emphasis added); see also 135 CONG. REC. H6423, 6426 (Oct. 2, 1989) (statement of Sen. Leach) (describing TVPA clarificatory function in ensuring progression of ATCA judicial successes).

28. S. REP., *supra* note 24, at 6 (emphasis added).

29. H. REP. NO. 367(I), 102D CONG., 1st Sess. 1991, 1992 U.S.C.C.A.N., 86 1991 WL 255964 (Nov. 25, 1991).

#### IV. IMPLICATIONS AND ASSESSMENTS

After the TVPA, judges who want to respect Congress' intentions should feel free, if not encouraged, to incorporate human rights violations in addition to official torture and extrajudicial killing. Indeed, the revisionist reading of the TVPA requires Herculean judicial activism to avoid this conclusion. Furthermore, some of the revisionist arguments concerning the TVPA demonstrate the hollowness of their claims for democracy. Congress, after all, clearly did not want the TVPA to disturb the incorporation of other causes of action under the *Filartiga* doctrine. Yet, Bradley and Goldsmith would use the TVPA specifically for such mischief.

At a greater level of abstraction, the TVPA also indicates Congress' support for the continued judicial practice of applying customary international human rights law as federal common law. Congress' stance should confound the revisionist position. The revisionists' instruction to courts, to incorporate as federal law only customary international law norms that are designated by statute is a rule that the Congress, itself, opposes.

# THE FEDERAL COMMON LAW OF UNIVERSAL, OBLIGATORY, AND DEFINABLE HUMAN RIGHTS NORMS

*Derek P. Jinks\**

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International law is part of United States law. Indeed, international law — or the “law of nations” in eighteenth century parlance — has been considered part of United States law since the founding.<sup>1</sup> The Judiciary Act of 1789, the enabling legislation of Article III,<sup>2</sup> establishes federal court jurisdiction over torts committed in violation of the law of nations. This provision, the Alien Tort Claims Act (ATCA), provides: “[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or treaty of the United States.”<sup>3</sup> Given the paucity of potential claims arising under eighteenth-century “law of nations,” this provision predictably generated

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1. See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 55-56 (1952).

[T]he Constitution was framed in firm reliance upon the premise, frequently articulated, that . . . the Law of nations in all its aspects familiar to men of learning in the eighteenth century was accepted by the framers, expressly or implicitly, as a constituent part of the national law of the United States . . . .

2. See Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988) (describing Judiciary Act as “the structural statutory law of the new nation” and, with the Constitution, part of the “‘organic laws’” of the Founding).

3. 28 U.S.C. § 1350 (1994).

few suits through the early years of the republic.<sup>4</sup> The shockwaves of Nazi Germany, the “final solution,” and Nuremberg would, however, fundamentally alter the landscape of international law.<sup>5</sup> Since the end of World War II, international law has regulated not only relations between states, but also relations between states and their citizens.<sup>6</sup> Individual human rights are now indisputably part of the transnational legal system. This development created the juridical space necessary to revive the ATCA. Given the ever-widening consensus on the legal status of an inviolable core of international human rights, renewed interest in the ATCA was arguably inevitable.

*Filartiga v. Pena-Irala* was the breakthrough case.<sup>7</sup> In *Filartiga* — aptly termed the “*Brown v. Board of Education* of domestic human rights litigation”<sup>8</sup> — the Second Circuit Court of Appeals held that official torture violates the law of nations, and, therefore, gives rise to an actionable claim under the ATCA.<sup>9</sup> Confronted with a constitutional challenge to the ATCA, the *Filartiga* court also held that Article III permitted such jurisdiction since the “law of nations,” as part of the federal common law, arises under the laws of the United States.<sup>10</sup> *Filartiga* has since met with near uniform approval in the academy<sup>11</sup> and federal courts.<sup>12</sup> Only Judge

4. Of course, eighteenth century CIL encompassed very few norms. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring). Additionally, only roughly 15 treaties were in force in 1789. See Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 46 (1985). Many scholars have offered explanations for this initial paucity of ATCA claims. For a particularly rich account, see Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 470-71 (1989).

5. See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2038 (1997) (discussing Nuremberg as a “paradigm shift”).

6. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 227-40 (1993); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1-16 (1982).

7. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

8. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2366 (1991).

9. *Filartiga*, 630 F.2d at 876.

10. *Id.* at 887 n.20 (“International law has an existence in the federal courts independent of acts of Congress . . . .”); *Id.* at 885 (“[T]he law of nations . . . has always been part of the federal common law”) (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900) and *The Neireide*, 13 U.S. 388, 423 (1815)).

11. See, e.g., Kathryn Burke, et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 321 (1983); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 57, 98-102 (1981); Symposium,

Bork's now-repudiated concurrence in *Tel-Oren v. Libyan Arab Republic* challenged the *Filartiga* holding that the ATCA provided a federal cause of action for certain international human rights violations.<sup>13</sup> In short, a veritable consensus emerged that some subset of CIL, including certain international human rights norms, is part of federal common law.

## I. THE REVISIONIST CRITIQUE: WHAT IS THE STATUS OF INTERNATIONAL LAW IN UNITED STATES LAW?

The *Filartiga* line now faces a new challenge.<sup>14</sup> This emergent challenge to the consensus view, which Ryan Goodman and I have called the "revisionist position,"<sup>15</sup> questions the foundations of the *Filartiga* holding. This critique claims that the consensus view "is the result of a combination of troubling developments, including mistaken interpretations of history, doctrinal bootstrapping by the *Restatement (Third) of Foreign*

INT'L L. 1 (1981); Symposium: *Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 305 (1981).

12. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997) [hereinafter *Customary International Law*] ("[A]lmost every federal court that has considered the modern position has endorsed it.") See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (describing the "settled proposition that federal common law incorporates international law"), *cert. denied*, 116 S. Ct. 2524 (1996); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) ("It is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law."); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1473, 1475 (9th Cir. 1994); *Filartiga*, 630 F.2d 876, 885; *Xuncax*, 886 F. Supp. 162, 193; *United States v. Schiffer*, 836 F. Supp. 1164, 1170 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3d Cir. 1994); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987), *reh'g granted on other grounds* 694 F. Supp. 707 (N.D. Cal. 1988); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds* 654 F.2d 1382 (10th Cir. 1981).

13. *Tel-Oren* 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring). See also Michael Ratner & Beth Stephens, *Tyrants, Terrorists and Torturers Brought to Justice; United States Courts Provide Compensation for Victim*, NEW YORK L.J., May 15, 1995, at S5. ("Judge Bork's opinion is the only judicial opinion calling *Filartiga* into question. Since then every decision has supported the result reached in *Filartiga*; most have awarded substantial damages.")

14. See Bradley & Goldsmith, *supra* note 12; Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter *Human Rights Litigation*]; see also Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

15. See Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: Federal Common Law and International Human Rights*, 66 FORDHAM L. REV. 463, 469 (1997).

*Relations Law*, and academic fiat.”<sup>16</sup> Professors Curtis Bradley and Jack Goldsmith suggest that — contrary to *Filartiga*’s holding — CIL is not federal law absent political branch authorization and, as a consequence, federal courts should have limited, if any, jurisdiction over claims arising under CIL.<sup>17</sup> Furthermore, the revisionists argue that if CIL is not part of federal common law, ATCA suits between non-citizens would be unconstitutional for failure to fit under any of Article III’s provisions. Indeed, the doctrinal consequences of the revisionist critique are potentially crippling for the *Filartiga* line.

The normative force of the revisionist position rests on two related concerns. First, the revisionists suggest that international law increasingly regulates “many areas that were formerly of exclusive domestic concern.”<sup>18</sup> Second, the revisionists decry the “new CIL,”<sup>19</sup> which governs a broad range of juridical relationships,<sup>20</sup> emerges quickly,<sup>21</sup> and is less consent-based than traditional CIL.<sup>22</sup> Thus, the revisionists conclude that the “new CIL” has many potentially troubling doctrinal implications: federal CIL might preempt an unacceptably broad range of state laws;<sup>23</sup> federal CIL might involve federal courts in issues best left to the political branches;<sup>24</sup> and federal CIL might potentially invalidate inconsistent, democratically-produced United States political branch action.<sup>25</sup> Under the revisionist view, these concerns counsel against the wholesale incorporation of CIL

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16. Bradley & Goldsmith, *supra* note 12, at 821.

17. A word on the parameters of my analysis is in order. First, in this short presentation, I will not provide an in-depth explication of Bradley and Goldsmith’s position. For a summary of their argument, see Goodman & Jinks, *supra* note 15, at 470-79. The steps of the argument are far more nuanced than I will discuss, however, the objections I raise here center on the applicability of this critique to ongoing ATCA litigation. Second, I will not discuss the implications of the Torture Victim Protection Act. For an excellent, succinct discussion of the TVPA’s relevance to this debate, see Ryan Goodman, *Congressional Support for Customary International Human Rights Law as Federal Common Law: Lessons of the Torture Victim Protection Act*, 4 ILSA J. COMP. & INT’L L. (forthcoming 1998). This short Article draws on a more extended piece I co-authored with Ryan Goodman, *supra* note 15. Article written by Ryan Goodman and I. See Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: Federal Common Law and International Human Rights*, 66 FORDHAM L. REV. (forthcoming 1997). This piece summarizes one of the arguments we advance in that Article.

18. Bradley & Goldsmith, *supra* note 12, at 821.

19. *See id.* at 838-42.

20. *See id.* at 839-40.

21. *See id.* at 840-41.

22. *See id.* at 841-42.

23. *See id.* at 846-47.

24. *See* Bradley & Goldsmith, *supra* note 12, at 844-46.

25. *Id.* at 857-58, 868-69.



into federal common law. Bradley and Goldsmith thus conclude that absent political branch authorization, CIL is not federal law.<sup>26</sup>

Although the revisionist position can, and has been, discredited along many fronts, I focus here on one argument.<sup>27</sup> My claim is that close examination of actual judicial practice deprives the revisionist critique of all normative force. Federal courts do not incorporate the "new CIL" without a searching inquiry that satisfies the revisionist concerns over democracy, separation of powers, and federalism. Thus, the actual nature of judicial inquiries and the resultant findings merit further inspection.

## II. INTERNATIONAL HUMAN RIGHTS LAW IN UNITED STATES COURTS: THE STRUCTURE OF ATCA LITIGATION

The structure of controlling case law lends little support to the revisionist critique. Indeed, the revisionist critique cautions against the wholesale incorporation of CIL into federal common law without ever analyzing the categories of CIL norms that courts actually deem judicially cognizable. The structure of current ATCA litigation supports two related conclusions. First, federal courts have developed a rigorous analytical framework delimiting the application of international law in United States courts; and second, this framework has, in practice, recognized a set of wholly unobjectionable CIL claims. In short, the *Filartiga* line of cases appropriately fashions a federal common law of universal human rights norms.

Federal courts utilize a stringent tripartite test for assessing whether an alleged act constitutes an *actionable* CIL claim. *Filartiga* established that, under the ATCA, judicially cognizable CIL must be 1) universal; 2) obligatory (as opposed to hortatory or aspirational); and 3) definable.<sup>28</sup> This tripartite test effectively limits the range of actionable

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26. See *id.* at 868, 870; Bradley & Goldsmith, *supra* note 15, at 1.

27. Many commentators have provided sound critiques of the revisionist position. See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. (forthcoming 1998); Goodman, *supra* note 17; Goodman & Jinks, *supra* note 17; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORD. L. REV. 371 (1997); Beth Stephens, *Law of Our Land Customary International Law as Federal Law After Erie*, 66 FORD. L. REV. 393 (1997).

28. *Filartiga*, 630 F.2d at 885-87; see also *In re Estate of Ferdinand Marcos, Human Rights Litigation II*, 25 F.3d 1467, 1475 (9th Cir. 1994) (citing *Filartiga*, 630 F.2d at 885-87) ("We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350 (1982), creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . ."); *Forti v. Suarez-Mason I*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) (citing *Filartiga*, 630 F.2d at 881) (other citations omitted) ("The contours of the requirement have been delineated by the *Filartiga* court and by Judge Edwards in *Tel-Oren* . . . .

claims to a small subset of CIL, namely, *jus cogens* (or "compelling law") norms. Therefore, successful ATCA plaintiffs must raise claims based on *jus cogens* norms,<sup>29</sup> a short list of settled, peremptory norms.<sup>30</sup> Accordingly, the three prongs of the ATCA's "*jus cogens* test"<sup>31</sup> enable a delimited but fundamentally important category of legal norms to succeed.

Discernible patterns have emerged in ATCA litigation. Utilizing the "*jus cogens* test," federal courts have identified some clearly actionable CIL norms including: genocide,<sup>32</sup> official torture,<sup>33</sup> extra-judicial killing,<sup>34</sup>

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This 'international tort' must be one which is definable, obligatory (rather than hortatory), and universally condemned."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (1995).

29. See Vienna Convention on the Law of Treaties, 39th Sess., art. 53, U.N. Doc. A/39/27 (1969); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) ("[*Jus cogens* 'embraces customary laws considered binding on all nations,' and 'is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.']) (quoting David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 350-51 (1988); RESTATEMENT OF FOREIGN RELATIONS § 102 cmt. K 1987; Craig Scott, et al., *A Memorial for Bosnia*, 16 MICH. J. INT'L L. 1, 28 (1994) (*Jus cogens* norms "derive from principles that the legal conscience of humankind deems essential to coexistence in the international community.").

30. The notion of *jus cogens* employed in ATCA litigation closely tracks, but does not mirror, the conventional understanding of this term in public international law. See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (1995) (drawing on notion of non-derogability in holding that "the prohibition against [the action] is non-derogable and therefore binding at all times upon all actors."); *Doe v. Unocal*, 1997 U.S. Dist. LEXIS 5094, \*27 (C.D. Cal. March 25, 1997) ("Under the ATCA, jurisdiction may be based on a violation of a *jus cogens* norm which enjoys the highest status within international law.") (citations omitted); *In re Estate of Ferdinand Marcos, Human Rights Litigation I*, 978 F.2d 493, 503 (9th Cir. 1992) (involving suit of wrongful death "by official torture in violation of *jus cogens* norm of international law, properly invokes the subject-matter jurisdiction of the federal courts under § 1350"); *Siderman v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("In *Filatiga*, though the court was not explicitly considering *jus cogens*, Judge Kaufman's survey of the universal condemnation of torture provides much support for the view that torture violates *jus cogens*.").

31. Ryan Goodman and I have elsewhere described the contours of the "*jus cogens* test" in some detail. See Goodman & Jinks, *supra* note 15, at 494-511.

32. See, e.g., *Kadic v. Karadic*, 70 F.3d 232 (2nd Cir. 1996); *Beanal v. Freeport-McMoran*, 1997 U.S. Dist. LEXIS 4767, \*19-21 (E.D. La. Apr. 9, 1997); *Mushikiwabo v. Berayagwiza*, 1996 U.S. Dist. LEXIS 4409, \*3-4 (S.D.N.Y. Apr. 8, 1996).

33. See, e.g., *Filatiga*, 630 F.2d 876, 881 (2nd Cir. 1980) ("[T]here are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1196 (S.D.N.Y. 1996) (alleging acts of the defendant violated "a fundamental principle of the law of nations: the human right to be free from torture"); *In re Estate of Ferdinand Marcos*, 978 F.2d 493, 498 (citing *Siderman v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992)) (explaining that it is "unthinkable" to hold that official torture does not violate customary international law); *Forti*, 672 F.Supp. 1531, 1541 (expressing "no doubt" that official torture is cognizable §1350 violation of law of nations).

34. See, e.g., *Forti*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Xuncax*, 886 F. Supp 162, 185.

disappearances,<sup>35</sup> and prolonged arbitrary detention.<sup>36</sup> Likewise the federal courts have uniformly rejected a (much broader) range of CIL. Note that many of these norms are arguably CIL, but they fail to meet the “*jus cogens* test.” The list of unsuccessful claims includes: expropriation of property,<sup>37</sup> fraud,<sup>38</sup> negligence in aircraft crashes<sup>39</sup> and mismanaged sea

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[T]he practices of summary execution . . . have been met with universal condemnation and opprobrium. . . . An affidavit signed by twenty-seven widely respected scholars of international law attests that every instrument or agreement that has attempted to define the scope of international human rights has ‘recognized a right to life coupled with a right to due process to protect that right.’ And again, not only are the proscriptions of these acts universal and obligatory, they are adequately defined to encompass the instant allegations. (citations omitted).

35. See, e.g., *Forti*, 694 F.Supp 707; *Xuncax*, 886 F.Supp. 162, 185.

36. See, e.g., *Forti*, 672 F. Supp. 1531, 1541-42 (holding that prolonged arbitrary detention has “sufficient consensus . . . is obligatory, and is readily definable.”

37. See, e.g., *Jafari v. Islamic Republic of Iran*, 539 F.Supp 209, 214-15 (N.D. Ill. 1982); *Guinto v. Marcos*, 654 F. Supp. 276 n.1 (S.D. Cal. 1986) (“While there is no consensus on what constitutes a violation of the ‘law of nations,’ in one area there appears to be a consensus. A taking or expropriation of a foreign national’s property by his government is not cognizable under § 1350.”)

38. See *Trans-Continental Investment Corp., S.A. v. Bank of the Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980) (concerning fraudulent misrepresentation to receive \$2.5 million deposit in bank); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2nd Cir. 1975) (involving action for fraud, conversion, and corporate waste); *Abiodun v. Martin Oil Service, Inc.*, 475 F.2d 142 (7th Cir. 1973) (per curiam) (involving fraud in procuring workers from foreign country).

39. See *Benjamin v. British Europena Airways*, 572 F.2d 913, 916 (2nd Cir. 1978) (finding that no evidence supports the claim that negligence constitutes law of nations violation).

vessels,<sup>40</sup> free speech,<sup>41</sup> libel,<sup>42</sup> child custody law,<sup>43</sup> and financial misconduct.<sup>44</sup>

The degree of consensus in ATCA litigation is remarkable. Indeed, federal courts are divided on the status of only one CIL norm: the prohibition of cruel, inhuman, or degrading treatment. While the norm clearly satisfies the requirements of universal condemnation and obligatory prohibition, federal courts have disagreed about the definability of the norm.<sup>45</sup>

Significantly, federal courts have closely guarded against any unwarranted expansion of the *jus cogens* category.<sup>46</sup> The range of potential *jus cogens* violations are, of course, not a fixed set. Other norms may at some point assume the character of a universal, obligatory norm, and

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40. See *Damaskinos v. Societa Navigacion Interamericana, S.A.*, Pan., 255 F. Supp. 919, 923 (S.D.N.Y. 1966) ("Negligence in providing a seaman with a safe place in which to work, and unseaworthiness of a vessel in that respect, are not violations of the law of nations."); *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 294-95 (E.D. Pa. 1963) (stating doctrine of unseaworthiness that allowed compensation for seamen beyond maintenance and cure was particular American principle not found under law of nations); see also *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49, 51-52 (2nd Cir. 1960) (per curiam) (denying ATCA jurisdiction because unrestricted right of access to harbors by vessels of all nations not a part of law of nations).

41. See *Guinto*, 654 F. Supp. 276, 280 ("However dearly our country holds First Amendment rights . . . a violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations.'").

42. See *Akbar v. New York Magazine Co.*, 490 F.Supp 60, 63 (D.C.C. 1980) ("No treaty concerning libel has been noted nor allegedly violated, and plaintiffs have not alleged any violation of "u.e law of nations" as the term has been interpreted by the courts.").

43. See, e.g., *Huynh Thi Anh v. Levi*, 586 F.2d 625, 630 (6th Cir. 1978) ("[T]he 'law of nations,' to the extent that it speaks on the subject, does not demand a particular substantive rule regarding custody of alien children.").

44. See *Valanga v. Metropolitan Life Insurance Co.*, 259 F.Supp 324, 328 (E.D.Pa. 1966) (refusal of life insurance company to pay proceeds is not law of nations violation nor approaches the *calibre of cases* legitimately found under § 1350); cf. *Cohen v. Hartman* 634 F.2d 318, 319 (5th Cir. 1981) (holding that converted funds between employer and employee does not involve: a) internal relations nor; b) affect national sovereignty and thus *in no way* a law of nations violation).

45. One court has rejected such claims. See *Forti v. Suarez-Mason I*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) ("Because this right lacks readily ascertainable parameters, it is unclear what behavior falls within the proscription . . . . Lacking the requisite elements of universality and definability, this proposed tort cannot qualify as a violation of the law of nations.") Conversely, one federal court, after considering the reasoning of the *Forti* court, allowed the claim. See *Xuncax*, 886 F. Supp. 162, 187.

46. See, e.g., *Xuncax*, 886 F. Supp. 162, 189 ("[C]aution is required in identifying new violations of *jus cogens*."); *Forti I*, 672 F.Supp, at 1542-43 ("Before this Court may adjudicate a court claim under §1350, it must be satisfied that the legal standard it is to apply his one with universal acceptance and definition; on no other bases may the Court exercise jurisdiction over a claimed violation of the law of nations.").

definable. This is the nature of an evolving legal order. Nevertheless, federal courts have clearly exercised great caution in determining whether an alleged offense constitutes such a violation.

### III. RETHINKING REVISIONISM: THE LESSONS OF THE ATCA LITIGATION

Several lessons can be gleaned from the *Filartiga* case line. First, the structure of the litigation underscores the distinction between CIL, in general, and *actionable* CIL. The potentially troubling features of the *new* CIL, while thought-provoking, are largely irrelevant to the ATCA line. Second, prevailing judicial practice demonstrates the *systematicity* of the *Filartiga* line. The uniform results in the case law eviscerate the importance of the revisionist charge that CIL is “often unwritten . . . unsettled . . . difficult to verify;”<sup>47</sup> the “contours [of which] are often uncertain.”<sup>48</sup> At worst, such characterizations might be relevant to borderline inquires. However, these characteristics cannot be fairly attributed to justiciable or *jus cogens* CIL. Components of CIL that are “difficult to verify” or “uncertain” simply do not survive the rigorous standard articulated by federal courts.

Finally, the specific norms that federal courts have incorporated — genocide and torture for example — are decidedly unobjectionable. Bradley and Goldsmith refer only to deeply disputed norms, such as the death penalty, when articulating the dangers of the *Filartiga* line. Their critique, however, is not persuasive when applied to genocide, torture, or summary executions. The illegal character of these actions is beyond reproach. With respect to this category of CIL, it seems absurd to suggest that the incorporation of such norms produces *anti-democratic* outcomes frustrating the *legitimate* ambitions of states or the electorate.

The structural concerns that animate the revisionist critique simply do not implicate the current international human rights litigation. In this sense, Bradley and Goldsmith are tilting at windmills. The incorporation of CIL takes place against the backdrop of many jurisprudential and institutional safeguards designed to frustrate the *wholesale incorporation* of CIL. At a minimum, the revisionist challenge loses all persuasive appeal when applied to the ATCA litigation. Indeed, the *Filartiga* line has appropriately fashioned a federal common law of universal, obligatory, and definable human rights norms.

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47. Bradley & Goldsmith, *supra* note 12, at 855.

48. *Id.* at 858.

# REVIVE THE HAGUE EVIDENCE CONVENTION

*Andrew N. Vollmer*

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This article is about the Hague Evidence Convention<sup>1</sup> and the Supreme Court's decision in *Aerospatiale*.<sup>2</sup> Because of *Aerospatiale*, the Hague Evidence Convention is used only rarely for party discovery in United States litigation. That is unfortunate, and my purpose here is to suggest reasons and ways to revive use of the Convention. I will first discuss several aspects of the international discovery situation before *Aerospatiale*. Then I will discuss the *Aerospatiale* decision and the reaction of United States courts to it. Finally, I will propose circumstances in which United States courts should consider more frequent first use of the Convention. Extensive commentary about the Hague Evidence Convention and the *Aerospatiale* decision exists.<sup>3</sup>

## I. THE SITUATION BEFORE *AEROSPATIALE*

Three aspects about the international discovery situation before the *Aerospatiale* decision are important. They are the opposition of foreign countries to United States methods of discovery, the adoption of the Hague Evidence Convention, and the various interpretations by United States

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\* Wilmer, Cutler & Pickering, Washington, D.C. I am grateful for research assistance from my colleague Amber Cottle. The views expressed in this article, which are based on notes for a panel presentation on international discovery at a meeting of the American Branch of the International Law Association on November 8, 1997, are not necessarily those of the law firm or its clients.

1. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

2. *Socit Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987).

3. See, e.g., D. EPSTEIN AND SNYDER, INTERNATIONAL LITIGATION 10.10-12 (2d ed. 1996); L. TEITZ, TRANSNATIONAL LITIGATION 173-76, 182-93 (1996 & Supp. 1997); A. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 809-61 (1993); 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE 159-243 (1995).

courts of the relationship between United States discovery and the Hague Evidence Convention.

Essential to an understanding of the appropriate role of the Hague Evidence Convention in United States litigation is the strong resentment of foreign countries to United States style of discovery, employing the traditional discovery methods available in federal and state rules of procedure.<sup>4</sup> The main foreign objections to direct United States discovery are its breadth and intrusiveness, and its control by the requesting party rather than a judicial official in the foreign country.<sup>5</sup> In civil law countries, the gathering of evidence is an exercise of judicial sovereignty.<sup>6</sup> The much more restrictive scope of foreign discovery, especially in civil law countries, generally reflects important foreign public policies, such as protection of personal and business privacy. Direct United States discovery has provoked strenuous foreign objections and resistance such as diplomatic confrontations, diplomatic protests, and retaliatory actions, including in particular the enactment of blocking statutes to prevent the production of information for purposes of United States litigation.<sup>7</sup>

Against this background of opposition, the United States ratified the Hague Evidence Convention in 1972. Currently, approximately twenty eight countries have ratified the Convention. The Conventions purpose was to establish a system for obtaining evidence located abroad that would be tolerable to the state executing the request and would produce evidence utilizable in the requesting state.<sup>8</sup> It was to bridge differences between the common law and civil law approaches to the taking of evidence abroad,<sup>9</sup> to standardize the form of the request, the languages to be used, and the reasons justifying refusal to execute a request, and to eliminate some of the

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4. No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 442 (1987).

5. See A. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 664-71 (1993); D. EPSTEIN & J. SNYDER, INTERNATIONAL LITIGATION 10-4 - 10-7 (1996); L. TEITZ, TRANSNATIONAL LITIGATION 158-59 (1996).

6. *Aerospatiale*, 482 U.S. at 557-58 (Blackmun, J., concurring and dissenting); SNYDER *supra* note 5, at 10-14.

7. See RESTATEMENT, *supra* note 4, Reporters' Notes 1, 4 (discussing diplomatic protests and blocking statutes); INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST CONFERENCE 565-92 (1964) (quoting various diplomatic protests); A. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 698-740 (1993); D. EPSTEIN & J. SNYDER, INTERNATIONAL LITIGATION 10-3 - 10-6 (1996); L. TEITZ, TRANSNATIONAL LITIGATION 158-59, 165 (1996).

8. *Aerospatiale*, 482 U.S. at 530.

9. *Id.* at 531 (internal quotation marks omitted).

unnecessary steps between the initiating and executing courts.<sup>10</sup>

The Convention has both procedural and substantive elements. For execution of letters of request sent by the judicial authorities of a signatory state to a competent authority in another signatory state, the only method in the Convention that involves the use of compulsion to obtain information,<sup>11</sup> the receiving state typically applies its own laws as to methods, procedures, and the extent of compulsion. The Convention also embodies several substantive protections. The person providing information may invoke any applicable privilege under the law of the state of execution or the law of the requesting state (Article 11). A receiving state may refuse to execute a letter of request that would prejudice its sovereignty or security (Article 12). Finally, Article 23 gives signatories the option of declaring that they will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries. Nearly all countries that ratified the Convention have included some form of an Article 23 reservation.<sup>12</sup>

Starting in the 1980s, the Convention became the subject of litigation in the United States. The main issue in this litigation was whether and in what circumstances parties to United States litigation needed to use the procedures of the Convention rather than the standard direct discovery methods offered by federal and state procedural rules.

United States courts reached three main answers to this question.

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10. A. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 810 (1993).

11. The Hague Convention also provides for non-compulsory discovery through diplomatic officers, consular agents, and commissioners.

12. The modern form of the reservation states that the receiving country will not execute a letter of request requiring a person to state what documents relevant to the proceeding are or have been in the person's possession, custody, or power or to produce any documents other than particular documents specified in the request as being documents appearing to the requesting court to be or likely to be in the person's possession, custody, or power. See Report by the Permanent Bureau of the Hague Conference on International Law on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in 28 I.L.M. 1556 (1989); Report by the Permanent Bureau of the Hague Conference on International Law on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in 24 I.L.M. 1668, 1675-77 (1985); Report by the Permanent Bureau of the Hague Conference on International Law on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in 17 I.L.M. 1425, 1427-28 (1978); *Socit Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 563-64 (1987) (Blackmun, J., concurring and dissenting) (the emerging view of [the Article 23] exception to discovery is that it applies only to requests that lack sufficient specificity or that have not been reviewed for relevancy by the requesting court (internal quotation marks omitted)).



Some concluded that the Convention's procedures are the exclusive method of obtaining information located in another signatory of the Convention. A party to United States litigation may not use direct discovery through the courts rules of procedure. Others decided that the Convention requires first but not exclusive use of its procedures. If initial resort to the Convention is not satisfactory, a party to United States litigation may use direct discovery through the court's rules of procedure. Finally, some courts found that the Convention has no applicability to discovery from a litigant that is subject to the United States court's personal jurisdiction. It applies only to discovery from a person not a party.

## II. *AEROSPATIALE*

In *Aerospatiale*, the Supreme Court of the United States rejected both extreme interpretations and adopted a modified form of the middle ground. The case concerned requests for documents, answers to interrogatories, and admissions from two French companies that moved for a protective order for to require use of the Convention, citing the French blocking statute against foreign discovery other than through the Convention. The Court held unanimously that the Hague Evidence Convention was not the exclusive means of obtaining evidence located in a signatory state, with the majority noting that the opposite conclusion would create several asymmetries and potential unfairness to United States nationals or citizens of non-signatory countries involved in United States litigation.<sup>13</sup>

The Court also unanimously agreed that the principle of international comity required first use of the Convention, at least in some cases, although the Justices divided over the result produced by applying the comity doctrine. Five members of the Court in an opinion by Justice Stevens held that comity required only an ad hoc, case-by-case balancing of foreign and United States interests to determine when first use of the Convention is required. They noted that letters of request could be unduly time consuming, expensive, and less certain to produce needed evidence and urged trial courts to consider the following factors, among others: the sovereign interests of the United States; the sovereign interests of the relevant foreign state; the likelihood that resort to the Conventions procedures would be effective; the breadth and intrusiveness of requested discovery; and the special difficulties that foreign litigants encounter in responding to United States style discovery.<sup>14</sup> In a footnote, Justice

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13. *Aerospatiale*, 482 U.S. at 540 n.25.

14. *Id.* at 544-46. In note 28, the majority said that what is now section 442 of the Restatement identifies the concerns that guide a comity analysis.

Stevens said the French blocking statute did not alter his conclusion, although it was relevant in a comity analysis because it identified the nature of the sovereign interests in nondisclosure of certain types of information.<sup>15</sup>

Four Justices concurred and dissented (Blackmun, Brennan, Marshall, and O'Connor), taking the position that comity required a general rule of first use of the Convention, subject to an exception for cases where resort to the Convention would be futile or when its procedures prove to be unhelpful. The dissent thought that the principle of comity leads to more definite rules than the ad hoc approach endorsed by the majority and warned that the Court's ad hoc comity analysis will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently.<sup>16</sup>

### III. THE SITUATION AFTER *AEROSPATIALE*

The *Aerospatiale* opinion has been heavily criticized,<sup>17</sup> and its promise of first use of the Convention is not being fulfilled. In particular, courts have complained about the unstructured balancing test of the majority in *Aerospatiale* and wished for more specific rules. Although a few United States courts ordered first use of the Convention, they for the most part do not do a sensitive, serious balancing of factors in individual cases and instead simply permit the use of direct United States discovery. The only real benefit of *Aerospatiale* has been that the courts rejecting the use of the Convention have tended to narrow the discovery requests in a way they probably would not have for domestic discovery.

A few United States courts have required first use of the Convention,<sup>18</sup> but most have not. Their reasons are that discovery under

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15. *Id.* at 544 n.29.

16. *Id.* at 548, 554 (Blackmun, J., concurring and dissenting).

17. L. TEITZ, *TRANSNATIONAL LITIGATION* 189 (1996) (The *Aerospatiale* opinion has been severely criticized and rightly so, for its parochial approach to international cooperation and its gutting of the Hague Evidence Convention, leading basically to a last resort utilization approach).

18. *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 353-56 (D. Conn. 1991) (applying the *Aerospatiale* balancing test and holding that the Hague Convention applied to discovery requests against a French corporation because the discovery requests were intrusive, the FED.R.CIV.P. would infringe upon French judicial sovereignty, and no evidence suggested that the Convention's procedures would prove ineffective); *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 37-38 (N.D.N.Y. 1987) (relying on Justice Blackmun's concurrence and dissent rather than the majority's more complex balancing test and concluding that the Hague Convention governed the service of interrogatories against a West German manufacturer because the FED.R.CIV.P. would offend the sovereign interests of civil law countries such as Germany and because the Hague Convention does not frustrate the sovereign interests of the United States); *Geo-Culture, Inc. v. Siam Inv. Management S.A.*, 936 P.2d 1063, 1067 (Or. Ct. App. 1997) (holding, without any discussion, that the Hague Convention applied to discovery of

the Convention produces unsatisfactorily limited amounts of information; discovery under the Convention is slow;<sup>19</sup> foreign nations typically do not have significant interests in limiting United States discovery; and the United States has significant interests in prompt, complete pretrial discovery. Of the courts refusing to order first use of the Convention, some have narrowed the discovery requests out of deference to foreign sensitivities,<sup>20</sup> but the majority have not.<sup>21</sup>

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jurisdictional facts); *Knight v. Ford Motor Co.*, 615 A.2d 297, 299-302 (N.J. Super. Ct. Law Div. 1992) (holding that Hague Convention procedures, rather than New Jersey discovery rules, applied to discovery requests against a German corporation because New Jersey rules would infringe upon Germany's sovereign interests and no evidence suggested that the Convention procedures would be ineffective).

19. *Haynes v. Kleinwefers*, 119 F.R.D. 335, 338 (E.D.N.Y. 1988) (holding use of Convention would delay proceedings); *Anglo American Ins. Group, P.L.C. v. Calfed Inc.*, 940 F. Supp. 554, 564 (S.D.N.Y. 1996) (holding Hague Convention more time-consuming than discovery under Federal Rules).

20. *Fishel v. BASF Group*, 1997 WL 587003, at \*2-4 (S.D.Iowa) (granting plaintiff's motion to compel discovery against German corporations under the FED.R.CIV.P. because the discovery did not implicate Germany's sovereign interests and the Hague Convention procedures would unduly delay the proceedings, but limiting discovery); *Bedford Computer Corp. v. Israel Aircraft Indus, Ltd.*, 114 B.R. 2, 6 (Bankr. D.N.H. 1990) (applying the FED.R.CIV.P. rather than the Hague Convention to discovery against an Israeli corporation because the discovery request did not prejudice Israel's sovereign interests and the Convention's procedures would delay the proceedings, but limiting the scope of the discovery to make it as unintrusive and pertinent as is appropriate in the circumstances); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 258-60 (M.D.N.C. 1988) (applying the. to discovery against a French corporation because the FED.R.CIV.P. did not impinge on any specific sovereign interest of France, but narrowing the scope of the plaintiff's discovery requests); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 390-91 (D.N.J. 1987) (holding that the FED.R.CIV.P. governed interrogatories and requests for documents against a Swedish corporation because the Hague Convention procedures would have delayed discovery and the discovery did not violate any specific sovereign interest of Sweden, but streamlining the plaintiff's discovery requests on the ground that expansive discovery without concomitant relevance is not what the [*Aerospatiale*] Court envisioned).

21. *In re Aircrash Disaster Near Roselawn, Indiana*, 172 F.R.D. 295, 307-11 (N.D. Ill. 1997) (holding that the FED.R.CIV.P., rather than the Hague Convention, applied to discovery against French corporations because the discovery requests were not intrusive, the discovery would not jeopardize French sovereign interests, and the Hague Convention procedures would be complicated, time consuming, and expensive); *Doster v. Schenk*, 141 F.R.D. 50, 52-55 (M.D.N.C. 1991) (denying German defendant's motion for protective order and holding that the FED.R.CIV.P. applied to the plaintiff's discovery requests because the requests were not intrusive, they did not compromise Germany's sovereign interests, and the Convention's procedures would not be effective); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334 (N.D. Ill. 1990) (permitting discovery under FED.R.CIV.P.); *Roberts v. Heim*, 130 F.R.D. 430 (N.D. Cal. 1990) (same); *Haynes v. Kleinwefers*, 119 F.R.D. 335 (E.D.N.Y. 1988) (applying the FED.R.CIV.P. to document requests and interrogatories against a West German defendant because the discovery was not extensive and the Hague Convention was more expensive and less effective than the FED.R.CIV.P.); *Moake v. Source Int'l Corp.*, 623 A.2d 263, 265 (N.J. Super. Ct. App. Div. 1993) (affirming lower court's ruling that New Jersey discovery rules applied to interrogatories against a German corporation because discovery requests did not violate Germany's interests and no evidence suggested that the Hague

The Convention remains applicable or useful in certain situations. For example, United States courts use the Convention to compel information abroad from a person in a signatory country who is not a party to the litigation and not reachable by a subpoena.<sup>22</sup> Sometimes courts prefer the use of the Convention to obtain information from a non-party even if the party can be reached by a subpoena in the United States.<sup>23</sup> United States courts also typically require use of the Convention for discovery that will occur on the territory of a signatory, such as a deposition or a visual inspection.

This limited use of the Convention has not satisfied the objections of foreign countries to direct United States discovery. They have not come to accept the United States position on use of the Convention, although no particular international dispute about United States discovery is currently in the public eye. For example, foreign governments continue to file briefs objecting to United States discovery.<sup>24</sup> In addition, as recently as the early 1990s, when the United States proposed to amend the Federal Rules of Civil Procedure explicitly to allow United States courts to ignore the Hague Evidence Convention and even to authorize the use of discovery methods that violate the laws of foreign countries, several foreign countries strongly protested. They urged the use of discovery methods that involve the foreign government such as those in the Convention. The proposal was not adopted.<sup>25</sup>

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Convention procedures would be more effective); *In re Asbestos Litig.*, 623 A.2d 546, 549 (Del. Super. Ct. 1992) (holding that the plaintiff did not have to conduct discovery against a Finnish defendant under the Hague Convention procedures); *Scarminach v. Goldwell GmbH*, 531 N.Y.S.2d 188, 191 (N.Y. Sup. Ct. 1988) (applying New York's discovery rules, rather than the Hague Convention, to interrogatories and document requests against a West German corporation because the discovery did not implicate any specific sovereign interest of West Germany and the foreign party failed to demonstrate that the Hague Convention procedures would be effective); *Sandsend Fin. Consultants, Ltd. v. Wood*, 743 S.W.2d 364 (Tex. App. 1988) (affirming trial court's ruling that applied Texas rules to discovery involving a foreign corporation).

22. *The Gap, Inc. v. Stone Int'l Trading, Inc.*, 1994 WL 38651 (S.D.N.Y.); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988); *Orlich v. Helm Bros., Inc.*, 560 N.Y.S.2d 10 (N.Y. App. Div. 1990).

23. *Laker Airways, Ltd. v. Pan American World Airways*, 607 F. Supp. 324, 326-27 (S.D.N.Y. 1985) (quashing subpoena duces tecum served on British nonparty's New York office but seeking documents usually stored in Britain and stressing importance of using the Convention because the antitrust action before the Court was an internationally sensitive matter).

24. *Volkswagen, A.G. v. Valdez*, 909 S.W.2d 900 (Tex. 1995) (dealing with section 442 of the Restatement, not the Hague Evidence Convention).

25. An article of which I am a co-author describes these events: *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 243-44 (1993).

#### IV. A PROPOSAL FOR REVIVING THE HAGUE EVIDENCE CONVENTION

In sum, United States lower courts rarely require first use of the Hague Evidence Convention for party discovery, having struck the balance under *Aerospatiale* too far toward United States interests, and foreign countries continue to object to the untempered use of direct United States discovery methods. This tension led to diplomatic incidents and friction in the past and threatens to continue to do so. The danger remains that, in some future case of significant interest to a particular foreign country, direct United States discovery will cause substantial damage to United States foreign relations.

United States courts therefore should shift the balance back toward foreign interests to some extent and resort to first use of the letter of request procedure in the Convention more frequently. United States courts should be more receptive to using the procedures of the Convention when, consistent with the main purposes of the Convention, doing so would significantly reduce the risk of foreign objections.

The purposes of the Convention suggest a few types of situations in which first use would make sense. As said at the beginning, the Convention has both procedural and substantive goals. It is mainly procedural in that it allows a requested state to use its own procedures to obtain evidence and thus to preserve its notions of judicial sovereignty. The Convention is also substantive. By involving government officials of the foreign country to review and participate in evidence gathering, the foreign government can narrow requests, ensure protection of its sovereign and national security interests, and ensure that its personal privilege and privacy laws are respected.

As a result, a United States court should use the letter of request system first when it would significantly advance these goals, that is, when the specific circumstances of the particular case indicate that:

- 1) The type of requested information has special protection under the laws of the foreign country (personal privacy, protection of intellectual property, trade secrets, or other information that could assist a foreign commercial competitor, state secrets, and bank secrecy).
- 2) The identity of the requested party raises special foreign concerns (such as a foreign state, an agency of a foreign sovereign, or foreign government official).
- 3) An unusual interest of the foreign country calls for the involvement of officials of that country in providing the

information so that its notions of judicial sovereignty are satisfied (the information might be applicable in parallel proceedings in the foreign country and the United States; the foreign country would want to take evidence in its way for its proceeding and to have the evidence taken only once).

Other categories might exist, just as exceptions could always exist. For example, on some occasions the United States court might need information quickly, and the procedures of the Convention would be too slow.

Under this approach, first use of the Convention would not be justified simply because the foreign country is a party to the Convention and prefers Convention procedures or because the information is located in the foreign country. In addition, use of the Convention would not be justified simply because the foreign country has a general blocking statute.

One virtue of this proposal is that it is true to the majority analysis in *Aerospatiale* and does not need any further international, judicial, or legislative action to be adopted. This approach merely urges that United States courts give more weight to certain foreign interests as reflected in foreign laws or policies. In accordance with the case-by-case comity analysis of *Aerospatiale*, this will result in more frequent first use of the Convention.

## SECTION 1782 OF TITLE 28 (U.S. CODE): IS THERE A DISCOVERABILITY REQUIREMENT?

*Gregory F. Hauser\**

There is an excellent, thorough, and relatively recent discussion of the issue in a student note by Peter Metis.<sup>1</sup> These remarks supplement and update that discussion. Courts continue consistently to reject any discoverability inquiry in cases where the request for assistance under section 1782 comes from a foreign tribunal, reasoning that the requesting authority is better aware of its own discovery rules and procedures and presuming that they have already been considered and applied.<sup>2</sup>

The federal courts have reached differing results, however, when such a request comes directly from a party to a foreign litigation.

The Courts of Appeals for the First and Eleventh Circuits have held clearly that a threshold requirement for the grant of such a request under section 1782 is that the evidence sought must be discoverable under the law and procedures of the foreign tribunal.<sup>3</sup>

The justifications for the requirement are to avoid disadvantage to a United States party *vis a vis* an opposing party when they are litigating in a country with limited pre-trial discovery and to prevent any attempt to circumvent foreign law and procedure and thereby also any offense to a foreign tribunal.<sup>4</sup>

The Courts of Appeals for the Third and District of Columbia Circuits have not directly held that there is such a discoverability

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\* Remarks by Gregory F. Hauser, Walter, Conston, Alexander & Green, P.C., New York City.

1. Peter Metis, *International Judicial Assistance: Does 28 U.S.C. § 1782 Contain an Implicit Discoverability Requirement?*, 18 *FORDHAM INT'L L.J.* 332 (1994).

2. See e.g., *United States v. Morris*, 82 F.3d 590, 592 (4th Cir. 1996); *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310-11 (5th Cir. 1995).

3. See *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 5-7 (1st Cir. 1992); *In re Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 F.2d 1005 (1989).

4. See, e.g., *In re Application of Asta Medica, S.A.*, 981 F.2d at 5-7.

requirement, but have in dicta discussed the requirement with apparent approval.<sup>5</sup>

The district court for the Eastern District of Pennsylvania, even while acknowledging that there was no direct Third Circuit ruling, has recently followed the apparent dictates of the Third Circuit dicta and found a discoverability requirement.<sup>6</sup> Indeed, the discoverability requirement had originated in another decision by that same district court.<sup>7</sup>

The Ninth Circuit has gone no further than to acknowledge the seriousness of the policy concerns underlying the discoverability requirement,<sup>8</sup> but the district court for the Central District of California has firmly imposed such a requirement.<sup>9</sup>

The Fifth Circuit has also discussed the decisions requiring a discoverability finding with apparent approval,<sup>10</sup> but district courts in that circuit have split on whether the dicta is binding and thus on whether such a requirement should be imposed.<sup>11</sup> In a case before the Federal Circuit that did not reach the issue, a dissenter argued at length for the discoverability requirement.<sup>12</sup>

The Court of Appeals for the Second Circuit, however, has taken the clear opposing stand that, even when a request under section 1782 is not from a foreign tribunal itself, there need be no discoverability

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5. See *In re* Letter of Request from the Crown Prosecution Service of the United Kingdom, 870 F.2d 686, 692-93 (D.C. Cir. 1989); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985); see also *Euromepa S.A. v. R. Esmerian*, 51 F.3d 1095, 1099 (2d Cir. 1995) (noting that neither of the Third or D.C. Circuits had yet actually held that a finding of discoverability was a requirement for the grant of a private litigant's request under section 1782); *Foden v. Gianoli*, 3 F.3d 54, 60 n.1 (2d Cir. 1993) (same), *cert. denied sub nom. Foden v. Aldunate*, 510 U.S. 965 (1993).

6. *In re* Application of Mats Wilander, No. 96 Misc. 98, 1996 U.S. Dist. LEXIS 19357, at \*7-\*11 (E.D. Pa. July 24, 1996).

7. Peter Metis, Note: *International Judicial Assistance: Does 28 U.S.C. § 1782 Contain an Implied Discoverability Requirement?*, 18 *FORDHAM INT'L L.J.* 332, 352-54 (1994); see *Selas Corp. v. Electric Furnace Co.*, 88 F.R.D. 75 (E.D. Pa. 1980); but see *Foden*, 3 F.3d at 61 n.3 (disputing this interpretation of the Pennsylvania case).

8. See *Okubo v. Reynolds*, 16 F.3d 1016, 1021 (9th Cir. 1994).

9. See *In re* Application for an Order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England, 147 F.R.D. 223, 226 (C.D. Cal. 1993).

10. *In re* Letter Rogatory, 42 F.3d at 310-11.

11. Cf., *In re* Application of Gert Duizendstraal, No. 3:95-MC-150-X, 1997 U.S. Dist. LEXIS 16506, at \*4-\*7 (N.D. Tex. April 16, 1997) (finding no discoverability requirement) with *In Re* Trygg-Hansa Ins. Co., 896 F. Supp. 624, 626-27 (E.D. La. 1995) (finding that court must review whether the evidence sought was discoverable in the foreign jurisdiction).

12. See *In Re* Jenoptik AG, 109 F.3d 721, 724-26 (Fed. Cir. 1997).



showing.<sup>13</sup> The request should be denied only if there is “authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782,” such authoritative proof entailing “judicial, executive or legislative declarations that specifically address the issue of evidence gathered under foreign procedure.”<sup>14</sup> The bases for the Second Circuit’s position are the absence of any discoverability requirement in the language of the statute as well as its history and purposes.<sup>15</sup> In response to the concerns underlying the discoverability requirement, the Second Circuit has noted that “any and all other limitations upon discovery that would be available under Fed. R. Civ. P. 26 . . . are also available under section 1782(a)” and that concerns about lack of reciprocity may be addressed is a “closely tailored discovery order.”<sup>16</sup> In an additional, indirect response to courts that have felt allowing discovery in the United States not allowed in the foreign jurisdiction would offend the foreign tribunal, the Second Circuit noted a British litigation in which the House of Lords on appeal vacated an injunction imposed by a lower court against such discovery in the United States, finding that the discovery did not interfere with British due process.<sup>17</sup>

At least one district court has apparently followed the Second Circuit’s suggestion and conditioned the requested discovery on reciprocity.<sup>18</sup> Thus, discoverability is not irrelevant but only one consideration in the exercise of the discretion of the district court, which remains the ultimate arbiter.

The Seventh Circuit has not yet considered the issue, but the district court for the Northern District of Illinois has twice taken the position that, since the statute states no discoverability requirement, a decision on a section 1782 request from a foreign litigant is entirely a matter of the district court’s discretion.<sup>19</sup>

Two other intriguing issues have arisen in section 1782 cases. The Court of Appeals for the Ninth Circuit has declined to adopt or to try to

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13. See *Esses v. Hanania*, 101 F.3d 873, 876 (2d Cir. 1996); *Euromepa S.A. v. R. Esmerian Inc.*, 51 F.3d 1095, 1098-1101 (2d Cir. 1995); *Foden v. Gianoli*, 3 F.3d 54, 58-61 (2d Cir. 1993), *cert. denied sub nom. Foden v. Aldunate*, 510 U.S. 965 (1993).

14. *Esmerian, Inc.*, 51 F.3d at 1095, 1100; *see also Hanania*, 101 F.3d at 876-77.

15. *See id.*; *Foden*, 3 F.3d at 58-60.

16. *Esmerian, Inc.*, 51 F.3d at 1100 n.4, 1101.

17. *See id.* at 1100 n.3.

18. *See id. Hanania*, 101 F.3d 873 at 876.

19. *See Elm Energy and Recycling (U.K.) Ltd. v. Basir*, No. 96 C 1220, 1996 U.S. Dist. LEXIS 15255, at \*25-\*29 (N.D. Ill. Oct. 9, 1996); *Verson v. Allied Products Corp.*, No. 87 C 7549, 1987 U.S. Dist. LEXIS 8981, at \*2-\*3 (N.D. Ill. Sept. 25, 1987).

enforce on a foreign court an exclusionary rule with respect to evidence obtained for a foreign criminal prosecution pursuant to section 1782 but allegedly in violation of due process,<sup>20</sup> although a New York district court in an earlier, similar case had ordered a foreign prosecutor to return such evidence, basing its authority to do so on a conclusion that the prosecutor had submitted to the jurisdiction of the United States court by submitting the request for evidence.<sup>21</sup> The distinctions between the two decisions were that, in the Ninth Circuit case, the evidence had already been submitted to the foreign court and, even if the foreign prosecutor had submitted itself to the jurisdiction of the United States court, the foreign court had not.<sup>22</sup>

Finally, a recent dispute raised the issue whether section 1782 could be used to reach documents in the possession or control of a United States entity but located outside the United States. In the district court, the request was denied on the ground of privilege, but the Court of Appeals ruled that the privilege had been waived and remanded for consideration of the extraterritorial issue.<sup>23</sup> Before the district court ruled, however, the application was withdrawn with prejudice.

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20. See *Okuba v. Reynolds*, 16 F. 3d 1016, 1021 (9th Cir. 1994).

21. See *In re Letter of Request from the Supreme Court of Hong Kong*, 138 F.R.D. 27, 32-33 (S.D.N.Y. 1991).

22. See *Okuba*, 16 F. 3d at 1021.

23. See *Chase Manhattan Corp. v. Sarrío, S.A.*, 119 F.3d 143 (2d Cir. 1997); see also *In re Application of Sarrío S.A.*, No. M 9-372, 1995 U.S. Dist. LEXIS 14822 (S.D.N.Y. 1995).

# JURISDICTION AND EVIDENCE — AN ENGLISH PERSPECTIVE

*Steven Loble\**

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### I. THE JURISDICTIONAL REGIME IN EUROPE

The countries of Europe have entered into multilateral treaties to facilitate doing business in Europe. These treaties cover jurisdiction, enforcement of foreign judgments and choice of law. The individual states in the United States have analogous arrangements to facilitate doing business within the United States. However, due to what are perceived as extravagant awards of damages in the United States, most non-United States companies are afraid of that jurisdiction. It is often thought by the layman that the jurisdiction of other courts is not so wide. He may well be wrong.

#### A. *Jurisdiction of the English Courts*

The English Courts have territorial jurisdiction in respect of England and Wales. Scotland, Northern Ireland, Isle of Man and the Channel Islands are separate jurisdictions.

The main legislation governing jurisdiction is the Civil Jurisdiction and Judgments Act 1982 (Act) which is "an act to make further provision about the jurisdiction of courts and tribunals in the United Kingdom and certain other territories and about the recognition and enforcement of judgments given in the United Kingdom or elsewhere . . ."<sup>1</sup> This Act was passed to bring the Brussels Convention into effect in English Law. There is a similar Act and Convention applicable to most of the non-European Union European countries (the Lugano Convention) that was brought into effect by the civil Jurisdiction and Judgment Act 1992.

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1. Civil Jurisdiction Judgments Act of 1982 (England).

Indeed, the wording of the respective Conventions are mostly identical, save that the Lugano Convention does not have an equivalent to Article 58.

### *B. Jurisdiction Under the Conventions*

The Conventions do away with the individual countries own rules on jurisdiction in relation to disputes to which the Conventions apply. However, the net of the courts of some countries can still be spread extremely wide. Provided that the Conventions do not apply, the German courts, for example, still have jurisdiction over anyone who has assets in Germany. The French courts will still assert jurisdiction on the grounds of nationality. The English courts also have extremely wide jurisdiction.<sup>2</sup>

### *C. The Basic Rule*

The primary basis of jurisdiction under the Convention is the domicile of the defendant. For the purposes of the Convention a person is domiciled in the state in which he resides or in which he has a substantial connection. A company is domiciled in the state in which it is incorporated, has its registered office or its central management and control.

Article 2 of the Convention provides, “subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that state.”<sup>3</sup>

### *D. Special Jurisdiction*

Article 5 of the Convention sets out a secondary basis of jurisdiction. It provides that

a person domiciled in a Contracting State may, in another Contracting State, be sued:

(1) in matters relating to a contract, in the Courts for the place of performance of the obligation in question; . . .

. . .

(3) in matters relating to tort, delict or quasi-delict in the Courts for the place where the harmful act occurred; . . .

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2. See *infra* section III.

3. Brussels Convention, art. 2.

(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the Courts for the place in which the branch, agency or other establishment is situated . . . .”<sup>4</sup>

There are special provisions dealing with insurance and consumer contracts. Article 16 gives exclusive jurisdiction, regardless of domicile, to the courts of the relevant country in which:

- (i) the subject of the action is an object *in rem* or immovable property;
- (ii) the constitution, nullity or dissolution of companies or other associations or legal persons;
- (iii) the validity of entries in public registers;
- (iv) patents, trademarks;
- (v) enforcement of judgments (the courts of the country in which enforcement is sought).<sup>5</sup>

### E. Jurisdiction Agreements

The provisions set out above deal with the day to day jurisdiction of Courts in *civil and commercial matters*. Arbitration matters are among the few areas to which the Convention has no application. Article 17, however, provides:

if the parties, one or more of whom is domiciled in the Contracting State, have agreed the Court, or the Courts of a Contracting State, are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, then those Courts shall have exclusive jurisdiction.<sup>6</sup>

The Article goes on to provide that such agreement must be in writing, evidenced in writing or be in accordance with the practices in a particular trade. It should however be noted that Article 17 also provides:

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4. *Id.* art. 5.

5. *Id.* art. 16.

6. *Id.* art. 17.

“if an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.”<sup>7</sup>

#### *F. Summary of Jurisdiction Under the Conventions*

In England, jurisdiction can only be taken by the English Court if proceedings can be served on the defendant or defendants. Where a defendant is domiciled in an European Union country, or most of the other European countries, the English courts jurisdiction is governed by the Conventions allowing service of proceedings to be made out of the jurisdiction without the leave of the Court.

#### *G. Jurisdiction of the English Courts Where the Conventions Do Not Apply*

Where the defendant is not domiciled in a Convention country, the Convention does not apply. While the English court can exercise jurisdiction over a defendant present in England, leave must be obtained from the Court to serve proceedings out of the jurisdiction. The Court has discretion over decisions to grant leave to serve proceedings out of the jurisdiction and will only do so if the applicant for such leave shows that he has a *good, arguable case* on the merits. The principle circumstances in which service of a writ out of the jurisdiction is permissible are contained in Order 11 of the Rules of the Supreme Court (R.S.C.) which provide that the Court may allow service out of the jurisdiction, *inter alia*, if:

- (a) relief is sought against a person domiciled within the jurisdiction;
- (b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
- (c) the claim is brought against a person duly served within or out of the jurisdiction, and a person out of the jurisdiction is a necessary or proper party thereto;
- (d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages

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7. *Id.*

or obtain other relief in respect to the breach of a contract, being (in either case) a contract which:

- (i) was made within the jurisdiction, or
  - (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
  - (iii) is by its terms, or by implication, governed by English law, or
  - (iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract;
- (e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;
- (f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction; or
- (g) the claim is brought to enforce any judgment or arbitration award.<sup>8</sup>

There are numerous cases relating to the obtaining of leave to serve and the setting aside of service or writs out of the jurisdiction. The case-law shows that when exercising its discretion under Rules of Supreme Court Order 11, the Court must consider among other things:

- (i) the general undesirability of subjecting a foreigner to the jurisdiction of the English court when no allegiance

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8. *Rules of the Supreme Court*, ORDER 11 (England).



is owed here particularly if the dispute has little to do with this country or the claim is dubious;

- (ii) whether the parties have agreed that the particular court should have exclusive jurisdiction over the dispute;
- (iii) where proceedings have already been begun in another court.
- (iv) which court can give most effective relief;
- (v) whether one party will suffer an unfair disadvantage in a particular jurisdiction<sup>9</sup>

This also has the same effect as Article 21 of the Convention which states:

where proceedings involving the same cause of action between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may reinstate its proceedings if the jurisdiction of the other Court is contested;<sup>10</sup>

A defendant who has been served with proceedings, whether domiciled in England or not, can make an application to the Court disputing the jurisdiction of that court by applying for an order setting aside service of the writ, an order declaring that the writ has not been duly served, or an order discharging any order giving leave to serve the writ out of the jurisdiction. There may be further or other reasons indicating the fact that the English court is not the proper forum (*forum non conveniens*). It can be seen from the above that complicated, time-consuming and expensive disputes can arise over jurisdiction.

The English Court's discretion to decide upon the extent of its own jurisdiction is extremely wide. This is clearly illustrated by the following:

With all respect to the Judge, I think that this reasoning confuses two different jurisdictions. One is the jurisdiction to try the issues in the Action. That is disputed. It derives from the Brussels Convention and the 1982 Act. It depends on whether the First Defendant was domiciled in the United Kingdom at the relevant date. The other is the jurisdiction to decide whether it has jurisdiction to try the

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9. *Id.* ORDER 11.

10. Brussels Convention, *supra* note 3, art. 21.

issues in the Action. This is an inherent jurisdiction. It does not derive from the Brussels Convention or the 1982 Act. Its existence is beyond dispute.

The High Court is a Court of unlimited jurisdiction. This does not mean that its jurisdiction is universal and unrestricted. It means that, unlike inferior courts and tribunals, it has jurisdiction to decide the existence and limits of its own jurisdiction. It has an indisputable jurisdiction (of the second kind) to decide whether or not it has jurisdiction (of the first kind) to entertain substantive proceedings. If it decides that it has no jurisdiction (of the first kind) to entertain them, its decision is nevertheless one made within its jurisdiction (of the second kind). If it makes a mistake and erroneously assumes a jurisdiction (of the first kind) to entertain substantive proceedings which it does not truly possess, it makes an error of fact or law, but it is not one which goes to its own jurisdiction (of the second kind). It is inherent in the rule of law itself that somewhere in any judicial system there must be a court which possesses jurisdiction to determine the limits of its own jurisdiction.<sup>11</sup>

## II. ENFORCEMENT OF FOREIGN JUDGMENTS

### A. *Under a Treaty*

Since there is a uniform system of jurisdiction in the convention countries, it is easier to enforce judgments of other convention countries than those of non-convention countries. The conventions also deal with enforcement. Article 26 commences: “[a] judgment given in a Contracting State shall be recogni[z]ed in the other Contracting State without any special procedure being required.”<sup>12</sup>

Furthermore, recognition and enforcement is not confined to final money judgments. However, injunctions and other orders of foreign courts will also be given effect.

There are limited grounds for resisting enforcement:

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11. *Canada Trust Company v. Stolzenberg*, [1997] 1 W.L.R. 1582.

12. Brussels Convention, *supra* note 3, art. 26.

- (i) enforcement would be contrary to the public policy of the State in which enforcement is sought;
- (ii) if the judgment was given by default and the defendant was not duly served;
- (iii) if the judgment is irreconcilable with a judgment given between the same parties in the State in which recognition is sought;
- (iv) that in order to arrive at its decision the court has decided a preliminary question concerning the rights or status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, will or succession in a way that conflicts with a rule of private international law of the State in which recognition is sought, unless the same result would have been reached by the application of the rules of private international laws of that State; or
- (v) if the judgment is irreconcilable with an earlier judgment given in a non-Contracting State involving the same cause of action and between the same parties, provided that the latter judgment fulfills the conditions necessary for its recognition in the State in which enforcement is sought.<sup>13</sup>

The rules for enforcing foreign judgments are set out in a statute containing almost identical rules to New York and a number of other states of the United States.

The procedure for registration of foreign judgments is that the judgment or certified copy, together with the translation if the original judgment is in a foreign language, is lodged with the High Court of Justice together with the affidavit in support of an application for the judgment to be registered.

The application is made *ex parte* by lodging papers with the Master's Secretary's Department. Assuming the conditions of the applicable Act are complied with, an order will be given for the judgment to be registered. Notice is then given to the defendant that the judgment has been registered and that the defendant has twenty one days in which to

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13. See generally *id.* (emphasis added).

apply to set aside the registration. If an application is made there will be a hearing before the Master in the Queen's Bench Division of the High Court.

Under the Administration of Justice Act of 1920 and subsequent legislation, judgments obtained in the Superior Courts in many parts of Her Majesty's Dominions outside the United Kingdom may be registered. Under the Foreign Judgments (Reciprocal Enforcement) Act 1933, judgments obtained in the Courts of various foreign countries may also be registered in this Country. The 1933 Act allows the judgments of higher courts in the countries with which the United Kingdom has entered into bilateral treaties to be enforced by registration.

Registration of the judgment will be set aside if the court is satisfied:

1. [t]he judgment is not a judgment to which the Act applies or was registered in contravention of the provisions of the Act; or
2. The Courts of the Country of the original court had no jurisdiction (according to the English rules of private international law) in the circumstances of the case; or
3. The judgment debtor being the defendant in the proceedings in the original court did not, (notwithstanding that process may have been duly served on him in accordance with the law of the Country of the original court), receive notice of those proceedings in sufficient time to enable it to defend the proceedings and did not appear; or
4. The judgment was obtained by fraud; or
5. The enforcement of the judgment would be contrary to English public policy; or
6. The rights under the judgment are not vested in the person by whom the application for registration was made.<sup>14</sup>

The judgment may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had

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14. Foreign Judgments Reciprocal Enforcement Act 1933 (England).

previously been the subject of a final and conclusive judgment by a Court having jurisdiction in the matter. This registration procedure is similar to that for registering judgments from Convention countries.

### *B. At Common Law*

Judgments of countries with whom there is no treaty and which are not party to the Convention may be enforced by bringing an action on the judgment. The foreign judgment is the cause of action and an application can be made for summary judgment on the grounds that there is no defense to the action.

In order for a foreign judgment to be enforced the English Courts must be satisfied that the foreign court had jurisdiction according to the English rules of private international law.

In a nutshell, the English Courts' requirements for jurisdiction are that:

1. The defendant in the enforcement proceedings was resident or if a body corporate had a place of business (or perhaps was present) in the country of the foreign court which gave judgment; or
2. The defendant to the enforcement proceedings was plaintiff or counter-claimed in the proceedings in the foreign court; or
3. The defendant agreed to submit to the jurisdiction of the foreign court; or
4. The defendant submitted to the jurisdiction of the foreign court by taking an active step in the proceedings other than in relation to i) property which had been seized; or, ii) disputing the jurisdiction of the foreign court).

The leading case on the foreign law enforcement judgment is *Adams et al. v. Cape Industries plc and Capasco*.<sup>15</sup> I acted for the plaintiffs in that case which involved an attempt to enforce, at common law, judgments obtained in Texas by 206 plaintiffs injured by asbestos. The judgments were obtained against the defendants in the United States District Court for the Eastern District of Texas, Tyler Division, and proceedings were brought in the High Court of Justice in London to enforce the judgments. The court declined to enforce the judgment for the following reasons:

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15. *Adams v. Cape Industries plc and Capaso Limited*, [1990] 2 W.L. R. 657.

- 1) The defendants were not present in the country of the foreign court when the proceedings were commenced; and
- 2) It would be contrary to natural justice/public policy to enforce the judgment on the grounds that there had been no proper judicial assessment of the damages.<sup>16</sup>

The court also found that the defendants, if they had been shown to be present in the United States, would have been present in Illinois, and that judgment given in Texas would not prevent the judgment from being enforced. This was because the issue was before a Federal Court, and a Federal Court is a court of the United States and not of the individual State in which it sits. In other words, the United States of America is a country for the purposes of English private international law! The appeal to the Court of Appeals was unsuccessful.

A further argument advanced in that case has Court of Appeal authority against it. The argument may however at some stage succeed before the House of Lords. As seen above, English Courts will allow service out of the jurisdiction in certain circumstances. They would then expect foreign Courts to enforce their judgments. The argument, based on reciprocity, is that English Courts should enforce foreign judgments in analogous circumstances. This argument rests heavily on the doctrine of the comity of nations.

### *C. An English Perspective of the United States*

The United States courts are perceived in Europe as exercising excessive jurisdiction. As we have seen above, the jurisdiction of the English court is extremely wide. I am not anti-American. I am a partner in an American law firm. The fear in Europe is of excessive and unpredictable jury award and multiple damages.

The English courts jurisdiction is as wide or possibly even wider than that of the United States courts, but there is less perception that the English courts are to be avoided and less ruffling of the feathers of other courts due to two factors — sensitivity and sovereignty. The English courts are sensitive to the notion that they should not be seen to be grabbing cases that do not belong in England and are sensitive to the sovereignty of foreign courts.

Furthermore, there is a danger that if United States courts claim jurisdiction in inappropriate cases those judgments will not be enforced.

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16. *Id.*

This could be because the United States court did not have jurisdiction or on the grounds of natural justice. One example is if service on a non-United States company had been effected by serving its United States subsidiary or, even worse, the Secretary of State.

Regarding service, the United Kingdom lodged no objection under Article 23 of the Hague Service Convention and service can therefore be effected directly. Instruct a solicitor to effect service of United States proceedings on an English company. It is quicker and more effective than going through official channels and any eventual judgment will be less likely to be unenforceable for lack of proper service.

### III. EVIDENCE

#### A. Introduction

I suggest below the most appropriate procedures in particular cases; it is not an exhaustive review of the law or procedure. Evidence may be obtained in England and Wales for use in foreign proceedings without any formal order. In certain other countries the obtaining of evidence without the leave of the court is a criminal offense but the English Courts will not interfere with any procedure whereby witnesses appear voluntarily to give evidence or produce documents. In restricted circumstances production of documents may be contrary to English law.<sup>17</sup>

The United States is a prolific source of requests and therefore the means of obtaining evidence outside the United States under United States federal law is also set out in this guide.

#### B. *The Methods of Obtaining Evidence in England and Wales*

Evidence may be collected in England and Wales for United States proceedings in the three ways described below.

##### 1. Voluntarily

Depositions can be taken and documentary evidence collected from any persons willing to appear voluntarily. This must be done in a way acceptable to the United States Court and depositions are frequently taken before the United States Consul.

##### 2. Pursuant to Rule 28(b) of the Federal Rules

Evidence can be obtained in any of the three ways set out in Rule 28(b):

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17. See Protection of Trading Interest Act of 1989 (England).

- 1) On notice, before a person authorised to administer oaths in the place in which the examination is held, either by the law of that place or by U.S. law; or
- 2) Before a person commissioned by the English Court and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony; or
- 3) Pursuant to Letters Rogatory (known in England as *Letters of Request* and so referred to below).<sup>18</sup>

Further, a United States national or United States resident present in England or Wales may be subpoenaed pursuant to 28 U.S.C. §1783.

However; there may be a conflict between the obligation of a United States national or United States resident to comply with such a subpoena and local law. For example, in a London branch of a United States bank a subpoena would not be effective. A London branch of a United States bank should require the protection of an English Court Order before divulging any documents or information. There is also a limit to the subject matter jurisdiction of foreign courts.<sup>19</sup>

### 3. Pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The Hague Evidence Convention is working well in England. The statute passed to bring the convention into effect will probably enable an American attorney to collect more and better evidence than in any other country outside the United States.

The Evidence (Proceedings in other Jurisdictions) Act of 1975 was passed partly to give effect to the Hague Convention. The Act goes further than necessary for the purposes of the Convention and should be read in conjunction with Order 70 of the Rules of the Supreme Court to ascertain the boundaries within which evidence can be obtained pursuant to the Convention or for foreign proceedings generally and the procedure for obtaining such evidence. The procedure under The Hague Convention is the same for any country which is a party to it and indeed for any country which requests judicial assistance from the English Court.

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18. FED. R. CIV. PROC. 28(b).

19. See *Mackinnon v. Donaldson, Lufkin & Jennrette Securities Corporation*, [1986] 2 W.L.R. 453.



### C. *Letters of Request*

Letters of Request may be submitted either (i) through diplomatic channels, or (ii) by direct submission by English Solicitors. If English Solicitors are not instructed by the party seeking an Order for depositions or the production of documents the Treasury Solicitor will make an application to the Court for an Order but it is more prudent to instruct English Solicitors in case the witnesses resist the Order. It is also quicker to instruct Solicitors and to send the Letters of Request directly to them. An Order can then be obtained within a week, whereas transmission through diplomatic channels takes considerably longer.

### D. *Discovery and Fishing Expeditions*

Discovery in England and Wales is much narrower than the discovery which is allowed in the United States. English Courts will not countenance *fishing expeditions*. The English Court is prohibited from making an order requiring any particular steps to be taken unless they are steps which could be taken to obtain evidence for the purposes of civil proceedings in the English Court. The English rules distinguish between (i) evidence in the nature of proof to be used for the purposes of the trial and (ii) evidence in the nature of pre-trial discovery to be used for purposes of a train of inquiry which might produce evidence for trial. The English Court will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents and will not give effect to a request for those purposes.

The notes to the Rule of the Supreme Court state:

the English Court will refuse to make an order in aid of a foreign request for evidence if it appears or to the extent to which it appears that that evidence is required, not for the purpose of proof at the foreign trial, where it is admissible and relevant to the issues in those proceedings, but for the purpose of discovery, something in the nature of a roving inquiry in which a party is seeking to 'fish out' some material which might lead to obtaining admissible evidence at the trial, even though the procedure of the foreign court permits such a practice, as does, for example, Rule 26 of the U.S. Federal Rules of Civil Procedure . . . . On the other hand, if the foreign request is for evidence in the nature of proof to be adduced at the trial, the English Court will give effect to such request and it may do so

subject to modifications as to the disallowance of certain witnesses or documents.<sup>20</sup>

As a practical matter, it is becoming more and more difficult to obtain orders for United States proceedings as the procedure has been abused, and the English Court is wary of attempts to obtain pre-trial discovery and fishing expeditions. This was exemplified in the case of *State of Minnesota v. Philip Morris Incorporated and Others*. In that case the Court of Appeal set aside an order for evidence to be provided in England for use in United States tobacco litigation on the grounds that the Letter of Request was too wide and uncertain in its scope and that the request could not be made acceptable by amendment. The Court quoted Lord Denning MR from the *Westinghouse* case (*infra*), “[i]t is our duty and our pleasure to do all we can to assist that court, just as would expect the United States court to help us in like circumstances. Do unto others as you would be done by.”

Nevertheless, the court went on to say,

I have striven mightily to give effect to the Request, but reluctantly, and for the reasons given, have been unable to do so. In my judgment this is not a case where blue pencilling is appropriate, or where the introduction by this court of a safeguard in the form of a suitably worded limitation can provide adequate protection for the witnesses. Given the width of the Request, the formulation of a suitably worded limitation by this court is not, in my view, workable in the context of the proposed examinations. What is required is that the Request should be drafted in different terms.<sup>21</sup>

### *E. Proceedings Must have been Instituted or be Contemplated*

The English Court will not give effect to any request from a United States court unless proceedings have actually been instituted or proceedings are contemplated. In this context *contemplated* means that proceedings are imminent or pending.

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20. See generally *Rules supra* note 8, notes.

21. *State of Minnesota v. Philip Morris Incorporated et.al.*, No. C1-94-8565 (Dist. Ct. Minn.).

### *F. General Principle*

Subject to the above, the general principle followed by the English Court in relation to requests from foreign courts is that the English Court will ordinarily give effect to a request so far as is proper and practicable and to the extent that is permissible under English Law.

### *G. No General Investigation*

General investigation (*as in Chapter 11 Bankruptcy Proceedings*) will not be allowed. Documents sought must be specifically listed and not referred to by general descriptions. Solicitors should be asked to advise on the form of the document request before the request is submitted to the United States Court. This will certainly save time in the long run, because if this procedure is not followed there may be contested hearings in England and possibly part or all of the request may be struck out.

### *H. No Discovery Order Against Non-Parties*

Section 2(4)(a) of the 1975 Act prohibits the English court from making an order against a stranger to the proceedings which requires him to make general discovery of documents. Such an order would be in the nature of a *fishing expedition* which is never allowed in the English court. The request for witnesses to be heard or documents to be produced must specify which evidence witnesses can give or the actual documents which are to be produced.

Section 2(4) of the 1975 Act states: “[a]n Order under this Section shall not require a person to produce any documents other than particular documents specified in the Order as being documents appearing to the Court making the Order to be, or likely to be, in his possession custody or power.” The Court must be satisfied that the documents in question are in the possession, custody or power of the person against whom the Order is made. The burden of proving this fact is on the applicant.

### *I. Orders Available from the English Court*

The English Court has power to make orders for:

- 1) oral or written examinations of witnesses;
- 2) the production of documents;
- 3) inspecting, photographing or preserving property;
- 4) taking samples of property;
- 5) conducting experiments on property;
- 6) medical examination of persons;
- 7) taking blood samples.

Once an Order has been made by the English Court, depositions are taken in "the English manner" before an Examiner appointed by the Court.<sup>22</sup> The Examiner will be an English barrister. In order to facilitate the taking of depositions at a time convenient to the party requesting the Order, it is normally better to have an Examiner of the party's choice appointed rather than one of the Court Examiners who may not be available at the required time. This can only be done if the application for the Order is made by solicitors who will also make the appropriate arrangements for the examination — including providing a court reporter if required.

### *J. Videotaping*

Examinations may also be videotaped. Recently an application to set aside an Order for videotaping the taking of evidence was unsuccessful.<sup>23</sup> In that case Evans J. said:

Two things are clear. (i) A video recording of evidence given in English Courts is not permitted. There is statutory recognition of tape recordings: photographs in Court are banned. In my judgment videotaping is not allowed. (ii) At the other extreme, evidence in the form of tape recordings and video recordings is capable of admission in English courts, just as photographs are commonly admitted.

Here we have an intermediate situation. What is sought is videotaping outside the court, and it is proposed that the videotaping should be available to the court itself. That is parallel to the taking of tape recordings outside court of a shorthand transcript outside court. It is clearly something different from recording proceedings in the court itself. . . . Proceedings involving examination of witnesses outside court are not necessarily limited to the permitted methods of recording proceedings in court. It seems to me that the request by the Californian court is not inconsistent with the English mode.<sup>24</sup>

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22. *Rules, supra* note 8, ORDER 39.

23. *J. Barber & Sons v. Lloyd's Underwriters*, [1986] 2 All E.R. 845.

24. *Id.*

### K. *Extra-Territoriality*

It is noteworthy that many of the leading cases on extra-territoriality are concerned with whether evidence should be produced for foreign proceedings. In *R. v. Grossman*, the Court of Appeal declined to make an order for disclosure of information held by a branch of Barclays Bank in the Isle of Man under Section 7 of the Bankers' Books Evidence Act 1879.<sup>25</sup> Lord Denning M.R. said:

I think that the branch of Barclays Bank in Douglas, Isle of Man, should be considered in the same way as a branch of the Bank of Ireland or an American Bank or any other Bank in the Isle of Man which is not subject to our jurisdiction. . . . It is subject to the laws and regulations of the Isle of Man. It is licensed by the Isle of Man Government. It has customers there who are subject to Manx law. It seems to me that the Court here ought not in its discretion to make an Order against the Head Office here in request of the books of the branch in the Isle of Man in regards to the customers of that branch. It would not be right to compel the branch — or its customers — to open their books or to reveal their confidences in support of legal proceedings in Wales.<sup>26</sup>

The case of *MacKinnon* concerned an Order made against an American bank, which was not a party to the main action, requiring it to produce books and papers held at its Head Office in New York. These related to an account of one of the Defendants, a Bahamian company which had since the issue of the Writ been struck off the Register of Companies, and a subsequent subpoena duces tecum which was served on an Officer of the Bank at its London Office. Hoffman J. held that the Order and subpoena, taking effect in New York, were an infringement of the sovereignty of the United States, and, therefore, the English Courts should not require a foreign bank which owed a duty of confidence to its customers to produce documents outside the jurisdiction of the English Courts. Because the bank was regulated by the law of the country where the customer's account was kept (in this case the United States) and concerned business transactions outside that country's jurisdiction was material.

He said:

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25. *R. v. Grossman* [1973] Cr. App. R. 302.

26. *Id.*

the need to exercise the Court's jurisdiction with due regard to the sovereignty of others is particularly important in the case of banks. . . . If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in an unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure.<sup>27</sup>

He also referred to the decision of the New York Federal District Court in *Laker Airways v. Pan American World Airways*, where subpoenas served on English banks at their New York offices requiring them to produce documents relating to transactions in England were quashed and stated that: "this decision shows a welcome revival in a United States Court of sensitivity to foreign sovereign interests."<sup>28</sup>

Perhaps the best known case on the subject of such requests is *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation*. In this case the House of Lords reversed a decision of the Court of Appeal which had upheld the implementation of Letters of Request issued by a Court in Virginia.

Viscount Dilhorne said:

for many years now, the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that Country. This is not in accordance with international law and has led to legislation on the part of other States designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty.<sup>29</sup>

#### IV. PRIVILEGE AND DUTY OF CONFIDENTIALITY

##### A. *Privilege*

The *Westinghouse* case also comments in detail on claims to privilege against production of documents sought under Letters of Request and differentiates between documents required for the purposes of civil

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27. *Mackinnon v. Donoldson, Lofkin & Jennrette Securities Corporation* [1987] 2 W.L.R. 453.

28. *Laker Airways v. Pan American World Airways*, 607 F.Supp. 324 (S.D.N.Y. 1985).

29. *Rio Jinto Zino Corporation v. Westinghouse Electric Corporation* [1978] A.C. 547.

proceedings and documents sought for the purpose of a Grand Jury investigation which might lead to criminal proceedings. Lord Wilberforce said:

Now Section 5 of the 1975 Act provides for the obtaining of evidence for criminal proceedings but expressly the section only applies to proceedings which have been instituted (none have been instituted) and, impliedly, to a request by the Court in which the proceedings have been instituted. The case is therefore not within Section 5, and the procedure is an attempt to get the evidence in spite of that fact.<sup>30</sup>

A party wishing to obtain evidence for use in foreign proceedings should institute proceedings, or at least produce some evidence that proceedings are about to be commenced, before any application is made to the Court for an order.

### *B. Duty of Confidentiality*

*X A.G. v. A Bank* discussed the question of disclosure of documents in breach of the duty of confidentiality owed by a bank to its customers.<sup>31</sup> Leggatt J. referred to the case of *British Nylon Spinners Limited v. Imperial Chemical Industries Limited* and quoted the passage:

The Courts of this Country will, in the natural course, pay great respect and attention to the Superior Court of the United States of America, but I conceive that it is nonetheless the proper province of English Courts, when their jurisdiction is invoked, not to refrain from exercising that jurisdiction if they think that it is their duty so to do for the protection of rights which are peculiarly subject to their protection. In so saying, I do not conceive that I am offending in any way against the principles of comity . . .

.<sup>32</sup>

The Judge also referred to the comment of Denning L.J., The writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here.

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30. *Id.*

31. *X A.G. v. A Bank* [1983] 2 All ER 464.

32. *British Nylon Spinners Limited v. Imperial Chemical Industries Limited* [1952] 2 All E.R. 780.

*X A.G. v. A Bank* was a case involving injunctions preventing a Bank from complying with subpoenas issued by an American Court in three actions. Although the proceedings were in chambers judgment was given in open court. Leggatt J. summarized as follows:

On the one hand, there is involved in the continuation of the injunction impeding the exercise by the United States Court in London of powers which, by English standards, would be regarded as excessive, without in so doing causing detriment to the Bank; on the other hand, the refusal of injunctions, or the non-continuation of them, would cause potentially very considerable commercial harm to the plaintiffs, which cannot be disputed, by suffering the Bank to act for its own purposes in breach of the duty of confidentiality admittedly owed to its customers. . . . Any sanction imposed now on the Bank would look like pressure on this Court, whereas as it seems to me, it is for the New York Court to relieve against the dilemma, in which it turns out to have placed its own national, by refraining from holding it in contempt proceedings are issued.

Accordingly, it was ordered that the injunctions should continue. In *In Re the State of Norway* (No. 1 and No. 2) - Judgment 9th February 1989, Lord Goff upheld the decision of the Judge of the first instance stating that: witnesses should not be required to reveal the identity of a settlor in breach of a banker's duty of confidentiality unless the witness should have evidence that the settlor was acting as the nominee or agent of the tax payer.

### C. *Civil or Commercial Matter*

There was also much discussion of the practice relating to Letters of Request, possible infringement of United Kingdom sovereignty and extra-territoriality in *In Re the State of Norway (No.1)* and *In Re. the State of Norway (No. 2)* House of Lords (Judgment 9th February 1989).

There had previously been two cases in the Court of Appeal which to some extent resulted in conflicting decisions. The main issue was whether an action in the Sandefjord City Court in Norway to set aside an assessment of tax was a *civil or commercial matter*. The Court of Appeal in Norway (No. 1) had decided that this should be decided pursuant to the laws of the requesting Court and not the recipient Court of the Letters



Rogatory. In Norway (No. 2) the Court decided that it should be resolved pursuant to the law of the Court receiving the request.

The main speech in The House of Lords was given by Lord Goff who said:

The words (civil or commercial matter) should be given their ordinary meaning, so that proceedings in any civil matter should include all proceedings other than criminal proceedings, and proceedings in any commercial matter should be treated as falling within proceedings in civil matters. On this simple approach, I do not see why the expression should be read as excluding proceedings in a fiscal matter . . . .

#### *D. Comity*

It will be seen from the above cases that the English Courts are keen, in accordance with the principle of comity of nations, to give effect to requests for evidence from foreign courts. The English Courts are, however, jealous in protecting the sovereignty of the United Kingdom, and the border separating the willingness to assist foreign courts and the protection of sovereignty is not always clearly defined.

#### *E. Practical Matters*

It is becoming increasingly difficult to obtain orders for witnesses to give evidence for foreign, especially United States, proceedings. Letters of Request must be drafted extremely carefully, and this applies even more to document requests. It takes some time to obtain evidence using official channels. The quickest way and the most likely to be effective is to draft the request in conjunction with an English solicitor experienced in the field and use that solicitor to make the application to the English court.

**A DEATH PENALTY PRIMER: REVIEWING  
INTERNATIONAL HUMAN RIGHTS DEVELOPMENT  
& THE ABA RESOLUTION FOR A MORATORIUM  
ON CAPITAL PUNISHMENT IN ORDER TO INFORM  
DEBATES IN U.S. STATE LEGISLATURES**

*Dorean Marguerite Koenig\**

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I. THE ILA CONFERENCE

More than half of the world's nations have either abolished or no longer practice the death penalty.<sup>1</sup> In this coming year, the opportunity for a vast expansion in the number of nations which no longer adhere to the death penalty appears almost certain because of events which occurred in 1997, some of which are detailed here. I was fortunate to be able to bring together a group of outstanding scholars and an outstanding practitioner to a panel on the death penalty<sup>2</sup> at the International Law Weekend '97.<sup>3</sup> The focus of the weekend meeting was on practical applications of public international law in domestic judicial and other proceedings, a topic broad enough to encompass the development of limits on the use of the death penalty in international law, and the application of these developments to United States death penalty practices.

The topic for the ILA panel, *Implementing the ABA Resolution Limiting the Death Penalty: Bringing the International Movement to Limit (Or Ban) the Death Penalty Home to the United States*, sought to stimulate a recognition away from the parochial attitudes of mainstream America. Those attitudes are frequently found in local state legislatures, where the

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1. Fifty nine countries have totally renounced the penalty. (Amnesty lists fifty eight; and Georgia has enacted a new criminal code prohibiting the death penalty); see Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (Mar. 1996), HUGO BEDEAU, THE DEATH PENALTY IN AMERICA 78-Table 6-1 (1997), (listing fifty seven countries). Fifteen countries have abolished the death penalty except for extraordinary crimes. *Id.* at 80, Table 6-2. Twenty-seven countries with the penalty have suspended all executions and have not had an execution in ten years. *Id.* at 81 (listing 28 countries).

2. The speakers, all of whom have expertise on the death penalty are: William Schabas, Professor and Chair, Department des sciences, Universite du Quebec a Montreal, Ved P. Nanda, John Evans University Professor and Thompson G. Marsh Professor of Law, University of Denver College of Law; John Quigley, Ohio State University College of Law; and practitioner Ron Tabak, of Skadden, Arps, Slate, Meagher & Flom and Chair of the Death Penalty Committee of the Individual Rights and Responsibilities Section of the American Bar Association. (While I will mention some highlights brought to the panel by the panelists, I will let their works speak for them). My thanks to each of them for adding to my knowledge as well as the knowledge of others about the death penalty. I also wish to thank them for many of the ideas which were gleaned from their talks, and are elaborated here.

3. The annual event of the American Branch of the International Law Association held from November 6-8, 1997, at the House of the Association of the Bar of the City of New York.

death penalty is a highly politicized tool.<sup>4</sup> As Professor Quigley commented, the United States is becoming *increasingly isolated* from the rest of the world, so much so that other countries are increasingly unwilling to extradite persons to the United States.<sup>5</sup>

What could be a better topic than trying to open up the insular and populist American thought and beliefs often reflected in state legislatures by bringing to local discussions the debates and understandings which are occurring in international public law. Those discussions are increasingly limiting the application of the death penalty, and more generally, increasing calls for moratorium and abolition. The United Nations Human Rights Committee has voiced concerns about the extensive application of the death penalty in the United States.<sup>6</sup> Until the late 1960's, the death penalty had little or no role in American electoral politics.<sup>7</sup> However, that has now changed since there has been both an increase in the politicization of the death penalty and a concomitant decrease in the use of executive clemency.<sup>8</sup> Few Americans realize the harsh direction to which American penal law has committed itself, its interrelatedness to politics or the possible long term effects upon both our democracy and our economy.<sup>9</sup>

One of the darker sides of elected representative democracies is that the elective process often results in failing to foster leadership to broaden opinions, but instead has the opposite effect of causing elected representatives to merely reiterate the unreflected, uneducated, and racist responses of the majority.<sup>10</sup> Thus, there is a tendency in elected

4. See discussion *infra*, note 10 and accompanying text.

5. John Quigley, presentation at the ILA Conference, Nov. 8, 1997, New York Association for the Bar of the City of New York.

6. UNITED NATIONS, U.N. HUM. RTS. COMM., Nineteenth Annual Report of the Human Rights Committee, U.N. Doc. A/50/40 §280 (1995) [hereinafter NINETEENTH ANNUAL REPORT].

7. HUGO ADAM BEDEAU, THE DEATH PENALTY IN AMERICA, BACKGROUND AND DEVELOPMENTS 17-19 (1997).

8. *Id.*

9. A colleague at the University of Uppsala in Sweden once remarked that concern about imprisonment was a mark of a free society, and that when a society locked up a significant percentage of its people it was, by definition, no longer a free society.

10. See MICHAEL TONRY, MALIGN NEGLECT-RACE, CRIME, AND PUNISHMENT IN AMERICA (1995). Tonry points out that the targeting of prisoners for political advantage rose to its current popularity in the United States during the volatile period of extraordinary growth in the prison population since about 1980. See also David Bruck, Keynote Address: Political and Social Misconceptions Fueling the Death Penalty, 13 T.M. COOLEY L. REV. 863, 864 (1996).

The death penalty's saturation of political life now extends to how we choose our presidents. [It] became the defining event of the 1988 Presidential campaign, and may have cost the election for the Democratic nominee, Massachusetts Governor Michael Dukakis. By 1992, the next Democratic nominee, learned from Dukakis' mistake. In

democracies to suppress leadership<sup>11</sup> and in the case of the death penalty, to substitute emotional rhetoric for reasoned judgment. A death penalty in which government takes the life of a citizen should be cause for great alarm when political motivation is suspected and the trauma it causes to the community can be viewed as being done for individual political gain.<sup>12</sup>

Of equal concern, as the Title implies, is that the ILA panel sought to focus on the national direction taken by the preeminent lawyer organization in the United States, the American Bar Association, when on February 3, 1997, the

House of Delegates of the American Bar Association passed a resolution urging states not to carry out the death penalty in their jurisdictions until the imposition of the death penalty is carried out in a manner which would ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and minimize the risk that innocent persons will be killed.<sup>13</sup>

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the middle of the New England primary, Governor Bill Clinton rushed home to Arkansas to preside over the execution of a brain-damaged inmate so impaired that he planned to vote for Mr. Clinton after his execution.

See BEDEAU, *supra* note 1, at 18. "For several years it has been virtually impossible for any candidate for high elective office in the states - governor, attorney general, appellate court judge - to appear hesitant over (much less opposed to) the death penalty." See also, Phoebe Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: American's Views on the Death Penalty* in THE DEATH PENALTY IN AMERICA 90 (H. Bedeau, ed.1997).

11. See Robert D. Kaplan, *Was Democracy Just a Moment?*, THE ATLANTIC MONTHLY, 280, Dec., 1997, at 56, quoting Thomas Paine: "Society is produced by our wants and government by our wickedness." It was the crude and reactionary philosophy of Thomas Hobbes which placed security ahead of liberty in a system of enlightened despotism, from which the Founders drew philosophical sustenance.

12. See David Bruck, *supra* note 10, at 865.

The depressing part of the [Susan] Smith case was that it did not strike most people as odd, in the face of the terrible catastrophe to that community represented by the deaths of Michael and Alex Smith out at John D. Long lake, that the only response from the criminal justice system was to descend into nine months of costly legal maneuvering and eye gouging in court over whether it would be better to kill this suicidal young woman or let her suffer out her life in prison. In a traumatized community, this melodrama of retribution was just not a very logical way to get about the work of healing. Yet, that is what the legal system had to offer. When the battle was over, all the legal system had to congratulate itself about was that it had managed not to make an almost unimaginably horrible human disaster any worse.

13. Marshall J. Harman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997) (citing to the American Bar Association Resolution) [*hereinafter* Resolution].

Few Americans appear to have any awareness of the seriousness of the state of American death penalty practice. Not only has that practice been condemned by international bodies as inimicable to current world-wide thought, but that condemnation has now been opened for debate in the national discourse. The American Bar Association has now recommended and endorsed a resolution calling for a moratorium on the death penalty. The accompanying report to that resolution highlights the many serious deficiencies in the application of the death penalty in America and highlights reasons for the call for a nationwide moratorium.<sup>14</sup>

This panel sought to promote discourse on how and why evolving limitations on the death penalty are being invoked in the international community, and how these trends might be informative in implementing the American Bar Association's Resolution calling for a moratorium on the use of the death penalty by states and the federal government in the United States.

## II. THE ABA RESOLUTION

### A. What it Does

The American Bar Association Resolution adopted in 1997 calls for states "not to carry out the death penalty"<sup>15</sup> until the jurisdiction has implemented policies and procedures that are consistent with ABA policies. The purpose is to "ensure that death penalty cases are administered fairly and impartially in accordance with due process"<sup>16</sup> and to "minimize the risk that innocent persons may be executed."<sup>17</sup> The policies which are referred to in the resolution include: the ABA Guidelines for the appointment and performance of counsel in Death Penalty cases (adopted Feb. 1989)<sup>18</sup> and Association policies intended to encourage competency of counsel in capital cases. (Adopted Feb. 1979, Feb. 1988, Feb. 1990, and Aug. 1996);<sup>19</sup> to preserve the courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in federal *habeas corpus* proceedings as well as in state post-conviction proceedings

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14. Report of the American Bar Association Section of Individual Rights and Responsibilities Section of Litigation (Accompanying the Resolution, *supra*, note 13) [*Hereinafter* Report].

15. Resolution, *supra* note 13, introductory paragraph.

16. *Id.*

17. *Id.*

18. *Id.* para. (i).

19. *Id.*

(adopted Aug. 1982, Feb. 1990);<sup>20</sup> "Striving to eliminate discrimination in capital sentencing on the basis of race" — of the victim or the defendant (Adopted Aug. 1988, Aug. 1991);<sup>21</sup> and "Preventing execution of mentally retarded persons (adopted Feb. 1989)<sup>22</sup> and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983)."<sup>23</sup>

### B. Why it is Necessary

The reasons behind the ABA resolution are not found in some philosophical book, but in the actual practice in the United States. Appointed counsel, including *habeas* counsel, have often undertaken the tasks without proper training.<sup>24</sup> The fault for this lies both with the appointing mechanisms<sup>25</sup> and with the gross underfunding that "pervades indigent defense,"<sup>26</sup> and with the general reluctance of local experienced counsel to take these cases.<sup>27</sup> The results have been, as expected, disastrous. In one case, defense counsel not only presented little mitigating evidence, but also made no objections at all, as he told the jury that the death penalty was appropriate.<sup>28</sup> In *Ross v. Kemp*, the defense counsel was a drug addict dependent on drugs during trial who was later convicted and

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20. *Id.* para. (ii).

21. Resolution, *supra* note 13, para. (iii).

22. *Id.* para. (iv).

23. *Id.*

24. Report, *supra* note 14.

25. *Id.* "[S]ome states simply assign lawyers at random from a general list — a scheme destined to identify attorneys who lack the necessary qualifications and, worse still, regard their assignments as a burden. Other jurisdictions amply 'contract' systems, which typically channel indigent defense business to attorneys who offer the lowest bids."

26. *Id.* at 5. See also, *supra* note 14, quoting Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, But for the Worst Lawyer*, 103 YALE L.J. 1835, 1839-1852 (1994).

They are unable to attract and keep experienced and qualified attorneys because of lack of compensation and overwhelming workloads. Just when lawyers reach the point when they have handled enough cases to begin avoiding basic mistakes, they leave criminal practice and are replaced by other young, inexperienced lawyers who are even less able to deal with the overwhelming caseloads. Generally, no standards are employed for assignment of cases to counsel or for the performance of counsel. And virtually no resources are provided for investigative and expert assistance or defense counsel training.

27. In some rural counties in Texas, an appointed attorney is paid no more than \$800.00 for representation in a capital case. *Id.* at 7. In Virginia, the hourly rate is about \$13.00. *Id.* at 8. In one Alabama case, the attorney was given a total budget of \$500.00 which included all the money for investigative and expert services. *Id.*

28. *Messer v Kemp*, 393 S.E.2d 244 (Ga. 1990). Defendant was executed. Report, *supra*, note 14, at 7,9.

sentenced to prison on state and federal drug charges.<sup>29</sup> In *Frey v. Fulcomer*, defense counsel complied with a state statute limiting mitigating evidence, not knowing that that statute had been declared unconstitutional three years earlier.<sup>30</sup>

Defunding of the regional death penalty centers<sup>31</sup> established by Congress to improve death penalty representation in the federal courts has further increased the urgency of the ABA Resolution. Those regional centers had achieved a success rate of forty percent, indicative of the need for improvement in state court representation in death penalty cases.

In the *Anti-Terrorism and Effective Death Penalty Act of 1996*,<sup>32</sup> Congress established deadlines for filing federal *habeas* petitions, by placing limits on federal evidentiary hearings into the facts underlying federal constitutional claims, putting severe restrictions on second or successive *habeas* claims, and seemingly barring federal courts from determining constitutional violations where state courts had erred in making a contrary determination.<sup>33</sup>

### C. What is Needed Now to Implement It

It is imperative that State Bar Associations be moved to adopt the ABA Resolution and to increase awareness of the dismal state of death penalty representation as well as the other serious violations of due process in death penalty litigation.

## III. THE INTERNATIONAL COMMUNITY & RECENT CALLS FOR MORATORIUM AND ABOLISHMENT OF THE DEATH PENALTY

There is a renewed energy in the international community towards moratorium and abolishment of capital punishment throughout the world, and in one sense the ABA Resolution is a continuation of that movement. This year there were many new calls in regional and world bodies for abolition of the death penalty.<sup>34</sup>

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29. *Ross v. Kemp*, No. 85-98-2-MAC (M.D. Ga. 1985). Defendant was executed. Report, *supra* note 14, at 7, 9.

30. *Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992). Report, *supra* note 14, at 7.

31. Congress ended funding for Post-Conviction Defender Organizations (PCDO's) which handled many capital post-conviction cases. (See Report, *supra* note 14, at 3).

32. Antiterrorism And Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

33. Report, *supra* note 14, at 3.

34. The advances discussed here were part of the presentation of Bill Schabas at the ILA Weekend. Please see his paper for further discussion.



### A. The European Parliament

On October 2, 1997, the foreign ministers of the fifteen European Union Member States signed the Treaty of Amsterdam.<sup>35</sup> There are three main objectives to the Treaty, of which only one, the launching of the *Euro*, has been given prominence in American newspapers. Two other objectives of the Treaty have escaped notice. The first of these is the planned expansion of the European Union (EU) to encompass the Central and Eastern European states as well as Turkey and Cyprus. This will create a vast economic, political, and human rights union with vast implications for the balance of power in the Western world.

The last objective is the implementation of human rights norms stated in the Treaty of Amsterdam itself.<sup>36</sup> On July 16, 1997, President Jacques Santer spoke on the year 2000 Agenda, a plan to have major components of the treaty in place by the year 2000. The Treaty "underpins the abolition of the death penalty in all EU member states."<sup>37</sup> A declaration concerning the abolition of the death penalty is included in the final act, which declares that the death penalty is no longer applied by any EU member state.<sup>38</sup> The new treaty also includes a sanctions provision for *serious and persistent violations* of human rights.<sup>39</sup>

As indicated, the treaty also allows for institutional reform and expansion of the EU to include the former Eastern Bloc countries.<sup>40</sup> The treaty will now have to be ratified by the national parliaments.<sup>41</sup> The

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35. The Treaty is available at <<http://ue.eu.int>> The website also has news releases and other information about the E.U. and the Treaty.

36. *Id.*

37. *Id.*

38. *Summit Sees EU Stumble Onwards in Amsterdam — part 2 of 2*, EUROPEAN REPORT, June 19, 1997, available in 1997 WL 8517656. Under Section III, Final Act, the Treaty has adopted the final text of the Declaration on the Abolishment of the death penalty. That declaration reads as follows: 1. Declaration on the Abolishment of the Death Penalty. With reference to Article F(2) of the Treaty on European Union, the Conference recalls that Protocol NO. 6 to the European Convention for the Protections of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and which has been signed and ratified by a large majority of Member States, provides for the abolition of the death penalty. In this context, the Conference notes the fact that since the signature of the above mentioned Protocol on 28 April 1983, the death penalty has been abolished in most of the member states of the Union and has not been applied in any of them.

39. *Id.*

40. John R. Schmertz & Mike Meier, *EU Adopts Treaty of Amsterdam to Revamp Institutional System and Include Former Eastern Bloc Countries as Additional Members*, 3 INT'L L. UPDATE 130 (Nov. 1997).

41. *European Parliament: European Court of Justice Rules in Favor of Strasbourg*, EUROPEAN REPORT, Oct. 4, 1997, available in 1997 WL 13046999.

Treaty has been called "A charter of rights for citizens of EU."<sup>42</sup> The Treaty also gives the EU a stronger voice in international affairs, with a new foreign-policy planning unit to be set up inside the EU Council of Ministers.<sup>43</sup>

However, even outside of the Treaty of Amsterdam, the EU has been a force for the abolishment of the death penalty. Paving the way for the extension of the EU into the former Eastern Block countries, the EU has been active in assessing anti-death penalty activities in the countries being considered for future inclusion in the EU. On November 28, 1997, the EU formally welcomed the Georgia Parliament's adoption of a new penal code in which they abolish the death penalty in Georgia. "An EU Presidency declaration greeted the move as 'an important step in strengthening democracy and the rule of law,' and encouraged Georgia to persevere in that direction, in particular with a view to early accession to the Council of Europe."<sup>44</sup> The Joint EU/Lithuania Parliamentary Committee held an inaugural meeting in Vilnius in October, Lithuania being one of five candidates identified by the European Commission as being *insufficiently ready* to start negotiations in early 1998. The Joint committee "encouraged NGO involvement in monitoring of human rights, and called on Lithuania to speed up the abolition of the death penalty."<sup>45</sup> The first meeting of the EU/Latvia Joint Parliamentary Committee took place in Riga on Nov. 3 and 4, 1997, preliminary to work on accession to the EU, and among the negotiations, was a call for "formally abolishing the death penalty."<sup>46</sup> The first meeting of the Joint European Union-Estonian Parliamentary Committee with Estonia was held in Tallinn on Oct. 27-29, 1997, and the Joint Parliamentary Committee supported "the Estonian Government and Riigikogu in their effort to abolish the death penalty in Estonia."<sup>47</sup>

A United States delegation, which included Professor Julian Bond and National Coalition to Abolish the Death Executive Director Steven Hawkins met Jose Maria Gil-Robles, the President of the European Union

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42. John Palmer, *Amsterdam Summit: A Charter of Rights for Citizens of EU Human Face of Brussels: The Right to Work and Laws to Banish Discrimination and Safeguard Environment at Heart of New Deal*, THE GUARDIAN, June 18, 1997, available in 1997 WL 2386803.

43. Euronews, 11/17/97 (Deutsche Presse-Agentur).

44. Euronews - 11/28/97. Membership in the European Parliament is granted only to nations that have been admitted to the Council of Europe.

45. Euronews - 10/11/97.

46. Euronews - 11/13/97.

47. *EU-Estonia: EU Holds First Joint Parliamentary Committee Meeting with Estonia*, EURO-EAST, Nov. 27, 1997, available in 1997 WL 13228191.

and Renzo Imbeni, a European Parliament Vice-President, as well as Jeroen Schokkenbrock, Head of the Human Rights Section of the Council of Europe in Strasbourg, in France in December, 1997.<sup>48</sup> The purpose of a series of meeting was "to urge European political leaders to sponsor the adoption of a resolution in the European Parliament."<sup>49</sup> The Resolution invites companies that are considering locating a manufacturing plant or making a major capital investment in the United States to give priority to those twelve states and the District of Columbia that do not have capital punishment.<sup>50</sup> The basis of the resolution is that in order to join the EU countries must abandon the use of capital punishment. Asking the European companies to show "the same respect for human rights when they cross the Atlantic,"<sup>51</sup> the resolution will be presented by a number of both American and European representatives,<sup>52</sup> and the resolution has the support of a large number of anti-death penalty organizations.<sup>53</sup> The goal is to brand us as a "pariah nation,"<sup>54</sup> a status that the United States is creating for itself with its growing use of the death penalty.

The resolution grew out of an international discussion between the National Coalition to Abolish the Death Penalty (NCADP), the National Association of Criminal Defense Lawyers and Hands Off Cain, an Italian non-governmental organization working to abolish the death penalty.<sup>55</sup>

### B. The Council of Europe

The Council of Europe's now 40 member States, with 800 million citizens, put abolition at the top of the list of priorities in 1997, agreeing in October, 1997, to call for the universal abolition of the death penalty.<sup>56</sup> The two day proceedings were hosted by President Jacques Chirac, who stated: "It is the first time that 40 heads of state and government have

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48. Speedy Rice, *Lifelines*, No. 72, 2 (Jan./Feb. 1998).

49. *Id.*

50. *Id.*

51. Steven Hawkins, *Lifelines*, No. 71, 1 (Nov./Dec. 1997).

52. *Id.*

53. *Id.*

54. Hawkins, *supra* note 51.

55. *Id.*

56. Bernard Besserglik, *Council of Europe Seeks Wider Role on European Stage*, AGENCE FR. - PRESSE, Oct. 12, 1997, available in 1997 WL 13412204. Representation at the two day meeting was very high: "Virtually every country in Europe — all 40 Council members, together with four candidate members — attended, sending its highest possible representation. Only two states were absent: Belarus, suspended for human rights violations, and Serbia, which has not applied to join." *Id.*

gathered around a table to talk in the same terms about such essential issues as man's place in society, his rights, his dignity, and social progress."<sup>57</sup> The Council of Europe had condemned the death penalty as a violation of human rights,<sup>58</sup> stating in a preliminary paper that the Council "believes the death penalty can no longer be regarded as an acceptable form of punishment from a human rights perspective."<sup>59</sup>

The Russian Federation and the Ukraine agreed to a moratorium on the death penalty in order to obtain membership in the Council of Europe in 1996.<sup>60</sup> Since then, 62 persons have been executed in Russia.<sup>61</sup> In January, 1997, a special commission of the European Parliament met to discuss how Russia had not met her commitments. "Of special concern is Russia's failure to abolish capital punishment and to impose a moratorium on carrying out death sentences passed since Russia's admission to the Council of Europe."<sup>62</sup> Instead of the Russian Federation being thrown out of the Council, the Russian Federation ended up being influenced by it.<sup>63</sup>

Yet, Russia still maintains the death penalty despite its promises.<sup>64</sup> In 1996, Boris Yeltsin tried to decree a moratorium on capital punishment, but this was defeated by the Duma, Russia's lower house of Parliament.<sup>65</sup> However, on Dec. 17, 1997, the Duma passed a draft law which requires that the country's president approve each death sentence handed down by the courts.<sup>66</sup> Although the proposed legislation has yet to pass the upper house and then be agreed upon by the Duma again,<sup>67</sup> this marks a step towards the fulfillment of Russia's promises.

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57. *Id.*

58. *Council of Europe Demands Worldwide Ban on Death Penalty*, AGENCE FR. - PRESSE, Oct. 11, 1997, available in 1997 WL 13411718.

59. *Id.* The Council requires that within three years of admission new member states ratify Article 1 of Protocol 6 of the European Convention for the Protection of Human Rights.

60. Igor Vandenko, *62 Persons Executed in Russia After Her Admission to Council of Europe*, EURONEWS, Jan. 25, 1997, available in 1997 WL 7804295.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Russia's Parliament Considers Capital Punishment Changes*, AGENCE FR. - PRESSE, Dec. 17, 1997, available in 1997 WL 13456505.

65. *Id.*

66. *Id.*

67. *Id.*

### C. *The United Nations Human Rights Commission*

The Human Rights Commission met at its headquarters in Geneva for its annual meeting in March and April, 1997, with more than 200 non-governmental organizations participating.<sup>68</sup> This year the Commission passed its first resolution condemning capital punishment,<sup>69</sup> putting the death penalty at the forefront of international human rights. The United States was the only Western nation voting against the Resolution.<sup>70</sup> The Commission resolution urged "countries to consider abolishing capital punishment. The resolution, sponsored by Italy but not legally binding, passed in Geneva, 27-11. Fourteen nations abstained."<sup>71</sup>

The resolution also called on all countries that have not yet abolished the death penalty "to suspend executions, with a view toward the definitive elimination of capital punishment."<sup>72</sup> Lastly, it also called upon countries which still practice state-sponsored executions "to spare adolescents under 18 (when the crime was committed) and pregnant women."<sup>73</sup>

### D. *The United Nations Human Rights Committee*

Few Americans or their local or national representatives are aware that when the United Nations Human Rights Committee reviewed the report of the United States on implementation of the Covenant on Civil and Political Rights,<sup>74</sup> they found conditions surrounding the use of the death penalty in the United States to be among the most serious problems placing the United States out of compliance with the Covenant.

In the Report of the High Commissioner for Human Rights, Annual General Assembly Report of the Human Rights Committee, the

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68. Gustavo Gonzalez, *Poor Harvest for UN Commission*, Apr. 19, 1997, INTER PRESS SERV., available in 1997 WL 7074924.

69. *1996 Set Grim Record for Executions: Amnesty*, AGENCE FR.-PRESSE, Apr. 4, 1997, available in 1997 WL 2089763. This is the first time the death penalty became an accepted part of the agenda of the United Nations. Last year an attempt to approve a motion on the death penalty in the General Assembly failed. *Id.*

70. *World in Brief United Nations Resolution Opposing Death Penalty*, L.A. TIMES, Apr. 4, 1997, at A5, available in 1997 WL 2197852.

71. *Id.*

72. Gonzalez, *supra* note 68.

73. Agence Fr.-Presse, *supra* note 69. (Material in parenthesis added).

74. The Covenant on Civil and Political Rights was ratified by the U.S. Senate in 1992. The initial report was submitted in 1994. See U.S. DEP'T OF STATE, CIVIL AND POLITICAL RIGHTS IN THE UNITED STATES, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1994).

United States Report was reviewed.<sup>75</sup> The Committee agreed with the report of the delegation that American courts are not prevented from seeking guidelines from the Covenant in interpreting American law.<sup>76</sup> However, the Committee expressed regret and concern over the lack of knowledge about the Covenant by the judiciary, noting:

The Committee regrets that members of the judiciary at the federal, state and local levels have not been fully made aware of the obligations undertaken by the State party under the Covenant, and that judicial continuing education programmes do not include knowledge of the Covenant and discussion of its implementation.<sup>77</sup>

However, the Committee expressed even more serious concern over the application of the death penalty in America, stating:

The Committee is concerned about the excessive number of offenses punishable by the death penalty in a number of states, the number of death sentences handed down by courts, and the long stay on death row which, in specific instances, may amount to a breach of Article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain states. It also deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to be a lack of protection from the death penalty of those mentally retarded.<sup>78</sup>

Finally, the Human Rights Committee recommended:

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75. *Annual General Assembly Report of the Human Rights Committee: Report of the High Commissioner for Human Rights*, U.N. Doc. 3/10/95.A/50/40 (1995) available in (visited 10/97) <<http://193.135.156.15/HTML/menu4/chrrep.htm>>.

76. *Id.* para. 276, which states in full: “[t]he Committee takes note of the position expressed by the delegation that, notwithstanding the non-self-executing declaration of the U.S., American courts are not prevented from seeking guidelines from the Covenant in interpreting American law.”

77. *Id.* para. 280.

78. *Id.* para. 281.

The Committee urges the State party to revise federal and state legislation with a view of restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with article 6 of the Covenant and with a view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were 18. The Committee considers that the determination of methods of execution must take into account the prohibition against causing avoidable pain and recommends the State party to take all necessary steps to ensure respect of article 7 of the Covenant.<sup>79</sup>

### E. Extradition

Extradition from other countries to the United States is seriously hampered by the death penalty practices found within the United States. Since the *Soering* decision<sup>80</sup> by the European Court of Human Rights, there has been an increased resistance to extradition requests by the United States where the defendant may face the death penalty in the United States.<sup>81</sup> While *Soering* was not based upon a view that the death penalty itself was contrary to the Convention, it held that circumstances relating to a death sentence, called the *Death Row Phenomena*, could result in a violation of Article 3, prohibiting inhuman and degrading treatment or punishment.<sup>82</sup> It is almost systematic now that the United States government will give assurances that the death penalty will not be imposed because it is often a necessary precondition to the obtaining of extradition.

## IV. TWO PROHIBITION STATES

The ultimate aim of any discourse is to focus on those states which apply the death penalty since they are in the majority. However, since I live in an abolitionist state, Michigan, I am particularly interested in stopping further extension to those States which do not currently employ the death penalty. During October and November, 1997, two States that currently ban the death penalty, Michigan and Massachusetts, were

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79. *Id.* para. 296.

80. *Soering v United Kingdom* (App. No. 14038/88), Series A, Vol. 161.

81. Comments by Bill Schabas at the ILA conference.

82. *Soering*, (App. No. 14038/88), Series A, Vol. 161. See discussion in WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT & TORTURE*, 96-156 (1996).

subjected to legislative attempts to reintroduce death penalty practices. In Michigan, attempts to bring the death penalty back are almost always on the agenda. The bill is introduced by a legislator who has little information and has almost no understanding about the serious and difficult problems which having a death penalty raises.

## V. THE LOCAL DISCOURSE

The October, 1997, Michigan death penalty public hearing occurred over a referendum, Resolution M, which attempted to place on the ballot a resolution that anyone who killed a corrections officer could be sentenced to death.<sup>83</sup> To make this change, the Michigan Constitution would have to be altered. In the 1964 Constitution, thanks to the work of Eugene Wanger and Tom Downs, among others, the death penalty was prohibited.<sup>84</sup>

On Thursday evening, October 2, 1997, I received a phone call from Beth Arnovitz, the director of the Michigan Council on Crime and Delinquency, telling me that the referendum, Resolution M, would be heard the following Tuesday morning, October 7th. Beth is the Paul Revere of the well-organized and responsive community in Michigan which opposes the death penalty. This gave us a little over 4 days to organize a response. We are also more fortunate in having the Governor, John Engler, also opposing the death penalty. The issue comes up almost routinely every one to three years.<sup>85</sup> On Tuesday, October 7th, the House Judiciary Committee, chaired by Ted Wallace, met as planned. In the past four days a great deal of organizational work had been done. People had organized a bus up from Detroit. Religious groups had organized. Sister Monica from the Catholic Conference and the Team for Justice were there. I represented the Religious Society of Friends. Many other religious groups were present. Professors were there, including myself, Justin Brooks from my institution, and Andrea Lyons from the University of Michigan. Jim Neuhardt and Marty Tieber from the Defenders, Wendy Waggenheim, the lobbyist from the American Civil Liberties Union, were there, and Pat Clark from the Michigan Council on Crime and Delinquency were there. Overall, there were more than one hundred persons who turned out on such short notice. There was only the bill's sponsor and one other lobbyist for the Michigan Corrections Officers

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83. Michigan House Resolution M, 1997.

84. See Eugene G. Wanger, *Historical Reflections on Michigan's abolition of the Death Penalty*, 13, No. 2 T.M. COOLEY L. REV. 755, 770-774 (1996).

85. Michigan Senate Joint Resolution F, which would have amended the state constitution to permit reinstatement of the death penalty was filed in 1994.



Union who were there in favor of the bill. At the end of the three-and-a-half hour hearing the chairperson, Representative Ted Wallace, declared that "the committee will issue a report that there is overwhelming opposition to capital punishment . . . There is no need for a vote or further hearings. . . . [T]he measure [is] dead."<sup>86</sup> There are now four bills calling for the imposition of the death penalty that have been introduced in this legislative session, each one garnering for its sponsor a little time in the limelight and a chance for more votes.<sup>87</sup>

The Massachusetts House of Representatives voted eighty one to seventy nine, on October 28th, 1997, to bring the death penalty back to Massachusetts.<sup>88</sup> The death of a ten year old boy and a series of murders had created a *lynch mob mentality* in the state.<sup>89</sup> A slightly different bill had already passed the Senate. Thus, the House-Senate conference committee had to come up with a compromise bill. The Senate easily passed the compromise bill.<sup>90</sup> Paul Hill and Sister Helen Prejean lobbied for the abolitionists while families of some murder victims lobbied for the compromise legislation.<sup>91</sup> The end result came down to one vote.<sup>92</sup> Representative John P. Slattery (D) then changed his vote, bringing the tally to an eighty-eighty tie.<sup>93</sup> When asked why he changed his vote, he responded that he could not accept that the legislation might apply to teenagers under the age of 18 or that it would weaken protections for minority defendants.<sup>94</sup>

But perhaps most he was influenced by the British *au pair* trial: "It left me feeling that we can't always be certain that we executed the right guy, and if we can't be certain of that, then I have a very big problem with the death penalty."<sup>95</sup>

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86. The wording of this last statement is taken from Hawkins, *supra* note 51, at 5.

87. Two in the Senate, SJRC and SJRD; and two in the House, SJRC and HJRM.

88. Hawkins, *supra* note 51, at 3.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Rice, *supra* note 48, (*see supra* note 88 to finish).

95. *Id.* at 7.

## VI. COSTS & OVERLOAD IN PRISONS – THE FACTS & THEIR IMPORTANCE TO THE DEATH PENALTY DEBATE

Many states, including Michigan have serious problems in their prisons and corrections system. The build-up of prisons in the United States during the last twenty years has been phenomenal. In 1996, the total number of prisoners in the United States reached 1.7 million,<sup>96</sup> costing more than 30 billion dollars. United States incarceration at year-end, 1996, totaled 427 sentenced inmates per 100,000 persons, up from 292 per 100,000 in 1990.<sup>97</sup> In Michigan, the number of people imprisoned has risen from less than 8,000 two decades ago to over 43,000 today. The cost of the prisons is 1.3 billion dollars annually in Michigan, outspending higher education. In California, the number of prisoners has risen from 19,000 twenty years ago to over 150,000 persons today.<sup>98</sup> There, the taking of services from other budgets is more direct and observable. There, the impact on education is more direct; the increase in funding for prisons has been directly proportional to the loss of funds to higher education.<sup>99</sup> Not one new University in California has been built since the build-up of the prisons has commenced.

## VII. WRONG CONVICTIONS: WHY THEY OCCUR AND THEIR IMPLICATIONS FOR THE DEATH PENALTY

In the last four years seventeen inmates sentenced to death in the United States have been found innocent and freed.<sup>100</sup> In Illinois, nine men have been found innocent and freed in the ten years since the death penalty was reinstated there.<sup>101</sup> Eight of the nine men were found innocent after

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96. Christopher J. Mumola, et al., *Prisoners in 1996*, BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEPT. OF JUSTICE OFFICE OF JUSTICE PROGRAMS, June 1997, NCJ 164619.

97. *Id.*

98. Fox Butterfield, *Crime Keeps Falling, but Prisons Keep on Filling*, N.Y. TIMES, Sept. 28, 1997, § 4, at 1.

99. For example,

[t]he state (California) will have to build 24 new prisons at a cost of about \$7 billion by the year 2005 to handle exploding growth in inmate populations brought on largely by the Three Strikes sentencing law. That growth will double the Department of Correction's annual operating budget, from \$3 billion to \$6 billion.

Steve Lawrence, *State Still Facing \$1.1 Billion in Cuts Despite Higher Revenue*, THE ASSOCIATED PRESS POL. SERV., Feb. 21, 1996.

100. Ky Henderson, *How Many Innocent Inmates Are Executed*, 24 HUMAN RIGHTS, No. 4, 10.

101. *Id.*

intervention from outside sources, indicative that without outside intervention, the errors would not have been detected.<sup>102</sup>

All of the cases involved heinous crimes, and six of the nine involved people of color convicted and sentenced to death for interracial murders. In four of the cases, a rape was involved.<sup>103</sup>

In Illinois, about forty lawyers, judges and legal organizations signed a petition for a one-year moratorium to investigate what had happened in these cases.<sup>104</sup> A number of factors appear to be involved in why these errors occurred. First is the use of poor counsel.<sup>105</sup> As Ron Tabak has suggested, "The quality of lawyers at trial for defendants in capital cases is often abysmal, such that you can wind up getting the death penalty more because of how bad your lawyer was than because of how bad you were."<sup>106</sup>

Secondly, the "extreme pressure from the public on law enforcement to capture, convict, and give the death penalty in these cases leads to faulty police work — some accidental, some deliberate."<sup>107</sup> As an example, two men were sentenced to death after being framed by the police in Chicago, even though the police learned who the real killers were just days after the murders. But, by then, since they had framed the innocent men, they could not expose their fraudulent work at that point.<sup>108</sup>

Thirdly, the politicization of the death penalty, and its feature in the running for political office, keep the emotional climate going. "Going for and getting the death penalty in well-publicized cases looks good to most constituents."<sup>109</sup> What is not stated is that political advocacy of the death penalty by politicians running for political office provides an avenue of political opportunism with all of the associated costs being borne by the taxpayer.

#### VIII. ADDING TO EXISTING HARSH PENALTIES: GETTING THE TRUTH OUT

The political manifestations become chilling when a representative or senator parades the families of the victim of some terrible crime. I

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102. *Id.*  
 103. *Id.* at 11.  
 104. *Id.* at 10.  
 105. *Id.* at 11.  
 106. Henderson, *supra* note 100, at 11.  
 107. *Id.*  
 108. *Id.*  
 109. *Id.*

would suspect that asking any family of a victim of whether they would choose a policy going towards the prevention of such a crime rather than imposing the death penalty upon a person who already will spend the rest of their life in prison,<sup>110</sup> that family would seek prevention and ask that the money be channeled into the community. But they are not given that choice. Rather, the death penalty is suggested to them as the only alternative.<sup>111</sup>

Michigan's criminal penalties are among the harshest in the world, and adding the death penalty would add almost nothing more. Michigan was the first political entity in the Western world to abolish the death penalty. The state has never brought it back. Abolition occurred in 1847, effective 1848.<sup>112</sup> Michigan punishes those who commit first degree murder with a mandatory life sentence, with no possibility of probation or parole.<sup>113</sup> There is no other alternative sentence available. Unfortunately, most citizens do not know this and a random sample from among my students elicits the belief that the ordinary penalty for first degree murder is 8 years.<sup>114</sup>

This is consonant with a recent study that indicated that "only 4% of respondents believed murderers sentenced to life actually spend their whole lives in jail; the average estimate of a 'life sentence' was 15.6

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110. Michigan provides a penalty of mandatory life imprisonment for first degree murder. First degree murder in Michigan follows the language, originating in Pennsylvania, that *willful deliberate and premeditated murder* and felony-murder constitutes first degree murder. MICH. COMP. LAWS. ANN. § 750.316. The statute mandates life imprisonment without any possibility of probation or parole. The only way in which a convicted first-degree murderer will be released is through pardon by the Governor (unlikely since the Willie Horton phenomena). However, legislators frequently have done little to educate the public about this fact of Michigan law.

111. This ignorance of existing law is endemic throughout the State and is fostered by the media. For example, fifteen years ago in Michigan, a young man confessed to murdering four young girls. He is now often referred to as a *serial killer*. Almost weekly, the newspapers report accounts of how this *serial killer* and *mass murderer* is about to be released from prison. What is either missing from the accounts or placed at the end of the story is the fact that this young man was allowed to plead to one count of manslaughter, one count of attempted murder and a rape count, and was sentenced to fifteen years imprisonment, which is now about to expire. Having a death penalty would certainly not have impacted upon his punishment at all, but the public does not make those distinctions, and the Donald Miller story is often used as an example of why the state should have a death penalty.

112. Wanger, *supra* note 84.

113. See *supra* note 110.

114. Informal sampling taken during Michaelmas term, 1997.

years".<sup>115</sup> In states with tough sentencing requirements, "few citizens realize that this is so."<sup>116</sup>

In 1993, Bowers did a study which was replicated the same year by Dieter in a national poll. Bowers asks respondents:

'If convicted murderers in this state could be sentenced to life in prison with absolutely no chance of ever being released on parole or returning to society, would you prefer this as an alternative to the death penalty?' In all five states (California, Florida, Georgia, Nebraska, New York) where this question has been asked, more people have preferred this form of life imprisonment. (Bowers, 1993). Adding a requirement that the murderer be required to work in prison industries for money that would go to the families of their victims further diminishes support for the death penalty.<sup>117</sup>

#### IX. THE DERELICTION OF DUTY BY LEGISLATORS

Legislators have a duty to inform themselves of the serious problems that implementing a death penalty imposes. Few bother to garner even the most basic information about the implementation of a death penalty. For example, many legislators still erroneously believe that the death penalty decreases the cost of imprisonment.<sup>118</sup> Quite the contrary, the death penalty imposes an enormous financial burden on the prison budget, since killing a prisoner can cost up to ten times what it costs to keep a prisoner in a prison for life.<sup>119</sup> I am aware of no legislator who has informed any constituent of this fact. When the current penal system is already creaking from the costs of the criminal justice system and is taking money which previously went to higher education and to the communities, legislative leadership must be called into question as to why these important matters of fiscal responsibility have not been revealed to the public.

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115. Ellsworth & Gross, *supra*, note 10, at 99.

116. *Id.*

117. *Id.*

118. See Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty* in THE DEATH PENALTY IN AMERICA 401 (H. Bedau, Ed. 1997).

119. *Id.* See also Justin Brooks & Jeanne H. Erickson, *The Dire Wolf Collects His Due While the Boys Sit by the Fire: Why Michigan Cannot Afford to Buy into the Death Penalty*, 13 No. 3 T.M. COOLEY L. REV. 877 (1996).

When a bill seeking to impose the death penalty is brought up for hearing, one issue which needs exploration is whether the author of the legislation has considered the impact of this legislation upon the state budget, and whether it would raise local or state taxes, and its impact on the provision of other services. For example, would any responsible representative or senator sponsor a bill calling for a multi-million dollar stadium without having any blueprint or estimate of the costs involved? Why would any serious and competent legislator introduce legislation calling for the death penalty without researching the issue of costs?

The most basic responsibility of any legislator is to investigate the full impact and cost of legislation that they are sponsoring. Anything less reflects poor judgment on the part of the sponsor.

## X. CONCLUSION

When considering death penalty legislation, the debate should be realistic. Abstract discussions of good and evil, or the bizarre asking of the question of whether, in the abstract, one is in favor or opposes the death penalty, clouds the debate. Intense scrutiny should be focused on the politician who is sponsoring the bill. One way to determine whether the politician is simply looking for easy votes is to question their knowledge on the topic and whether they have done their homework (other than the political homework).

The purpose of this panel at the ILA Conference was to integrate the various strands towards moratorium and abolishment of capitol punishment as it affects those efforts in the United States. It is astonishing that Americans have so little appreciation of either the changes which are being wrought within the American criminal justice system, or of the changes in the other direction which are occurring throughout the world. It is the hope that this panel and this article will stimulate thinking in these directions.

Knowledge makes the key difference. Knowledge about alternatives to violence, about alternatives to executions, makes the death penalty less attractive. Given information about capital punishment as it is practiced, about the limitations of the criminal justice system to determine guilt or innocence, about the failings of a very seriously flawed system, about the lack of proportionality in application, about the death penalty's inevitable highly politicized content, and its numerous errors, few Americans continue to adhere to the rectitude of such punishment.

# INTERNATIONAL LAW AND ABOLITION OF THE DEATH PENALTY: RECENT DEVELOPMENTS

*William A. Schabas\**

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## I. INTRODUCTION

As a goal for civilized nations, abolition of the death penalty was promoted during the drafting of the *Universal Declaration of Human Rights*<sup>1</sup> in 1948. It found, however, that expression was only implicit in the recognition of what international human rights law designated “the right to life;” the same approach was taken in the *American Declaration of the Rights and Duties of Man*, adopted May 4, 1948.<sup>2</sup> At the time, all but a handful of states maintained the death penalty. In the aftermath of a brutal struggle which took hundreds of millions of lives, few were even contemplating its abolition. The idea of abolition gained momentum over the following decades. International lawmakers urged the limitation of the death penalty, by excluding juveniles, pregnant women, and the elderly from its scope and by restricting it to an ever-shrinking list of serious crimes. Enhanced procedural safeguards were required where the death penalty still remained. In several subsequent international human rights instruments, notably the *International Covenant on Civil and Political Rights*,<sup>3</sup> the *European Convention on Human Rights*,<sup>4</sup> and the *American*

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1. G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), art. 3.

2. O.A.S. Doc. OEA/Ser.L./V/I.4 (1948), art. I.

3. 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 6.

*Convention on Human Rights*,<sup>5</sup> the death penalty is mentioned as a carefully-worded exception to the right to life. From a normative standpoint, the right to life protects the individual against the death penalty unless otherwise provided as an implicit or express exception. Eventually, three international instruments were drafted that proclaimed the abolition of the death penalty. The first instrument was adopted in 1983 and the others at the end of the 1980s.<sup>6</sup> Fifty-one States are now bound by these international legal norms abolishing the death penalty,<sup>7</sup> and the number should continue to grow rapidly.<sup>8</sup> Fifty years after the Nuremberg trials, the international community has now ruled out the possibility of capital punishment in prosecutions for war crimes and crimes against humanity.<sup>9</sup>

The importance of international standard setting was evidenced by parallel developments in domestic laws. In 1945, there were only a handful of abolitionist states. By 1997, considerably more than half the countries in the world abolished the death penalty *de facto* or *de jure*.

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4. 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953, art. 2§1.

5. American Convention on Human Rights, 1144 U.N.T.S. 123, *entered into force* Jul. 18, 1978.

6. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. no. 114, *entered into force* Mar. 30, 1985; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty, G.A. Res. 44/128, *entered into force* Jul. 7, 1991; Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S.T.S. no. 73, 29 I.L.M. 1447, *entered into force* Oct. 6, 1993. The American Convention on Human Rights, is also an abolitionist instrument because it prevents countries that have already abolished the death penalty from reintroducing it. Thus, a State which has abolished the death penalty at the time of ratification of the *American Convention* is abolitionist from the standpoint of international law. *Id.*

7. Andorra, Australia, Austria, Bolivia, Brazil, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Macedonia, Malta, Mexico, Moldova, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, Spain, Surinam, Sweden, Switzerland, Uruguay, Venezuela. These States are abolitionist either *de jure* or *de facto*, and have either signed or ratified one or more of the abolitionist treaties (Jean-Bernard Marie, *International Instruments Relating to Human Rights*, 18 HUM. RTS. L. J. 79 (1997)).

8. Albania, Belgium, Bosnia and Herzegovina, Estonia, Lithuania, Russia and Ukraine have indicated their intention to be bound by international norms prohibiting the death penalty, either by signing an abolitionist instrument or by publicly declaring their intention to ratify.

9. The Security Council has excluded use of the death penalty by the two international *ad hoc* tribunals created to deal with war crimes in the former Yugoslavia and Rwanda: *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S/RES/827 (1993), annex, art. 24(1); *Statute of the International Criminal Tribunal for Rwanda*, S/RES/955 (1994) annex, art. 23(1). The International Law Commission has also excluded the death penalty in its draft statute for an international criminal tribunal: U.N. Doc. A/49/10 (1994), art. 47.



Those that still retain it find themselves increasingly subject to international pressure in favor of abolition. Sometimes the pressure is quite direct. One example is the refusal by certain countries to grant extradition where a fugitive will be exposed to a capital sentence. Abolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterized by terror, injustice, and repression. In some cases, abolition is affected by explicit reference in constitutional instruments to the international treaties that prohibit the death penalty. In others, it has been the contribution of the judiciary (judges applying constitutions that make no specific mention of the death penalty but that enshrine the right to life and that prohibit cruel, inhuman, and degrading treatment or punishment).<sup>10</sup>

Several recent works provide detailed overviews of international legal issues relating to abolition of the death penalty.<sup>11</sup> The intention of this article is considerably more modest: to update the existing material by addressing recent developments in international law. Three subjects are considered; the ongoing debate within international organizations including the United Nations and European institutions, the issue of the death penalty and general sentencing matters involved in establishment of the international criminal court, and the growing refusal of states to extradite to the United States of America in cases where fugitives are subject to the death penalty.

## II. INTERNATIONAL CRIMINAL JUSTICE

The first truly international trials were held in the aftermath of the Second World War and in many cases led to capital executions. The *Charter* of the International Military Tribunal authorized the Nuremberg court to impose upon a convicted war criminal "death or such other punishment as shall be determined by it to be just."<sup>12</sup> Many of the Nazi defendants were condemned to death, although a few received lengthy prison terms and some were acquitted. The Soviet judge expressed the

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10. Makwanyane & Mchunu v. The State, 16 HUM. RTS L. J. 154 (1995); (Constitutional Court of South Africa); Ruling 23/1990 (X.31) AB, Constitutional Court of Hungary, Judgment of October 24, 1990, Magyar Közlöny (Official Gazette), Oct. 31, 1991.

11. Roger Hood, *The Death Penalty* (1996); William A. Schabas, *The Abolition of the Death Penalty in International Law* (1997); *Capital Punishment: Global Issues and Prospects* (Peter Hodgkinson, Andrew Rutherford, eds., 1996). On the death penalty in the United States, see: *The Death Penalty in America, Current Controversies* (Hugo Adam Bedau, ed., 1997).

12. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.), Aug. 8, 1945, art. 27, 82 U.N.T.S. 279.

minority view that all of those convicted should also have been sentenced to death. Those condemned to death were subsequently executed within a few weeks, with the exception of Göring, who committed suicide hours before the time fixed for sentence.<sup>13</sup> A series of successor trials were held in Nuremberg pursuant to *Control Council Law No. 10*.<sup>14</sup> Again, large numbers were sentenced to death or to various lesser punishments, including life imprisonment or lengthy terms of detention. The sentencing provisions of the *Charter of the Tokyo Tribunal* were similar to those adopted at Nuremberg.<sup>15</sup> Of those convicted, seven were sentenced to death and fifteen to life imprisonment.<sup>16</sup> The President of the Tokyo Tribunal penned a separate opinion which seemed to favor sentences other than death:

It may well be that the punishment of imprisonment for life under sustained conditions of hardship in an isolated place or places outside Japan — the usual conditions in such cases — would be a greater deterrent to men like the accused than the speedy termination of existence on the scaffold or before a firing squad.<sup>17</sup>

In response to arguments that these sentences breached the rule *nulla poena sine lege*, it was said that “[i]nternational law lays down that a war criminal may be punished with death whatever crimes he may have committed.”<sup>18</sup> The 1940 United States Army Manual *Rules of Land Warfare* declared that “[a]ll war crimes are subject to the death penalty, although a lesser penalty may be imposed.”<sup>19</sup> A post-war Norwegian court answered a defendant’s plea that the death penalty did not apply to the offense as charged by finding that violations of the laws and customs of

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13. France et al. v. Göring et al., (1946) 23 Trial of the major war criminals before the international military Tribunal, 13 I.L.R. 203. See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, A PERSONAL MEMOIR (1992); LES PROCÈS DE NUREMBERG ET DE TOKYO (Annette Wieviorka, ed., 1996).

14. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany, 50-55.

15. Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 4 BEVANS 20, as amended, 4 BEVANS 27 (“Charter of the Tokyo Tribunal”).

16. R. JOHN PRITCHARD & SONIA MAGBANUA, THE TOKYO WAR CRIMES TRIAL 854-858 (1981).

17. Id.; See also B.V.A. RÖLING, ANTONIO CASSESE, THE TOKYO TRIAL AND BEYOND, 1993.

18. UNITED NATIONS WAR CRIMES COMMISSION, XV LAW REPORTS OF TRIALS OF WAR CRIMINALS, 200 (1949).

19. FIELD MANUAL 27-10, Oct. 1, 1940, para. 357.

war were always punished by death under international law.<sup>20</sup> In 1948, the Secretary-General of the United Nations suggested that the drafting committee of the *Convention for the Prevention and Punishment of the Crime of Genocide* might wish to provide that the crime of genocide be subject to capital punishment.<sup>21</sup> This indicates the general acceptance of capital punishment at the time. A group of three experts involved in drafting the *Genocide Convention*, Donnadieu de Vabres, Pella, and Lemkin, revived provisions from a 1937 treaty that never came into force and that provided for capital punishment for serious international crimes.<sup>22</sup> Even then, the drafters of the *Universal Declaration of Human Rights* rejected proposals that the death penalty be explicitly mentioned as an exception to the right to life because this might pose an obstacle to the growing abolitionist trend.<sup>23</sup>

Within a few years, international lawmakers were more circumspect about the death penalty. A draft provision proposed by the International Law Commission for its "Draft Code of Offenses Against The Peace and Security of Mankind" avoided any categorical reference to capital punishment: "The penalty for any offense defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offense."<sup>24</sup> A general assembly committee subsequently recommended that the statute contain only the most general of provisions dealing with sentencing and suggested the phrase "the court shall impose such penalties as it may determine."<sup>25</sup> The General Assembly committee even stated that the statute might exclude certain forms of punishment, such as the death penalty.<sup>26</sup>

The post-Nuremberg efforts by the International Law Commission and the general assembly to establish an international court did not progress as quickly as hoped.<sup>27</sup> Ultimately, the international criminal court project was shelved for thirty-five years. Following a 1989 request by the

20. Public Prosecutor v. Klinge, (1946) 13 I.L.R. 262 (Supreme Court, Norway).

21. "List of substantive items to be discussed in the remaining stages of the Committee's session, Memorandum submitted by the Secretariat," U.N. Doc. E/AC.25/11 (1948).

22. "Establishment of a permanent international criminal court for the punishment of Acts of Genocide," U.N. Doc. E/447, at 73-74, 82-83 (1948).

23. U.N. Doc. E/CN.4/AC.1/SR.2 (1947), pp. 10-11.

24. Yearbook 1951, Vol. II, at 134 et seq., U.N. Doc. A/1858, §59.

25. "Report of the Committee on International Criminal Jurisdiction," U.N. GAOR 7th Sess., Supp. No. 11, A/2136 §110-111 (1952). See draft art. 32: "The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court."

26. *Id.* §111.

27. G.A. Res. 898 (IX), G.A. Res. 1187 (XII).

general assembly, the International Law Commission (The Commission) returned to the issue. In 1990, special rapporteur Doudou Thiam proposed three different provisions of a sentencing provision, one which did not rule out the death penalty, the other two expressly excluded the death penalty. Thiam said "[i]t therefore seems appropriate to select penalties on which there is the broadest agreement and whose underlying principle is generally accepted by the international community."<sup>28</sup> When the issue of sentencing came before the Commission in 1991, special rapporteur Thiam then proposed that the *Code of Crimes Against the Peace and Security of Mankind* set out specific penalties. This time, the death penalty was formally proscribed and a maximum sentence of life imprisonment was provided.<sup>29</sup> A few members of the Commission argued that capital punishment should not be abandoned.<sup>30</sup> However, the vast majority felt it would be unthinkable to retain the death penalty, given the international trend in favor of its abolition.<sup>31</sup> Several members also expressed their reservations about sentences of life imprisonment, which they said were also a form of cruel, inhuman, and degrading punishment.<sup>32</sup> After lengthy discussion in the Commission, special rapporteur Thiam produced two new draft sentencing provisions. Both of these drafts allowed for sentences up

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28. "Eighth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur," U.N. Doc. A/CN.4/430/ Add.1 §§101-105 (1990). See also "Report of the International Law Commission on the work of its forty-second session," U.N. Doc. A/CN.4/SER.A/1990/Add.1 (Part 2), A/45/10 §§148-149 (1990).

29. U.N. Doc. A/CN.4/435/ Add.1, §29. For the discussion of this proposal by the International Law Commission, see U.N. Doc. A/CN.4/SR.2207-2214, U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), A/46/10, §§70-105.

30. U.N. Doc. A/CN.4/SR.2211, §15; U.N. Doc. A/CN.4/SR.2212, §19; U.N. Doc. A/CN.4/SR.2212, §28; U.N. Doc. A/CN.4/SR.2213, §55. Special rapporteur Thiam promised that the Commission's report would state that "two or three of its members" had expressed reservations about exclusion of the death penalty: U.N. Doc. A/CN.4/SR.2213, §59. The report eventually stated that "many members of the Commission" opposed the death penalty and "[s]ome other members" supported the death penalty: U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), A/46/10, §§85-85.

31. U.N. Doc. A/CN.4/SR.2207, §§23-24; U.N. Doc. A/CN.4/SR.2208, §2; U.N. Doc. A/CN.4/SR.2208, §21; U.N. Doc. A/CN.4/SR.2208, §30; U.N. Doc. A/CN.4/SR.2209, §5; U.N. Doc. A/CN.4/SR.2209, §29; U.N. Doc. A/CN.4/SR.2210, §25; U.N. Doc. A/CN.4/SR.2210, §33; U.N. Doc. A/CN.4/SR.2210, §46; U.N. Doc. A/CN.4/SR.2212, §4; U.N. Doc. A/CN.4/SR.2213, §12; U.N. Doc. A/CN.4/SR.2213, §23; U.N. Doc. A/CN.4/SR.2213, §33.

32. U.N. Doc. A/CN.4/SR.2208, §10 (Graefrath); U.N. Doc. A/CN.4/SR.2208, §21 (Calero Rodriguez); U.N. Doc. A/CN.4/SR.2209, §19 (Barboza); U.N. Doc. A/CN.4/SR.2210, §47 (Njenga); U.N. Doc. A/CN.4/SR.2212, §4 (Solari Tudela). See also: U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), A/46/10, §88. The German Constitutional Court has suggested that life imprisonment without possibility of parole constitutes cruel, inhuman and degrading punishment: [1977] 45 BVerfGE 187, 228 (as translated in KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 316 (1987)).

to life imprisonment (which was square bracketed), or for a term of fifteen to thirty years not subject to commutation. The draft provided for additional sanctions including community work, total or partial confiscation of property and deprivation of some or all civil and political rights.

In 1993, as attention shifted to a draft statute of the proposed international criminal court, it was necessary to include a sentencing provision in that instrument also.<sup>33</sup> The draft statute adopted by the Commission stated that a person convicted under the statute could be sentenced up to life imprisonment, but capital punishment was not included. These provisions were reworked in the 1994 draft, although the substance was not changed significantly.<sup>34</sup> The 1995 discussion confined itself to reiterating the importance of having a *residual* sentencing provision in the statute in order not to run afoul of the *nulla poena sine lege* principle, and once again eliminated the death penalty.<sup>35</sup>

During the August 1996, session of the Preparatory Committee on the international criminal court, some states with a predominantly Moslem population argued that if the statute was to be considered representative of all legal systems, it should include the death penalty.<sup>36</sup> When work on the draft statute of the proposed international criminal court was being discussed by the Sixth Committee of the General Assembly in October 1997, several states seized the opportunity to insist that capital punishment be excluded from the instrument. These states included Poland, Haiti, Paraguay, Ukraine, and Italy. Kuwait, on the other hand, urged its retention.<sup>37</sup> Retentionist States are likely to insist upon the issue when the Preparatory Committee discusses penalties during its December 1997 session. The recent history of these debates would suggest that they have no chance of succeeding. What is more likely is that their silence might imply acquiescence, something that human rights tribunals might later interpret as evidence of the emergence of a customary norm.

While the debate had been underway in the International Law Commission and the Preparatory Committee, the Security Council also

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33. "Report of the International Law Commission on the work of its forty-fifth session," 3 May-23 July 1993, GAOR 48th Sess., Supp. No. 10 (A/48/10), §84.

34. "Report of the International Law Commission on the work of its forty-sixth session," 3 May-23 July 1994, GAOR 49th sess., Supp. No. 10 (A/49/10), 123-125.

35. "Report of the International Law Commission on the work of its forty-seventh session," U.N. GAOR 50th Sess., Supp. No. 10 (A/50/10), 183.

36. U.N. Doc. L/2805 (1996); *see also* U.N. Doc. L/2806 (1996), U.N. Doc. L/2813 (1996).

37. U.N. Doc. GA/L/3044 (1997); U.N. Doc. GA/L/3046 (1997); U.N. Doc. GA/L/3047 (1997); U.N. Doc. GA/L/3048 (1997).

addressed the issue of sentencing when it set up the *ad hoc* tribunals for the former Yugoslavia and Rwanda. The statutes of the two *ad hoc* tribunals contain brief provisions dealing with sentencing. The provisions essentially propose that sentences be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labor, and fines) and that they be established by taking into account the *general practice* of the criminal courts in the former Yugoslavia or Rwanda, as the case may be.<sup>38</sup> The exclusion of the death penalty by the International Tribunal is a particularly sore point with Rwanda. In the Security Council, Rwanda claimed there would be a fundamental injustice in exposing criminals tried by its domestic courts to execution if those tried by the international tribunal would only be subject to life imprisonment.<sup>39</sup> Rwanda's representative said:

[S]ince it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence. . . . That situation is not conducive to national reconciliation in Rwanda.<sup>40</sup>

But to counter this argument, the representative of New Zealand reminded Rwanda that "[f]or over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely

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38. Statute of the International Criminal Tribunal for the former Yugoslavia, art. 25, *supra* note 9; Statute of the International Criminal Tribunal for Rwanda, art. 24, *supra* note 9. On the *ad hoc* tribunals generally, see M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); VIRGINIA MORRIS & MICHAEL SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); Dai Tribunali Penali Intrnazionali ad hoc a una Corte Permanente (Flavia Lattanzi, Elena Sciso, eds., 1996); D. Shraga & R. Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360 (1994); Eric David, *Le tribunal international pénal pour l'ex-Yougoslavie*, 25 REV. BELGE DROIT INT'L. 565 (1992); M. Bergsmo, *The Establishment of the International Tribunal on War Crimes*, 14 HUM. RTS. L. J. 371 (1993); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994); Karine Lescure, *Le tribunal pénal international pour l'ex-Yougoslavie*, 1994; Christopher Greenwood, *The International Tribunal for former Yugoslavia*, 69 International Affairs 641 (1993); Jules Deschênes, *Toward International Criminal Justice*, 5 CRIM. L. F. 249 (1994); David Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. F. 401 (1994); M. Gordon, *Justice on Trial: The Efficacy of the International Tribunal for Rwanda*, 1 ILSA J. INT'L COMP. L. 217 (1995).

39. U.N. Doc. S/PV.3453, at 16.

40. *Id.*

unacceptable, and a dreadful step backwards, to introduce it here."<sup>41</sup> Since domestic trials began in Rwanda in December 1996, more than one hundred people have been sentenced to death. These sentences have not yet been carried out.<sup>42</sup> In fact, Rwanda has not imposed capital punishment since 1982. In 1992, President Habyarimana systematically commuted all outstanding death sentences.<sup>43</sup> According to the United Nations Secretary-General, Rwanda is now considered a *de facto* abolitionist state because it has not conducted executions for more than ten years.<sup>44</sup> Even the program of the Rwandese Patriotic Front calls for abolition of the death penalty. Furthermore, in the 1993 Arusha peace accords, which have constitutional force in Rwanda, the government undertook to ratify the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty* although it has not yet formally taken this step.<sup>45</sup> Recent legislation adopted by Rwanda in order to expedite trials of genocide suspects abolishes the death penalty for the vast majority of offenders, who would otherwise be subject to capital punishment under the country's *Code pénal*.<sup>46</sup>

### III. INTERNATIONAL ORGANIZATIONS

International organizations have played an important role in promoting abolition of the death penalty, through resolutions, treaties, and other initiatives. Foremost among them are the various organs of the United Nations, notably the General Assembly, the Commission on Human Rights, and European regional organizations such as the Council of Europe and the Parliamentary Assembly of the European Union.

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41. *Id.* at 5.

42. William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 8 CRIM. L. F. 523 (1997).

43. *Arrêté présidentiel no 103/105, Mesure de grâce*, J.O. 1992, p. 446, art. 1.

44. *Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty, Report of the Secretary-General*, U.N. Doc. E/1995/78 §36 (1995). See also: *The Death Penalty, List of Abolitionist and Retentionist Countries (September, 1985)*, AI Index: ACT 50/06/95.

45. "Protocole d'Accord entre le Gouvernement de la République Rwandaise et le Front Patriotique Rwandais portant sur les questions diverses et dispositions finales signé à Arusha", Aug. 3, 1993, *Journal officiel*, Year 32, no. 16, August 15, 1993, p. 1430, art. 15.

46. WILLIAM A. SCHABAS & MARTIN IMBLEAU, INTRODUCTION TO RWANDAN LAW 44, 59-60 (1997).

### A. United Nations

In 1994, at the forty-ninth session, a draft General Assembly resolution called for a moratorium on the death penalty.<sup>47</sup> The resolution originated from a newly-formed non-governmental organization, "Hands Off Cain — the International League for Abolition of the Death Penalty Before the Year 2000," which obtained the support of the Italian Parliament for the draft resolution. A series of introductory paragraphs referred to earlier General Assembly resolutions on the death penalty: the 1984 *Safeguards*, relevant provisions, in the *Universal Declaration of Human Rights*,<sup>48</sup> the *International Covenant on Civil and Political Rights*<sup>49</sup> and the *Convention on the Rights of the Child*,<sup>50</sup> the Statutes of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda,<sup>51</sup> and the draft statute of the proposed International Criminal Court.<sup>52</sup> The first of three dispositive paragraphs invited states that still maintain the death penalty to comply with their obligations under the *International Covenant* and the *Convention on the Rights of the Child*, and in particular to exclude pregnant women and juveniles from execution. The second paragraph invited states which had not abolished the death penalty to consider the progressive restriction of the number of offenses for which the death penalty may be imposed, and to exclude the insane from capital punishment. The final paragraph "encourage[d] states which have not yet abolished the death penalty to consider the opportunity of instituting a moratorium on pending executions with a view to ensuring that the principle that no state should dispose of the life of any human being be affirmed in every part of the world by the year 2000."

Italy launched the campaign with a request addressed to the Office of the Presidency of the General Assembly that the item *capital punishment* be added to the agenda. Pakistan, speaking on behalf of the Organization of the Islamic Conference, argued that capital punishment was a highly sensitive and complicated issue, and warranted further and thorough consideration. Pakistan opposed modification of the agenda to include the

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47. U.N. Doc. A/49/234 and Add. 1 and Add.2 (1994), later revised by U.N. Doc. A/C.3/49/L.32/Rev.1 (1994).

48. *Supra* note 1, art. 3.

49. *Supra* note 3, art. 6.

50. G.A. Res. 44/25, Annex (1989), art. 6, 37(a).

51. *Supra* note 9.

52. *Supra* note 34.



item, adding that if the resolution were to be considered, it should be in the Sixth Committee that deals with legal issues, not the Third Committee that deals with human rights issues.<sup>53</sup> The representative of Sudan described capital punishment as "a divine right according to some religions, in particular Islam."<sup>54</sup> Iran, Malaysia, and Egypt also opposed discussing the draft resolution, while Uruguay, Malta, Cambodia, Austria, Burundi, Guinea-Bissau, Nicaragua, France, Ukraine and Andorra urged that it be included on the agenda of the Third Committee.<sup>55</sup> The item *capital punishment* was added to the agenda of the Third Committee not by consensus, as many had hoped, but on a vote of the General Assembly, with seventy States in favor, twenty-four opposed, and forty-two abstentions.<sup>56</sup>

Italy eventually obtained forty-nine co-sponsors for the resolution.<sup>57</sup> During debate in the Third Committee, Singapore took the initiative in attacking the draft resolution. According to the Singapore representative, it strongly opposed efforts by certain states to use the United Nations to impose their own values and system of justice on other countries. He added that it was evident, from the wording of the *International Covenant on Civil and Political Rights*, that no universal consensus held capital punishment to be contrary to international law. He also said that the abolition of the death penalty did not necessarily contribute to the advancement of human dignity. Rather, its retention served to preserve and safeguard the interests of society, notably in the repression of drug trafficking.<sup>58</sup> Other states opposing the resolution during the debate included Malaysia, Jamaica, Bangladesh, China, Sudan, Saudi Arabia, Libya, Egypt, Iran, Japan, and Jordan.

Germany spoke on behalf of the European Union, of which it was the President at the time, supporting the resolution and noting that capital punishment was not applied by any of its members. The German representative cited its lack of significant deterrent effect, and a preference

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53. U.N. Doc. A/BUR/49/SR.6, §2.

54. U.N. Doc. A/BUR/49/SR.5, §13.

55. U.N. Doc. A/BUR/49/SR.5-6.

56. U.N. Doc. A/49/610, §2.

57. Andorra, Argentina, Australia, Austria, Belgium, Bolivia, Cambodia, Cape Verde, Chile, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Marshall Islands, Micronesia, Monaco, New Zealand, Nicaragua, Norway, Panama, Paraguay, Portugal, Romania, San Marino, Sao Tomé and Príncipe, Slovak Republic, Solomon Islands, Spain, Sweden, Uruguay, Vanuatu and Venezuela.

58. U.N. Doc. A/C.3/49/SR.33, §§23-27.

of European States for rehabilitation rather than retribution as a goal of punishment. The text did not create new standards, but did urge that while *looking ahead* towards abolition, the status quo of persons currently on death row should be preserved.<sup>59</sup> Slovenia, Sweden, Italy, Ireland, Nicaragua, New Zealand, Andorra, Malta, Portugal, Cambodia, and Namibia took the floor to support the draft resolution.

At the conclusion of the debate in the Third Committee, the Chair attempted to summarize the debates:

[T]he Committee had clearly been divided into two camps those favoring the abolition of capital punishment and those wishing to retain it. Arguments in favor of abolishing the death penalty had been the following: States could not impose the death penalty as a means of reducing crime because there was no evidence that it had a deterrent effect; the right to life was the most basic human right and, consequently, States did not have the right to take the life of any individual; the death penalty sometimes veiled a desire for vengeance or provided an easy way of eliminating political opponents; the death penalty, once applied, could not be reversed in the event of judicial error; and capital punishment was excluded from the penalties used by international tribunals, including those established to deal with the situations in the former Yugoslavia and Rwanda, and should consequently become less prevalent in national legislation.

Arguments in support of maintaining the death penalty had been the following: certain legislative systems were based on religious laws; it was not possible to impose the ethical standards of a single culture on all countries; there was a need to discourage extremely serious crimes, and, in some countries, capital punishment was a constitutional or even a religious obligation.

At the same time, all members had agreed on certain fundamental points: the death penalty should be applied only in exceptional circumstances and subject to strict

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59. U.N. Doc. A/C.3/49/SR.36, §§7-15.

preconditions, and its scope of application should be extremely limited.<sup>60</sup>

Singapore initially attempted to block the resolution by proposing a *no action* motion. This attempt was rejected, sixty-five states voting in favor to seventy-four against, with twenty abstentions. Singapore then proposed an *amendment* that distorted the original purpose of the resolution, by adding the following preambular paragraph: "Affirming the sovereign right of states to determine the legal measures and penalties which are appropriate in their societies to combat serious crimes effectively."<sup>61</sup> In order to save the resolution, Italy modified its original text by incorporating the Singapore amendment. At the same time, Italy added a reference to the *Charter of the United Nations* and to international law, aimed at making Singapore's reactionary appeal to *state sovereignty* subject to some recognition of international norms.<sup>62</sup> By a close vote, seventy-one to sixty-five, with twenty-one abstentions, Singapore's amendment was adopted.<sup>63</sup> Those voting in favor of the amendment were retentionist states, essentially from Africa, Asia, and the Caribbean. However, such an amendment made the resulting text unacceptable to many abolitionist states. It constituted a setback to efforts within the United Nations system dating to the 1950s to consider capital punishment

60. *Id.* at §§74-76.

61. U.N. Doc. A/C.3/49/L.73.

62. U.N. Doc. A/C.3/49/L.74.

63. *In favor:* Afghanistan, Algeria, Antigua-Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Bhutan, Brunei, Burkina Faso, Burundi, Cameroon, China, Côte d'Ivoire, Cuba, Korea, Egypt, Eritrea, Grenada, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Libya, Malaysia, Maldives, Mauritania, Mongolia, Morocco, Myanmar, Namibia, Nigeria, Oman, Pakistan, Papua New Guinea, Peru, Philippines, Qatar, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sri Lanka, Sudan, Surinam, Swaziland, Syria, Thailand, Trinidad and Tobago, Tunisia, Uganda, United Arab Emirates, Tanzania, Uzbekistan, Vietnam, Yemen, Zambia, and Zimbabwe.

*Against:* Andorra, Angola, Argentina, Armenia, Australia, Austria, Belgium, Brazil, Bulgaria, Cambodia, Canada, Cape Verde, Chile, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Marshall Islands, Micronesia, Monaco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Poland, Portugal, Moldova, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Vanuatu, and Venezuela.

*Abstaining:* Albania, Azerbaijan, Belarus, Benin, Bolivia, Croatia, Ecuador, Ethiopia, Fiji, Gabon, Gambia, Georgia, Ghana, Guatemala, Kazakhstan, Mali, Mauritius, Mexico, Niger, Togo, Ukraine.

as an issue of international concern, and not merely a domestic matter. In the vote on the entire resolution, Italy continued to support the resolution, even with the Singapore amendment, but most of its co-sponsors deserted the camp and abstained in the final vote (a total of seventy-four states abstained). The remainder, essentially retentionist states, tended to divide: thirty-six voted in favor and forty-four voted against.<sup>64</sup>

Capital punishment returned to the United Nations agenda at the 1996 session of the Commission on Crime Prevention and Criminal Justice, which considered a draft resolution entitled *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*. The resolution is the latest in a series adopted by the body and by its predecessor, the United Nations Committee on Crime Problems and Control, dealing with the death penalty.<sup>65</sup> In 1984, the Committee drafted the *Safeguards Guaranteeing the Rights of Those Facing the Death Penalty* (Safeguards),<sup>66</sup> a document which was inspired in large part by articles 6, 14, and 15 of the *Civil Rights Covenant*. However, it went further, detailing the scope of the phrase *most serious crimes* and adding new mothers and the insane to the categories of individuals upon whom the death penalty could never be carried out. The Congress on the Prevention of Crime and the Treatment of Offenders, held every five years, examined the death penalty and endorsed the *Safeguards*, as did the Economic and Social Council and the General Assembly. In 1988, the *Safeguards* were

64. U.N. Doc. A/C.3/49/SR.61. *In favor*: Argentina, Armenia, Cambodia, Cape Verde, Chile, Colombia, Costa Rica, Croatia, Cyprus, Ecuador, El Salvador, Fiji, Gambia, Georgia, Greece, Haiti, Ireland, Israel, Italy, Kyrgyzstan, Macedonia, Malta, Marshall Islands, Mexico, Mozambique, Namibia, Nepal, Nicaragua, Panama, Paraguay, Portugal, San Marino, Slovenia, Uruguay, Uzbekistan, and Venezuela.

*Against*: Afghanistan, Algeria, Antigua-Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Brunei, Cameroon, China, Comoros, Egypt, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Morocco, Myanmar, Nigeria, Oman, Pakistan, Qatar, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sudan, Syria, Trinidad and Tobago, United Arab Emirates, United States of America, and Yemen.

*Abstaining*: Albania, Andorra, Australia, Austria, Azerbaijan, Belarus, Belgium, Benin, Bolivia, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Côte d'Ivoire, Cuba, Czech Republic, Denmark, Estonia, Ethiopia, Finland, France, Gabon, Germany, Grenada, Guatemala, Honduras, Hungary, Iceland, Kazakhstan, Kenya, Korea, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Mauritius, Micronesia, Moldova, Monaco, Mongolia, Netherlands, New Zealand, Niger, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Russian Federation, Slovakia, South Africa, Spain, Sri Lanka, Surinam, Swaziland, Sweden, Tanzania, Thailand, Togo, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, Vanuatu, Vietnam, Zambia, Zimbabwe.

65. Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program, Formulation of Standards and Efforts at Their Implementation 1994*, 58-62.

66. E.S.C. Res. 1984/50. Subsequently endorsed by G.A. Res. A/39/118.

themselves strengthened by a new resolution of the Committee on Crime Prevention and Control, which addressed additional matters, such as the prohibition of execution of the mentally handicapped.<sup>67</sup>

The 1996 resolution calls upon Member States in which the death penalty has not been abolished to effectively apply the safeguards guaranteeing protection of the rights of those facing the death penalty. This will ensure that each defendant facing a possible death penalty is given all guarantees to ensure a fair trial, that defendants who do not sufficiently understand the language used in court are fully informed by way of interpretation or translation of all the charges against them and the content of the relevant evidence deliberated in court, to allow adequate time for the preparation of appeals; for the completion of appeals proceedings as well as for petitions for clemency, to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals, for petitions for clemency of the prisoner in question, and to effectively apply the *Standard Minimum Rules for the Treatment of Prisoners*,<sup>68</sup> in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering. The resolution was subsequently endorsed by the Economic and Social Council.<sup>69</sup>

Italy recovered from the frustration of the 1994 General Assembly, and presented a resolution to the 1997 session of the Commission on Human Rights calling, *inter alia*, for a moratorium on the death penalty.<sup>70</sup> The preamble refers to the right to life provisions of the *Universal Declaration of Human Rights*,<sup>71</sup> the *International Covenant on Civil and Political Rights*<sup>72</sup> and the *Convention on the Rights of the Child*,<sup>73</sup> as well as relevant resolutions of the General Assembly<sup>74</sup> and the Economic and Social Council.<sup>75</sup> It notes deep concern that several countries impose the

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67. E.S.C. Res. 1989/64.

68. E.S.C. Res. 663C(XXIV); as amended, E.S.C. Res. 2076(LXII), §§56-59. On the *Standard Minimum Rules*, see: ROGER S. CLARK, *supra* note 66 at 145-179

69. E.S.C. Res. 1996/15, July 23, 1996.

70. U.N. Doc. E/CN.4/1997/L.20 (1997).

71. *Supra* note 1, art. 3.

72. *Supra* note 3, art. 6.

73. G.A. Res. A/44/25, Annex (1989), art. 6, 37(a).

74. G.A. Res. A/26/2857 (XXVI) (1971); G.A. Res. A/32/61 (1977); G.A. Res. A/44/128 (1989).

75. E.S.C. Res. 1574 (L) (1971); E.S.C. Res. 1745 (LIV) (1973); E.S.C. Res. 1930 (LVIII) (1975); E.S.C. Res. 1984/50; E.S.C. Res. 1985/33; E.S.C. Res. 1989/64; E.S.C. Res. 1990/29; E.S.C. Res. 1990/51; E.S.C. Res. 1996/15.

death penalty in disregard of the limitations provided for in the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*, as well as the *Safeguards guaranteeing protection of the rights of those facing the death penalty*.<sup>76</sup> The resolution states the Commission's conviction "that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights."<sup>77</sup>

In its operative paragraphs, it calls for accession or ratification of the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*. States that still maintain the death penalty are urged to comply fully with their obligations under the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*. Notably, the obligations not to impose the death penalty for any but the most serious crimes, not to impose it for crimes committed by persons below eighteen years of age, to exclude pregnant women from capital punishment and to ensure the right to seek pardon or commutation of sentence. It requests states to consider suspending executions and impose a moratorium on the death penalty.

There was fierce debate within the Commission as a handful of retentionist states struggled to resist this new initiative. The Philippines, with the support of Malaysia and Egypt, attempted to subvert the resolution by a number of amendments that, in effect, undermined its meaning.<sup>78</sup> Denmark noted that the United Nations Security Council, in the statutes governing the Tribunals for war crimes in the former Yugoslavia and Rwanda, did not provide for the death penalty. Canada, although not a co-sponsor of the resolution, commended Italy's leadership and announced it would vote in favor of the resolution. Speaking before the Commission on behalf of the non-governmental organization that originally promoted the revolution, I noted that thirty states ratified the *Second Optional Protocol*, and that international justice no longer tolerated capital punishment, even for those responsible for genocide and war crimes. I expressed deep concern about the number of executions taking place in many parts of the world, particularly in countries such as Nigeria, Iran, Iraq, Sudan, China, and the United States, and urged all States that maintained the death penalty not to apply it to pregnant women, juveniles or the insane.<sup>79</sup> Several opponents charged that the Italian draft was *unbalanced*, including China, Egypt, India, and the United States. India and Malaysia argued

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76. E.S.C. Res. 1984/50, Annex.

77. *Id.*

78. U.N. Doc. E/CN.4/1997/L.35 (1997).

79. U.N. Doc. HR/CN/770 (1997).

that it was improper to present a resolution before the Commission that had already been rejected by the General Assembly. Others who spoke against the resolution were Japan, Republic of Korea, and Bangladesh.<sup>80</sup> The resolution was passed by a roll-call vote of twenty-seven in favor and eleven opposed, with fourteen abstaining.<sup>81</sup>

According to Italian Foreign Minister Lamberto Dini, in a recent interview:

We have to let some time pass, so that the abolitionist victory in Geneva can sink in, and produce results. Raising this issue prematurely with the General Assembly could compromise our efforts. This is why Italy, and other "like-minded" countries, prefer to avoid a confrontation with the General Assembly, and wait until the moment is right. We shall continue to closely monitor the situation, however, to avoid draft resolutions being presented by retentionist states.<sup>82</sup>

The terms of the 1997 resolution require that the matter return to the Commission agenda in 1998. No death penalty resolution was presented to the General Assembly during its 1997 session.

The Commission on Human Rights has not designated a special rapporteur with specific responsibility for capital punishment. However, its special rapporteur on extrajudicial, summary or arbitrary executions, Senegalese lawyer Waly Bacre Ndaye, has taken a considerable interest in the subject and clearly views it as part of his mandate. In his 1997 annual report to the Commission on Human Rights, Ndaye reiterated his views on the desirability of abolishing the death penalty. He stated that "given that the loss of life is irreparable . . . the abolition of capital punishment is most desirable in order fully to respect the right to life." He added that

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80. U.N. Doc. HR/CN/788 (1997).

81. U.N. Doc. HR/CN/789 (1997). The resolution is recorded as 1997/12. *In favor*: Angola, Argentina, Austria, Belarus, Brazil, Bulgaria, Canada, Cape Verde, Chile, Colombia, Czech Republic, Denmark, Ecuador, France, Germany, Ireland, Italy, Mexico, Mozambique, Nepal, Netherlands, Nicaragua, Russian Federation, South Africa, Ukraine, Uruguay. *Against*: Algeria, Bangladesh, Bhutan, China, Egypt, Indonesia, Japan, Malaysia, Pakistan, Republic of Korea, United States. *Abstaining*: Benin, Cuba, El Salvador, Ethiopia, Gabon, Guinea, India, Madagascar, Philippines, Sri Lanka, Uganda, United Kingdom, Zaire, and Zimbabwe.

82. Alessandra Filograno, *Italy's Greatest Triumph, Hands Off Cain, Review Against the Death Penalty* No. 3, October/December 1997, at 35-37.

“where there is a fundamental right to life, there is no right to capital punishment.”<sup>83</sup>

In his report, Ndaye noted such positive developments as the abolition of the death penalty by Belgium during July 1996. He expressed concern about expansion of the scope of the death penalty in Estonia and Libya, and regretted the fact that some states resumed executions after a lull of many years, notably Bahrain, Comoros, Guatemala, Thailand and Zimbabwe. The special rapporteur referred to the importance of maintaining the highest procedural standards in capital trials, including public hearings. He said he was disturbed by reports that the death penalty was imposed in secrecy in some countries, such as Blears, China, Kazakhstan and Ukraine.

Ndaye noted that:

[A]s in previous years, the Special Rapporteur received numerous reports indicating that in some cases the practice of capital punishment in the United States does not conform to a number of safeguards and guarantees contained in international instruments relating to the rights of those facing the death penalty. The imposition of the death penalty on mentally retarded persons, the lack of adequate defense, the absence of obligatory appeals and racial bias continue to be the main concerns.<sup>84</sup>

In his report, he said he:

[R]emains deeply concerned that death sentences continue to be handed down after trials which allegedly fall short of the international guarantees for a fair trial, including lack of adequate defense during the trials and appeals procedures. An issue of special concern to the Special Rapporteur remains the imposition and application of the death penalty on persons reported to be mentally retarded or mentally ill. Moreover, the Special Rapporteur continues to be concerned about those cases which were allegedly tainted by racial bias on the part of the judges or prosecution and about the non-mandatory nature of the

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83. Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, U.N. Doc. E/CN.4/1997/60 (1996). *See also* Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, U.N. Doc. E/CN.4/1996/614, §§507-517, §§540-557.

84. Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, U.N. Doc. E/CN.4/1997/60 (1996), §543.



appeals procedure after conviction in capital cases in some states.<sup>85</sup>

In the course of 1996, the Special Rapporteur sent urgent appeals to the United States of America concerning death sentences imposed on the mentally retarded; in cases following trial in which the right to an adequate defense had allegedly not been fully ensured; where individuals had been sentenced to death without resorting to their right to lodge any legal or clemency appeal; and where they had been sentenced to death despite strong indications casting doubt on their guilt.<sup>86</sup> Ndaye sent a special appeal to the United States in the case of Joseph Roger O'Dell, who, according to his report to the Commission on Human Rights, "has reportedly extraordinary proof of innocence which could not be considered because the law of the State of Virginia does not allow new evidence into court twenty-one days after conviction."<sup>87</sup> Despite an international campaign, O'Dell was executed in July 1997. Ndaye also noted that in response to his urgent appeals, the Government of the United States provided nothing more than a reply in the form of a description of the legal safeguards provided to defendants in the United States in criminal cases.<sup>88</sup>

Ndaye had inquired on several occasions as to whether the United States would "consider extending him an invitation to carry out an on-site visit."<sup>89</sup> As a result of repeated initiatives, on October 17, 1996, he received a written invitation from the government to visit the United States and conduct his investigation.<sup>90</sup> In October 1997, Special Rapporteur Ndaye conducted a two-week mission to the United States, where he attempted to visit death row prisoners in Florida, Texas, and California. At California's San Quentin Penitentiary, he was refused permission by authorities to meet with designated prisoners. Ndaye's visit provoked the ire of Senator Jesse Helms, chair of the Senate Foreign Relations Committee, who in a letter to William Richardson, United States Permanent Representative to the United Nations, described the mission as an "an absurd U.N. charade."<sup>91</sup> Helms asked, "Bill, is this man confusing the United States with some other country or is this an intentional insult to

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85. *Id.* §551.

86. *Id.* §544.

87. *Id.*

88. *Id.* §546.

89. *Id.* §§547, 548.

90. *Id.* §549.

91. John M. Goshko, *Helms Calls Death Row Probe "Absurd U.N. Charade,"* THE WASHINGTON POST, October 8, 1997; at A07.

the United States and to our nation's legal system?"<sup>92</sup> Ndaye replied: "I am very surprised that a country that is usually so open and has been helpful to me on other missions, such as my attempts to investigate human rights abuses in the Congo, should consider my visit an insult."<sup>93</sup>

### B. Council of Europe

The Council of Europe, now composed of forty member states covering virtually all of the European continent as well as much of northern Asia, was the first regional system to incorporate a fully abolitionist international norm when, in 1983, it adopted *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty Protocol*.<sup>94</sup> The *Protocol* is an optional instrument, allowing states that are parties to the *European Convention on Human Rights*<sup>95</sup> to extend their obligations and to bind themselves as a question of international law to the prohibition of capital punishment. The *Protocol*, although not without its shortcomings, represents a seminal development in the abolition of the death penalty, setting an example that goes well beyond its own borders. It provided a model to drafters in the United Nations and the Organization of American States, who followed Europe's example several years later.

In 1994, the Parliamentary Assembly of the Council of Europe adopted a resolution calling upon member states that had not yet done so to ratify the *Protocol*.<sup>96</sup> The resolution praised Greece, which in 1993 had abolished the death penalty for crimes committed in wartime as well as in peacetime. It stated:

In view of the irrefutable arguments against the imposition of capital punishment, it calls on the parliaments of all member states of the Council of Europe, and of all states whose legislative assemblies enjoy special guest status at the Assembly, which retain capital punishment for crimes committed in peacetime and/or in wartime, to strike it from their statute books completely.

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92. *Id.*

93. *Id.*

94. PROTOCOL NO. 6, *supra* note 6.

95. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, E.T.S. no. 5, entered into force Sep. 3, 1953.

96. Resolution 1044 (1994) on the abolition of capital punishment, October 4, 1994 (25th sitting). See also C. of E. P.A. Doc. 7154.

It urged all heads of state and all parliaments in whose countries death sentences are passed to grant clemency to the convicted. It also affirmed that willingness to ratify *Protocol No. 6* be made a prerequisite for membership of the Council of Europe. Significantly, in the Dayton Peace Agreement, signed at Paris on December 14, 1995, the new state of Bosnia and Herzegovina is held to the highest standard of compliance with contemporary human rights norms, including ratification of the *Protocol* and the incorporation of its terms as the fundamental law of the new republic.<sup>97</sup> The irony is that the agreement was negotiated in Ohio, a state that still retains the death penalty.

The Parliamentary Assembly (Assembly) also adopted a *recommendation* that deplored the fact that the death penalty was still provided by law in eleven Council of Europe member states and seven states whose legislative assemblies have special status with respect to the organization.<sup>98</sup> An indication that the death penalty is far from a theoretical issue in Europe, it expressed shock that fifty-nine people were legally put to death in those states in 1993, and that at least 575 prisoners were known currently to be awaiting their execution. The Assembly said that application of the death penalty may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the *European Convention on Human Rights*. It recommended that the Committee of Ministers draft an additional protocol to the *European Convention on Human Rights*, abolishing the death penalty both in peace and wartime, and obliging the parties not to re-introduce it under any circumstances. The recommendation also proposed establishing a control mechanism that would oblige states where the death penalty is still provided by law to set up a commission with a view to abolishing capital punishment. A moratorium would be declared on all executions while the commissions fulfill their tasks. The commissions would be required to notify the Secretary General of the Council of Europe of any death sentences passed and any executions scheduled without delay. Any country that had scheduled an execution would be required to halt it for a period of six months from the time of notification of the Secretary General. During this time the Secretary General would be empowered to send a delegation to conduct an investigation and make a recommendation to the country concerned. Finally, all states would be bound not to allow the

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97. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4: Constitution of Bosnia and Herzegovina, art. II§2, Annex I, §7; General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 6: Agreement on Human Rights, art. 1.

98. Recommendation 1246 (1994) on the abolition of capital punishment, October 4, 1994 (25th sitting).

extradition of any person to a country in which he or she risked being sentenced to death and subjected to the extreme conditions on *death row*.

The Committee of Ministers of the Council of Europe, in a January 1996, interim reply, indicated that the proposals of the Assembly were being examined. The Assembly adopted a new recommendation, on June 28, 1996, calling for the Committee of Ministers to follow up on the 1994 proposals without delay.<sup>99</sup> On June 28, 1996, the Assembly adopted a resolution reaffirming its opposition to the death penalty. The Assembly declared that all states joining the Council of Europe must impose a moratorium on executions, without delay, and indicate their willingness to ratify The *Protocol*. The resolution added:

[T]he Assembly reminds applicant states to the Council of Europe that the willingness to sign and ratify *Protocol No. 6* of the European Convention on Human Rights and to introduce a moratorium upon accession has become a prerequisite for membership of the Council of Europe on the part of the Assembly . . . .<sup>100</sup>

Resolution 1097 (Resolution) was also an answer to reports that the Russian Federation and Ukraine, which had recently joined the Council of Europe, were not honoring their commitments. The Resolution condemned Ukraine for apparently violating its commitments to introduce a moratorium on executions of the death penalty upon its accession to the Council of Europe. As for Russia, the Assembly demanded that it respect its undertakings to stop all executions. The Resolution stated that further executions could imperil the continued membership of the two states in the Council of Europe. The Assembly extended its warning to Latvia, where apparently two executions have been carried out since it joined the Council of Europe. Amnesty International has reported that in 1996, Ukraine carried out 167 executions and Russia carried out 140 executions. This put the two states at the top of the list for executions world-wide, with the exception of China, whose title to first place in the standings has been undisputed for many years.<sup>101</sup> In order to advance the debate within Ukraine, the Assembly of the Council of Europe held a seminar on the abolition of the death penalty in Kiev, November 28-29, 1996, at which

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99. Recommendation 1302 (1996).

100. Resolution 1097 (1996).

101. The Death Penalty Worldwide: Developments in 1996, Amnesty International, June 1997, AI Index: ACT 50/05/97.

international experts debated the issues with members of the Ukrainian judicial community.<sup>102</sup>

Russia and the Ukraine have now signed the *Protocol*, on April 17, 1997 and May 5, 1997 respectively. These states must still ratify the instrument, although pursuant to the *Vienna Convention on the Law of Treaties*:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . . .<sup>103</sup>

It appears that both the Russian Federation and the Ukraine have, in effect, respected the moratorium and that executions in those countries have stopped.<sup>104</sup> If they stay the course, it will be a compelling argument in support of those who argued that it was preferable for the Council to admit Russia and Ukraine as members despite their initial failure to meet the basic conditions of the organization, the Council would be in a better position to influence them to conform to its fundamental norms.

On October 11, 1997, at the Second Summit of the Council of Europe, the Heads of State or Government of the Council of Europe adopted a series of declarations, including one dealing with capital punishment. In their declarations to the Summit, several of the leaders insisted upon the importance of abolition of the death penalty as one of the central human rights goals of the Council, including Romano Prodi of Italy, Jean-Claude Juncker of Luxembourg, Alfred Sant of Malta and Poul Nyrup Rasmussen of Denmark. Russian President Boris Yeltsin announced: "Russia has introduced a moratorium on capital punishment and we are strictly complying with this undertaking. I know that the European public opinion was shocked by public executions in Chechnya. Russia's leadership is taking all necessary measures to contain such manifestations of medieval barbarity."<sup>105</sup> The President of Latvia, Guntis Ulmanis, explained that a year earlier he had imposed a moratorium on

102. C. of E. Doc. AS/Jur (1996) 70-72.

103. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 18a, 1155 U.N.T.S. 331.

104. The Committee Against Torture recently urged Ukraine to make its moratorium on the death penalty permanent: U.N. Doc. HR/4326.

105. C. of E. Doc. SUM(97)PV1 prov., at 65.

executions and that it is still in force.<sup>106</sup> In the final Declaration of the Summit, the heads of state and government call for the universal abolition of the death penalty and insist on the maintenance, in the meantime, of existing moratoria on executions in Europe.

### C. European Union

Death penalty issues have frequently been raised within the European Parliament, which has generated a number of resolutions over the years. A resolution in 1981 called for abolition of the death penalty in the European Community.<sup>107</sup> Following the coming into force of the *Protocol*, the European Parliament called upon member states to ratify that abolitionist instrument.<sup>108</sup> In 1989, the European Parliament adopted *The Declaration of Fundamental Rights and Freedoms*, which proclaims the abolition of the death penalty.<sup>109</sup> In 1990, the President of the European Parliament announced that he had forwarded a motion for a resolution on abolition of the death penalty in the United States.<sup>110</sup> Subsequently, the Political Affairs Committee decided to prepare a report on the death penalty and appointed Maria Adelaide Aglietta as rapporteur. In 1992, a motion for a resolution was prepared that named those European Union states whose legislation still provided for the death penalty in the case of exceptional crimes, namely Greece, Belgium, Italy, Spain, and the United Kingdom, to abolish it altogether. It also urged all member states that had not yet done so to ratify the *Protocol* as well as the *Second Optional Protocol to the International Covenant on Civil and Political Rights*. The resolution also called upon member states to refuse extradition to states where capital punishment still exists, unless sufficient guarantees that it will not be provided were obtained. The resolution also stated that the European Parliament:

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106. *Id.* at 28.

107. E.C. Doc. 1-20/80, March 13, 1980; E.C. Doc. 1-65/81; *Official Journal of the European Communities, Debates of the European Parliament*, No. 1-272, Annex, pp. 116-129; the Irish extremist Ian Paisley spoke against the proposal, as did some Greek members. The Report was adopted on June 18, 1981: *Official Journal of the European Communities, Debates of the European Parliament*, No. 1-272, Annex, pp. 225-228; E.C. Doc. A 2-167/85, Doc. B 2-220/85; *Official Journal of the European Communities, Debates of the European Parliament*, No. 2-334, Annex, pp. 300-303.

108. E.C. Doc. A2-0187/85; *Official Journal of the European Communities, Debates of the European Parliament*, C 36, February 17, 1986, at 214.

109. *Official Journal of the European Communities, Debates of the European Parliament*, Annex, No. 2-377, pp. 56-58, 74-79, 151-155; E.C. Doc. A 2-3/89.

110. E.C. Doc. B3-0605/89. See also E.C. Doc. B3-0682/90; E.C. Doc. B3-1915/90.

[H]opes that those countries which are members of the Council of Europe, and have not done so, will undertake to abolish the death penalty (in the case of exceptional crimes, this applies to Cyprus, Malta, and Switzerland, and in the case of both ordinary and exceptional crimes, to Turkey and Poland), together with those countries which are members of the C.S.C.E., in which the death penalty still exists (Bulgaria, United States of America, Commonwealth of Independent States, Yugoslavia, Lithuania, Estonia, Latvia, and Albania).<sup>111</sup>

It urged the United Nations to adopt a “binding decision imposing a general moratorium on the death penalty.”<sup>112</sup> Death penalty practice has also been a factor in assessing human rights within states whose recognition is being considered by the European Union. In its *opinion* on recognition of Slovenia, the Arbitration Commission presided by French Judge Robert Badinter took note of the abolition of the death penalty in the Constitution of Slovenia.<sup>113</sup>

In October 1997, the European Union adopted the *Treaty of Amsterdam*, which amends the various conventions concerning the body and its components. The instrument is completed with a series of declarations, the first of which concerns the death penalty. It states:

With reference to Article F(2) of the Treaty on European Union, the Conference recalls that Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and which has been signed and ratified by a large majority of Member States, provides for the abolition of the death penalty. In this context, the Conference notes the fact that since the signature of the abovementioned Protocol on 28 April 1983, the death penalty has been abolished in most of the Member States of the Union and has not been applied in any of them.<sup>114</sup>

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111. *Id.*

112. *Id.*

113. Conference on Yugoslavia, opinion No. 7, on International Recognition of the Republic of Slovenia by the European Community and its Member States, Jan. 11, 1992, 31 I.L.M. 1512, 1516 (1992).

114. *Treaty of Amsterdam* (visited February 21, 1998)  
<http://ve.ev.int/Amsterdam/en/amstera/en.htm7>.

## IV. EXTRADITION

Extradition has become an important indirect way in which international law promotes the death penalty. Since the late nineteenth century, extradition treaties have contained clauses by which states parties may refuse extradition for capital offenses in the requesting state unless a satisfactory assurance will be given that the death penalty will not be imposed. Such provisions can be found as early as 1889, in the *South American Convention*, in the 1892 extradition treaty between the United Kingdom and Portugal, in the 1908 extradition treaty between the United States and Portugal, and in the 1912 treaty prepared by the International Commission of Jurists.<sup>115</sup> These clauses have now become a form of international law *boilerplate* and are contained in model extradition treaties adopted within international organizations including the United Nations.<sup>116</sup> Several important cases have been heard by courts in Europe and Canada concerning extradition to the United States. Extradition to the United States from Europe is now virtually contingent on such assurances, the result of the case law of the European Court of Human Rights, while in Canada the position is not nearly as clear.

The European Commission of Human Rights (Commission) first addressed the question of extradition to the death rows on the other side of the Atlantic in *Kirkwood v. United Kingdom*, a case originating in California. The United Kingdom was empowered to refuse Soering's extradition to the United States because of a provision in the extradition treaty between the two countries. This provision entitles either contracting party to insist upon an undertaking from the other that the death penalty would not be imposed. The text is drawn from Article 11 of the *European Convention on Extradition*. Although the death penalty is ostensibly

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115. P. Leboucq, *Influence en matière d'extradition de la peine applicable dans le pays requérant*, (1911) J.D.I. 437; J.S. Reeves, *Extradition Treaties and the Death Penalty*, 18 AM. J. INT'L L. 298 (1924); *American Institute of International Law, Project No. 17*, 20 AM. J. INT'L L. Supp. 331 (1926); *Harvard Law School Draft Extradition Treaty*, 29 AM. J. INT'L L. 21, 228 (1935); GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 99-100 (1991); Sharon A. Williams, *Extradition to a State that Imposes the Death Penalty*, 28 CAN. Y.B. INT'L L. 117 (1990); Sharon A. Williams, *Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition*, 62 INT'L REV. PENAL L. 259 (1991); Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191 (1992).

116. Model Treaty on Extradition, U.N. Doc. A/CONF.14/28/Rev.1, p. 68 (1990), art. 4; Inter-American Convention on Extradition, Feb. 25, 1981, art. 9, 20 I.L.M. 723 (1981); European Convention on Extradition, (1960) 359 U.N.T.S. 273, E.T.S. 24, art. 11. The Italian Constitutional Court has ruled that article 11 of the *European Convention on Extradition* does not codify a customary rule of international law: *Re Cuillier, Ciamborrani and Vallon*, (1988) 78 I.L.R. 93 (Constitutional Court, Italy).



permitted by article 2, section 1 of the *European Convention on Human Rights*, which subjects the right to life to limitations, the Commission considered that it might raise issues under article 3, which is the prohibition of inhuman and degrading treatment. Kirkwood's application was declared inadmissible, not because the argument itself was flawed but because he had failed to demonstrate that detention on *death row* was inhuman and degrading treatment within the meaning of article 3.<sup>117</sup> Implicitly, the Commission recognized that the *European Convention on Human Rights* might intervene to prevent extradition from a state party.

The issue returned to the Strasbourg organs several years later in the case of Jens Soering, who had been arrested in the United Kingdom under an extradition warrant issued at the request of the United States.<sup>118</sup> In a judgment issued on July 7, 1989,<sup>119</sup> the European Court of Human Rights confirmed that circumstances relating to a death sentence could give rise to issues respecting the prohibition of inhuman and degrading treatment or punishment. It addressed four of them: length of detention prior to execution; conditions on death row; age and mental state of the applicant; and the competing extradition request from Germany.

The Court noted that a condemned prisoner could expect to spend six to eight years on death row before being executed. The Court agreed that this was "largely of the prisoner's own making," in that it was the

117. *Kirkwood v. United Kingdom* (App. No. 10308/83), (1985) 37 D.R. 158, at 184.

118. C. Warbrick, *Coherence and the European Court of Human Rights: the Adjudicative Background to the Soering case*, 11 Mich. J Int'l L. 1073, (1989-90); Vincent Berger, *Jurisprudence de la Cour européenne des droits de l'homme* 12-13 (1994).

119. *Soering v. United Kingdom*, 161 EUR. CT. H.R. (ser.A) (1989). For scholarly comment on the *Soering* case, see: W. Ganshof VAN DER MEERSCH, *L'extradition et la Convention européenne des droits de l'homme. L'affaire Soering*, 1990 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 5; Frédéric Sudre, *Extradition et peine de mort - arrêt Soering de la Cour européenne des droits de l'homme du 7 juillet 1989*, 1990 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 103; Michael O'BOYLE, *Extradition and Expulsion under the European Convention on Human Rights, Reflections on the Soering Case*, in HUMAN RIGHTS AND CONSTITUTIONAL LAW, ESSAYS IN HONOUR OF BRIAN WALSH 93 (James O'REILLY, ed., 1994); Ann Sherlock, *Extradition, Death Row and the Convention*, 15 EUR. L. REV. 87 (1990); David L. Gappa, *European Court of Human Rights - Extradition - Inhuman or Degrading Treatment or Punishment, Soering Case*, 161 Eur.Ct.H.R. (Ser.A) 1989, 20 GA. J. INT'L & COMP. L. 463 (1990); H. Wattendorff, E. du Perron, *Human Rights v. Extradition: the Soering case*, 11 MICH. J. INT'L L. 845 (1990); J. Quigley, J. Shank, *Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?*, 30 VA. INT'L L.J. 251 (1989); Christine van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757 (1990); Susan Marks, *Yes, Virginia, Extradition May Breach the European Convention on Human Rights*, 49 CAMBRIDGE L. J. 194 (1990); Henri Labayle, *Droits de l'homme, traitement inhumain et peine capitale: Réflexions sur l'édification d'un ordre public européen en matière d'extradition par la Cour européenne des droits de l'homme*, 64 SEMAINE JURIDIQUE 3452 (1990); L.E. Pettiti, *Arrêt Soering c./Grande-Bretagne du 8 juillet 1989*, 1989 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 786.

result of systematic appellate review and various collateral attacks by means of *habeas corpus*. The Court said:

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However, well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.<sup>120</sup>

The Court took note of the exceptionally severe regime in effect on death row, adding that it was "compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years."<sup>121</sup> What the Court had described is often labeled the *death row phenomenon*.<sup>122</sup> As

120. *Id.* §106.

121. *Id.* §107.

122. The issue of the *death row phenomenon* has been litigated before many domestic courts. For case law on the subject, see: *Sher Singh v. State of Punjab*, [1983] 2 S.C.R. 582, A.I.R. 1983 S.C. 465; *Rajendra Prasad v. State of Uttar Pradesh*, [1979] 3 S.C.R. 78, A.I.R. 1979 S.C. 916; *Chessman v. Dickson*, 275 F.2d 604, 608 (9th Cir. 1960); *Arsenault v. Commonwealth*, 353 Mass. 575, 233 N.E.2d 730 *rev'd*, 393 U.S. 5, 89 S. Ct. 35, 21 L. Ed. 2d 5 (1968); *People v. Anderson*, 6 Cal. 3d 628, 100 Cal.Rptr. 152, 493 P.2d 880, 894 (1972), *cert. denied*, 406 U.S. 958, 92 S. Ct. 2060, 32 L. Ed. 2d 344 (1972); *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D.Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir.1986), *cert. denied*, 485 U.S. 919, 108 S. Ct. 1091, 99 L. Ed. 2d 253, *reh'g denied*, 485 U.S. 1015, 108 S. Ct. 1491, 99 L. Ed. 2d 718 (1988); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995); *et al. v. Carter N.O. et al.*, [1968] 1 R.L.R. 136 (A.), 1968 (2) S.A. 445; *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Zimbabwe, et al.*, [1993] 4 S.A. 239 (Z.S.C.), [1993] 1 Z.L.R. 242 (S), 14 H.R.L.J. 323; *Abbott v. A.-G. of Trinidad and Tobago*, [1979] 1 W.L.R. 1342, 32 W.I.R. 347 (J.C.P.C.); *Riley v. Attorney-General of Jamaica*, [1983] 1 A.C. 719, 3 All. E.R. 469, 35 W.I.R. 279 (J.C.P.C.); *Pratt et al. v. Attorney General for Jamaica et al.*, [1993] 4 All.E.R. 769, [1993] 2 L.R.C. 349, [1994] 2 A.C. 1, [1993] 3 W.L.R. 995, 43 W.I.R. 340, 14 H.R.L.J. 338, 33 I.L.M. 364 (J.C.P.C.). On the *death row phenomenon* in general, see: STEPHEN M. GETTINGER, *SENTENCED TO DIE: THE PEOPLE, THE CRIMES AND THE CONTROVERSY* (1979); BRUCE JACKSON, DIANE CHRISTIAN, *DEATH ROW* (1980); J. Alexis, M. De Merieux, *Inordinately delayed hanging: Whether an inhuman punishment*, 29 J. INDIAN L. INSTITUTE 356 (1987); Lloyd Vogelmann, *The Living Dead: Living on Death Row*, 5 SOUTH AFRICAN J. HUM. RTS 183 (1989); J.L. Gallemore Jr., J.H. Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AMERICAN J. PSYCHIATRY 167 (1972); Nancy Holland, *Death Row Conditions: Progression Toward Constitutional Protections*, 2 AKRON L. REV. 293 (1985); ROBERT JOHNSON, *CONDEMNED TO DIE, LIFE UNDER SENTENCE OF DEATH* (1981); HELEN PREJEAN, *DEAD MAN WALKING* (1993); WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE* 96-156 (1996).

a result of the Court's decision, the United Kingdom sought and obtained more thorough assurances that the death penalty would not be imposed, as was noted by the Committee of Ministers of the Council of Europe on March 12, 1990.<sup>123</sup> Soering was subsequently extradited, tried, and sentenced to life imprisonment.<sup>124</sup>

Although the Court has not revisited the question since *Soering*, the European Commission on Human Rights has been called upon to interpret the *Soering* judgment. In January 1994, it ruled an application from an individual subject to extradition to the United States for a capital offense to be inadmissible. The Commission considered the guarantees that had been provided by the Dallas County prosecutor to the French Government, to the effect that if extradition were granted, "the State of Texas (would) not seek the death penalty," to be sufficient. Texas law stated that the death penalty could only be pronounced if requested by the prosecution. The fugitive had claimed that the undertaking was "vague and imprecise." Furthermore, she argued that it had been furnished by the federal authorities through diplomatic channels and did not bind the executive or judicial authorities of the State of Texas. The Commission compared the facts with those in *Soering*, where the prosecutor had made clear an intention to seek the death penalty.<sup>125</sup> The Commission found the Texas prosecutor's attitude to be fundamentally different and concurred with an earlier decision of the French Conseil d'État holding the undertaking to be satisfactory.<sup>126</sup>

In *Cinar v. Turkey*, the applicant was sentenced to death in 1984, and the judgment was upheld on appeal in 1987. In 1991, the applicant was released on parole, pursuant to legislation that also declared that all death sentences were to be commuted. The Commission recalled that Article 3 of the *Convention* could not be interpreted as prohibiting the death penalty. Moreover, it held that a certain period of time between pronouncement of the sentence and its execution was inevitable. The Commission added that Article 3 would only be breached where an individual passed a very long time on death row, under extreme conditions, with the constant anxiety of execution. Thus, the Commission adopted a large view of *Soering* by not insisting upon the various extenuating factors, such as young age and mental instability, which had been referred to by the

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123. Council of Europe, *Information Sheet No. 26*, Strasbourg, 1990, 116.

124. Richard B. Lillich, *The Soering case*, 85 AM. J. INT'L L. 128 (1991).

125. *Aylor-Davis v. France* (No. 22742/93), (1994) 76B D.R. 164.

126. *Dame Joy Davis-Aylor*, C.E., req. no 144590, 15/10/93, D. 1993, IR, 238; J.C.P. 1993, Actualités No. 43, [1993] *Revue française de droit administratif* 1166, conclusions C. Vigoreux.

Court.<sup>127</sup> Furthermore, the Commission concluded that in Turkey during the period Çinar was on death row, there was not actually any serious danger of his death sentence being carried out. Referring to the Court's judgment in *Soering*, which observed that the death penalty no longer existed in the states parties to the *Convention*, the Commission described the threat of execution as "illusory."<sup>128</sup>

The Commission implied, in a decision issued in September 1994, that it might be prepared to go further and find the death penalty itself to be contrary to Article 3 of the *Convention*. That case involved an alleged deserter from the Syrian army, who was contesting his expulsion from Sweden. The Commission concluded that it was far more likely the applicant was a draft evader, a crime for which capital punishment did not apply. It stated: "Concerning his possible imprisonment for that offense, the Commission does not find such a penalty so severe as to raise an issue under Article 3 of the *Convention* even considering the general situation in Syrian prisons."<sup>129</sup> Interestingly, the Commission did not cite *Soering*, or state that in any case, expulsion to a country where the death penalty would be imposed would not *per se* violate the *Convention*, which authorized capital punishment in Article 2. Was the Commission suggesting it may be prepared to find extradition to a state where the death penalty might be imposed, irrespective of whether it would be associated with the *death row phenomenon*, to be contrary to Article 3 of the *Convention*?

Still more recently, the Commission considered the case of Lei Ch'an Wa, who was threatened with extradition from Macao to China for trafficking in narcotics, which is a capital crime. The representative of the Chinese news agency Xinhua, which unofficially represented China's interests in Macao, had stated that the death penalty would not be imposed in the event of extradition. This was allowed by the Portuguese extradition legislation in force in Macao. Portugal's Constitution says that extradition is forbidden for crimes for which the death penalty is provided in the receiving state's legislation. Extradition was forbidden by the Constitution despite the existence of an assurance from the representative of China. The Constitutional Court held that under the circumstances extradition was prohibited. In the meantime, Lei had registered an application with the European Commission, which issued provisional measures pursuant to Article 36 of its *Regulations*. However, once the Constitutional Court had settled the matter, the problem was resolved, and the Commission decided

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127. *Çinar v. Turkey* (App. No. 17864/91), (1994) 79A D.R. 5, at pp. 8-9.

128. *Id.* at 9.

129. (App. No. 22408/93), (1994) 79A D.R. 85, at p. 96.

that it was unnecessary to further examine the application.<sup>130</sup> In another case, involving extradition from Austria to the Russian Federation to stand trial for murder, the Commission noted a maximum sentence of ten years in the Penal Code of the Russian Federation. The commission also noted the fact that the two accomplices had been sentenced to nine years, concluding that "there are no substantial grounds for believing that the applicant faces a real risk of being subjected to the death penalty in the Russian Federation."<sup>131</sup>

The *Protocol* has also been cited in domestic law in cases concerning extradition of fugitives to states imposing the death penalty. On two occasions, the French Conseil d'État has refused to extradite, expressing the view that the *Protocol* establishes a European *ordre public* that prohibits extradition in capital cases.<sup>132</sup> The Supreme Court of the Netherlands took a similar view. The court invoked the *Protocol* in refusing to return a United States serviceman,<sup>133</sup> although required to do so by the *N.A.T.O. Status of Forces Agreement*.<sup>134</sup> The Court also considered the *European Convention* and the *Protocol* took precedence over the other treaty.

In 1996, Italy's Constitutional Court took judicial opposition to extradition for capital crimes one step further when it refused to send Pietro Venezia to the United States. The court refused despite assurances from American prosecutors that the death penalty would not be sought or imposed. Venezia's extradition to Dade County, Florida had been requested by the United States, pursuant to the Treaty of Extradition, dated October 13, 1983. Article IX of the treaty entitles Italy to request that

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130. *Lei Ch'an Wa v. Portugal* (App. No. 25410/94), unreported decision of November 27, 1995. See also: *Yenng Yuk Lennng v. Portugal* (App. No. 24464/94), unreported decision of November 27, 1995; *Cheong Meng v. Portugal* (App. No. 25862/94), (1995) 83-A D.R. 88.

131. *Raidl v. Austria* (App. no. 25342/94), (1995) 82-A D.R. 134, at 145.

132. *Fidan*, (1987) II *Receuil Dalloz-Sirey* 305 (Conseil d'État); Gacem, (1988) I *Semaine juridique* IV-86 (Conseil d'État). *Fidan* was cited by Judge De Meyer in his concurring opinion in *Soering v. United Kingdom*, *supra* note 119, at 51.

133. *Short v. Netherlands*, (1990) 76 *Rechtspraak van de Week* 358, (1990) 29 I.L.M. 1378.

134. *Agreement Between the Parties to the 1949 North Atlantic Treaty Regarding the Status of Their Forces*, (1951) 199 U.N.T.S. 67. Note that on June 19, 1995 the States parties to the NATO treaty finalized the *Agreement among the State Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces* together with an *Additional Protocol*. Article 1 of the *Additional Protocol* states:

Insofar as it has jurisdiction according to the provisions of the agreement, each State party to the present additional protocol shall not carry out a death sentence with regard to any member of a force and its civilian component, and their dependents from any other state party to the present additional protocol.

extradition be conditional upon an undertaking by the United States that the death penalty not be imposed. The United States government gave assurances in the form of a *note verbale* on July 28, 1994, August 24, 1995 and January 12, 1996. However, this was not enough for the Constitutional Court.

According to the judgment of the Constitutional Court, "the prohibition of capital punishment is of special importance — like all sentences which violate humanitarian principles — in the first part of the Constitution." The right to life is the first of the inviolable human rights enshrined in Article 2. The judgment continues: "The absolute character of this constitutional guarantee is of significance to the exercise of powers attributed to all public authorities under the republican system, and specifically with respect to international judicial cooperation for the purposes of mutual judicial assistance." The Court notes that it has already stated that the participation of Italy in punishments which cannot be imposed within Italy in peacetime constitutes a breach of the Constitution.

Referring to the mechanism by which the Italian authorities consider the sufficiency of the undertaking by the United States authorities, not to impose capital punishment, the Court states:

Such a solution has the advantage of providing a flexible solution for the requested State, and allows for policy to be developed over time based on considerations of criminal law policy; but in our system, where the prohibition of the death penalty is enshrined in the Constitution, the formula of 'sufficient assurances' — for the purpose of granting extradition for crimes for which the death penalty is provided in the legislation of the requesting State — is not admissible from the standpoint of the Constitution. The prohibition set out in paragraph 4 of article 27 of the Constitution and the values that it expresses — foremost among them being life itself — impose an absolute guarantee.<sup>135</sup>

As a result, the Court declared provisions of the Code of Penal Procedure designed to give effect to the extradition treaty between Italy and the United States to be contrary to the Constitution. It also declared that the portion of Law 225 of March 26, 1984, implementing article IX of the extradition treaty, was unconstitutional. It noted, however, that Italian law allowed for Venezia to be prosecuted by Italian courts for crimes

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135. *Id.*

committed abroad.<sup>136</sup> Venezia had also filed an application with the European Commission of Human Rights. The Commission decided to strike the case from its docket as a result of the judgment of the Italian Constitutional Court.<sup>137</sup>

Canadian courts have been reluctant to follow the European precedents, although a recent judgment suggests that they will be increasingly severe in granting extradition in capital cases. In *United States of America v. Burns and Rafay*,<sup>138</sup> issued on June 30, 1997, the British Columbia Court of Appeal overruled the decision of the Canadian Minister of Justice to allow extradition in a capital offense without seeking an assurance that the death penalty would be imposed. Article VI of the Extradition Treaty between Canada and the United States declares:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Burns and Rafay were both eighteen at the time of the crime, a brutal murder of Rafay's parents. They were charged by the State of Washington with aggravated first degree murder, for which the Revised Code of Washington, s. 10.95.030, provides a sentence of death. Canada abolished the death penalty in 1976 for common law crimes. Although the death penalty still exists under military law, it has not been imposed for more than fifty years. A current revision of the *National Defense Act* will probably eliminate capital punishment from the statute books altogether.

Justice Donald, writing for the majority of the Court, admitted that he could not refuse extradition on the basis of section 12 of the *Canadian Charter of Rights of Freedoms*,<sup>139</sup> which prohibits cruel and unusual punishment, or section 7 of the *Charter*, which enshrines the right to life, given the 1991 judgment of the Supreme Court of Canada in *Kindler v. Canada*.<sup>140</sup> However, he concluded that because Burns and Rafay were

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136. *Id.*

137. *Venezia v. Italy* (App. No. 29966/96), (1996) 87-A D.R. 140.

138. (1997) 116 C.C.C. (3d) 524 (B.C.C.A.).

139. R.S.C. 1985, Appendix II, No. 44.

140. *Kindler v. Canada*, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 6 C.R.R. (2d) 193, 129 N.R. 81, 26 C.R. (4th) 1. On the Kindler decision, see: William A. Schabas, *Kindler v. Canada*, 87 AM. J. INT'L L. 128 (1993); Sharon A. Williams, *Extradition*

Canadian citizens, their extradition would violate section 6(1) of the *Charter*, which declares: "Every citizen of Canada has the right to enter, remain in and leave Canada."<sup>141</sup>

As Justice Donald noted correctly, section 6(1) is subject to the limitation clause of section 1, which instructs the courts to subject *Charter* rights to the test of "reasonable limits in a free and democratic society." Following an analytical approach developed by the European Court of Human Rights in the application of similar provisions,<sup>142</sup> Canadian courts consider whether the legal rule that violates the *Charter* right has a legitimate purpose, and whether it constitutes a minimal infringement upon the right in question. The Supreme Court of Canada has already determined that extradition constitutes an acceptable limit on the right of Canadians to remain in Canada.<sup>143</sup> According to Justice Donald, execution of Burns and Rafay would clearly violate their right to return to Canada upon completion of their sentence, something that extradition for non-capital offenses would not. Given alternatives, specifically a sentence of life imprisonment, it was clear that extradition without an assurance the death penalty would not be imposed failed the minimal impairment test. He wrote:

The simple point taken by the applicants in the present case, with which I am in full agreement, is that their return to Canada is impossible if they are put to death. . . . By handing over the applicants to the American authorities without an assurance, the Minister will maximally, not minimally, impair the applicants' rights of citizenship.<sup>144</sup>

Although bound by precedent of the Supreme Court of Canada that allows the extradition of non-citizens for capital offenses — caselaw that,

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*and the Death Penalty Exception in Canada: Resolving the Ng and Kindler Cases*, 13 LOY. L.A. INT'L COMP. L. J. 799 (1991); Donald K. Piragoff, Marcia V.J. Kran, *The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts*, (1992) 3 CRIM. L. F. 191; William A. Schabas, *Extradition et la peine de mort: le Canada renvoie deux fugitifs au couloir de la mort*, 4 REVUE UNIVERSELLE DES DROITS DE L'HOMME 65 (1992); William A. Schabas, *Kindler and Ng: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion*, 51 REVUE DU BARREAU 673 (1991).

141. Kindler, *supra* note 131.

142. See WILLIAM A. SCHABAS, INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER, 2ND ED. (1996).

143. United States of America v. Cotroni, United States of America v. El Zein, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193, 96 N.R. 321, 42 C.R.R. 101, 23 Q.A.C. 182.

144. *Id.*



incidentally, has been criticized by other courts in other countries<sup>145</sup> — Justice Donald is clearly opposed to extradition for capital offenses in general. He writes:

With respect, the Minister appears to have given only lip service to a fundamentally important aspect of Canadian policy, namely, that we have decided through our elected representatives that we will not put our killers to death. . . . Abolition reflected the will of the majority and their concern for the sanctity of life and the dignity of the person.<sup>146</sup>

He cites the reasons of Supreme Court Justice Peter Cory, who dissented in *Kindler*, referring to the fact that Canada's Parliament rejected the death penalty in two separate free votes. Criticizing the executive decision to extradite Burns and Rafay without the assurance that capital punishment will not be imposed, he says:

The Minister confesses his support for abolition but then fails to act on his conviction. Apart from trying to have it both ways, the problem with the Minister's thinking is that he treats the policy question about the death penalty in Canada as undecided and at large. This approach led him to give effect to the minority view on the death penalty as far as these applicants are concerned.<sup>147</sup>

Justice Donald states that Article VI of the treaty "was drawn to accommodate the difference between nations so that the requested State could give effect to its policy of abolition."<sup>148</sup> What he did not note is that, ironically, Article VI was inserted in the Extradition Treaty in 1974 at the demand of the United States, which had then abolished the death penalty judicially.<sup>149</sup> This was at a time when Canadian law still allowed for capital punishment.<sup>150</sup> Article VI was designed to protect Americans and not

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145. Pratt et al. v. Attorney General for Jamaica et al., [1993] 4 All.E.R. 769, [1993] 2 L.R.C. 349, [1994] 2 A.C. 1, [1993] 3 W.L.R. 995, 43 W.I.R. 340, 14 H.R.L.J. 338, 33 I.L.M. 364 (J.C.P.C.).

146. *Id.*

147. *Id.*

148. *Id.*

149. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

150. *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, 31 C.C.C. (2d) 177, 38 C.R.N.S. 139, 70 D.L.R. (3d) 324, [1976] 5 W.W.R. 711, 11 N.R. 386.

Canadians! Of course, since 1974 the United States has slid backwards<sup>151</sup> while Canada has gone on to abolish the death penalty.

*Burns* is being appealed to the Supreme Court of Canada. That Court, in a four to three decision, authorized the extradition of Joseph Kindler in 1991. Yet even the *Kindler* decision suggests its discomfort with the death penalty, with six of the seven justices indicating that capital punishment, were it to be imposed in Canada, would violate the right to life and the prohibition of cruel and unusual punishment.

## V. CONCLUSION

In his 1995 report to the Economic and Social Council,<sup>152</sup> English criminologist Roger Hood concluded that "there has been a considerable shift towards the abolition of the death penalty both de jure and in practice" in the years 1989-1993.<sup>153</sup> After consulting other sources, Professor Hood observed that "it appears that since 1989 twenty-four countries have abolished capital punishment, twenty-two of them for all crimes in peacetime or in wartime."<sup>154</sup> Over the same period, the death penalty was reintroduced in four states.<sup>155</sup> Professor Hood stated that "the picture that emerges is that an unprecedented number of countries have abolished or suspended the use of the death penalty."<sup>156</sup> Amnesty International issued revised figures in July 1997, which declared that ninety-nine States have abolished the death penalty in law or in practice, whereas ninety-four retain the death penalty. Amnesty adds that "the number of countries which actually execute prisoners in any one year is much smaller."<sup>157</sup>

Despite many decades of virtual indifference to international human rights norms, and an unfortunate legacy of traditional isolationist sentiments within the country's political constituency, in recent years the United States of America has sought to ratify some of the major

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151. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

152. Pursuant to E.S.C. Res. 1994/206.

153. "Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty, Report of the Secretary-General," U.N. Doc. E/1995/78 (1995), §32.

154. *Id.* §33.

155. *Id.* §38.

156. *Id.* §87.

157. Facts and figures on the Death Penalty, Amnesty International, AI Index: ACT 50/08/97. For an even more optimistic assessment, see: THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 1997 (William A. Schabas, ed., 1997).

conventions and to play a role in treaty bodies, such as the Human Rights Committee.<sup>158</sup> President Jimmy Carter made an unsuccessful attempt to ratify four of the principal instruments, but the issue stagnated during the Reagan presidency.<sup>159</sup> President George Bush revived the matter and in 1988, the United States ratified the *Convention for the Prevention and Punishment of the Crime of Genocide*.<sup>160</sup> Four years later, instruments of accession were produced at United Nations headquarters for the *International Covenant on Civil and Political Rights*.<sup>161</sup> These instruments were accompanied by a series of reservations, understandings and declarations, aimed in part at the international norms dealing with limitation and eventual abolition of the death penalty. In 1994, similar statements were made upon ratification of the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.<sup>162</sup> The American initiatives have been challenged by both its treaty partners and by the Human Rights Committee, notably on the issue of the death penalty.<sup>163</sup> Indeed, the debate has undoubtedly given grist to the mill of politicians who resent the entire international human rights system. The consequences are that efforts to ratify other human rights treaties have been stalled since early 1995. The issue of the death penalty stands as an impediment to further efforts by the United States of America to play a full role within international human rights institutions and treaty bodies. Given public opinion that is largely favorable to the death penalty and a political

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158. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

159. U.S. Ratification of the Human Rights Treaties: With or Without Reservations? (Richard B. Lillich, ed., 1981).

160. 78 U.N.T.S. 277, entered into force Jan. 12, 1951.

161. Hurst Hannum, Dana D. Fischer, U.S. Ratification of the International Covenants on Human Rights 1993; David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 Hum. Rts. L. J. 77 (1993); Ved Nanda, *The U.S. Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, 42 Depaul L. Rev. 1311 (1993); M. Cherif Bassiouni, *Reflections on the Ratification by the United States of the International Covenant on Civil and Political Rights by the United States Senate*, 42 Depaul L. Rev. 1169 (1993); Aryeh Neier, *Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1233 (1993); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993); William A. Schabas, *Les réserves des États-Unis d'Amérique aux articles 6 et 7 du Pacte international relatif aux droits civils et politiques*, 6 REVUE UNIVERSELLE DES DROITS DE L'HOMME 137 (1994).

162. U.N. Doc. A/39/51, p. 197 (1984).

163. William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995).

leadership that chooses to follow rather than lead its electorate,<sup>164</sup> international pressure may well prove to be of decisive significance in advancing the abolitionist agenda within the United States.

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164. William J. Bowers, Margaret Vandiver, Patricia H. Dugan, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77 (1994).

# INTERNATIONAL LAW AND THE IMPLEMENTATION OF THE AMERICAN BAR ASSOCIATION RESOLUTION REGARDING THE DEATH PENALTY

*Ved P. Nanda*

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## I. INTRODUCTION

My assignment is to consider the emerging international norms and how they might affect implementation of the American Bar Association (ABA) resolution calling for a moratorium on the imposition and enforcement of the death penalty.<sup>1</sup> The American Bar Association

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1. The language of the ABA's resolution follows:

RESOLVED, that the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed; . . .

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted Feb. 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims

resolution calls attention to the unfair and unjust practices and procedures with which the death penalty is carried out in the United States. I have looked at the various aspects of the resolution's goals — providing competent legal counsel at all stages of the conviction, sentencing, and appeals processes; preserving due process, especially in adjudication of constitutional claims in state post-conviction proceedings and in federal habeas corpus proceedings; elimination of discrimination in death sentences on the basis of race of either the victim or the defendant; and prevention of execution of persons who were juveniles under the age of eighteen or mentally retarded at the time they committed their offenses.

In my allotted time, however, I will begin with a glance at selected recent major developments in international fora regarding capital punishment. This will be followed by a comparison between the Eighth Amendment of the United States Constitution and the International Covenant on Civil and Political Rights, and other international human rights instruments as they bear on the death penalty. Then I will discuss primarily three aspects: racial discrimination, the execution of juveniles, and the execution of mentally retarded persons.

Coincidentally, the day of the ABA vote, February 3, 1997, was also marked by the decision announced in *Gomez v. Acevedo*,<sup>2</sup> in which a panel of the Seventh Circuit ruled that the Federal Anti-Terrorism and Effective Death Penalty Act of 1996<sup>3</sup> narrows the scope of federal habeas

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in state post-conviction and federal habeas corpus proceedings (adopted Aug. 1982, Feb. 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and

(iv) Preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

See James Podgers, *Time Out for Executions — ABA Action at the Midyear Meeting is Expected to Stir Renewed Debate on the Death Penalty*, 83 A.B.A.J. 26 (Apr. 1997); Gina Chon, *ABA Reinigorates Death Penalty Debate*, 24 HUM. RTS. 8 (Spring 1997). For a comprehensive study on the implementation of the ABA's recommendation regarding the moratorium, see Randall Coyne & Lyn Entzeroth, *Report Regarding implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3 (1996) [hereinafter Coyne & Entzeroth].

2. *Gomez v. Acevedo*, 106 F.3d 192 (7th Cir. 1997), cert. denied, Oct. 6, 1997, 1997 U.S. LEXIS 4568.

3. 110 Stat. 1214 (1996).

corpus review of state court decisions in capital cases. The panel held that the new section 2254(d) of Title 28 (28 U.S.C. 2254(d))<sup>4</sup> mandates that federal courts give deferential review to state court decisions on claims pertaining to sufficiency of the evidence.<sup>5</sup> The court held that the new section 2254(d)(1) requires only deferential review for reasonableness on mixed questions in habeas proceedings.<sup>6</sup> The court said that it was

compelled to hold that a writ of habeas corpus may be issued for evidence insufficiency only if the state courts have unreasonably applied the *Jackson*<sup>7</sup> standard. Federal review of these claims, therefore, now turns on whether the state court provided fair process and engaged in reasoned, good-faith decision making when applying *Jackson's* no rational trier of fact test.<sup>8</sup> As we stated in *Lindh*, section 2254(d)(1), requires federal courts to take into account the care with which the state court considered the subject. . . . [A] responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment.<sup>9</sup>

## II. DEVELOPMENTS IN INTERNATIONAL FORA REGARDING CAPITAL PUNISHMENT

The movement to ban capital punishment worldwide has been ongoing at the United Nations and in other international fora since the 1960s.<sup>10</sup> In 1968 the United Nations General Assembly adopted a resolution declaring the objective of gradually but progressively restricting

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4. This section prohibits federal courts from granting a writ of habeas corpus on a claim adjudicated on the merits in state court, unless such adjudication 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

5. *Gomez*, 106 F.3d at 193-94.

6. *Id.* at 199, citing *Lindh v. Murphy*, 96 F.3d 856, 870-71 (7th Cir.1996) (en banc), cert. granted in part, 117 S.Ct. 726 (1997).

7. *Jackson v. Virginia*, 443 U.S. 307 (1979) (which expanded the availability of the writ of habeas corpus).

8. There the court had said that a federal court may grant habeas relief only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

9. *Gomez*, 106 F.3d at 199, quoting *Lindh*, 96 F.3d at 871.

10. See generally WILLIAM A. SCHABAS, *THE ABOLITION OF DEATH PENALTY IN INTERNATIONAL LAW* (1993); Ariane M. Schreiber, *Note, States That Kill: Discretion and the Death Penalty — A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263 (1996).

the range of offenses punishable by death.<sup>11</sup> Two decades later, in 1989, the General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights,<sup>12</sup> obligating each state party to "take all necessary measures to abolish the death penalty within its jurisdiction," and acknowledging a worldwide effort to abolish capital punishment for all purposes.<sup>13</sup>

In 1994 a United Nations draft resolution called for a worldwide moratorium on capital punishment and for a global ban on the death penalty by the year 2000.<sup>14</sup> Although the resolution was rejected by the General Assembly's Social, Humanitarian, and Cultural Committee by a vote of 44 to 33, there were 74 abstentions,<sup>15</sup> which left the door open for such initiatives in the future. More recently, the United Nations Commission on Human Rights has called for the abolition of the death penalty.<sup>16</sup>

In international fora, the American Convention on Human Rights in 1978 forbade capital punishment for "political offenses or related common crimes" and prohibited the execution of "persons who, at the time the crime was committed, were under eighteen years of age or over seventy years of age," or pregnant women.<sup>17</sup> The Convention limited the death penalty to only the most serious crimes, and mandated that it "shall not be reestablished in the states that have abolished it," and that its application "shall not be extended to crimes to which it does not presently apply."<sup>18</sup> Subsequently, the 1984 Protocol to the American Convention on Human Rights to Abolish the Death Penalty resolved "in accordance with the spirit of Article 4 [of the Convention] and the universal trend to eliminate the death penalty, [to] call on all countries in the Americas to abolish it."<sup>19</sup>

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11. UN GAOR 3rd Comm., 23d Sess., agenda item 59, U.N. Doc. A/Res./2393 (XXIII) (1968).

12. *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128, U.N. GAOR, 44th Sess., supp. no. 98, operative para. 2, U.N. Doc. A/RES/44/128 (1990).

13. *Id.* at Annex, art. 1(2).

14. See E. Leopold, *U.N. Panel Defeats Resolution on Capital Punishment*, REUTERS WORLD SERVICE, Dec. 10, 1997 (available in LEXIS, Nexis Library).

15. *Id.*

16. The vote last year was 27 in favor to 11 against with 14 abstentions.

17. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. no. 36, at 1, art. 4 (*entered into force* July 18, 1978).

18. *Id.*

19. Inter-Am. Commission on Human Rights, Annual Report 1984-1985, O.A.S. Doc. OEA/Ser. L./V./II. 77 doc. 10 rev. 1, at 10 (1985).



In Europe, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>20</sup> which was entered into force in 1953, recognized capital punishment as an exception to the right to life. In 1985, however, European states adopted Protocol No. 6 to the European Convention Concerning the Abolition of the Death Penalty.<sup>21</sup> It declared the abolition of the death penalty in time of peace. Article 1 of the Protocol explicitly states, "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Its Preamble states that the Protocol had its genesis in the recognition that several member states of the Council of Europe had experienced an evolution which "expresses a general tendency in favor of abolition of the death penalty."<sup>22</sup> Under the Protocol, parties are still allowed to impose death sentences for acts committed in time of war or during a time of imminent threat of war.<sup>23</sup> No reservations are permitted to any of its provisions.<sup>24</sup> In October 1997, the Council of Europe, meeting in Strasbourg, endorsed a moratorium on capital punishment. Among the prior holdouts, Ukraine and Russia have now signed the Sixth Protocol and are committed to abolition.

Among the fifty-three members of the organization for Security and Cooperation in Europe, the United States now stands alone in opposing the moratorium on the death penalty or its abolition. In extradition cases, the United States is consistently being refused extradition by many countries<sup>25</sup> until it gives undertakings not to impose the death penalty on the extraditee.

The United States, having ratified the International Covenant on Civil and Political Rights (ICCPR),<sup>26</sup> the Convention Against Torture and

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20. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention].

21. Protocol No. 6 of the Convention for the protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* April 28, 1983, E.T.S. No. 114, *reprinted in* 22 I.L.M. 538 (1983) (*entered into force* March 1, 1985).

22. *See* COUNCIL OF EUROPE, THE DEATH PENALTY IN EUROPEAN COUNTRIES (1962). In 1973, the Council adopted a resolution stating that capital punishment was "inhuman and degrading within the meaning of Article 3 of the European Convention." Eur. Consult. Assn., 25th Sess., Doc. No. 3297, at 2 (1973).

23. *Id.* art. 2.

24. *Id.* art. 4.

25. *See generally* AMNESTY INTERNATIONAL, WHEN THE STATE KILLS THE DEATH PENALTY, A HUMAN RIGHTS ISSUE 85 (1989); John Palk, *Note -Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life*, 26 CORNELL INT'L L.J. 239 (1993).

26. International Covenant on Civil and Political Rights, GA Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>27</sup>, and the International Convention on the Elimination of Racial Discrimination (ICERD),<sup>28</sup> is obligated under international law to comply with their various applicable provisions pertaining to capital punishment. These obligations exist notwithstanding the various reservations, understandings, and declarations that relate to the practice and procedures of death penalty sentencing within the United States, for example, the United States reservation regarding imposition of the death penalty on juveniles.<sup>29</sup> In addition, even though the United States has simply signed but not ratified the Convention on the Rights of the Child,<sup>30</sup> since the signing was without reservations, it could be argued under the Vienna Convention on the Law of Treaties<sup>31</sup> that the United States must not violate the Convention provision which bans execution of those who committed the offense while younger than eighteen.

It may be recalled that the ICCPR includes the obligation on state parties to "respect and ensure to all individuals within its territory and subject to its jurisdiction" the basic right of nondiscrimination,<sup>32</sup> the right to a fair trial,<sup>33</sup> and specific rights in respect of death penalty sentencing.<sup>34</sup> Although the Covenant does not prohibit the death penalty, it restricts the application of capital punishment with special safeguards and with a view to its ultimate abolition.<sup>35</sup> The Race Convention obligates parties to "pursue by all appropriate means and without delay a policy of eliminating

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27. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72, Annex (1984) (*entered into force* June 26, 1987).

28. International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966) (*entered into force* Jan. 4, 1969) [hereinafter ICERD].

29. Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, art. 19(c), 115 U.N.T.S. 331 (*entered into force* Jan. 27, 1980): the reservation must not be "incompatible with the object and purpose of the treaty." [hereinafter Vienna Convention.].

30. Convention on the Rights of the Child, U.N. GAOR, 3rd Comm., 44th Sess., Agenda Item 108, UN Doc. A/RES/44/25 (1989), *reprinted in* 28 I.L.M. 1457 (1989).

31. Vienna Convention, *supra* note 29, art. 18 (a) (a state that has signed a treaty "is obliged to refrain from acts which would defeat the object and purpose of [that] treaty").

32. ICCPR, *supra* note 26, arts. 2, 26.

33. *Id.* arts. 2, 14.

34. *Id.* arts. 2, 6.

35. *Id.* art. 6.

racial discrimination in all its forms.”<sup>36</sup> It includes the right to equal treatment before the courts.<sup>37</sup>

Two general comments are in order. First, in 1996 the International Commission of Jurists sent a fact finding mission to the United States to study the administration of the death penalty in this country — to investigate both federal and state practices and procedures in respect of capital punishment sentencing.<sup>38</sup> It found that almost no attention was given to accepted international norms in the administration of the death penalty in the United States, specifically to United States obligations under the ICCPR and the ICERD.<sup>39</sup> The ICJ urged “the United States and other countries with death penalty sentencing . . . to take the necessary steps to ensure that there is greater compliance with their international obligations.”<sup>40</sup>

Second, in light of the United States ratification of these instruments, it is necessary to revisit Justice Scalia’s opinion in *Stanford v. Kentucky*,<sup>41</sup> when he wrote for the plurality that sentencing practices of foreign countries, if they did not reflect American conceptions of decency, were not relevant. In his words,

we emphasize that it is American conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant. While the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so implicit in the concept of ordered liberty, that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well, . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.<sup>42</sup>

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36. ICERD, *supra* note 28, art. 2.

37. *Id.* art. 5(a).

38. For a report, see International Commission of Jurists, *Administration of the Death Penalty in the United States*, 19 HUM. RTS. Q. 165 (1997) [hereinafter ICJ Report].

39. *Id.* at 169.

40. *Id.* at 170.

41. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

42. *Id.* at 369 n.1, *quoting* *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting).

It is useful to recall that a year earlier in *Thompson v. Oklahoma*,<sup>43</sup> in which the question was whether the implementation of a death sentence on a person who was fifteen years of age when he committed a capital crime would violate the Cruel and Unusual Clause of the Eighth Amendment, the Court held that the execution of any person under the age of sixteen at the time of the offense would violate the Eighth Amendment guarantees. Justice Stevens' plurality opinion held that "it would offend civilized standards of decency to execute a person who was less than sixteen years old at the time of his or her offense,"<sup>44</sup> and interpreted evolving standards of decency in the light of standards under international law as well as the practices of other nations,<sup>45</sup> specifically citing the practices of western European democracies. It was in *Trop v. Dulles*<sup>46</sup> that, while analyzing and interpreting the Eighth Amendment, the Supreme Court observed that the "evolving standards of decency that mark the progress of a maturing society" must be considered.<sup>47</sup>

### III. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PERTINENT INTERNATIONAL INSTRUMENTS

Under the Eighth Amendment to the United States Constitution, "cruel and unusual punishments" shall not be inflicted. The comparable language under the International Covenant on Civil and Political Rights (ICCPR) is that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>48</sup> This language is identical to that used in the Universal Declaration of Human Rights.<sup>49</sup> Among other international instruments of human rights, the European Convention on Human Rights stipulates that "[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment."<sup>50</sup>

Several decisions of the European Commission of Human Rights and the European Court of Human Rights have interpreted the language of Article 3 of the European Convention to develop definitional distinctions

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43. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

44. *Id.* at 830.

45. *Thompson*, 487 U.S. at 830-31.

46. *Trop v. Dulles*, 356 U.S. 86 (1958).

47. *Id.* at 101.

48. ICCPR, *supra* note 26, art. 7.

49. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3rd Sess., at 71, art. 5, U.N. Doc. A/810 (1948).

50. European Convention, *supra* note 20, art. 3.

between torture and "inhuman or degrading treatment or punishment."<sup>51</sup> Also, the United Nations Human Rights Committee has interpreted Article 7 of the ICCPR's prohibitions on torture and cruel and inhuman treatment.<sup>52</sup> It has also interpreted the ICCPR "to prohibit extradition to a jurisdiction where the extraditees faces a real risk, that his rights under ICCPR will be violated. This position is consonant with the European Court's interpretation of the European Convention in *Soering v. United Kingdom*."<sup>53</sup> In *Soering*, the Court ruled that the "death row phenomenon" in the United States,<sup>54</sup> which potentially faced the defendant were he sentenced to capital punishment, would violate the accused's rights under the European Convention.

These interpretations should inform the United States Supreme Court in its analysis of the Eighth Amendment, since they are much broader in their reach of what constitutes inhuman or degrading treatment than the United States Supreme Court's interpretation of the comparable Eighth Amendment language of cruel and unusual punishment.

#### IV. RACIAL DISCRIMINATION

In August 1988, the American Bar Association adopted the following policy in opposition to discrimination in capital sentencing:

BE IT RESOLVED, that the American Bar Association opposes discrimination in capital sentencing on the basis of the race of either the victim or the defendant.

BE IT FURTHER RESOLVED, that the American Bar Association supports the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing which may exist.<sup>55</sup>

Several studies have shown how racial discrimination based on the race of the victim or the defendant affects the imposition of capital punishment.<sup>56</sup> These include studies by the National Association for the

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51. See generally David Heffernan, *Comment — America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U.L. REV. 481, 518-30 (1996).

52. See *id.* at 530-37.

53. *Id.* at 539, citing *Soering v. United Kingdom*, 161 Eur. Ct. H.R.(ser. A) (1989).

54. On the death row phenomenon, see ICJ Report, *supra* note 38, at 206-09.

55. ABA POLICY AND PROCEDURES HANDBOOK (1988). For a thorough discussion, see Coyne & Entzerth, *supra* note 1, at 34-40.

56. See *id.* at 34-37.

Advancement of Colored People Legal Defense and Educational Fund; a comprehensive statistical analysis of racial discrimination in capital cases by Professor David Baldus, who took into account 230 non-racial factors and still found that even if they "might legitimately influence a sentencer, the jury more likely than not would have spared [the defendant's] life had his victim been black;"<sup>57</sup> and a 1990 General Accounting office report reviewing twenty-eight different empirical studies that examined racial discrimination in capital cases with its conclusion that these studies clearly showed a pattern "indicating racial disparities in the charging, sentencing and imposition of the death penalty."<sup>58</sup>

In *McCleskey v. Kemp*,<sup>59</sup> the Court held that statistical evidence of racial disproportion in death sentences does not demonstrate arbitrary, capricious, or discriminatory application of the death penalty.<sup>60</sup> The Court held that the Baldus study, which demonstrated that blacks who kill whites are sentenced to death "at nearly twenty-two times the rate of blacks who kill blacks, and more than seven times the rate of whites who kill blacks."<sup>61</sup> In a five to four opinion, the Court held that the statistical study did not demonstrate a risk of racial bias in violation of the Eighth Amendment.<sup>62</sup> It also rejected McCleskey's Fourteenth Amendment claim for his failure to show intentional discrimination.<sup>63</sup>

The International Commission of Jurists' Mission to the United States found that "the Race Convention's prescription of effects-based discrimination (Article 2(c) of the ICERD) extends to areas of disparate impact-discrimination not currently proscribed under United States law in the United States."<sup>64</sup>

In response to the Supreme Court's finding in *McCleskey* that problems of racism in death penalty cases "are best presented to the legislative bodies,"<sup>65</sup> there have been several bills introduced in the United States Congress since 1988 to remedy the situation presented by these studies. These bills are aimed at giving the condemned a federal right to

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57. *McCleskey v. Kemp*, 481 U.S. 279, 325 (1987) (Brennan, J., dissenting, *citing* Baldus study).

58. U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERNS OF RACIAL DISPARITIES 5 (1990).

59. *McCleskey v. Kemp*, 481 U.S. 279, 325 (1987).

60. *See id.* at 292-93.

61. *Id.* at 327 (Brennan, J., dissenting; *citing* Baldus study).

62. *Id.* at 313.

63. *Id.* at 297-99.

64. ICJ Report, *supra* note 38, at 203.

65. *McCleskey*, 481 U.S. at 319.

challenge any death sentence that “furthers a racially discriminatory pattern” based on the race of either the defendant or the victim. The defendant may support his or her challenge by statistical proof and without the necessity of showing discriminatory intent, motive or purpose.

In 1994, the House of Representatives passed the Racial Justice Act, under which proof of significant racial discrimination in the administration of capital sentencing would have required the prosecutor to show a non-race based explanation for the death sentence.<sup>66</sup> However, the bill has not yet been enacted into law.<sup>67</sup> The ICJ Mission has said that a failure to enact the Racial Justice Act “would constitute a breach of the United States government’s express ratification of the ICCPR and the ICERD — particularly of Articles 6(1), 6(2) and Article 26 read with Article 2(2) of the . . . ICCPR, and of Articles 2(1) and 5(a) of . . . the ICERD.”<sup>68</sup> It added:

The mission is conscious of the final reservation taken, [by the United States] to the [ICCPR] and to the [ICERD], namely that their provisions are not self-executing [citation omitted]. But this reservation touches upon the non-enforceability of international instruments under domestic law, and does not effect a conclusion based upon non-implementation of the provisions of the [ICCPR] and of the [ICERD].

The Mission is of the considered opinion that in the absence of a nation-wide law framed on the pattern of the Racial Justice Act, the administration of capital punishment in the United States will continue to be arbitrary, and definitely not in consonance with Articles 6 and 40 of the [ICCPR].<sup>69</sup>

The Mission’s report concludes that:

(b) Change in United States law is mandated by the provisions of Article 2(c) of the [ICERD], which was ratified by the United States in 1984 without any reservation being taken on this provision.

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66. H.R. 4017, 103rd Cong., 2nd Sess. (1994).

67. See generally E. Chemerisky, *Eliminating Racial Discrimination in Administration of the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519 (1995).

68. ICJ Report, *supra* note 38, at 204.

69. *Id.* at 204.

(c) Even in the absence of such change, the Mission submits that by virtue of the Supremacy Clause in the United States Constitution (Article VI Clause 2) broader treaty obligations under the [ICERD] would furnish the Controlling Rule of the Law in the United States.<sup>70</sup>

## V. EXECUTION OF MENTALLY RETARDED PERSONS

In February 1989, the ABA adopted a policy prohibiting the execution of mentally retarded persons:

Be It Resolved, that the American Bar Association urges that no person with mental retardation, as defined by the American Association on Mental Retardation, should be sentenced to death and execution; and

Be It Further Resolved, that the American Bar Association supports enactment of legislation barring the execution of defendants with mental retardation.<sup>71</sup>

The American Association of Mental Retardation adopted in 1992 a revised definition of *mentally retarded person*:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age eighteen.<sup>72</sup>

In 1989, in deciding *Penry v. Lynaugh*,<sup>73</sup> the United States Supreme Court held that the execution of a mentally retarded prisoner would not violate the Eighth Amendment. While a psychiatrist had testified that the defendant was suffering from a brain disorder at the time of the offense so that he could not appreciate the wrongfulness of his

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70. *Id.* at 212.

71. ABA, *Summary of Action of the House of Delegates, 1989 Midyear Meeting*, Feb. 1989.

72. Coyne & Entzeroth, *supra* note 1, at n. 40.

73. *Penry v. Lynaugh*, 492 U.S. 302 (1989).



conduct and was unable to conform his conduct to the law,<sup>74</sup> the Court said that "in the absence of better evidence of a national consensus against execution of the retarded, mental age should not be adopted as a line-drawing principle in our Eighth Amendment jurisprudence."<sup>75</sup> Accordingly, the Court declined to hold that "the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability [with the reasoning capacity of a seven-year-old] convicted of a capital offense simply by virtue of his or her mental retardation alone."<sup>76</sup> It should be noted that the decision was five to four and Justices Blackmun, Brennan, Marshall and Stevens considered executing mentally retarded persons as unconstitutional.

Examples show that some severely psychologically impaired individuals have been executed in the United States.<sup>77</sup> In one capital case, Judge Fitzpatrick aptly observed:

No justification can be had for the execution of a child of ten or eleven years of age in any society that considers itself civilized. If a child of ten or eleven should not be executed under any circumstances, then surely a person who may have a chronological age of twenty, but a mental and emotional age of ten or eleven, should not be put to death.<sup>78</sup>

## VI. DEATH PENALTY FOR JUVENILE OFFENDERS<sup>79</sup>

In *Stanford*, writing for the majority, Justice Scalia held that the execution of two defendants, ages sixteen and seventeen, was permissible under the Constitution. Rejecting the defenses argument that "juveniles, possessing less developed cognitive skills than adults, are less likely to fear death [and,] being less mature and responsible, are also less morally blameworthy,"<sup>80</sup> Justice Scalia stated that the juvenile death penalty would fail under equal protection arguments, rather than the Eighth Amendment,

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74. *Id.* at 308-09.

75. *Id.* at 340.

76. *Id.*

77. See Coyne & Entzeroth, *supra* note 1, at 41-46.

78. *Smith v. Kemp*, 664 F.Supp. 500, 507 (M.D. Ga. 1987).

79. See Ved Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993).

80. *Stanford*, 492 U.S. at 377.

if such arguments could be conclusively proven.<sup>81</sup> He stated that the will of the majority should govern a court's consideration of punishments imposed by a government. Thus, under the *Stanford* plurality's ruling, the fate of juvenile offenders is to be decided solely by the voters of the 50 states.

Pertinent international agreements containing prohibitions on the death penalty against juvenile offenders include the ICCPR, which states that a "[s]entence of death shall not be imposed for crimes committed below eighteen years of age . . . ." <sup>82</sup> Similarly, the American Convention on Human Rights states that "[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . . ." <sup>83</sup> Among other pertinent international instruments, the Fourth Geneva Convention, the Convention Relative to the Protection of Civilian Persons in Time of War,<sup>84</sup> states, "In any case, the death penalty may not be pronounced against a protected person [one held by a party to the conflict or an occupying force of which he/she is not a national] who was under eighteen years of age at the time of the offense."<sup>85</sup>

The 1977 Protocols to the Geneva Conventions specifically prohibit imposition of capital punishment on those who committed those crimes while they were under the age of eighteen. The Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I) states in Article 77, paragraph 5, "The death penalty related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offense was committed."<sup>86</sup> Also, the Additional Protocol Relating to the Protection of Victims of NonInternational Armed Conflicts (Protocol II) states, "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offense . . . ." <sup>87</sup>

In 1989, the Convention on the Rights of the Child mandated that states parties ensure that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences

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81. *Id.* at 378.

82. ICCPR, *supra* note 26, art. 6(5).

83. American Convention on Human Rights, *supra* note 17, art. 4(5).

84. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 286.

85. *Id.* art. 68.

86. Geneva Protocol I, Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 77, *reprinted in* 16 I.L.M. 1391, 1425 (1977).

87. Additional Protocol, Protocol II, art. 6(4), *reprinted in* Geneva Protocol I, *supra* note 86, at 1446.

committed by persons below eighteen years of age.<sup>88</sup> As already mentioned, in 1983, Protocol 6 to the European Convention on Human Rights abolished the death penalty in time of peace<sup>89</sup> and, in December 1989, the United Nations General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty.<sup>90</sup>

Although the United States is not a party to the American Convention on Human Rights, another organ of the Organization of American States (OAS), the Inter-American Commission on Human Rights, found the United States in 1987 to be in violation of a rule of *jus cogens* because of its practice of executing juvenile offenders.<sup>91</sup> The case involved J. Terry Roach and James Pinkerton, both seventeen at the time of their crimes, who were sentenced to capital punishment. A complaint filed by Amnesty International on behalf of Roach argued that the execution of a juvenile would violate United States obligations under customary international law and human rights provisions of the OAS.<sup>92</sup> The Commission, and subsequently the OAS Secretary General, appealed for a stay of Roach's executions.<sup>93</sup> However, these appeals fell on deaf ears.

Although the United States has not ratified some of the international human rights instruments mentioned above, and has made reservations to the International Covenant on Civil and Political Rights, it can be persuasively argued under the Vienna Convention on the Law of Treaties that the United States reservation is incompatible with the objects and purposes of the ICCPR and that its signing the instruments obligates it not to violate their provisions.<sup>94</sup>

## VII. CONCLUSION

The United States stands virtually alone among its peer countries in its practice regarding capital punishment. The obligations it has assumed under the international human rights instruments are unambiguous. The

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88. Convention on the Rights of the Child, *supra* note 30, art. 37(a).

89. *Supra* note 21.

90. *Supra* note 12.

91. Case 9647, Inter-American C.H.R. 147, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987), reprinted in HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 61, 73 (R.E. Norris & T. Buergenthal eds., 1988).

92. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 72 (1987).

93. *Id.* at 72-73.

94. See *supra* notes 26-31 and accompanying text.

call by the American Bar Association for a moratorium on the death penalty, its concern over racial inequality in capital sentencing, and its assertion of the impropriety of execution of mentally retarded and juvenile offenders should renew the debate within the American legal community on these critical issues, to the end that a more rational death penalty jurisprudence emerges, informed as well by international law.

# EXECUTION OF FOREIGN NATIONALS IN THE UNITED STATES: PRESSURE FROM FOREIGN GOVERNMENTS AGAINST THE DEATH PENALTY

*John Quigley\**

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## I. INTRODUCTION

One of the sources of pressure against the use of capital punishment in the United States is foreign governments. Half the world's states do not use capital punishment. Importantly, that half includes all of Western Europe. The states of Western Europe, as a result of their economic situation and their economic cohesiveness, are better positioned than most other states in the world to put pressure on the United States on human rights matters.

In Western Europe, not only is capital punishment not practiced, but also the use of capital punishment is deemed a violation of human rights. A European treaty outlawing capital punishment as a human rights violation enjoys wide adherence. Western European states have often refused extradition to the United States where the United States has sought the surrender of a person to be tried for a capital offense. Popular sentiment is so strong against capital punishment in many Western

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European states that European citizen groups and government officials have lobbied against the imposition of death sentences in particular cases. Italy has played a leading role in this regard.

## II. WESTERN HEMISPHERE PRESSURE ON CAPITAL PUNISHMENT

In recent years, pressure against the use of capital punishment in the United States has come from Western Hemisphere states as well, typically in cases in which nationals of a Western Hemisphere state have been sentenced to death in the United States. The number of foreign-state nationals sentenced to death in the United States is not insignificant. Presently, between sixty and seventy are housed in death row sections of the prisons of various states, awaiting execution. Most are from this hemisphere, a fact that is likely attributable to the large numbers of immigrants to the United States from the hemisphere.

Capital punishment is little used in the Western Hemisphere. After western Europe, the western hemisphere is the next region of the world most strongly opposed to capital punishment. The United States is a major exception in this regard.

The pressure by Western Hemisphere states has been exerted not on the grounds of the impropriety or illegality of capital punishment. It has been exerted on a basis that may surprise many in the United States, namely, the unfairness of the criminal trials and sentencing of these foreign-state nationals.

Prejudice against these foreign-state nationals has been suggested as a factor in some of the cases. The principal point of challenge, however, has been the alleged violation of a treaty provision. Under the Vienna Convention on Consular Relations, to which 156 states are parties, authorities who arrest a national of a high contracting party are required to inform that person of a right provided in the Convention to contact the person's consulate for assistance. The obligation is contained in Article 36, paragraph 1, of the Vienna Convention on Consular Relations, which reads:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
  - (a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state;

(b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officials shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending state who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.<sup>1</sup>

The critical aspect of Article 36, paragraph 1, is the final sentence of subparagraph (b), namely, the obligation to inform a foreign national of the right of consular access. The Western Hemisphere States whose nationals have been sentenced to death in the United States have charged, both in protest notes and in documents filed in court, that their nationals were not afforded this information at the time of arrest, or, indeed, at any time during the trial or sentencing. The governments of these states were thus deprived of the opportunity to assist their co-nationals in defending the charge that led to conviction and a sentence of death. Of all the foreign-state nationals currently awaiting execution in the United States, few if any were provided the information required to be given by the Vienna Convention on Consular Relations.

The result, argue these governments, is unfair trials. The function of consular assistance is to allow a foreign national to present a proper defense. The institution is based, in part, on the premise that a foreigner is typically less able than a national to present a defense, because of less familiarity with the culture and legal system. It is based as well, in part,

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1. Vienna Convention on Consular Relations, April 24, 1963, T.I.A.S. 6820, 21 U.S.T. 77.

on a concern that the person may be the object of discrimination as a foreigner.

The United States does not question the importance of consular protection in criminal cases. According to the Legal Adviser to the Department of State, “[t]he United States attaches great importance to ensuring respect for the consular notification obligation under the Vienna Convention. In addition to being legally required, United States compliance helps ensure our ability to protect United States citizens when similarly detained abroad.”<sup>2</sup> The Justice Department has made a similar affirmation of the effect and importance of the notification obligation: “the United States firmly believes in and supports consistent adherence to the consular notification provisions in Article 36 of the Vienna Convention on Consular Relations. . . . These provisions are very important to the United States because they give significant protection to United States nationals when they reside or travel abroad.”<sup>3</sup>

On several occasions in recent decades, the Department of State has sent a circular letter to local law enforcement agencies around the United States, advising them of the obligation to inform foreign nationals of their right to contact a consul, and providing a list of the locations and telephone numbers of embassies and consulates.<sup>4</sup>

The Legal Adviser states that many detained foreign nationals are given the required information by law enforcement authorities:

We have had many positive experiences with local, state, and federal law enforcement authorities in cases raising the Article 36 notification and access obligations. We regularly hear from state and local law enforcement agencies in widely separate parts of the United States that wish to confirm information contained in our April 1993 Notice for Law Enforcement Officials on the Detention of Foreign Nationals or to seek clarification of these instructions. We also hear routinely from foreign government representatives about issues relating to foreign nationals

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2. Letter to Robert F. Brooks, Esq., from Michael J. Matheson, Acting Legal Adviser, (Aug. 20, 1997) (copy on file with author).

3. Brief for Allen at 1, *Paraguay v. Allen* (No. 96-2770)(4th Cir. 1997).

4. U.S. DEPARTMENT OF STATE, NOTICE: IF YOU HAVE DETAINED A FOREIGN NATIONAL, READ THIS NOTICE, (Sept. 1, 1991) (copy on file with author).



whose detentions have been notified to these representatives through the Article 36 notification process.<sup>5</sup>

Nonetheless, in the current capital cases involving foreign nationals, there is, as mentioned, little indication that the required information was given. In none of the capital cases has the Department of State, or a prosecuting attorney, asserted, in response to an Article 36 claim, that the required notification was given.

### III. REASONS COURTS HAVE REFUSED TO ENFORCE THE RIGHT OF CONSULAR ACCESS

Since the Article 36 obligation reads in clear terms, one might expect the courts to provide redress when the obligation is violated. To date, however, courts in the United States have given a cool reception to foreign nationals who have raised the lack of compliance to challenge a conviction. In only one reported case, a non-capital case, has a court granted relief.<sup>6</sup>

The courts have found various ways to reject an Article 36 claim. One state court judge presented with a post-conviction petition based on an allegation of non-compliance with Article 36 said that Article 36 did not require any notification. The judge said:

This court knows of no law, treaty, or judicial precedent, which imposes on law enforcement officials an affirmative duty to inform an alien detainee of a right to contact consul, nor does this court recognize such an obligation. While custodial personnel may not obstruct or deny an alien detainee's right to contact his nation's consul, they have no affirmative duty to inform him of that right.<sup>7</sup>

The court made this ruling after being presented the text of Article 36. The judge did not provide any elaboration that would indicate how he arrived at his erroneous reading of Article 36. His reading is in obvious contradiction to the text, which, as the Department of State acknowledges, requires notification of the right to contact a consul.

For the most part, however, the courts have recognized that Article 36 requires notification and that a foreign national to whom no notification was given may raise the matter. However, the courts, confronted by

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5. Letter to Robert F. Brooks, Esq., from Michael J. Matheson, Acting Legal Adviser, Aug. 20, 1997 (copy on file with author).

6. *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980).

7. *Ohio v. Loza*, No. CA96-ID-214, 1997 WL 634348 (Ohio Ct. App. Oct. 13, 1997).

foreign nationals raising Article 36 claims, have invoked one or another procedural hurdle that has resulted in a denial of relief.

### *A. Limitation on Appeal to the United States Court of Appeals*

In a 1997 case, the Supreme Court of the United States denied certiorari review after the court of appeals refused to review a district court order denying a habeas corpus petition filed by a foreign national sentenced to die by a state court. A Mexican national had been convicted of murder in Virginia and sentenced to death there. Virginia authorities had not informed him of his right to contact a Mexican consul. He sought habeas corpus review in the United States district court on grounds of Virginia's failure to comply with the obligation to inform him of the right of consular access, challenging the conviction on that basis.

A claim based on a treaty may serve as a ground for the issuance of a writ of habeas corpus. A federal statute provides that a writ of habeas corpus may issue if a person is in custody "in violation of the constitution or laws or treaties of the United States."<sup>8</sup> The District Court denied relief, however, after which he filed an appeal in the United States Court of Appeals. The Court of Appeals refused to hear the appeal, in light of a 1996 statute providing that if a district court denies the habeas corpus petition of a person sentenced in state court, there should be no appeal of that denial, unless the petitioner can make a substantial showing of a violation of a constitutional right.<sup>9</sup> The Court of Appeals said that the Mexican national was alleging a violation of a treaty right, not a constitutional right.<sup>10</sup>

In seeking review by the Supreme Court of the United States, the petitioner, supported by the government of Mexico as *amicus curiae*, argued, unsuccessfully, that the Court of Appeals had misconstrued the 1996 Act, because there was no indication in the legislative history of an intent to preclude appeals based on treaty claims, which up until then had been permitted. In addition, they argued, also unsuccessfully, that where the effect of a statute on a treaty obligation is unclear, courts must construe the statute in a way that does not result in a violation by the United States of its treaty obligation.<sup>11</sup>

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8. 28 U.S.C.S. §§ 2241(c)(3), 2254(a) (1997).

9. Antiterrorism and Effective Death Penalty Act of 1996, (*codified as* 28 U.S.C. § 2253(c)(2)) (1997).

10. *Murphy v. Netherland, Warden*, 116 F.3d 97 (4th Cir. 1997) *cert. denied*, 1997 U.S. LEXIS 4423.

11. Brief for Netherland, *Murphy v. Netherland, Warden*, 116 F.3d 97 (4th Cir. 1997).

### B. Default on Procedural Grounds

Another basis on which courts have rejected a Vienna Convention claim is that the matter was not raised early enough in the proceedings. In most of the litigated cases, the foreign national has raised the Vienna Convention claim only in post-appeal review. In an Ohio case, the foreign national raised the claim in post-conviction proceedings, under a statute that allows review of a criminal conviction on constitutional grounds.<sup>12</sup> The Ohio court denied review on the grounds that the Vienna Convention claim was not a constitutional claim.<sup>13</sup>

Federal courts too have denied Vienna Convention claims on the ground that the claim was raised too late. These cases have involved persons convicted and sentenced to death in state court. Even though federal statute provides for habeas corpus review whenever a person is in custody "in violation of the constitution or laws or treaties of the United States,"<sup>14</sup> the courts have invoked a rule that a person convicted in state court must present all possible arguments to the courts of the state before seeking federal review. If an issue that could have been presented in state court was not presented, the federal courts say that the issue was *procedurally defaulted*.<sup>15</sup>

Foreign nationals challenging a conviction and death sentence on Vienna Convention grounds have questioned this result, arguing that the procedural default rule is based on considerations of federal-state relations. The rule is designed to accord deference to the state courts.<sup>16</sup> The foreign nationals have argued that this consideration is inapposite when a treaty right has been violated. When that has occurred, any opportunity presented to a court to correct the violation should be taken, because the result otherwise will be that the United States defaults on a treaty obligation.

### C. A Prejudice Requirement

Most courts that have not refused to consider Vienna Convention claims on procedural grounds have rejected them on the basis of a requirement of showing prejudice. They have said that a foreign national

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12. OHIO REV. CODE ANN. § 2953.21(A)(1) (1997).

13. Ohio v. Loza, No. CA96-10-214, 1997 WL 634348 (Ohio Ct. App. Oct. 13, 1997).

14. 28 U.S.C.S. §§ 2241(c)(3), 2254(a) (1997).

15. Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997).

16. Fay v. Noia, 372 U.S. 391, 432 (1963); Engle v. Isaac, 456 U.S. 107, 127 (1982); Murray v. Carrier, 477 U.S. 478, 487 (1986); Coleman v. Thompson, 501 U.S. 722, 730 (1991).

asserting a Vienna Convention claim must demonstrate that he or she was prejudiced by the inability to have a consul's assistance.<sup>17</sup>

The courts have created a prejudice requirement, without a clearly stated rationale, but apparently by analogy to other defensive assertions regarding which a showing of prejudice is required. The difficulty with this approach, as applied to the Vienna Convention on Consular Relations, is that it is only the rare case in which a foreign national can demonstrate to any degree of certainty that participation by a consul would have led to an acquittal, or to a lesser sentence. A consul's functions are varied, and one cannot know after the fact what a consul might have done that would have affected the outcome. A prejudice requirement makes it highly unlikely that a court will rule in favor of a Vienna Convention claim.

Under the Vienna Convention, the contracting states have implicitly said that a person is prejudiced if required to defend a criminal charge without consular assistance. Absent an assumption that a foreigner is disadvantaged in the criminal process, there would be no need for consular assistance.

In one case, a United States district judge reversed a conviction because of a Vienna Convention violation without requiring the convicted foreign national to demonstrate prejudice. The court of appeals reversed, however, stating that prejudice must be demonstrated by the foreign national.<sup>18</sup> In the Court of Appeals, one judge dissented, arguing that while prejudice was relevant, the burden should be on the government to show that no prejudice occurred. The dissenting judge based his view on the importance of meeting treaty obligations. He wrote:

This nation must manifest integrity in our treaties with foreign countries. To honor the provisions of . . . the Vienna Convention on Consular Relations . . . mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal if not greater than a Constitutional violation.<sup>19</sup>

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17. *United States v. Calderon-Medina*, 591 F.2d 529, 532 (9th Cir. 1979); *Murphy v. Netherland, Warden*, 116 F.3d 97, cert. denied 1997 U.S. LEXIS 4423; *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996).

18. *United States v. Calderon-Medina*, 591 F.2d 529, 532 (9th Cir. 1979).

19. *United States v. Calderon-Medina*, 591 F.2d 529, 532 (9th Cir. 1979) (Takasugi, J., dissenting).

#### IV. POSSIBLE INTERNATIONAL ACTION

To date, litigation in United States courts has not resulted in any success in challenging capital convictions on the basis of the Vienna Convention on Consular Relations. Approaches in the international arena may result. Petitions have been filed with the Inter-American Commission of Human Rights.<sup>20</sup> The matter has been taken up at the diplomatic level. Mexico, in addition to filing protest notes with the United States in several of the cases involving its nationals, has raised the issue at the United Nations.

To date, the United States Department of State has rebuffed the approaches of the Western Hemisphere governments who have approached it. As far as can be known, it has taken no steps to encourage state courts or state governors to comply with the Vienna Convention. Given the obligation of the United States to comply with the Vienna Convention, this lack of action puts the United States in violation of its Vienna Convention obligations. Since the obligation to comply with the Vienna Convention rests on the United States, one might expect more aggressive action from the State Department than an occasional circular letter. Importantly, the State Department acknowledges that rights under the Vienna Convention have been infringed in the cases that have been brought to its attention.

The Justice Department has argued, so far successfully, that a foreign state may not sue to force a United States to comply with Article 36, on the rationale that the matter must be handled at the state-to-state level. Thus, the Justice Department asserts: "Assertions by foreign states of treaty violations are properly resolved through diplomatic representations between the foreign state and the Executive Branch of our federal government, or through actions before appropriate international bodies, not through suits brought by foreign states in domestic courts."<sup>21</sup>

However, as indicated, every foreign state to date that has made diplomatic representations to the Department of State regarding Article 36 has been politely shown the Foggy Bottom exit door. Litigation in the International Court of Justice may ultimately result. The Vienna Convention on Consular Relations does not include a provision for compulsory reference of disputes to the International Court of Justice, but a separate protocol to the Vienna Convention does so. The United States is a party to the optional protocol, as are a number of Latin American states.

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20. S. Adele Shank & John Quigley, *Foreigners on Texas' Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 722-27 (1995).

21. Brief for Allen at 2, *Paraguay v. Allen* (No. 96-2770) (4th Cir. 1997).

## V. CONCLUSION

International pressure is being brought to bear on the United States on the capital punishment issue. The United States increasingly is isolated as a major state that continues to use capital punishment. Given this international isolation on the issue, the execution of foreign nationals becomes a lightning rod for mobilization of foreign sentiment and an occasion for action by foreign governments.

Domestic pressure as well is being brought to bear on the United States regarding capital punishment. The American Bar Association has called for a suspension of executions in light of widely perceived inequities in application of the death penalty.<sup>22</sup> Pressure by foreign governments regarding capital punishment is being brought to bear at the same time as domestic pressure is increasing. Pressure from abroad may ultimately play a decisive role in the fate of capital punishment in the United States.

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22. Darryl van Duch, *ABA Asks Death Penalty Halt, Skirts Bond Reform*, NAT'L L.J., Feb. 17, 1991, at A7 (calling for moratorium on executions until it can be demonstrated that the process leading to execution is being handled fairly).

# ISSUES SURROUNDING THE CREATION OF A REGIONAL HUMAN RIGHTS SYSTEM FOR THE ASIA-PACIFIC

*Kelly Dawn Askin\**

The only major region of the world that does not have a regional human rights commission or court is the Asia-Pacific. The Asia-Pacific can generally be recognized to include not only the entire Asian region, from Japan and the Philippines in the East to Pakistan and Afghanistan in the West, but also areas of the South Pacific, including Australia, New Zealand, the East Indies and the Pacific Islands, and Russia. These countries are diverse in a wide variety of areas, including culture, language, history, wealth, technology, development, and legal systems. Yet they share not only a territorial commonality but also some similar interests and problems.

There are currently three regional human rights systems: the European, Inter-American, and African systems. The European Commission and the European Court of Human Rights were established in response to the atrocities committed during the Second World War. In 1950, the Council of Europe created the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which entered into force in 1953. The ECHR subsequently created the European Commission on Human Rights and the European Court of Human Rights. Optional protocols afford additional rights. The European Commission can receive complaints from state parties and individuals, but only states can refer a case to the European Court, unless the Ninth Protocol is ratified by the state to allow individuals to have standing before the court. Ratification of the Eleventh Protocol by state parties to the ECHR, which is expected to enter into force on November 1, 1998, will dissolve the European Commission on Human Rights and allow individuals and states to take a case directly to the European Court of Human Rights.

In 1948, the Organization of American States (OAS) adopted the American Declaration of the Rights and Duties of Man. In 1959, the Inter-American Commission on Human Rights was created, and in 1969, the American Convention on Human Rights (ACHR) was adopted by the OAS.

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\* Dr. Askin is a Visiting Scholar at the Center for Civil and Human Rights, Notre Dame Law School, and served as the organizer and chair of this panel discussion.

The Inter-American Commission may receive communications from individuals, states, and others, such as non-governmental organizations. Optional protocols to the ACHR provide additional rights. In 1978, the Inter-American Court of Human Rights was established by the ACHR, despite lack of individual court standing.

In 1981, the Organization of African Unity (OAU) adopted the African Charter on Human and Peoples Rights. This charter established the African Commission on Human and Peoples Rights. While discussions have greatly progressed on establishing an African Court on Human and Peoples Rights, this court is not yet a reality. The African Charter places an emphasis on collective rights not recognized in the European and Inter-American Conventions and imposes duties not only on state parties but also on individuals.

There are strengths and weaknesses in the European, Inter-American, and African systems. Any human rights system created in the Asia-Pacific region can learn and borrow from the other systems and adapt them to the special needs of in the Asia-Pacific region. Financial resources may pose grave difficulties, and language will certainly be another problem, as there are thousands of languages and dialects within the Asia-Pacific region. Undoubtedly, many states will resist guaranteeing people certain fundamental rights or resist submitting the state to any outside authority.

Despite these and other obstacles, incentives abound. For instance, a commission or court could provide impartial resolution of disputes between state parties, possibly preventing escalation of tensions into armed conflicts. A regional human rights charter or convention on human rights principles could establish a more uniform minimum standard of treatment for persons, based on principles agreed upon by and within the Asian and Pacific arena. A human rights system would likely create both international and domestic goodwill, as a result of efforts and initiatives made by states to protect the basic human rights of people in the region. The Asia-Pacific frequently complains about Western nations and other areas of the world imposing its standards on them or interfering in their activities, but a regional system would allow the Asia-Pacific increased freedom to resolve international disputes and to keep internal human rights accusations within its region. Such a system could stand to educate citizens, states, corporations, and organizations on the importance of respecting human dignity, and to serve as a deterrent for those who assume that impunity is the norm.

For many years, various human rights organizations, and in recent years the United Nations and various Asia-Pacific state representatives, have participated in meetings and conferences concerning the establishment



of a human rights system in the Asia-Pacific. The Asian Human Rights Commission, a non-governmental organization based in Hong Kong, spent three years working on a draft Asian Charter for Human Rights, which was inspired by a desire to allow the people of Asia to live in peace and dignity. In 1997, the final draft of the Asian Charter for Human Rights was completed.

It remains to be seen whether any human rights mechanisms or systems will have the support of states in the Asia-Pacific. Many problems pervasive in this region, such as drug and sex trafficking, slave and child labor, torture, and forced detention of prisoners of conscience are often perpetrated, endorsed, or acquiesced to by the states that may have little or no incentive to stop or prevent such abuses. Nevertheless, nations as diverse as Russia, China, India, Japan, and Australia can and should work together to create a strong contingency in the Asia-Pacific for protecting its citizenry against human rights violations. It is important to emphasize that creating a regional system for the Asia-Pacific will not necessarily obligate states to increased legal responsibility, but the majority of states in the Asia-Pacific have signed, ratified, or acceded to many of the international human rights instruments currently in force, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination, the Genocide Convention, the Convention against Torture, and the Slavery Convention.

Issues surrounding the creation of an Asia-Pacific regional human rights system are complicated and diverse. There will be no easy solutions. However, articles by human rights scholars, lawyers, and/or activists, Dr. Clarence Dias (India), Bina D'Costa (Bangladesh), and Ali Qazilbash (Pakistan), provide greater insight into these issues. Their articles review past and current efforts to create a regional human rights system in the Asia-Pacific by non-governmental organizations, the United Nations, and state actors; provide a descriptive analysis of obstacles to a regional human rights system; report on human rights organizations and systems already established in various Asian countries; compare a regional human rights system in the Asia-Pacific with other human rights systems already established in other regions of the world; and detail the final draft of The Asian Charter on Human Rights.

# NGOS EFFORTS TOWARDS THE CREATION OF A REGIONAL HUMAN RIGHTS ARRANGEMENT IN THE ASIA-PACIFIC REGION

*Ali Mohsin Qazilbash\**

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I feel honored to be given an opportunity to speak at this panel on an issue which has a lot to do with a part of the world I belong to. NGOs

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in Asia and the Pacific have been crucial to the struggle for a regional human rights arrangement. Indeed it is they who have kept both the debate over and the struggle for an Asian human rights system alive. It is they who have exposed the sophistry, prevarications, evasions, and contradictions that Asian governments have brought to the discussions regarding a Regional System for the Protection and Promotion of Human Rights in the Asia-Pacific region.

In my presentation, I will attempt to highlight some of the contributions made by Asia-Pacific NGOs on the subject.

I think that the time has come that all the Asian States should take necessary practical measures towards the creation of an Asian Human Rights Mechanism. No doubt the Governments have reasons to remain silent and not get exposed, though their silence is the *silence of the lamb*. Today, large sections of our people continue to be exploited and oppressed and many of our societies are torn apart by hatred and intolerance. Increasingly, the people realize that peace and dignity are possible only when the equal and inalienable rights of all persons and groups are recognized and protected. They are determined to secure peace and justice for them and the coming generations through the struggle for human rights and freedoms. Towards that end they are committed as an affirmation of the desire and aspirations of the peoples of Asia to live in peace and dignity.

The problems in this region are typically of its own nature. For example, in Pakistan, three martial laws brought an end to the political life, reducing the political participation to zero. Fundamentalist religious revivalism has prompted violation of human rights in certain parts of Asia. Women's rights violations are also a major factor in the violation of human rights. Above all, governmental lawlessness is an increasingly frequent phenomenon in many Asian countries, as is the abuse of power and authority by public officials entrusted with implementing the law, such as local police, etc. Concentration of power in the executive branch of government is resulting in increased arbitrariness and decreased accountability. This proves that like all other regions of the world, this region also has a variety of human rights violations. What is missing in Asia compared with other regions is a Regional Human Rights Commission.

The need for an Asian Human Rights Commission and its priority first emerged in 1982, when a United Nations sponsored seminar was held on this issue in Colombo, whereafter three workshops further examined this issue in Manila in 1990, in Jakarta in 1993, in Seoul in 1994, and more recently, in Kathmandu in 1996, and Amman 1997.

## I. BRIEF INTRODUCTION TO THE OTHER THREE COMMISSIONS

The other three Commissions: The European Commission, the Inter-American Commission, and the African Commission are working in their respective regions. Before moving further, I think it will be useful to give a brief introduction of each of these three Commissions.

### *A. The European Commission*

The development of a regional Human Rights system in Europe was in critical ways a response to the genocidal horrors of the Second World War. Michael Reisman, in his paper at the Fourth Workshop On Regional Human Rights Arrangements in the Asian and Pacific Region at Katmandu (Feb. 26-28, 1994), stressed that the post-mortem by elites and scholars concluded, in part, that disrespect for the rule of law and fundamental individual rights was a transitional destabilizing force with a potentially strong regional reach. Post war European leaders promoted the creation of a European Human Rights system as a way of checking at an early stage the growth of regimes that based their rule on violations of individual rights. Another factor which contributed towards making a regional European system was a political stance against communism and also the East-West differences. In 1948, at the Congress of Europe, Winston Churchill called for a European Charter of Human Rights. Later, the Council of Europe became the forum in which most of the discussions leading to the creation of European Human Rights instruments took place and finally the ongoing process was completed in 1950.

#### 1. Supplementary Law Making

At the bureaucratic level, the law making process leading to the adoption of European Convention was complex and quite unique. A system of accommodation emerged when claims of minimalists, such as the United Kingdom and the Scandinavian countries, favored less institutionalization, and the claims of maximalists, such as France and Benelux countries, were reconciled. The drafting of relatively non-controversial parts of the Convention was accelerated, and political confrontation regarding the more controversial provisions of the so-called political questions was avoided.

#### 2. Protocol System

The protocol system has been used to add rights to the convention or implement new procedural rules in an incremental optional fashion. Presently, eight out of ten protocols submitted by the council have been ratified by the parties. The European Commission of Human Rights, the

committee of ministers of the Council of Europe and the European Court of Human Rights are the bodies responsible for enforcement.

The task of the commission can also be divided into three categories:

- a) Determining the admissibility;
- b) Fact finding; and
- c) Resolving disputes.

There are certain limitations as well, such as:

- a) The NGOs cannot file a petition;
- b) European Commission is restricted to the states that have ratified the European convention; and
- c) The committee of ministers has no power to grant specific remedies. Nevertheless, the ministers may order publication of a commission report on violations and may, although this is unlikely, expel a state from the council of Europe for violations of article 3 of its statute requiring observance of human rights.

### *B. The Inter-American System*

In 1959, the Inter-American Commission on Human Rights was created for overseeing national implementation of human rights commitment. Composed of seven members elected in their individual capacity, the Commission started operating in 1960 with a rather vague mandate. In 1965, its competence was expanded to accept communications, request information from governments, and make recommendations with the objective of bringing about more effective observance of human rights. In 1967, the Organization of American States (OAS) Charter was amended and the Commission became a principal organ of the organization. The American Convention of Human Rights, adopted in 1969, incorporated the commission and assigned it specific competencies.

The Convention also created the Inter-American Court of Human Rights. The commission has three forms of jurisdiction. Its conventional jurisdiction applies to the twenty-five states that have, to date, become parties to the American convention. Its judicial invocatory jurisdiction, i.e. its competence to invoke the Inter-American court, applies to the state

parties to the American convention that have declared that they accept the Courts jurisdiction. While these two forms of jurisdiction depend on adherence to the American convention, the Commission declaration jurisdiction applies to all parties to the OAS Charter — indeed, to all states in the Americas. Hence, every independent state in the hemisphere, even those which have not yet become parties to the convention, is subject, in some form, to the commission's jurisdiction. With the responsibility for thirty-four countries and more than 600 million human beings, the commission faces a daunting mandate with a staff of ten lawyers, a secretarial staff of seven, and an annual budget of less than \$1.6 million.

### 1. The United States and the Commission

The United States has not ratified the American Convention on Human Rights, but as a party to the OAS Charter it remains subject to the jurisdiction of the commission, which is an organ of the OAS. Complaints that have led to formal decisions by the Commission on allegations of human rights charges by the United States are:

- a) Haitians applying for asylum in the United States;
- b) Challenge to legalized abortion (the baby boy case);
- c) Allegations that the death penalty is imposed in a radically discriminatory manner; and
- d) A complaint concerning police misconduct and alleged murder of members of move organization in Philadelphia, which was declared inadmissible for the failure to exhaust domestic remedies.

The only case in which the commission has found a violation of the American declaration by the United States, involved imposition of the death penalty on persons who committed a crime when under age eighteen. The commission found that in Member States of the Organization of American States, there is a recognized norm of *jus cogens*, which prohibits the state execution of children. It agreed with the United States that there was no consensus as to the minimum age for imposition of death penalty. It nevertheless continued.

### C. The African Commission

The African Conference on the rule of law, held in Lagos in 1961, gave an idea of a regional human rights system. The International Commission of Jurists invited all the concerned states to study the

possibility of adopting a regional Human Rights Convention. In 1969, a seminar jointly sponsored by the United Nations and Egypt proved instrumental in attaining general support for an African Human Rights Commission. In 1981, efforts finally reached success when experts in Dakar prepared a final draft.

At the end of this year, the African Charter on Human and Peoples' Rights was adopted by the Organization of African Unity (OAU). In 1986, a simple majority of OAU membership ratified the instrument to come into force.

The African Charter is consistent with its predecessors in Europe and America. However, it goes well beyond civil and political rights, covering economic, social, and cultural rights, as well as a number of collective or peoples rights. The African Charter also explicitly lists duties. The commission has 3 sets of responsibilities: Promotional, Investigative; and Advisory.

The ambitious scope of rights mentioned in the charter makes it difficult for the enforcement bodies because it requires significant resources. The Commission in its first five years undertook no country studies. One of the most serious problems is that human rights NGOs have yet to take root in Africa. The commission received 100 petitions but had not taken any steps. Some states failed to submit their reports and those which have submitted did not meet required standards. The commission has no function other than to attempt to settle, or, failing that, to pass the matter on to the assembly. The Assembly may assign the case to commission for reporting. The African system has no court. The executions were condemned world wide, political influence on the commission did not condemn the executions of nine leaders of the Ogoni.

## II. ASIAN NGOS STATEMENT OF PRINCIPLES GOVERNING ANY REGIONAL ARRANGEMENT

This statement has been supported by 240 participants representing 110 NGOs who attended the historic event in Bangkok, of the Asia Pacific NGO conference on human rights. (March 25-28, 1993). These participants have addressed the question of the development of human rights instruments and mechanisms in this region, and realize that this is the only region which has not been able to achieve regional human rights machinery for the protection and promotion of human rights. The participants have reached the following consensus.

### A. NGO Perspective

Universal human rights standards are rooted in many cultures and afford protection to all of humanity. The international, regional, and national orders should complement one another. The specificity of each context shall serve as constructive element to strengthen universal human rights standards and mechanisms designed to achieve global respect for human rights. Human rights are indivisible and interdependent. The protection of human rights concerns both individuals and collectives. Cultural practices which derogate from universal human rights and women's rights, in particular, shall not be tolerated. Resources must be used to promote human development, not militarization. Women's rights, that are human rights, must be addressed in both public and private spheres of life. All people have the right to self-determination. Promotion of human rights and democracy requires both human rights education and training of various sectors of society.

The effective promotion and protection of human rights in Asia and Pacific regions requires governments in the region to ratify and implement without delay the International Covenant on Civil and Political Rights, CEDAW & Torture Convention. In this regard, the Asia Pacific NGOs recommend the following points about human rights charter and implementation mechanism:

- 1) The charter should not permit *any* limitations or derogations of rights from existing international human rights norms and standards, for example on the grounds of national security, law and order, state of emergency, or the equivalent. We reiterate that states are bound to respect human rights in all situations.
- 2) The charter must respect the principles of universality, indivisibility, and non selectivity of human rights. In addition, it must reflect the new sets of rights, for example, women's rights as human rights, rights of children and the indigenous people, the rights to develop as a human right, and the rights of refugees.
- 3) The Asian system of government, culture, and traditions should not be used as a pretext for the continuation of authoritarian regimes and the violation of human rights.
- 4) A Commission on human rights must have jurisdiction to conduct fact finding missions, and undertake country, thematic and other studies; to examine the reports of state parties under various



treaty bodies; and to receive complaints by member states, NGOs, victims, and other individuals against violations of human rights.

5) The Commission should be composed of independent experts appointed in consultation with NGOs; its meetings and reports should be accessible to the public, including NGOs; and petitions or appeals under consideration should not preclude action on the same issue by other United Nations human rights bodies.

6) There should be a separate Court on human rights with the power to adjudicate complaints, and make binding judgments, including compensation; and the court should have the power to enforce its decisions through appropriate measures.

7) State parties must provide for adequate budgets and personnel to carry out these budgets.

8) States of the Asia-Pacific region must establish adequate national human rights institutions to enforce the existing international human rights instruments and standards, including regional human rights instruments upon their implementation.

### III. ASIAN NGO ACTIVITIES TO PROMOTE A REGIONAL ARRANGEMENT

#### A. *Drafting of a Declaration and Charter*

The Declaration seeks to show the relevance of human rights to the Asian and Pacific societies. Declaration and Charter are also meant as a vehicle for human rights education to develop solidarity action. Thus, they often tend to be reactive and drawn empirically from patterns of existing human rights abuses and denials. The relevant articles of the *Declaration of The Basic Duties of Asian Peoples And Governments* are herein under summarized. It is clear from the title that the article only discusses the duties of both, people and governments, unlike Western documents, which would discuss the rights as well. In order to talk about the rights, it is not wrong that they should be guaranteed by corresponding duties

#### IV. NGO STRATEGIES IN RAISING HUMAN RIGHTS ISSUES AND AGENDA IN THE MEETING OF EXISTING SUB-REGIONAL BODIES

##### A. *Subregional Approach*

An effective regional arrangement is only possible where there is an excellent understanding between the Governments as to the development of a subregional machinery.

It is pertinent to mention that several of the human rights problems in the region are of cross national boundary nature. Interestingly, there is already a sub-regional co-operation on such problems, e.g. drug trafficking, terrorism. As pointed out by Dr. Clarence Dias in his paper that in areas where both redress and prevention of human rights violations require trans-border co-operation, there is every incentive for human rights co-operation on a Bilateral, sub-regional or regional basis as appropriate. Four examples drawn from the South Asian Association for regional Cooperation (SAARC) may help to illustrate this approach:

- 1) Trafficking in women.
- 2) Migrant workers.
- 3) Refugees.
- 4) Indigenous peoples.

In each of the above examples, the problems are of a transborder nature and addressing them requires transborder cooperation. Unfortunately these are not perceived as human rights problems and therefore the only solution because addressing international human rights standards are not considered an effective solution. The governments can carefully examine the international human rights norms and standards and select regional approaches which adopt the relevant norms and incorporate them into a regional cooperation agreement. This would enable the governments to apply the norm through their regional agreement without having to ratify the related international instrument. This experience in working with the norms could help the states to decide whether to ratify the related human rights instrument and would give a state the incentive to ratify. The experience of working together and regional cooperation could help for an effective and broader human rights cooperation, also meant as a vehicle for human rights education and to develop solidarity action. Thus, they often tend to be reactive and drawn empirically from patterns of existing human rights abuses and denials.

## V. CREATING AND SUPPORTING NATIONAL HUMAN RIGHTS INSTITUTIONS

A strong regional program necessitates strong national human rights institutions as well. Thus programs to strengthen national institutions (e.g the judiciary, law enforcement officers, parliaments) could be designed from perspectives of regional comparability and undertaken concurrently, especially within a sub-region. This could lay a very sound foundation for future regional co-operation.

National human rights institutions, as the international community has defined, form a very particular species of organization. As pointed out by Brian Burdekin in his paper for Kathmandu, national commissions can:

- 1) Firstly, encourage the creation of and work with similar bodies at the state and provincial levels;
- 2) Secondly, they can do this consistent with the standards prescribed in the international treaties, while accommodating constitutional peculiarities and the extraordinarily different challenges posed by local conditions and cultures, thus respecting ethnic, cultural, religious and linguistic diversity;
- 3) Thirdly, they can do this in a more informed and sensitive manner than any regional or international body;
- 4) Fourthly, they can do this without compromising a vigorous defense;
- 5) Fifthly, national commissions can contribute to and monitor the integrity of governmental reports to international bodies; and
- 6) Lastly, they can provide constructive and well informed criticism.

National commissions have now been established in the Philippines, India, Indonesia, Australia, and New Zealand. These institutions are domestic institutions, responding to the national realities of the countries they serve. Their focus on alternative dispute resolution, mediation, and conciliation, makes them particularly appropriate to the range of cultural traditions. In some Asian countries, the national commissions are playing a central role in training the military, for example, in the Philippines and India.

## VI. GOVERNMENT OBSTACLES AND NGOs' RESPONSES IN OVERCOMING THE DEAD LOCK

### A. *Government Obstacles*

Governments face many obstacles, including:

- 1) In consistency of the national laws with International human rights law.
- 2) Ratification and incorporation in their constitutions of covenants and conventions.
- 3) Governmental law breaking.
- 4) So called Asian values which are emphasized on duties rather than rights.

### B. *NGO Responses to the Deadlock*

NGOs provide several responses to the deadlock, such as:

- 1) We call upon the governments to pledge that they will ensure that their national legal orders enshrine the basic international human rights principles contained in the United Nations Charter, the Universal Declaration of Human Rights, the Covenant on Economic Social and Cultural Rights and the Covenant on Civil and Political Rights.
- 2) Sign and ratify all the existing international human rights covenants and conventions without reservations or derogatory clauses which have the effect of nullifying the very act of signature and ratification; call upon the governments to adopt in their constitutions the principle that such covenants shall be deemed to be automatically incorporated into domestic law by the very act.
- 3) Human rights in this region have also formed the basis of struggles against authoritarian regimes and military rule. Mass movements (e.g, for gender justice, for environmental protection) have gained strength and sustenance from human rights. Such movements have in turn empowered the peoples of this region to not tolerate any attempts at turning the clock back on human rights.

4) **Universality:** So far as this region is concerned, we stress that human rights is not a western concept but have been invoked by the peoples in this region both historically and contemporaneously.

5) **Indivisibility:** Both civil & political as well as economic, social, and cultural rights have validity. In this region there has been a woeful and willful neglect on the part of the governments to recognize and implement each sets of rights. The governments of this region are called upon to remedy their continuing neglect in implementing and realizing both economic, social, cultural, civil and political rights.

6) **Individual and collective rights:** Recognize the importance and the role of both individual and collective rights. There is, however, no hierarchy and no superiority between the two sets of rights. There is nothing which stops governments from redressing such imbalance at the national levels. If they have failed to do so at the national level their criticism of imbalance at the international level lacks credibility.

In the end it is important to state as provided in the task force document (Bangkok, March 28, 1993) that human rights are already universal for the people of Asia. It is they who press for more effective human rights mechanisms even while their governments demur and desist. So far as human rights are concerned, the people of South Asia are running — their governments are crawling.

# CHALLENGES FOR AN INDEPENDENT ASIAN HUMAN RIGHTS COMMISSION

*Bina D'Costa\**

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## I. INTRODUCTION

While there exists a solid body of principles and a wide-ranging and growing number of institutions currently working to promote and protect human rights in Asia, there have unfortunately been few consolidated regional efforts for legal enforcement against violations. An Asian Human Rights Commission is the most logical and sought after body for this purpose. Despite its obvious benefits, the Commission will invariably face challenges because of complexities surrounding the Asian states regarding free press, democratic opposition, independence of judiciary, and commitment to the rule of law. In my paper, I will point out some of the challenges a possible Asian Human Rights Commission will face in Asia. Due to the limitation of the paper, recommendations and their feasibility will not be explored.

## II. UNIVERSALITY OF HUMAN RIGHTS

The Asian Human Rights Commission will face the challenge of comparing the national legislation with the international human rights law because the laws of many Asian countries are not in conformity with the fundamental principles of human rights. To understand this complex situation, the Asian government's position needs to be explained.

Asia's Human Rights Annual Report points out that both the East and the West are locked in a bitter conflict. The West's criticisms of Asian state records on human rights and democracy are met by Asia's responsive denial of the universality and inalienability of human rights. The West

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regards human rights as essential to good and fair government and the social and economic development of countries. Asian countries disagree with this Western concept and offer an alternative viewpoint. They regard human rights, when based on the theory of individualism, as inappropriate for a number of reasons:

- 1) They are inconsistent with the Asian values, which place a high priority on the community;
- 2) The principal need in Asia is economic development contrary to the importance the West places on civil and political rights;
- 3) Social and economic rights are more important for the Asians and will receive higher priority; and
- 4) The West's attempts to impose human rights standards on Asia is motivated by its desire to establish hegemony over the rest of the world.

Now, what is described above is mainly the government's position and does not necessarily embrace citizen views. The political systems in most of the countries are not representing the people, do not respond to them, and are not accountable. In the West, human rights serve the function of *fine tuning* the system of government and administration, whereas in Asia, they have a huge transformative potential and can topple dictatorial regimes.

In most parts of Asia, communities are not consensual entities which operate under concepts of justice and fairness. A wide range of groups suffer under it, for example, indigenous people, women, minority religious groups, ethnic minorities, etc. Governments often justify the absence of open resistance as evidence of compliance, which is not at all true. However, since there is no outlet for voicing public dissatisfaction, local human rights groups are often branded not only anti-government but also as against people's interest, as the architect of modern Singapore, Lee Kuan Yew, calls them. Thus, the Commission's connection with local Non-Governmental Organizations (NGOs) will not be seen favorably by the governments, which will make it difficult to receive funding from them.

### III. DOMESTIC CONSTRAINTS

The Asian Human Rights Commission will face difficulties when it comes to monitoring the human rights violations of countries. The countries in many cases may not allow the Commission or human rights NGOs to monitor the human rights situation. For example, Bhutan is very selective in issuing visas to human rights observers and journalists, and the

lack of democracy within the country has helped the country get away with abuses. Most visitors to Bhutan are those who buy expensive guided tours. Foreign journalists are carefully screened, and the domestic media is state controlled. According to a new report, about 105,000 Bhutanese of Nepali origin, about one-sixth of the country's population, fled the country between 1992 and 1995. International human rights groups observe forced evictions, but the Kingdom's reclusive nature has made it difficult to independently verify these claims. This is only one example. There are numerous other examples where international human rights groups were not allowed to monitor human rights situations. Even if the countries allow them to enter, the work may be extremely dangerous, or the people may not be able to speak freely with them.

Accountability of states is the other challenge for the Commission. For example, from 1975 until May 1993, when United Nations supervised elections were held, a single political party controlled most of Cambodian society, and exercised direct influence on every aspect of life. Though the political system was theoretically changed by the introduction of a new constitution in September 1993, there has been great reluctance to introduce any institutions that work on the basis of laws rather than as a consequence of personal instructions. When there is no legal procedure to hold anyone accountable, the Commission will be unable to do anything significant about the human rights abuses.

In 1993, delegates representing forty-nine nations from Syria to Japan met at the start of an unprecedented United Nations sponsored conference to try and fix the Asian agenda for the World Conference on Human Rights. During that time a significant number of state reports were overdue. Government answers in many areas such as arbitrary executions, disappearances, torture, arbitrary detention, sale of children, and religious intolerance were too often unsatisfactory, and the lists of unresolved issues were fairly long.

This example leads to slow moving bureaucratic machinery, which is a major obstacle to the effective promotion and protection of human rights in Asia. Asian bureaucrats often hold privileged positions and are allowed to act arbitrarily in many areas, including those of economic rights. For example, they can withhold public housing or dislocate people from one geographic area to another without explanation.

With the concept of human rights perhaps not as broadly understood in Asia as in the West, the Human Rights Commission should focus on *human rights education*, whether it be in the schools of Hong Kong or through street theater in Bangladesh. For example, Amnesty International is trying to adapt its policies and activities to local conditions by focusing on human rights education. The Commission may consider



promoting human rights education by designing programs for universities, schools, and professionals. The draft Asian Human Rights Charter mentions:

there is a wide tendency in most parts of Asia to discourage human rights education. Self-consciousness of the peoples of their human rights is regarded all too often as too dangerous a human phenomenon. Extreme forms of violence including mass massacres had been used to negate the effect of peoples' growing consciousness of rights.<sup>1</sup>

The Tiananmen incident of 1989 is only one example.

It will be difficult to use the media as a means to provide human rights education. China, Malaysia, and Singapore have banned individual ownership of satellite dishes to prevent direct reception of Western programming, which they view as an assault on Asian values. The Singapore government has restricted the circulation of Western newspapers and magazines, such as *Time* and *The Economist* because officials dislike their coverage of Singapore affairs. The Asian approach towards free press is based on the premise that there can be no such thing as unbridled freedom. Freedom stops where responsibility begins, it is often said. How that responsibility is exercised is left to the individual or the media. But the government, as the paternal authority, sets down the markers on the room for maneuvering.

Lack of resources will be one major problem related to human rights education. The local human rights NGOs, which must work as vehicles to promote human rights, have funding problems. All of the existing human rights groups operate on shoestring budgets, about \$2 million a year for Asia Monitor, \$800,000 for the Hong Kong based Asian Human Rights Commission (AHRC) and only \$320,000 for Asian Students Association (ASA) which is largely a volunteer organization. Though they are Asian run, these groups rely on funding from Western sources, such as overseas development aid and contributions from church groups. Because of the poor welfare structures as compared to the West, there is intense competition with the hospitals, children's groups, and other groups for funds. The Commission itself will face a financial crisis if the Asian governments do not come forward to support it.

With this problem of fundraising is another related issue, which is prioritizing the issues. Human Rights Watch and Amnesty International

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1. Asian Human Rights Commission, *Our Common Humanity The Draft Asian Human Rights Charter* (visited Oct. 15, 1997) <[http://www.hk.supre.net/~ahrchk/ahr\\_draft\\_part2.htm](http://www.hk.supre.net/~ahrchk/ahr_draft_part2.htm)>.

lobby on behalf of political prisoners as a priority for Asian Human Rights organizations. But in addition, with the rapid industrialization of Asia, issues of an economic nature on behalf of a growing working class are also very important. Many of the workers face appalling conditions, including seven-day work weeks and horrendous safety conditions. These only get attention when disaster strikes, such as the fatal factory fires in Thailand, China, and Bangladesh in past years. As the AHRC Executive Director Basil Fernando mentions, "if someone goes to prison, they [Western groups] raise it. But if a particular dam is built and many people suffer, they don't raise it. That is not to say that what they are doing is wrong, but it's limited."<sup>2</sup> However, this is yet another issue on which Asia and the West seem likely to collide. The United States and France have suggested that a worldwide minimum wage be adopted by the World Trade Organization to stop the exploitation of workers in poor countries. Malaysian Prime Minister Mahathir Mohammad said, "[t]he West's professed concern about the worker's welfare is motivated by self-interest because low wages are the developing world's only competitive advantage against the industrialized West."<sup>3</sup>

#### IV. REPORTING AND COMPLAINT PROCEDURES

The decisions of both the European Commission of Human Rights and the Inter-American Commission on Human Rights are not legally binding. The Commissions first try to seek a friendly settlement between the parties and second, make a judgement on the facts. The European Commission is stricter than the Inter-American Commission about the requirements of individual petitions. For example, it requires that the State has accepted the right of individual parties, the domestic remedies of the State have been exhausted, and the petition is sent on the proper application form. If the Asian Human Rights Commission is to follow these procedures, it may run the risk of ignoring a huge group of people. First, many Asian states do not accept the rights of individual parties. Singapore, China, and Indonesia are examples. Second, the domestic remedies may be more difficult for individual parties to obtain due to corruption, unjust and unequal legal systems, untrustworthiness, or insecurity. Third, it is going to be very difficult to make the proper application form available to individuals and to local NGOs if it can even be obtained from the Commission office. Not having a common language is another problem.

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2. John Kohut, *Asian Equations for Human Rights*, SOUTH CHINA MORNING POST, Feb. 17, 1995, at 19.

3. Charles P. Wallace, *Malaysian Censors Move to Ban 'List,'* L.A. TIMES, May 24, 1994, at 1.

If the application is in English it will reach only a small group of people. On the other hand, if it is written or even translated in one of the local languages in a given country, the Commission's work may be delayed due to the unavailability of translators.

The Inter-American Human Rights Commission requires that the petition include a cover letter, summary of the facts, and the evidence relied on in the form of Annexes. This procedure may be easier for the Asian Human Rights Commission to follow. However, again there are the problems of translation, preparing the required documents or having any concrete evidence. The Commission will need to seriously consider how much flexibility will be allowed concerning the petitions.

In some countries difficult conditions exist in making such complaints. Such restrictions are limitations imposed on the practice of popular and participatory democracy. In some countries, the information relating to violations of rights, provided by or on behalf of the victims, is passed on to the perpetrators of such violations, who in return resort to further repressive measures, including assassinations in revenge.<sup>4</sup>

Decades of betrayal, corruption and insecurity have made Asians suspicious. The Commission will face the challenge to prove itself trustworthy, and working promptly on cases will help it to prove its effectiveness.

## V. CONCLUSION

The Commission should try to promote the idea that basic civil and political liberties are essential, not only for the sake of individual freedom, but also for the sake of social, political, and economic stability. Both the advocates of individual human rights and business groups need to be approached to support this. Asian people want just as much respect for individual rights as the people of any other region. "Any claim for cultural exceptionalism to exclude human rights is false, non-authentic, and is a pretext to justify latent or blatant forms of repression and to legitimize the action which violates the rights of all for the benefit of some individuals."<sup>5</sup>

Concerning the enforcement of human rights, effective mechanisms to bring human rights violations to light and to protect individuals are needed. Populations must be educated and mobilized to create change through alternative thinking from within the culture. In addition, the Commission may engage itself in identifying human rights standards consistent with the Asian cultural conceptions.

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4. Asian Human Rights Commission, *supra* note 1.

5. Kohut, *supra* note 2.

The Human Rights Commission can work actively by enhancing cooperative interaction among governments, NGOs, and international organizations. In these cooperative arrangements, the Commission would not only be responsible for monitoring and documenting violations, but also for helping the government correct their actions. Cooperation by the Commission with governments involves tension in maintaining a position that can be perceived as political, motivated by no other interest but commitment to human rights, advocating specific policies and measures to advance human rights and human rights traditional protections.

# DIPLOMATIC IMMUNITY: TO HAVE OR NOT TO HAVE, THAT IS THE QUESTION

*Mark S. Zaid\**

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The question of whether diplomats should be fully immune from criminal prosecution, no matter what the alleged crime, is one that is neither new nor free from dispute. As a matter of international law and United States domestic law, the source of the immunity and the extent to which it extends is quite clear.<sup>1</sup> But with each new offense or tragedy, far and apart as they may be, the public debate over diplomatic immunity rears its ugly head once again.

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1. The notion of diplomatic immunity is ages old and relates back to the time when the King could do no wrong, and the King's messenger served as an extension of the King and his authority. See Vienna Convention on Diplomatic Relations, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents) [hereinafter *Vienna Convention*]. The Vienna Convention was adopted in 1961 with the belief that an international convention in diplomatic intercourse, privileges, and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. *Id.* Article 29 states that "[t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." *Id.* Limited exceptions, however, do exist that effectively waive diplomatic immunity. *Id.* art. 31. In 1790, the United States enacted legislation that provided diplomats with full immunity. These laws remained in effect until repealed almost 200 years later in 1978, when the Diplomatic Relations Act, 22 U.S.C. § 254 (1978) [hereinafter DRA], was passed to implement the Vienna Convention. Although the DRA adopts the provisions of the Vienna Convention, the President retains the authority to extend more or less favorable treatment when appropriate. *Id.* § 254c.

This much is true: diplomatic immunity is a necessary evil, though evil it truly rarely is. However, despite that concession, there are improvements that can be implemented that would serve to possibly prevent future offenses or tragedies from occurring. At the very least, the public perception of diplomatic immunity may become more positive.

This article will briefly address four topics:

- 1) the American public's attitudes towards diplomatic immunity;
- 2) the use/abuse of diplomatic immunity within the United States;
- 3) policy changes that have occurred as a result of specific tragedies; and
- 4) suggestions to prevent future abuses or tragedies by diplomats within the United States.

### I. AMERICAN PUBLIC'S ATTITUDE

If the perception of diplomatic immunity in the United States had to be summarized by one word, that word would likely be *misunderstood*. Most instances where the topic of diplomatic immunity arises come from a context unflattering to the diplomatic community: parking violation abuses, apparent escape from criminal offenses, or drunk driving, to name just a few examples.<sup>2</sup>

As a result of the January 1997 tragic death of a teenage girl, a victim of a car accident caused by a drunk Georgian diplomat in Washington, D.C.,<sup>3</sup> and the simultaneously public dispute between officials of the City

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2. This perception is not helped by Hollywood's portrayal of diplomats such as in the 1989 film *Lethal Weapon 2* starring Mel Gibson and Danny Glover. In this film a South African diplomat openly hides behind the shield of diplomatic immunity while committing various criminal offenses, including drug smuggling and murder. Obviously, the overwhelming majority of diplomats, usually the best, brightest, and most educated a country has to offer, are law abiding guests residing in the United States.

3. See *infra* notes 21-24 and corresponding text for discussion: subsequent to delivering these remarks, the author was retained by the family of Joviane Waltrick to initiate a civil action against the Republic of Georgia, Gueorgui Makharadze and other responsible parties. An action was filed in the United States Federal District Court for the District of Columbia on december 31, 1997. John A. Knab, as representative of the Estate of Joviane Waltrick v. Republic of Georgia Case No. 1:97CV03118 (D.D.C. Dec. 31, 1997). See Bill Miller, *Crash Victim's Mother Seeks Damages from Georgian Diplomat, Others*, WASH. POST, Jan. 1, 1998, at D4; Gerald Mizejewski & Walden Siew, *Accident Victim's Mom Sues Jailed Diplomat*, WASH. POST, Jan. 1, 1998, at A1. Both diplomatic immunity and sovereign immunity will be issues litigated in the proceedings.

of New York and various diplomatic missions over parking violations,<sup>4</sup> the American public was consumed with the debate over diplomatic immunity. The opinion polls, while reflecting the dissatisfaction with the results of specific events, demonstrated an ignorance of the greater good obtained through the use of diplomatic immunity worldwide and a recognition that some changes are necessary.

During a survey period of January 28, 1997 to February 4, 1997, Americans were asked whether diplomatic immunity should supersede the laws of United States, federal, state, and local government? Of the respondents, five percent answered *yes*, fifty-three percent said *no* and forty-two percent were *mixed*.<sup>5</sup> Sample responses included the following retorts:

Yes, diplomatic immunity should be a matter of international law. I suspect that such immunity protects American diplomats abroad as much as it might allow certain diplomats to commit crimes here. Moreover, even it [sic] immunity should not override United States laws. I do not think it is a matter that can be left up to individual municipalities.

*RC of Brooklyn, NY on 1/28/97<sup>6</sup>*

I believe for the protection of our diplomats we should keep diplomatic immunity, but if a local law is violated they should be immediately deported to their country.

*JR of Union City, TN on 1/29/97<sup>7</sup>*

Diplomatic immunity shouldn't mean squat when it concerns the US laws.

*EP of Cuyahoga Falls, OH on 1/29/97<sup>8</sup>*

Yes. But in all categories except Murder, Manslaughter, Child Molesting and Rape! If any diplomat in any country did any of the offenses in the categories listed above, they should be deem [sic] a criminal and dealt with accordingly.

*RP of New York, NY on 1/30/97<sup>9</sup>*

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4. See *infra* notes 23-27 and corresponding text for discussion.

5. *The Official New York City Website* (visited Oct. 25, 1997) <<http://www.ci.nyc.ny.us/html/misc/html/qdipimm.html>>.

6. *Id.*

7. *Id.*

8. *Id.*

This is a question that must be addressed between the countries involves. Although it seems good on the face of it would we want another countries [sic] strange laws to affect our countries [sic] visitors there?

*LF of Jamaica, NY on 2/2/97*<sup>10</sup>

Diplomatic immunity should only be extended to Ambassadors, Consul General. Only the top three echelons of a diplomatic missions [sic] have any need for immunity. All other employees are simply civil service types and should not be entitled to immunity.

*JM of New York, NY on 2/3/97*<sup>11</sup>

Misconceptions over the notion of diplomatic immunity do not stop with the average American on the street, but dangerously extend to local law enforcement personnel. One commentator reported that:

State Department training sessions for local law enforcement personnel begin by breaking down the misconceptions and stereotypes about dealing with persons who have diplomatic immunity. On a written test given before the training, one question proposed:

Q. The U.S. Department of State (circle one)

A. Works with law enforcement and the court system to protect U.S. interests.

B. Fix traffic and parking tickets for diplomats.<sup>12</sup>

It was the objective of the State Department that anyone who initially chose B would change his answer to A by the end of the training course.

## II. USE/ABUSE OF DIPLOMATIC IMMUNITY

One thing must be made clear. Diplomatic immunity protects Americans more than it may cause harm to Americans. The fact is that the United States has one of, if not the, highest number of diplomats stationed

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9. *Id.*

10. *Id.*

11. *See supra* note 5.

12. *Id.*



around the world. Several countries, particularly during the Cold War, would not hesitate to arrange for an *accident* or *crime* to occur in order to harass western diplomatic personnel. This was particularly so when the diplomat was suspected to be a covert intelligence officer. Charging the diplomat with a *crime* served as a convenient manner in which to force a diplomat to leave the country. Given that many foreign legal systems fall far short of our notion of providing adequate due process, it is far preferable to know that members of our foreign service, or intelligence agencies, will not be subject to fraudulent prosecution or interrogations.<sup>13</sup>

In exchange for protecting our personnel, foreign diplomats are necessarily afforded the same courtesy. But is it a fair exchange? The answer is yes when one considers the statistics. There are over 18,000 individuals in the United States area who hold some form of diplomatic immunity.<sup>14</sup> Rarely do any of these individuals commit a crime. For example, from March 1986 to February 1988, out of 80,000 serious crimes reported in the District of Columbia, only five were committed by diplomats.<sup>15</sup>

The State Department has attempted to aggressively react to diplomatic incidents, particularly those involving alcohol offenses. Between 1993 and 1996, the licenses of thirty-seven diplomats were suspended.<sup>16</sup> Local law enforcement is supposed to report offenses to the State Department. Unfortunately, this does not always occur.<sup>17</sup>

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13. In 1992, Uganda's ambassador to Washington, Stephen Kapimpina Katenta-Apuli, was implicated in an arms-purchasing and smuggling scheme to buy 400 anti-tank missiles. He was detained in Florida after a sting operation by customs agents, but not indicted because of his immunity . . . . [T]he State Department asked Uganda to lift his immunity, but the envoy was recalled home. Espionage cases tend to be different, even when suspected foreign spies do not have official immunity. In general, officials said, foreign spies are simply expelled, to insure that American spies, when caught, are treated equally. Steven Erlanger, *U.S. Will Ask Former Soviet Republic to Lift Diplomat's Immunity*, NEW YORK TIMES, Jan. 6, 1997, A15.

14. George Gedda, ASSOCIATED PRESS, Jan. 10, 1997.

15. According to State Department officials, serious cases involving diplomats are relatively rare . . . with about 10 to 15 cases a year that are nearly all questions of shoplifting or drunken driving, and usually involve the dependents of diplomats. In about half of those cases, immunity is waived and fines are paid. Steven Erlanger, *Officials Defend Diplomatic Immunity; New York Case Is Politically Charged*, NEW YORK TIMES, Jan. 7, 1997, at B3. Seventeen felonies were committed by foreign diplomats in the United States in 1995, and 19 were committed the previous year, according to the State Department. ASSOCIATED PRESS, Jan. 7, 1997.

16. ASSOCIATED PRESS, Jan. 13, 1997. Additionally, eight diplomats were expelled from the United States in 1996 for repeated drunk driving. Ruben Castaneda *Diplomat Got 3 Tickets Before Fatal Crash*, WASH. POST Jan. 19, 1997.

17. Following the accident it was discovered that Makharadze had previously been stopped for traffic violations, including drunk driving and speeding, in Virginia and Washington, D.C., but local law enforcement officials never notified the U.S. Department of State. Had they done so, it is very likely that Makharadze would have lost his driving privileges and the accident might not have

On January 3, 1997, in Washington, D.C., a car driven by Gueorgui Makharadze, the second highest ranking diplomat for the Republic of Georgia in the United States, was involved in a tragic automobile accident that resulted in the death of sixteen-year-old Joviane Waltrick, a Brazilian national residing in Maryland. Makharadze, who was said to have been driving at eighty miles per hour, was intoxicated at the time.<sup>18</sup> However, due to his diplomatic status, Makharadze was not given a breathalyzer or blood test. The incident caused a public uproar, particularly when it appeared Makharadze would be recalled back to Georgia and would escape prosecution.<sup>19</sup> As a moral gesture, but in part due to intense public pressure, Georgian President Eduard Shevardnadze agreed to voluntarily waive Makharadze's immunity.<sup>20</sup> Makharadze subsequently pled guilty.<sup>21</sup>

Most likely the biggest abuse of local laws by diplomats, and certainly one that has caused much consternation among the American public, has involved parking violations. This year witnessed an extraordinary dispute between the diplomatic community and the City of New York, with harsh words exchanged on both sides.<sup>22</sup> Again, however, this is not a new problem. In fact, former New York City Mayor John Lindsay implemented an innovative and effective solution to the problems caused by illegal diplomatic parking during his administration in the 1960s. Although diplomatic immunity protected the representatives of foreign governments from having to pay their tickets or the impounding of their vehicles, police could tow an illegally parked diplomat's car to another legal parking place, however. So New York police hooked up diplomats' cars and hauled them to an undesirable part of New York. It took about two weeks for illegal parking by diplomats to decline in mid-town

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occurred. *Id.* The Washington Post determined that the system in place to report infractions was not very systematic. A survey of local police officials found that they do notify the State Department about serious violations, but how they define serious varies. Many police officers won't even write up a traffic infraction such as running a red light, if it doesn't cause an accident, because they figure with a diplomat there's no point. Editorial, *Diplomats and Immunity*, WASH. POST, Jan. 19, 1997, at A.

18. ASSOCIATED PRESS, Jan. 4, 1997; Bill Miller, *Diplomat Pleads Guilty*, WASH. POST, Oct. 19, 1997, at A1.

19. Ruben Castaneda & Karl Vicks, *Diplomat Unlikely to be Prosecuted in Crash, Officials Say*, WASH. POST, Jan. 7, 1997, at B1.

20. Donna Abu-Nasr, *Associated Press* (visited October 25, 1997)

<<http://lubockonline.com/news/021697/georgian.htm>> .

21. Vicks, *supra* note 19. Makharadze was subsequently sentenced to 7-21 years on Dec. 19, 1997.

22. See David Stout, *Diplomats' Tussle with Police Becomes an International Issue*, NEW YORK TIMES Jan. 1, 1997; John M. Goshko, *In New York, Another Undiplomatic Dispute*, WASHINGTON POST, Jan. 7, 1997, at B7.

Manhattan.<sup>23</sup> City officials today have sought to implement a less obtrusive remedy.<sup>24</sup>

### III. SERIOUS DIPLOMATIC ABUSES INVARIABLY LEAD TO POLICY CHANGES

In 1974, a respected Washington, D.C. physician was left a quadriplegic after being involved in an automobile accident with a diplomat.<sup>25</sup> The D.C. police declared the attache was responsible for the crash but immune from prosecution because of his diplomatic status. Public outrage about this case led Congress to change diplomatic immunity laws to require diplomats to carry automobile insurance. Diplomats are now required to maintain at least \$400,000 in liability insurance, a sum greater than most Americans are required to maintain.<sup>26</sup>

The answer to resolving diplomatic incidences, however, is not to overreact. Sadly, this is too often the case. Responses to diplomatic abuses must be rational, and implementation should be consistent. The development of international law from which diplomatic immunity extends finds much of its roots in the notion of reciprocity.<sup>27</sup> Thus, the action of Senator Judd Gregg (R-NH) to threaten to revoke foreign aid payments to the Republic of Georgia if it did not waive Makharadze's immunity is ill-advised, despite the fact that the United States, due to its international status, finds itself in a position to make such demands.<sup>28</sup> The Republic of

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23. Henrik Liljegren, the Swedish Ambassador to the United States, "remembered a case in Stockholm when a drunken diplomat refused to leave his car after the police asked him to do so, so they could drive him home. Instead, they towed him home in his car." *NEW YORK TIMES*, *supra* note 15.

24. New York City Mayor Rudy Giuliani hoped to implement a plan used with success in Washington, D.C., where "diplomats with tickets that have gone unpaid for more than a year are denied registration for their diplomatic license plates, preventing them from driving until they pay up." Randy Kennedy, *Giuliani Asks U.S. Help On Deadbeat Diplomats*, *NEW YORK TIMES* Jan. 9, 1997, at B3.

25. Vicks, *supra* note 19.

26. *Id.* See also 22 U.S.C. Section 254 (e) ("Liability Insurance For Members Of Mission"); Castaneda & Vicks, *supra* note 19 ("As a result of previous car accidents involving immunity, diplomats are required to carry insurance coverage of at least \$400,000, and State Department officials said yesterday that that is usually the extent of reparations available to victims.").

27. Reciprocity, of course, works both ways. Georgian President Eduard Shevardnadze set a commendable example by waiving the diplomatic immunity of Makharadze. However the hard-line approach taken by New York City officials resulted in Russian traffic police launching a crackdown on foreigners driving in Moscow. They issued more than 200 citations, the majority to Americans. Lynn Berry, *ASSOCIATED PRESS*, Jan. 7, 1997. Whether President Shevardnadze's example will be followed is yet to be seen.

28. *REUTERS*, Jan. 8, 1997; see also Abu-Nasr, *WASHINGTON POST*, *supra* note 20 (stating that Senator Gregg urged President Clinton to withhold \$30 million in aid to the Republic of Georgia until it waives immunity).

Georgia's decision to ultimately waive Makharadze's immunity should be applauded, and, hopefully, a worthwhile example has been set.<sup>29</sup> One wonders, however, whether it is an example the United States will follow, as it has not in the past.

As a result of the furor raised in the wake of the Makharadze incident, it was discovered that in "a similar case in Moscow in 1993, the United States refused to waive diplomatic immunity when an American envoy struck and killed a Russian pedestrian on a dark street after midnight . . . ." <sup>30</sup> The Russians accused the American diplomat of driving while under the influence of alcohol. "But the United States determined he had not been drinking and decided it would be best to recall him home. . . . The diplomat . . . left Moscow within thirty six hours of the accident. No disciplinary action was taken against the man, who remains in the foreign service."<sup>31</sup>

Indeed, United States officials could only recall one instance in recent years where the United States agreed to waive a diplomat's immunity to allow prosecution. However, in that case, which occurred in Bolivia in 1995, the United States itself was the aggrieved party. The accused individual was a contractor working for the United States Drug Enforcement Agency and allegedly embezzled funds from the United States.<sup>32</sup>

#### IV. DIPLOMATIC IMMUNITY, WHILE A NECESSARY POLICY, CAN BE MODIFIED TO BETTER PROTECT THE HOST STATE COMMUNITY

While diplomatic immunity must and should be maintained, there are several policy modifications that can be taken to ensure fewer violations of domestic law occur. As Congressman David Dreier recently stated,

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29. Examples of states waiving diplomatic immunity are far and few in between. In 1989, Belgium waived immunity after a sergeant posted at its embassy in Washington was charged with and later convicted of two murders in Florida. Steven Lee Myers, *Georgia Diplomat Told To Remain In U.S. For Inquiry*, NEW YORK TIMES, Jan. 11, 1997, at 1. Apparently, however, the defendant was judged mentally ill, Erlanger, *supra* note 15, at B3, and the waiver was conditional on the United States not seeking the death penalty. ASSOCIATED PRESS, *supra* note 15. More often than not, immunity is not waived. For example, in 1981, the teen-aged son of a Ghanaian diplomat was held on rape charges. After being declared persona non grata, he was expelled. A North Korean diplomat, in 1982, was charged with sexual abuse and was allowed to leave the United States after pleading guilty. However, he did not possess full immunity. Steven Erlanger, *U.S. Wants Immunity of Car-Crash Diplomat Lifted*, NEW YORK TIMES Jan. 6, 1997, at A15.

30. REUTERS, Jan. 7, 1997; Myers, *supra* note 29.

31. *Id.* Former American Ambassador to China and South Korea, James Lilley, remembered a few cases in which accredited Americans or their dependents had injured or killed local residents while driving a car. In general, he said, an indemnity is paid to the family, and the driver is sent back to America before the host country expels the driver. Erlanger, *supra* note 15.

32. REUTERS, Jan. 8, 1997.

“while the concept of diplomatic immunity remains an important underpinning of peaceful diplomacy, it is time, with the exponential growth of the diplomatic corps, that we reexamine the procedures and policies implicit in the doctrine of diplomatic immunity.”<sup>33</sup> Therefore, several suggestions include:

- 1) Bilateral treaties should be implemented with countries which maintain similar legal systems with that of the United States to allow for prosecution of diplomats. For example, there is no reason why an American diplomat accused of a crime in Canada or the United Kingdom should not stand trial. The systems are comparable to those to which we are accustomed and the concerns for a fair trial and prosecution of due process is minimal.<sup>34</sup>
- 2) Procedures should be established between countries to allow for prosecution of diplomats if the country presents sufficient evidence to the sending State demonstrating that probable cause exists to prove the diplomat may very likely have committed a punishable offense. Rather than the sending State recalling that diplomat immediately upon being accused, the diplomat should then stand trial. Similar to requirements in extradition treaties, the offense should be one recognized by both countries as illegal. Should the nature of the punishment be too foreign (such as the removal of a hand from a convicted thief which is a practice in some Muslim countries but one not recognized by western States), arrangements could be made to have the diplomat serve an appropriate punishment back in his home State.<sup>35</sup>

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33. *Dreier Statement on Reform of Diplomatic Immunity* (last modified May 1, 1997) <<http://www.house.gov/dreier/dipimmst.htm>> (on file with author) [hereinafter *Dreier Statement*].

34. Congressman David Dreier (RCA) introduced legislation that calls upon the “State Department to seriously study the proposal that the United States lead an international effort to encourage every civilized government to hold their own diplomats accountable for their actions abroad by prosecuting them in their own courts.” *Id.*

35. Another alternative is to provide criminal jurisdiction in the sending State for crimes committed by its diplomats in a receiving state. The 1997 State Department and Foreign Assistance Authorization Act included a provision that the Secretary of State should explore, in appropriate fora, whether states should enter into agreements and adopt legislation:

- 1) to provide jurisdiction in the sending state to prosecute crimes committed in the receiving state by persons entitled to immunity from criminal jurisdiction under laws extending diplomatic privileges and immunities; and
- 2) to provide that where there is probable cause to believe that an individual who is entitled to immunity from the criminal jurisdiction of the receiving state under laws extending diplomatic privileges and

3) The United States State Department, before accepting a diplomat's credentials, should require the sending country to provide criminal background histories of that diplomat, as well as any knowledge of alcoholism and explanations for why the diplomat left prior postings. Additionally, those countries where a diplomat had served prior to being sent to the United States should be contacted to inquire as to whether any problems arose involving the diplomat. In the aftermath of the Makharadze case, it was revealed that Makharadze had a history of serious traffic violations in his homeland, including at least three citations for drunken driving.<sup>36</sup> Had this been known to the State Department, prior to Makharadze's credentials being accepted additional consideration could have been given to whether Makharadze should be permitted to enter the United States or, at least, question whether he should be allowed to drive a vehicle.<sup>37</sup>

4) State legislatures should be urged to adopt legislation that would mandate their local law enforcement agencies to notify the United States Department of State when a diplomat is involved in any type of offense, criminal or civil, in order to monitor unacceptable behavior and, if necessary, implement punitive measures.

## V. CONCLUSION

The concept of diplomatic immunity traces its roots back to ancient times, and it is a practice that should remain intact. However, it is not a practice to be abused, and appropriate precautions can and should be taken to ensure that diplomats abide by the laws and regulations of the host state. While it unfortunately often takes a tragic event to bring about policy changes in the realm of diplomatic immunity, a balance must be achieved

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immunities committed a serious crimes, the sending state will waive such immunity or the sending state will prosecute such individual.

H.R.1486, § 1706 (b) (1997).

36. Martin Sieff & Walden Siew, *Diplomat Drove Drunk In Homeland*, WASH. TIMES, Jan. 14, 1997 at A1. The information was publicly revealed by Georgian President Eduard Shevardnadze in a radio address. *Id.* Makharadze also been cited on several occasions for traffic violations in the United States. *Id.*

37. According to State Department spokesman Nicholas Burns, "most diplomats, including those from the Republic of Georgia, are only required to pass a vision test and show proof of a valid license from their country to get a State Department-issued license here." *Id.*

that not only protects diplomats from harassment but also those citizens that accord visiting diplomats the hospitality of their nation.

# STRENGTHENING THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

*Harry H. Almond, Jr. \**

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## I. INTRODUCTION

The Jessup Competition has awakened perspectives about decision making in the students of international law. It has served in the legal education of countless students, and it has even served the promotion and perhaps the development of international law itself.<sup>1</sup> In pursuit of its objectives, the Jessup has grown to command major worldwide attention and substantial prestige due to its inclusion of contestants originating from all parts of the globe. The inclusion of these worldwide contestants is enough evidence to show that the Jessup Competition has caught the

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1. Legal education was afforded a major impetus in the writings of Myres McDougal and his associates. See, e.g., Harold Lasswell & Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943) [hereinafter *Legal Education*]; Florentino Feliciano, *Book Review*, in MYRES MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 1024 n.8 (1960); MYRES MCDUGAL ET AL., *THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER* (New Haven Press 1994) (1967) [hereinafter *INTERPRETATION*]. See generally MYRES MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960) [hereinafter *STUDIES*].



imagination of law schools throughout the world.<sup>2</sup> With the aid of television, video cassette recordings, and the publication of Jessup materials, the competition could expand its reach even further.<sup>3</sup>

Even given these past accomplishments and the present praiseworthy state of the Jessup, it is not inopportune to make a reappraisal at this time to determine whether we can strengthen the Jessup. In making this appraisal, we can draw upon the experience of other devices operating in reasonably similar contexts or situations to aid us.<sup>4</sup>

One device available to us is the art of gaming. Specifically, war gaming offers us great potentialities: it can be conceived primarily as a means for assembling and collecting information, data and intelligence in groupings suitable or relevant to a given inquiry; for identifying outcomes or potential outcomes; for working with problems that have a need for urgent action; for promoting data access or retrieval; and for building a data bank or even tapping other data banks. War gaming makes us data conscious as no other technique does.

Of course, there are differing perspectives about the conceptual element in making war. We look to this exercise as an art, while the Soviet Union in their war gaming were said to consider it a science with applicable principles, but including the application of complex technological advancements and features such as those evidenced by nuclear weapons and the high technology jet aircraft.<sup>5</sup>

Similar to the differing perspectives of the United States and the Soviet Union about the concept of war gaming itself, war gaming and moot court participants differ in their approaches to their respective games. War gaming participants are eager to refine the power element in their games

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2. The leading article on this subject expressed in comprehensive sweep, and in detailed terms, is Legal Education, *supra* note 1.

3. Numerous other applications for more effective and powerful uses of simulation are now beginning to appear. The Internet, for example, holds the promise of a wider audience, and wider participation in the Jessup, and the impact of an increased amount of scholarly assessment of the competition itself. Much will depend upon introducing the Jessup itself onto the Internet.

4. Various devices have been formulated for simulation of the symbolic framework of reference and the real world decisions and actions. *See generally* A. H. HAUSRATH, VENTURE SIMULATION IN WAR, BUSINESS, AND POLITICS (McGraw-Hill 1962). Hausrath says that war games differ in many ways, but he lists the *salient similarities* to be found. *Id.* at 82-97. These strongly suggest analogies and similarities to those found in the moot court competitions:

Every war game simulates a military operation (irrespective of phase or manner of gaming); each game involves two or more opposing forces; each war game is conducted in accordance with data, rules, and procedures acceptable to the military profession; every war game represents an actual or assumed real-life situation.

*Id.* at 82.

5. *See* THOMAS ALLEN WAR GAMES 59-62 (McGraw-Hill 1987).

whereas those engaged in Jessup Moot Courts tend to keep the rules of the moot court game intact and unchanged. The attitude of the moot court participants runs parallel with the prominent attitude about our courts and their proceedings, but it interferes with the development of refinements, which have only recently and slowly come into view in the interest in alternative dispute settlement procedures. Borrowing from this recent refinement, if encouraged by the adoption of gaming, the Jessup might consider the possibility of alternative settlement devices tested in a simulation framework.

Another interesting possibility that may be encouraged by gaming is the intrusion or intervention of law as an element in the decisions to be made when states are interacting with each other in a global, even if competitive, arena. Introduction of law as an element in the decision process amounts to an introduction of a theory or concept of public legal order, ambiguous to a large extent in this period of largely unorganized organs for a global community.<sup>6</sup> It also introduces the legal processes applicable under this legal order, and the outcomes expected in introducing law into the decision process. This possibility can be explored, through the application of law in gaming, i.e., in the war games, or other conflict-oriented games.<sup>7</sup>

But instead of limiting the discussion to war games, this paper will look at war gaming on a conceptual level to determine whether the Jessup might benefit from the experience that has accumulated through the use of war gaming. My primary objective is clarification of the Jessup as an instrument involving policy problems. I intend to consider standards that might be applied to add useful modifications to the Jessup.<sup>8</sup> I have

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6. See generally 10 YALE J. INT'L L. 1 (1984). This volume is a recommended collection of academic approaches to problems of international law, introducing the use of the incident as a decisional unit in international law, both the theoretical and operational dimensions. The chapter on the claims in Canada relating to accident of Cosmos 954 is useful for illustrating this approach, and for providing a future Jessup problem. *Id.* at 78. For a scientific counterpart to public order in the communities or states, i.e., the conception of nature and the physical world in terms of a scientific order, see generally ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD (Cambridge Univ. Press 1926).

7. See ALLEN, *supra* note 5.

8. The Jessup practice might be appraised at this time as well: would it be advisable, for example, to limit the appearances of judges in a given competition, particularly if it is likely that they will appear at various stages in the competition and find the same adversaries before them? Or would it be desirable to permit a one or two time modification and refinement of the Jessup memorials during the competition itself to incorporate the growing sophistication of the contestants? (This presupposes the use of a word processor). Or what steps should be taken to prepare the judges, or to make the scheduling of the Jessup closer to the real time needs of the law schools? Should the Jessup memorials be published and more widely circulated by the American Society of International Law, or the finals televised, and the television rights extended

refrained from assessing the housekeeping or even major repair efforts for running the Jessup at this time. Consequently, this inquiry is limited to the possible cross-fertilization of gaming and moot court procedures.

## II. STRENGTHENING THE JESSUP COMPETITION

### A. *The Jessup As an Instrument for Learning and Promoting Policy*

What are the objectives of the Jessup Competition? Foremost among the Jessup's objectives is to facilitate the learning experience for the contestants, and, to a comparable extent, for the judges, faculty advisors and others who participate.<sup>9</sup> But what does this learning experience entail? Moreover, what learning experiences can be added to the presents ones, partly as an effort to promote policy?

#### 1. Present Learning Experiences

The Jessup offers a valuable instrument for improving the general lawyer skills of the contestants, coupled with improvements in the analytical skills of the observers of the moot court cases.<sup>10</sup> The Jessup also provides a forum of deliberation and discourse for probing current problems in law, especially when presented in the context of a legal dispute. As such it enables those who participate or analyze the Jessup cases an opportunity to see the perspectives of numerous participants at play upon such problems, paralleling one of the ways in which the student is introduced to practice in the law schools. It extends a student's effort beyond the review of cases and appellate review into a complex, real-world simulation where the performance is judged by the effective invoking and appraisal of law, and the innovative effort in making law serve us, rather

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to the public broadcast stations? These more sophisticated developments might be considered if we move the Jessup closer to an instrument for probing or refining the practices of the real world of the International Court of Justice, or other international tribunals.

9. The leading article on this subject expressed in comprehensive sweep, and in detailed terms, is *Legal Education*, *supra* note 1.

10. *Cf.* ALLEN, *supra* note 5. Definitions are not essential in the development of wargaming. We are concerned with a dynamic medium, a simulation of decision making with respect to actions to be taken, pursuant to standards and conditions, inferences and assumptions, law and standards of reasonableness. The primary outcome desired is that of command and control over information essential at all levels of human experience: information, data and intelligence for inputs; data banks and data sources readily accessible for data availability and evaluation; data relevance, economy of data preservation, analysis of impact on goals; data access or retrievability, with regard to what is time urgent, action urgent, action impact.

than having us serve the law and the rigidities we might arbitrarily impose upon it.<sup>11</sup>

In essence, the Jessup is a collegial effort, where reinforcement and testing of learning arises from the interaction of the participants. Our experience so far shows that this interaction has been strongly motivated among them. Because the problems presented by the Jessup are problems of global significance, the problems add to that motivation the element of exhilaration. At least a major refinement of the competition would be one which facilitates greater and deeper participation. This refinement would be sharpened if we could apply the Jessup as an instrument to refine our critical faculties.

Because the development of international law is in part an outcome of attitudes and perspectives, the Jessup offers opportunities for practicing lawyers, acting as judges, to gain working skills in a subject of major importance. As in the war gaming exercises, there is also the possibility of changing the format of the Jessup, adding to the overall, adjudicatory setting of the Jessup a panel for the meetings of the American Society of International Law that takes the output of the Jessup competition and then provides comments and opinion.<sup>12</sup>

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11. The Jessup may contribute to the shaping of law through its impact upon attitudes, skills, enlightenment, and so on. How far that impact will reach is unclear, but in ALAN WATSON, *THE EVOLUTION OF LAW* 33 (Johns Hopkins Univ. Press, 1985), it is observed that: "[l]aw develops by lawyers thinking about the normative facts, whether in the abstract or in relation to hypothetical or actual societal facts. A course becomes set which is difficult to alter."

Lawyers, he argues:

come to treat law as fact - normative fact, of course, but still something existing in its own right. Faced with a legal problem, lawyers contemplate the societal facts of the issue and the normative facts of the law that have to be applied to them to come up with the answer. The societal facts and the normative facts may be equally hard to discover.

*Id.* at 32, 33.

12. This proposal is preliminary; it presupposes that if the American Society of International Law were to provide for such a panel commenting on and even critiquing the Jessup, as well as mining it for its effectiveness and content, it would be necessary to have the Jessup final early in the annual meetings rather than at the last day. The panel then convened would be an ad hoc panel, but this drawback can be overcome if experienced panellists are chosen, it would offer a chance to add a refining procedure to the Jessup and to strengthening its policy content. A frame of reference, familiar to international lawyers, is that of HAROLD LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY* (Yale Univ. Press 1950) [hereinafter *POWER*]. These terms of reference relate to unraveling the ambiguities and uncertainties in the decision and policy making activities of individuals, enterprise and governments. The approach is that of the problematic, and aimed at future courses of action: "From the manipulative standpoint, the problematic situation with which inquiry begins is resolved into alternative goals possible in the situation, and the problem is formulated in terms of courses of action leading to the goal." *Id.* at xi.

## 2. Possibilities for the Future

Carefully designed Jessup problems can introduce social order perspectives critical to the evolution of international law intended to serve global public order.<sup>13</sup> Hence the Jessup can serve other law and policy oriented objectives.<sup>14</sup> It can provide a valuable instrument for probing real world disputes, the policies and competing claims entailed, and their ramifications. Even real world courts do this: they consider various situations that have not come before them, and they provide dicta to reach situations or issues not before the Court.<sup>15</sup> Their dissents reveal differences in attitudes and perspectives among the judges, and so on.<sup>16</sup> Hence the Jessup offers us an instrument to probe important, but oft-treated marginal, issues that every international court must face such as whether a dispute offers a legal issue or, instead, is too political or too involved in

The systemic standpoint, or the overall *logic* of the method is a separate point of departure - referred to as *the contemplative standpoint*. The key point in the value system adopted is that of power: "political science, as an empirical discipline, is the study of the shaping and sharing of power." *Id.* at xiv. The dynamic features are characterized by perceptions that show change, "patterns of succession of events," rather than fixed equilibria. The overall frame of reference is readily adopted in the Jessup because both it and the framework of power and society speak to the realities of human action and decision. Hence, decision making is forward looking, formulating alternative courses of action extending into the future, and selecting among the alternatives by expectations of how things will turn out. *Id.* at xv-xvi.

13. See generally Legal Education, *supra* note 1 (discussing the interaction of social policy and law in the context of practicing international law).

14. See POWER, *supra* note 12, for a frame of reference familiar to international lawyers. This frame relates to unraveling the decision and policy making activities of individuals, enterprise and governments. The approach is aimed at the decision process in the context of problems, and the overall goal is aimed at future courses of action.

15. The latest opinion of the International Court of Justice, an advisory opinion, relating to the permissibility under international law of states possessing, or using, nuclear weapons includes *declarations* of a number of the judges. This device enables the judge to step aside from handing down a concurring or dissenting opinion, or, presumably from refraining from giving any opinion at all, though this is controversial. It enables such judges to speak to all or any occasion, for any purpose, simply because the declaration is that judge's perspective or comment on the case even while he is refraining from any further participation in the case. See The Nuclear Weapons Opinion, 1996 I.C.J. The larger problem of the *declaration* might be explored along with advisory opinions by future Jessup competitions. See, *infra*, discussion on advisory opinions in this paper.

16. See LOUIS JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 7 (Harvard Univ. Press 1933). Though his inquiry primarily assesses the role of the courts in foreign policy, Jaffe's remarks bring up the general problem of making decisions and policy in foreign affairs:

[t]he courts must move about in the spacious and dangerous realms of policy and statesmanship; they are called upon to make a choice from among conflicting attitudes. Such a choice will not only answer implicitly the given problem, but will also transcend the results in individual case. Unless, then, a writer admits that below the reasoned surfaces there is a question of attitudes, his objective legalism will rest on a quicksand of subterranean compulsions.

regulatory, administrative or discretionary matters for an international court to tackle, let alone monitor or supervise.<sup>17</sup>

The Jessup problem is a problem that should be designed so that it can address a situation or events that have already been presented before a court. Or, the Jessup can look at an array of real world problems and situations to consider issues that might never be raised in the immediate term of a court. Or it can look into a hypothetical problem working with real world premises and assumptions. Or, we can even consider for the Jessup a problem that is *sub judice* in international courts or tribunals.<sup>18</sup> All of these matters will eventually flow into the broader streams that make up the great collegial effort that is part of the conscious shaping of international law, its concepts, and its decision-making impacts. But to achieve this expanded perspective for the Jessup we must adopt as its goals wider missions, such as those mentioned here.

The Jessup is also a valuable and refined instrument of learning and argument that can be used by others such as courts, schools, advocates, working in or concerned with analogous cases. It offers a rare opportunity to undertake with great care and in great depth an appraisal of disputes and the applicable normative rules or principles. Clearly, the effectiveness of the Jessup Competition depends upon the participants, but in the hands of outstanding practitioners the Jessup and its contestants can reach outcomes that match the efforts of experienced jurists. The Jessup

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17. The notion of the *political question* and the practice of international courts to deny adjudication of such questions is pervasive in the legal disputes brought before international courts. However, the distinctions made between legal issues and political issues are not precise. United States Supreme Court practice should be consulted. Jaffe considered this problem in the context of the domestic courts of the United States, and in the context of a Constitution calling for a separation of powers, but not laying down standards that determine precisely when and how those powers are to be separated. The interaction and complexity of making this cut between the authority of the executive and legislative branch is such that the Court, as Jaffe points out, has frequently abdicated decision and left it a *political question* to be worked out by the other two branches. With italics of his own, Jaffe cites Quincy Wright, and his observations that we can make our distinction between the practice of the courts — constitutional understandings — and the law of the Constitution, to wit:

The constitutional understandings are based on the distinction between the possession of a power and discretion in the exercise of that power. The law of the constitution decides what organs of the government possess the power to perform acts of international significance [inter alia], but the understandings of the constitution decide how the discretion or judgment, implied from the possession of power, ought to be exercised in given circumstances.

*Id.* at 10.

18. In a sense a matter that is *sub judice* in the international tribunals simply is converted into a hypothetical problem because the Jessup designers will not have what the court or tribunal itself has by way of facts. Additionally, because the approaches of a real world court and a Jessup differ the case will have the hypothetical element imparted by these factors.

does include among the judges, especially in the final round, distinguished jurists from the International Court of Justice and other high tribunals. And perhaps more than the ICJ, the Jessup has the added competence to question and probe issues from many points of view. The repetition of the moot court trials upward through the Jessup competition tends to add further refinements. To facilitate these refinements, the Jessup might include a rule enabling contestants to modify their memorials several times as they move forward.

The Jessup also provides us with a teaching tool. In praise of this teaching aspect, the losing contestants have indicated that they benefited from this feature even though they also saw the contest as one to be won. Taking advantage of the Jessup is a teaching text about the law of war, which makes use of a modified version of the Jessup. The text is open-ended because a given problem in factual terms will always face changing law, or changing attitudes about law. Thus, an instructor using a Jessup oriented text is in the position to use an appropriately designed text over a period of years, adding or eliminating situations or facts, and adding supplementary materials of the instructor's own law or, for teaching purposes, even facts that had not been included in the earlier versions.<sup>19</sup> We can envision that this use of the Jessup might expand in the future because the instrument it provides demands wide participation by the class and instructor.

In this text the student learns from a form of practice. Through a simulated unraveling of a problem dealing with a complex subject, the student becomes familiar with the law of war and the law relating to the use of force. The Jessup format is being used except that the facts are not presented all at once, but in a sequential and simulated real time basis as the conflict proceeds, uncovering a wide variety of legal issues to be considered. This approach has some similarities to the briefings of high ranking military officers at the Department of Defense in the various exercises involving contingency operations, where the officers are briefed in a real time combat situation, and then enabled in the game that follows to engage in a simulation of a wartime situation.

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19. I am suggesting here that this text might be able, appropriately designed, to remain as the primary problem theme. If for example the Geneva Protocols of 1977 (Publication of the International Committee of the Red Cross, Bern, 1977) had appeared after the text was in print, a supplemental text could readily be added incorporating the impact of those Protocols, and the documentary supplement could include the Protocols. Additional protocols have been concluded concerning weapons of mass destruction, land mines and so on. In other contexts, such as the games and briefings that make up the teaching techniques of a military staff there is now a wide body of experience concerning the use of briefings and simulated actions taking place under conditions very similar to those of an emergency or crisis.

Although beyond the scope this paper, we might raise a further problem to be probed through Jessups in the future. The Jessup approach might enable us to consider more deeply on a collegial basis the decision and law-making processes and activities of governments. Because disputes, disagreements and misunderstandings are natural features of human interaction, we need to know continuously how far we can invoke a court in such matters. It is evident that most of the law-making process, especially those that involve trans-national activities, occurs outside the courts, and much of this process involves dispute settlement and the accumulation of a wide variety of dispute settlement mechanisms.<sup>20</sup> The Jessup, modified in approach, might enable us to probe the new institutions and practices accumulated.

The Jessup offers the opportunity, not yet explored, of tackling legal questions where advisory or commentary opinions are demanded. The traditional dispute format of the Jessup, following fairly closely the practice of the International Court of Justice, involves two states with a dispute that can be resolved under law, pursuant to Articles 36 and 38 of the ICJ statute. Under this authority, the court is to resolve legal disputes by applying the applicable or relevant law. But for an advisory opinion, legal questions about law are raised before the ICJ by way of a request from an appropriate organ of the United Nations.<sup>21</sup> Because the Jessup format does not precisely follow the ICJ, it would be possible, in the Jessup context, to consider requests by almost anyone for advisory recommendations concerning the implications of any legal question or prospective courses of action. In short, the Jessup offers flexibility that is

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20. See John Jackson, *Dispute Settlement Techniques Between Nations Concerning Economic Relations - With Special Emphasis on Gatt*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* (T. Carbonneau ed., Univ Press of Virginia 1990). This article, as well as the book in general, provides a valuable insight into the growing competence for resolving disputes in the course of the decisions and the processes of claim.

Although I will not discuss them all, in a broad sense there a large number of GATT dispute settlement procedures. In fact, one can identify over thirty such procedures. For example, there are nineteen clauses that obligate the parties of GATT to consult with each other in specific instances. Each of these might be termed a dispute settlement procedure. Likewise, there are seven different provisions for what the GATT calls "compensatory withdrawal or suspension of concessions." *Id.* These allow one party to withdraw concessions from, or alter its trade relationships with, another party in the face of certain types of actions by that other party.

It is evident that an important procedure in dispute settlement is one aimed to achieve accommodation of differences among the parties, and that a further goal is to ensure effectiveness and enforceability of the procedures adopted in the GATT context, by giving parties the authority to impose sanctions on others who carry out "certain types of actions" not permissible under the GATT. THOMAS E. CARBONEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* (Univ. of Ill Press 1989).

21. See the U.N. CHARTER, art. 96; I.C.J. Statute, art. 65-68.



not available in the real world of the ICJ, but in return for foregoing real world decisions in a real world context, we are given the opportunity of testing such decisions where we can enjoy the luxury of trial and error. Clearly, these are matters that require further review.

Accordingly, if in the future we were to develop a Jessup competition to work with legal questions while following the practice of the ICJ, we would be looking to the interesting yet complex problem of working out an approach for future contests that would employ the advisory opinion. This would open the Jessup to a number of important possibilities in testing the contestants and in testing the ICJ as an institution to promote customary international law through its own actions in the formulation or prescription process.<sup>22</sup> We would also be coming face to face with the matter of formulating international law through the court and the practices established or institutionalized to ensure that even though recommendatory, the advisory opinions would be expected to be assimilated as part of the customary international law. This format, both for the Jessup and for a more active ICJ involved in advisory opinions, would require that the judges, and perhaps a staff to assist the judges, have a more active role in the intended output.<sup>23</sup> At the same time, while the

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22. Professor M. Reisman observes as to prescription that we are looking at a function of decision, pointing out:

[p]rescription or law-making...occurs when actors, with varying degrees of authority, select and install certain preferences about policy as community law. This may be accomplished by a legislature or some other organized law-maker; but it is usually, and, especially in international law, largely accomplished in informal and sometimes even chaotic processes whose outcomes are generally referred to as 'custom.'

Michael Reisman, *A Jurisprudence from the Perspective of the Political Superior*, 23 N. KY. L. REV. 605, 612 (1996).

Because decisions are effective when enforceable, the other functions of decision [six are mentioned by Reisman] can be separately assessed for the law-making impact when they are used. Law-making is a component of enforcement shaping new law or applying the *existing* law. *Id.* Articles in depth relating to this approach are cited by Reisman in his footnotes.

23. This paper does not recommend the abandonment of the Jessup format, but is intended to critique the format, seek other probing devices such as that proposed in coupling the gaming and moot court approaches, and test such things as the declaration and codification of customary international law under the advisory opinions of the International Court of Justice. Law especially as practiced among states or nations can be conceived as a policy instrument, a support to policy, a support to the creation of public order, or the management of undesirable activities such as aggression. In any event the advisory opinion has not been exploited either in the Jessup or in the real world by the International Court of Justice and the contestants have so far not exploited the opportunity to appraise the Court and its limitations in developing customary international law by way of advisory opinions. A comparison of the law-making activities and reciprocating support of such activities in the *legislative* sense of the Court under its advisory competence and the *legislative* thrust in the formulations or prescriptions of treaty law has had an ample assessment in the literature.

opinion is the opinion of judges, the advisory opinion would take on a legislative or prescriptive character.<sup>24</sup>

But this is not the place to critique the use of the advisory opinion, in the real world, or in the Jessup. At the present time in the Jessups no written opinion is handed down, and it is not proposed at this time that one should be prepared in the Jessup contest. But such a proposal for the court and its work in the real world is another matter. Opinions are provided, complete with dissents, under conditions and under assessment procedures, differing from those in which states come together to make law through their treaties. But if we were to have the Jessup court pass on legal questions, we would need to be assured that the legal question is appropriately framed; that the differing perspectives of the advocates as to the legal question be introduced to the court; and that the court be called upon to issue its opinion.

Although a legal question may be the starting point for a variety of responses, including those that may be contrary to each other, we might arbitrarily break the problem involving advisory competence of the Jessup Court into two sides, each presenting an opposing view as to the response sought for the legal question. This format would be close to the war gaming approach where an analysis and a report are made at the close of the game.

If the Jessup court were given the competence to issue advisory opinions for a future Jessup Competition, the report of the Jessup judges, or even of a separately constituted panel of overseers and reporters, might be simplified. Under this approach, the Jessup judges would consider and pass upon the positions and arguments presented by the contestants, the differing strengths of these, and the conclusion of the Court, operating as a panel.<sup>25</sup>

Of course, in the Jessup context, there is another possibility for the Jessup court to review requests for an advisory opinion that is somewhat less ambitious. The legal question for an advisory opinion could be presented in the Jessup context by two sides, guided by the Jessup

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24. It will be recalled that the judges of the United States Supreme Court, at an early stage, advised that under the Constitution advisory opinions would not be advisable. The judges pointed out that the Court was designed to adjudicate "cases or controversies" pursuant to Article III Section 2. The cases involving the "legislative courts," their distinctions and wider jurisdiction have been widely analyzed. Advisory opinions are recognized in the adjudicatory practice in other countries. For a general assessment see HENRY MELVIN HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (Foundation Press 1953).

25. The alternative would envision a panel of judges and a panel of reporters working together: it is probably too difficult for the Jessup judges to act as their own reporters and to expect them competently to handle the judging.

guidelines to advocate differing or opposing points of view concerning the legal question, and acting in place of the larger number of participants in the real world of the ICJ. The Jessup Court could then consider the opposing positions, and come down on the position that was best presented. It might be required to provide a very brief statement supporting its determination and no more.

The first approach might provide a more valuable output both for the academic and the practicing community of lawyers and jurists, but the second might be more appropriate for the decisions that are to be taken by an ad hoc group of judges operating in the traditional form of the Jessup. It should be borne in mind, however, that even with the traditional Jessup competitions, the court provides only its views as to the persuasive or argumentative quality of the contestants' presentations and it does not provide an opinion. The Jessup court does not rely upon facts or materials introduced from outside the problem, nor does it review the memorials, which are reviewed by others. The second approach thus serves one of the major objectives, to wit, an appraisal of the forensic capabilities of the contestants and the selection of those that are superior in a given contest. Of course, both approaches serve the learning objective mentioned earlier.

But if pursued, the venture into advisory competence offers the Jessup an opportunity to undertake a further task of probing.<sup>26</sup> The ICJ,

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26. Pursuit of a theory of advisory opinions might also benefit by assessments or inquiry into what is expected from a court that is providing such opinions. See, e.g., ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY* (Chandler Pub. Co. 1964). According to Kaplan, we are not compelled in social order inquiries, including inquiries into law and its jurisprudence, to meet the standards of a pure and exact science, or those expected in the physical sciences. He points out that "science itself manages quite well even though its own most basic principles are something less than necessarily and unconditionally true." *Id.* at 13. If the preparatory work for an advisory opinion in the ICJ or the Jessup Court requires new methods or techniques, there is ample development of methodology to draw upon:

[m]ethods are techniques sufficiently general to be common to all sciences, or to a significant part of them. Alternatively, they are logical or philosophical principles sufficiently specific to relate especially to science as distinguished from other human enterprises and interests. Thus, methods include such procedures as forming concepts and hypotheses, making observations and measurements, performing experiments, building models and theories, providing explanations, and making predictions.

*Id.* at 23.

Kaplan later observes:

[a] scientific concept has meaning only because scientists mean something by it. The meaning is scientifically valid only if what they intend by it becomes actual: problems are solved and intentions are fulfilled as inquiry continues. Since Kant, we have come to recognize every concept as a rule of judging or acting, a prescription for organizing the materials of experience so as to be able to go about our business. Everything depends, of course, on what our business is.

*Id.* at 46.

the object of such probing, is an institution that is gradually gaining strength with regard to customary international law and the promotion of treaty law. The global community stands to benefit from such efforts at promoting a court that began its life in a weakened position. A determination, even on the moot court-gaming dimension, may assist us in finding what we can expect from the ICJ, and under what conditions these expectations might become operative. Hence the venture can probe the possibilities through moot court exercises of strengthening the competence of the ICJ itself. The specific possibilities of this nature and even a preliminary inquiry into the appropriate theory of advisory opinion jurisdiction, either for the ICJ or the Jessup Court, are not explored here. But such an inquiry might include in our objectives an expansion of the ICJ and its panels to reach regional disputes, and a more sophisticated competence for the advisory jurisdiction of the ICJ.<sup>27</sup>

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“Recognition is the source of all our natural knowledge,” Whitehead has said. “The whole scientific theory is nothing else than an attempt to systematize our knowledge of the circumstances in which such recognitions will occur.” It is the enterprise of making those identifications in experience which prove to be most significant for the control or appreciation of the experience yet to come. *Id.* at 85.

Laws are not generalizations at which we arrive we have established the facts; they play a part in the process of determining what the facts are. Indeed, we may without a vicious circularity accept some datum as a fact because it conforms to the very law for which it counts as another confirming instance, and reject an allegation of fact because it is already excluded by law.

*Id.* at 89.

27. KAPLAN, *supra* note 26, at 89. Also see the discussion made in this paper *infra*. Whether or not theory formation is the most important and distinctive scientific activity, in one sense of the term *theory* this activity might well be regarded as the most important and distinctive for human beings. In this sense it stands for the symbolic dimension of experience, as opposed to the apprehension of brute fact. The content of our experience is not a succession of mere happenings, but a sequence of more or less meaningful events, meaningful both in themselves and in the patterns of their occurrence. They are consequential, that is - significant in their bearings on one another. *Id.* at 294.

A theory is a way of making sense of a disturbing situation so as to allow us most effectively to bring to bear our repertoire of habits, and even more important, to modify habits or discard them altogether, replacing them by new ones as the situation demands. In the reconstructed logic, accordingly, theory will appear as the device for interpreting, criticizing, and unifying established laws, modifying them to fit data unanticipated in their formulation, and guiding the enterprise of discovering new and more powerful generalizations. To engage in theorizing means not just to learn by experience but to take thought about what is there to be learned. To speak loosely, lower animals grasp scientific laws, but never rise to the level of scientific theory. *Id.* at 295.

Theory puts things known into a system. But this function is more than a matter of what the older positivism used to call *economy of thought* or *moral shorthand*, and what today is expressed in terms of the storage and retrieval of information. It is true that the systematization effected by a theory does not have the consequence of simplifying laws and introducing order into congeries of fact. But this is a by-product of a more basic function: to make sense of what would

Lastly, we can invoke the Jessup moot court framework for testing and also teaching the use of models or theories to promote the assimilation of common standards of policy and law.<sup>28</sup> In short, it offers a setting amounting to a meta-world setting: it offers us a chance to look at how we and others look at real world happenings, and with sophistication of technique, how we from differing cultures go about solving and working the problems. Although the Jessup invokes law, it is not the means for generating law. It might of course generate law for the problem, but this is not the law we might anticipate will be applicable in the real world. And it is evident that the Jessup does not provide us with precedents of law either for future Jessups, or otherwise. But participating in the Jessup assists in the promotion of scientific thought, and assists in shaping effective mind sets of those involved in clarifying complex problems of policy and strategy.

But, this is not the place for working out a theory of theories<sup>29</sup> or for constructing a program that might help us break up and analyze policy and legal problems as such.<sup>30</sup> Unquestionably our goals will call for

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otherwise be inscrutable or unmeaning empirical findings. A theory is more than a synopsis of the moves that have been played in the game of nature; it also sets forth some idea of the rules of the game, by which the moves become intelligible. *Id.* at 302.

It might well be said that the predicament of behavioral science is not the absence of theory but its proliferation. The history of science is undeniably a history of the successive replacement of poor theories by better ones, but advances depend on the way in which each takes account of the achievement of its predecessors. Much of the theorizing in behavioral science is not building on what has already been established so much as laying out new foundations, or even worse, producing only another set of blueprints. *Id.* at 304.

28. See discussion generally in the notes from Kaplan's study.

29. See POWER, *supra* note 12; KAPLAN, *supra* note 26. See brief introductory note in the discussion of this paper. The commentators generally perceive strategy as a theory of control, and military strategy therefore becomes a control over the weapons, methods of use, and the war fighting activities.

30. For the interaction of concepts in theory and strategy, see J.C.WYLIE, MILITARY STRATEGY: A GENERAL THEORY OF POWER CONTROL (Greenwood Press 1980). Although discussed later in this paper, that discussion can usefully be anticipated here. Wylie uses the term *power* as a term of value, following the usage adopted by Lasswell, McDougal and their associates. See STUDIES, *supra* note 1. He observes that "while strategy itself may not be a science, strategic judgment can be scientific to the extent that it is orderly, rational, objective, inclusive, discriminatory, and perceptive." Wylie's definition thus contains two elements. Strategy, he says, can best be defined as "a plan of action designed in order to achieve some end; a purpose together with a system of measures for its accomplishment." WYLIE *supra* at 13. Wylie argues that his definition has two elements: the definition is not limited to war or even military applications. And the definition involves the balancing of relevant factors that comprise the definition. Hence the purpose and system of measures to achieve the purpose are included in the single concept. His framework thus would assist us in using the Jessup moot or the wargaming concepts and contexts or all of these. Wylie observes: "It should be recognized at

achieving such a program or even a theory of control eventually.<sup>31</sup> But the purpose here is to introduce the gaming concept in the framework of the moot case, and analyzing that framework to determine its potential in shaping or at least testing attitudes. The Jessup offers us the opportunities for exposing the attitudes of the participants in the context of a Jessup context — the predispositions, biases, assumptions, inferences, and the skeptical features in their decision making efforts. Our purpose, which is scientific in nature, is to work toward finding the way to common objectives and standards and a common vocabulary among the contestants and others; toward installing trend thinking; and toward scientific skepticism. These attitudes are likely to be most fruitful in pursuing a scientific inquiry and the scientific and progressive development of the decision-making art.<sup>32</sup>

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the outset of this discussion that a strategy has no moral quality of its own. It is inherently neither good nor evil; it is always normative or concerned with values." *Id.* at 15.

Wylie referring to principles of war observes a qualification to the effect that the wise commander must know when and how to apply the principles and also when and how to violate them. I think that what the principles really are is an attempt to rationalize and categorize common sense. I suggest that worship of any such patter as the *principles of war* is an unaware substitution of slogan for thought, probably brought about the by intellectual formlessness that must inevitably exist when there is no orderly and disciplined pattern of fundamental theory from which one consciously or unconsciously takes departure. *Id.* at 20. Wylie points out that he has never come across the use of principles as the means to achieve a strategy.

31. See WYLIE, *supra* note 30, at 10 (discussing strategy a quest for control).

The basic patterns of strategic thought should not be looked on as any kind of a secret. The more people who know about and understand these patterns, the more healthy will be our democracy in its strategic decisions. The Congressman voting on a military appropriation is, in a very real sense indeed, making a fundamental strategic decision, and he does not need very many *secrets* to lead him toward a sound decision.

The same could be said of the citizen's participation and enlightenment about the emergence of a global law affording him as a major outcome the enhancement of his nation's - and his - security. Hence Wylie, while speaking of military strategy, has reached the conclusion that the McDougal-Lasswell approach provides the appropriate theory:

I have been talking about one form or another of military control. But I do hope that it has come out clearly that military control, or military affairs in the broad sense, can seldom be taken up in isolation. Military matters are inextricably woven into the whole social power fabric. And this is why a general theory of strategy must, I believe, be a theory of power in all its form, not just a theory of military power.

*Id.* at 110

32. See *id.*, for a discussion of the interrelationship of theory and strategy for military purposes: Wylie is on a continuous quest for control in the decision process that will enable his strategy to serve military activities in a collegiate sense. In law the general approach is toward the promotion of public order - global public order among states. But as McDougal and his associates have pointed out, we realistically seek immediate attainable goals, and carry this out in the larger context of a comprehensive program for more remote goals. See STUDIES, *supra* note 1. The observations of Hausrath are enlightening:

### *B. The Benefits of Gaming*

So, to what extent can the experience of gaming benefit the strengthening of the Jessup Moot Court as an instrument both for learning and for promoting policy? Some experts to be sure have insisted that the potential for prediction through war games or through moot competitions are matters that are generally speculative. Allen, citing other authors, points out:

I believe that models can be used for military gaming. But political-military gaming? You can't predict. You can't even predict what's likely to happen. You may get some insights, but unless you have enough data that can be quantified and enough data that will give you what I call actuarial comparisons, you can't be sure of what is typical and what is atypical. The model is useful only if it can represent a typical situation.<sup>33</sup>

Despite these comments, combinations of gaming and the adversary test of the moot court regime might be considered through a joint effort among theorists for both approaches. The objective of combining the two is to look into validation of a theory not possible by pursuing one approach alone. The adversary environment of the Jessup problems offers us an opportunity of testing the receptivity of claims by an independent, objective tribunal. The data and intelligence flowing to the war gaming center, appraised after the introduction of the military and

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[f]ormal games attempt to investigate a particular group of questions or problems, obtain an adequate amount of data from the game, and organize all into meaningful comparisons or summaries. It is rare that the gross result of the game - as, for example, Who won? - is a prime consideration. In this respect a war game is unlike a sports contest. In a sense, all war gaming is undertaken for learning purposes, in preparation for leadership and employment of military forces in real war. Therefore, the emphasis is placed on finding ways to improve, or to use, resources for maximum combat effectiveness.

So likewise the use of a gaming approach coupled with the moot court might serve us in the future for the same purposes, but perhaps more for the purposes of extending our use of the International Court of Justice, and the options available for expanding a reasonable claim of jurisdiction. Hausrath pursues his inquiry into the use of war gaming to reduce the costs as well as to refine the methods of warfare.

*Id* at 91.

33. See ALLEN, *supra* note 5, at 64. Writers such as Klaus Knoor and Oscar Morgenstern have denied the scientific possibility of prediction. McDougal and his associates propose the use in the social sciences at least of a value orientation and trend thinking. See STUDIES, *supra* note 1, at 51-58.

other related instruments in the gaming context, can become an appraisal of testing data by claims, and of compelling the adversary system to produce its results by imposing the claims process on a changing environment. In effect, the judges for the gaming action are not the judges of the gaming process, but the judges and the process of adversarial claims of the moot court. Adjustments to make this system operative, and to introduce law as an element in decision will be required. The procedures and process for working in the gaming setting as the setting that is the precondition for the adversary setting of the moot court must also be designed. But in doing this we must recognize that data banks are not infallible. If there is no funding to keep them complete and current, or if the personnel for producing and maintaining the data banks are untrained or incompetent, they will fail us when we need them.

The experience so far with war gaming suggests that gaming techniques might be coupled with the moot court in order to strengthen the moot court as a probing or testing mechanism. When the Jessup competition is considered in the gaming context; that is, when we perceive a widened number of participants and situations involving legal disputes in which a larger number of participants are involved, we can exploit opportunities for testing or probing perspectives of the larger number of participants much as we encounter these in real world conditions. Although gaming differs whenever we shift the context of the games, or whenever the policy content and context are varied, the gaming approach can be refined by considering the experience of gaming in general, especially war gaming.<sup>34</sup> Allen describes the sophistication reached so far in war gaming:

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34. Wargaming might be expanded and in view of their similarities, the Jessup Moot Competition might also be expanded where the objective is to get results not presently achieved by the real world courts. War gaming for example might include the peacetime problems of force planning. See ROBERT P. HAFFA, *PLANNING U.S. FORCES*, (Nat. Def. Univ. Press 1988). He observes in a passage that suggests the similarities between the approaches to problems concerning the use of weapons and military attack [wargaming in the *pure* sense] and the preparation of military capabilities under force planning. There are further similarities in gaming military exercises, and so on. Haffa states:

Paul Nitze distinguished between declaratory policy - statements of political objectives with intended psychological effects - and action or employment policy - concrete military objectives and plans employing current [military] forces in support of those objectives. Nitze also saw the requirement to match the two levels closely, lest declaratory policy appear hollow or employment capability inadequate. But that fit has never been perfect . . . .

Force planning is the development of [military] forces flowing from the requirements of declaratory policy or the shortfalls in employment policy. Force development planning should, therefore, unite a declared strategy and the means to implement it. . .



I really try to create the atmosphere of a White House; the confusion, the leaks, [and] the turf problems. When I put a game together I'm looking for certain decisions to be made and I want to confront them with certain problems. And then I want to give them out to these human beings and I want them to get upset. Not too upset. It's not a highly refined art form. And yet you can kind of predict where it's all heading because you know what the options really are.

I think the term art form is correct. I don't think there's a science in this. It's not inferentially based. Nor are there controlled conditions under which it's done enough to get neat statistical evidence.

The search for that neat statistical evidence has led military game designers away from human beings and toward the most rational of all players, the computer.<sup>35</sup>

The most appropriate appraisal can be made by considering the widely adopted practice among military officers to become involved in war gaming. The experience gained in gaming about war is useful in itself for assessing the success of the Jessup Moot Court and similar dispute

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. Declaratory policy is the strategy of the elected political leaders. . . . Employment or action policy, on the other hand, lies in the domain of the military.

*Id.* at 4.

35. ALLEN, *supra* note 5, at 281-82. Consider the conclusions concerning the utility and effectiveness of gaming as established by Allen. War gaming is at the stage where effective use of the games is achieved by simulated solutions to real problems. *Id.* at 289. War gaming is already used to test hypothetical but real world simulations as well as to provide experience and teaching to those who participate in the game: Simulations are the next best thing to testing weapons and defenses against real Soviet submarines or tanks. And here the spectrum [of gaming] gets cloudy. Testing is a fine art that balances the reality of battle against the abstraction of a would-be weapon. Testing is an art like other arts, for it attracts creators, clients, patrons - and critics.

War gaming teaches that only the games that have a working framework of rules can be played and if the problems are raised under the rules they can then be solved:

[w]e learn very early in life that games have rules. The value of a war game is that it shows the results of a war when it is played as a game, with rules. Ever since the days of the Battle of Maldon the warriors of Western civilization have tried to wage war by rules. When nuclear war became the new kind of war, we tried to stick with the old rules. If Ivan and Sam have taught us anything it is this: The nuclear threshold is the place where war by the rules ends. Beyond that threshold, no war game can go, for beyond that threshold there are no rules.

*Id.* at 350.

settlement contexts when measured against their objectives, and it is also useful because gaming is a process in which adversary positions are taken. An imaginative group of participants may also be able to mine their war gaming efforts to uncover new or innovative means of dispute settlement. New process-oriented dispute settlement procedures might benefit us by reducing the possibility of a failed enterprise, or the likelihood of producing a controversy that might become more important than the enterprise once entertained in an adversary setting such as an arbitration or adjudicatory tribunal.

Gaming, in general, provides the situations and simulation for working with perspectives and principles in an operational context, where others are involved, and where differing perspectives are in contest. It provides an operational setting for the vocabulary, concepts and symbols that must be used for communications among opposing groups and within the groups as well.<sup>36</sup> But unlike war gaming, the gaming of legal disputes through refinement of the Jessup would draw more deeply upon the interaction of decisions and claims that reach into principles and theory; the application of principles and theory; and the theory of application.

We can anticipate and draw upon fruitful experience from the war gaming context, and work with conceptual elements that have their counterpart in the struggles of advocates. In time, if adopted, the gaming of the moot court situations will reinforce and strengthen the war gaming process also.

War gaming is undertaken by military and political policy-makers to investigate the processes of combat. The objective is not the real world of combat in an effort to assist in calculating the outcomes of those processes, but to provide a setting in which decisions are made, abstracted from the real world, yet linked to it because the experience in gaming decisions in itself is useful. But caution is needed. One writer on war gaming, familiar with the use of such games at the Naval War College in Newport, Rhode Island observes:

The power of a wargame to communicate and convince, however, can also be a potential source of danger. Wargames can be very effective at building a consensus on the importance of key ideas or factors in the minds of

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36. According to PETER PERLA, *THE ART OF WARGAMING* (Naval Institute Press 257 1990), playing non-U.S. or threat roles in a professional wargame is not really much different from playing friendly or *Blue* roles. Playing the threat well, however, requires special effort, and often special training or expertise. *Red* players must understand not only the technical capabilities of the opposition, but their tactical and strategic doctrine as well. To *play Red*, the player must learn to *think Red*.

participants. They attempt to create the illusion of reality, and good games succeed. This illusion can be a powerful and sometimes insidious influence, especially on those who have limited operational experience. For example a poorly designed game could allow players access to an unrealistic quantity and quality of information and so give those players a false picture of the worth of a weapon system that relies on just such unattainable information to be effective.

In wargames, as in any approach to study and analysis, there is always a possibility that intentional or unintentional advocacy of particular ideas or programs may falsely color the events and decisions made in a game and lead to self-fulfilling prophecies. The designer of a game has great power to inform or to manipulate.<sup>37</sup>

Nevertheless, the experience of those involved in war games and the practice that they afford can be probed for looking into the use of the Jessup competition as a multi-faceted instrument. As such it can serve to examine in depth the current problems of international law. It can serve to provide innovative ideas for promoting that law. And it will serve in honing the minds and thinking of the contestants and observers with regard to that law. The final rounds of the Jessup, even in its present form, without the added refinements that may be available in the war gaming experience, deserves to be televised for broader public consideration.

To determine the concepts of gaming and their application to the Jessup competition, we might look more closely at the experience achieved in war gaming. The purpose of these games has been to acquaint those who play with the past experience of others in military combat. The predictability powers of war games in the past has been spotty, but the utility of war games, as the only device that has been sufficiently refined to approximately fit real world activities played out in real time, has been recognized.<sup>38</sup> And if it does not serve explanation, war gaming, in any event, serves other purposes which will be discussed here.

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37. *Id.* at 182.

38. Predictability through models may be something that cannot be expected scientifically even when the models are used for the physical sciences. As part of an analysis in greater depth, Abraham Kaplan, appraising explanation and prediction, points out:

In whichever way explanation is reconstructed [i.e., as a deductive model or pattern model], prediction is at least a possibility. In both models, laws serve to explain events and theories to explain laws; a good law allows us to predict new facts and a good theory new laws. At any rate, the success of the prediction in either case adds

According to one expert, the war game has many of the features that were first caught up by Clausewitz, observing that warfare is the great decision arena of the unpredictable, described in his metaphor of "the friction of war."<sup>39</sup> James F. Dunnigan, a consultant to the Department of Defense on wargames, first notes that there are various ways to play the wargame. However,

Basically, you obtain good games by paying attention to past experience (history) and letting the chips fall where they may. Combat is a dispassionate arbiter of what works and what doesn't. If your games reflect political rather than combat reality, you're likely to find yourself fatally ill-prepared on the battlefield. . . . However, current peacetime illusions will always carry more weight than future wartime reality. Unless someone is shooting at you, immediate political demands take precedence over potential military ones. This can change if you actually develop realistic wargames, use them diligently, and widely distribute the results.<sup>40</sup>

As mentioned earlier, wars are arenas replete with uncertainty — with the murkiness of weather symbolizing the murkiness of the military campaign. Hence, according to Dunnigan,

Nothing new here except that historically there has always been a steady drift from reality in the peacetime military. Warfare is a complex process that cannot be easily

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credibility to the beliefs which led to it, and a corresponding force to the explanations which they provide.

KAPLAN, *supra* note 26, at 346.

39. According to Clausewitz:

[e]verything in war is very simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war. Friction is the only concept that more or less corresponds to the factors that distinguish real war from war on paper. This tremendous friction, which cannot, as in mechanics, be reduced to a few points, is everywhere in contact with chance, and brings about effects that cannot be measured, just because they are largely due to chance. One, for example, is the weather. Fog can prevent the enemy from being seen in time, a gun from firing when it should, a report from reaching the commanding officer. Rain can prevent a battalion from arriving, make another late by keeping it not three but eight hours on the march, ruin a cavalry charge by bogging the horses down in mud, etc.

CARL VON CLAUSEWITZ, *ON WAR* 119, 120 (Howard and Paret, ed. And trans. Princeton Univ. Press, 1976).

40. PERLA, *supra* note 36, at xviii.

understood when you can't actually do it. So it's understandable that peacetime preparations, including gaming, will 'drift' away from the unknown wartime reality. Contributing to this drift are new weapons and equipment, new tactics and doctrine, and new political situations. Social changes also have an impact: things like economic growth or decline, different partisan political differences, and the replacement of conscription with volunteers. These changes are complicated by changes within potential enemy nations. All of this is further clouded by secrecy.<sup>41</sup>

Dunnigan's observations conclude with the general usefulness of the wargame. In his view, the games provide a setting for exercising thinking, perception, and decision making skills that no other device could afford. Though warfare is fraught with uncertainty, he noted that the usefulness of war games is in what it can accomplish in the decision-process, experienced in practice with others. The quest is toward the assimilation of the realistic patterns of behavior and conduct, and the cautious assimilation of what the games can offer. "Before the Japanese defeat off Midway Island in 1942, Japanese admirals dismissed wargames that showed they could lose their carriers using their current plans. The Japanese admirals went ahead, and lost four carriers and naval superiority in the Pacific. You trifle with wargame validity at your own risk."<sup>42</sup>

We could add to the above the fact that war games extend back to antiquity. Though the games of antiquity take different forms, as in the *Odyssey* of Homer, and in those forms lack some of the precision, predictability, or explanatory power of the present games, they afforded much in common. Decisions and policies are made by human beings in contexts that can be reasonably replicated, and the experience of making those decisions, in itself, is a significant skill-oriented and skill-shaping effort.

War games are thus mentioned here primarily to consider the conceptual elements that may be common to games in general. These

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41. *Id.* at xix.

42. *Id.* at xx. It should be borne in mind that the Japanese Chiefs of Staff did use war games, but their assumptions and inferences, and their perceptions of the realities of the war, were affected by outcomes that they insisted upon achieving. They had achieved great success in using their intelligence sources to locate the United States naval fleet at Pearl Harbor, the priorities to be attained as to military targets, etc. But they failed to consider the possible outcomes especially when all of the outcomes might be materially out of control once the fighting had commenced.

common elements may be used to consider the Jessup competition, or the moot court, used by lawyers, and to determine how the moot cases such as the Jessup might be strengthened; thereby, strengthening the skills and the exercise of perceptions over situations by jurists. The jurists' art when faced with the legal order and decisions under law among nation-states, perhaps more than that of the military commander, may be able to benefit from war games concepts, adapted to the decisions of law even more than the military commander under his war games, because so much of the legal issues among states are issues that can only be approached or analyzed through the symbolism of policy, or through high degrees of abstraction, or by way of the generalities, and vague expressions and vocabulary of principles that must be brought to bear for resolution among choices.

The nature of war games indicates much that can be shared in common with the Jessup and other moot court games. To gain a better base for the purposes of comparison, consider the war game and how it operates at present. The war game, we have been told, is not analysis or intended to provide analysis of real world situations. It is not the means for making comparisons among alternative solutions. Second, the game is not part of the realities of state behavior; it is abstracted with changes necessary for games and the compressed time span for decisions. Third, the games are not things that can be duplicated.

The results, the nature of the play, the decisions and policies made or adopted, the reactions and tactics will differ, the strategies, if similar, will have been so broadly posited that they could encompass a variety of tactics and possibilities, with a variety of chances for success or failure. Though the non-duplication element reflects reality, the approaches taken are unique, as they are in the real world. The game, as Thomas Schelling has indicated, operates in the context of decisions and the decision process, and the strategies and tactics are shaped in the interaction process, that is, by the interaction of decisions.

In the war context, actions or decisions made by one side — new weapons, new tactics or methods of attack, new uses of weapons, and so on — lead to responses on the other side, not necessarily predictable. Wars occur in conditions of such uncertainty as to lead to chaos as to the choices and the conditioning factors that might determine the choices to be made by the decision maker, both in the real world and in the game. Wars are charged with variables and involve chaotic situations that affect military choices or affect decisions and action, but this element of chaos simply becomes a challenge for those involved to find innovative ways to accommodate change. And its presence is such that it becomes a factor in

the war game, or any other game of policy and decision, reflecting that change and chance may affect the results.<sup>43</sup>

War games, we are told, have objectives, whose clarity determine the effectiveness or success of the game. The overall context of the war game should be considered briefly in order to determine whether refinements to the moot court approach are possible, and whether, in particular, we can adapt the approach to enable the Jessup and similar moot court problems to provide a useful base for courts or other decision-makers that might be concerned with a similar problem.

The war game is designed to place the participants in specific situations — a context in which they make their decisions. The gaming procedure involves a data base or the information needed by the participants with regard to their making decisions. And it includes models or tables that translate the data of the game into the events that are taking place: these may be tables and mathematical expressions offering an opportunity to reflect chance in the operation. Rules and procedures set forth the means for applying the models. Finally, the game will have game analysis as one of its essential elements but the use of analysis will vary according to the purpose of conducting the wargame:

In a training game, analysis will usually consist of an instructor's observation and critique of the student's play. In a research game, analysis focuses on understanding why decisions were made. A good analysis plan, outlining where observers should be placed and what they should be looking for, is essential, but the process of game analysis not simply one of mechanics or even observation. The data collected during game play are only the raw material for the synthesis of insights and identification of issues.<sup>44</sup>

Perla summarizes the usefulness of war gaming in terms of the element of process: the role of the game is "to help human beings

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43. Perla argues that among the objectives or services afforded through wargaming are those that enable the participants to process information, to consider differing inputs and their impacts on expected outcomes, to investigate processes involved such as those of the interaction of belligerents to provide opportunities for learning, including the means to motivate or encourage further learning, to supplement other measures for assessing future policy, and so on. Wargames he warns are not to be confused with systems or operations analysis wargame analysis must be based "on a careful and comprehensive observation of the gaming process." Wargaming, he believes, resembles most closely *exploratory* science or historical research. *Id.* at 1-12.

44. *Id.* at 167.

investigate the processes of combat, not to assist them in calculating the outcomes of those processes."<sup>45</sup>

Perla refers to the design as an art, pointing out that experience alone of military officers, or others familiar with the workings of games, will suffice. War gaming, he points out, is a form of communication and resembles the construction of a historical novel. Gaming design requires "the construction of a framework, the creative building of an internally complete and consistent world whose broad contours are contained within the bounds of its historical context."<sup>46</sup>

The game, in play, arouses participants of the game itself, and, the wargame calls for the *sponsor* of the game, the source of the messages put to the players, to be involved in a communications flow actualized amongst players and sponsor. Communications entail the transmittal of questions, interpretations, inquiries for clarification, and even insights amongst these two groups.<sup>47</sup>

Design extends through the stages of concept development, research, drafting of rules, and so on. The primary guidelines are: first, those of an attempt to simulate accurately the historical events intended to be the subject matter of the game; and second, the simulation materials must be commensurate with that guideline. In a sense, these are the requirements aimed at a degree of realism and playability, making the game operative.

Other features in designing the game can be by-passed at this point, or briefly mentioned. The sponsor seeks to learn about certain outcomes through communications with the players: the sponsor thus has a stake in the game though it may differ from that of the players. Perhaps further analysis will show the nature of the stake of the judges of the Jessup in learning about outcomes, as well as the stake of the advocates or agents who argue the cases and seek to hone through their instruments of persuasion. Various questions can be raised as to these features. But these features resemble in many ways the framework of inquiry developed by Lasswell and McDougal, and their associates.<sup>48</sup> Objectives, participants, strategies, conditioning factors, all enter into the design inquiry and make the ultimate game more likely a successful exercise. The data should be

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45. *Id.* at 179.

46. PERLA, *supra* note 36, at 183.

47. The discussion here draws heavily on the study by Perla, Chapter 5, "Designing Wargames." That chapter, and the book itself, would need to be examined in greater detail, along with other texts to provide a complete comparison and review of the wargaming and the gaming in the Jessup competitions. *Id.* at 183ff.

48. *See generally* POWER, *supra* note 12.



commensurate with the game — the data made available in the problem; the data acquired during the moot trials; and the data molded and even synthesized by the interdependency of a successful give and take of argument in the trial itself.<sup>49</sup>

Perla suggests some fundamental principles applicable, at least, in the wargaming context:

- 1) Adapt the rules to the game, and not the game to the rules.
- 2) Tell the players everything they need to know to play the game by structuring the rules around the sequence of play.
- 3) Provide plenty of examples to illustrate how the rules are supposed to work, both individually and in concert.
- 4) Explain the underlying rationale for particularly important or especially unusual rules.

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49. Perla refers to the use of "scenarios" or what might be called the situation in which the game takes place. He argues that the scenarios must be designed to permit decision making flexibility, minimizing restrictions on those decisions, and permitting as much freedom of choice as is possible. PERLA, *supra* note 36, at 203, 204. Simply stated, a scenario should include all essential information about the game's setting and subsequent planned modifications to it, and should contain no superfluous information. *Id.* at 205.

The designer is in a unique position because he creates the environment for the play of the game:

Good scenario-design practice involves four fundamental principles: understanding the problem, building from the bottom up, documenting choices, and communicating results. *Id.* at 207.

The expression "building from the bottom up" refers to a design that defines the decision points, provides for a hierarchy of information and assumption, flowing through those who are made part of the problem, simulating their real world activities, and ensuring completeness, coherence, and credibility of the problem. *Id.* at 211, and see previous pages for discussion.

Perhaps differing from the moot court situations a large data base is made available, and then drawn upon by the players or contestants in the war game. The data base is constant, but the base itself is a source to be tapped, and not provided as the data afforded all parties as in the Jessup. If the Jessup had this data base, it would have a data source available to the Jessup judges, and common to all of the proceedings, but it would be a matter for the contestants to request and draw upon or be refused the data they request.

- 5) Integrate the text explaining the rules with the graphical play aids designed to help implement them.<sup>50</sup>

Clearly, the format and the practice of play in war games is not identical with that of the Jessup Competition. However, there are features and experience, shown in this brief discussion that can be used to refine the Jessup, or to provide us with standards to test and assure the effectiveness of the Jessup. It might be possible in the Jessup, though not in the wargaming enterprise, to consider the problems considered by the international court in exercising its advisory jurisdiction. Hence, the gaming plan and situations may be adapted so that the contestants and the games can be adapted to the context of an inquiry into legal questions as distinguished from legal disputes.

Other features make distinguishing contrasts between the objectives of war gaming and moot court gaming; the differences in situations or scenarios alone are sufficient to lead to these distinctions. Perla argued that the war games results are validated best by the degree to which they reflect reality "as opposed to the artificiality of the gaming environment."<sup>51</sup> War games include a report of the game by third parties — a procedure not adopted in the Jessup, though it might be considered — and analysis by third parties as well. But even in the context of the military campaign or combat, the analysis will not apply according to mathematical strictures:

While analysis focuses on systems, the true value of wargaming lies in its unique ability to illuminate the effect of the human factor in warfare. By their very nature, wargames seek to explore precisely those messy, 'unquantifiable' questions that analysis must ignore. Wargames teach us what we didn't know we didn't know.

To accomplish that, however, wargames must give up any vain hope of achieving the detailed mathematical structure and rigorous calculation characteristic of analysis. A wargame is not and will not ever be a mathematical experiment whose initial conditions can be recreated precisely and varied at will. The fundamental initial conditions of a game - the knowledge, talent, character,

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50. *Id.* at 227.

51. *Id.* at 236.

and experience of the players - changes as players change or as they play the game more.<sup>52</sup>

With growing use and familiarity of the wargaming techniques consciously applied to the gaming elements of the Jessup competition we might expect that we shall have new insights into the gaming process itself, so that we can refine that process. To do this we would need to turn to the possibility of adding to the moot court a program for analyzing the results of the Jessups, and monitoring and appraising the process itself. This would be aimed at the process itself, but also the process in a given moot court case, to provide clarification and better understanding about how it works and what would make it serve our objectives more effectively.

Though the element of analysis needs further assessment than that given here, because it would require assessment in context of the moot court cases, we can turn once more to Perla who catches a part of this feature in his remarks:

Wargames allow for the continual adjustments of strategies and tactics by both sides in response to the developing situation and outcomes of specific engagements; such adjustments are not seen in campaign analysis. Wargames afford their players a measure of control over events through the decisions they make during play. Unlike a campaign analysis in which changes in strategy occur as a result of calculating the outcomes of implementing the strategy, wargame decisions are not based on a clear and complete understanding of all the facts (much less the results) but rather on how the players view the facts through a cloudy and possibly incomplete frame of reference that is often distorted by preconceived notions, poor information, and the pressure of time - in other words, the fog of war. In a campaign analysis, a strategy that leads to disastrous losses is simply discarded; in a wargame, most decisions cannot be recalled after they have been made.<sup>53</sup>

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52. PERLA, *supra* note 36, at 284, 285. Perla further distinguishes in such games the differing perspectives of the military player or military analyst, from the civilian. This derives in part from differing experience or vocational cultures, and in part because the military officer is placed in a military decision making role, while the civilian is put in the role of the analyst. The civilian is tempted at least to impose rigor, and to that end has invented the operations research, the systems analysis, and other mathematically oriented analytical tools for that purpose.

53. *Id.* at 283.

### III. CONCLUSION AND RECOMMENDATIONS

From a policy perspective, this paper is an inquiry into exploring and reappraising the application of the Jessup competition as a means of enhancing legal education. But it also provides a preliminary look at other uses. With regard to legal education, as Professors McDougal and Lasswell had observed:

A first indispensable step toward the effective reform of legal education is to clarify the ultimate aim. We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic training for policy-making. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.<sup>54</sup>

The two authors supported the moot court as a key device for professional training:

One principle of professional training is to project the student into situations that resemble as closely as possible the circumstances of his future career. One well-established pattern of this type can, in the reformed law school, be turned into a more productive instrument of legal education. We refer to the moot court. It is common in some places to conduct various autopsies on the performance of students before these tribunals. What we propose is that the appraisal should be conducted not only in terms of legal technicality but for the purpose of revealing the total effectiveness of the participant in handling himself in the situation.<sup>55</sup>

Experience with war gaming indicates that a key refinement involving policy can be made with the Jessup moot case by increasing the number of participants and by specifying the appropriate objectives in designing both the problem and the conduct of the competition. By adding on participants that critique the Jessup as well as others that might draft a report on the Jessup's findings, or by including additional competence for the Jessup format, such as the preparation of advisory opinions, the Jessup has the possibilities of providing a more substantial contribution to

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54. Legal Education, *supra* note 1, at 46.

55. *Id.* at 149. Lasswell and McDougal note the potential use of recording measures, motion pictures, testing facilities, and intensive coaching, applying some of the procedures to be found in modern clinical psychology.

international law itself. Finally, the Jessup format can be used by experienced lawyers or jurists. If they are used, the differing or matured perspectives of the practitioner or scholar can be added. In all of these refinements, we bear in mind that the Jessup is a simulation, not a real world exercise, but, as such, it has the advantages of operating in a framework that can focus on the law and its impacts.

The Jessup is conceived in this paper as an instrument; that is, it is an instrument that is aimed at policy or strategic objectives. Seen in that light, law, especially international law, is a strategic instrument in itself, coupling in some instances, diplomatic, economic, ideological or even military strategies. Thus, law beyond the Jessup, extending to enforcement, includes resort to permissible force, where force is perceived as an essential means to maintain or protect public order.

Hence the Jessup can be used as an instrument that enables us to probe either past policy or prospective policy that is involved with the impacts of law. Second, the Jessup is an instrument that enables the participants to learn about law, policy and decision-making. The effectiveness of this depends upon the problem design and upon the motivation and capabilities of the participants. Problem design thus requires separate attention so that the design is aimed at specific objectives — probing law, testing law and its applications, and so on.

Third, the Jessup can be used to review cases that have taken place in the ICJ, thus affording another vehicle for critiquing those cases. Such critiques have greater strength than those that are in the form of commentary, and should produce publishable material for learned and practicing lawyer journals.

The Jessup necessarily is an instrument to promote international law. And the law it promotes is then perceived as a strategic instrument with strategic goals of its own to attain. Moreover, it is then perceived as part of the larger, collegial, global strategy to establish and strengthen global public order and its law. Hence it can also serve to probe and assist the law-making process; to condition or alert the attitudes of the practitioners; to hone the minds and analytical skills of the jurist involved in international law; and to arouse the interaction of theory and practice, and the choices that are available for the pursuit of goals and action.<sup>56</sup>

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56. Compare the warning of McDougal and Feliciano:

Inasmuch as an absolute prohibition of coercion has not been feasible, the historical alternatives of the general community have been either to permit complete disorder or to aspire to minimum public order. Complete disorder, failure to forbid even the most intense and comprehensive destruction of values, is not only possible, but has in fact long characterized the perspectives of traditional international law. If, on the other hand, the deliberate choice is made to pursue at least a minimum of order in the world

Some emphasis should be given to the collegial element that it applies; this is the element that we find in operation in the law making context. Those who participate in the Jessup become familiar with what the collegial aspect is all about. Law is not the output of a single scribe.

Fourth, the Jessup can operate as the simulation of an instrument, or vehicle, that works with other strategies. It is in a sense a diplomatic strategy, but as a vehicle, with varying policy content, it can include diplomatic, economic ideological strategies, or strengthen these. The wide variety of international institutions attest to the effectiveness of this.

Finally, implicit in the other observations above, the Jessup is an instrument that can sharpen the critical skills — the skills of the scientific mind — applied to the complexities of human action. We can anticipate that those motivated or stimulated by such an activity are likely to continue with their self-development, but will be stimulated toward an environment in which law-making actually takes place.

The brief excursus in this paper into strategy, theory, and wargaming highlights some of the possibilities of pressing the Jessup format into new uses, into texts for teaching, and into exploratory efforts that may lead to uncovering further applications. In some respects, the Jessup will gain in strength and effectiveness once it is perceived that whatever its shortcomings, the potentials are large, and open-ended. The need to have greater participation in law-making at all levels of human activity is widely acknowledged. The Jessup serves this need.<sup>57</sup>

To this end, the Jessup is a simulation of decision and policy-making and operates as the means to enable us to refine, correct, and amplify the jurisdiction of the Court, including the reduction of the impact of the denial of jurisdiction by the court's invoking the political question, enabling those involved in the Jessup, like those that were involved in war gaming, to pursue what the ICJ and other international tribunals are now

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arena, the coercion that is to be prohibited clearly must be distinguished from that which is to be permitted. The conceptions both of impermissible and of permissible coercion are thus necessary in the theoretical formulation of authoritative policy as well as in the practical application of that policy to interacting human groups.

MYRES MCDUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD ORDER* 128-29 (Yale Univ. Press 1961).

57. There are other instruments to attain this goal. Standardized terms for contracts and adherence to the policy if not the form of such terms and of contracts relating to trans-national activities is one of them. A participatory effort for developing and testing such terms might be conceived to support the aims of the Jessup. See Harry H. Almond, Jr., papers presented at the meetings of the I.A.F. published in part in Montreal, 1991, Washington 1992, and Graz, 1993, and Beijing, 1996. Some of these approaches calling for the use of recommendations, joint adherence to common guidelines, advisory opinions and inquiries, and so on are sometimes called "soft" law because they are to be distinguished from the work that enters into undertakings, commitments and the like.

actively doing. But with the growing appeal of cooperative and joint enterprise among states, their disputes and disagreements in the future will tend to disrupt their common enterprise, or even endanger the neighborly approach to achieving common goals.

Thus, the Jessup, with some of the refinements proposed in this paper, can first be fashioned into an instrument reaching beyond the traditional moot court format to serve us in more effective ways, such as the treatment of issues through alternative dispute settlement procedures. Perhaps the future combinations might include both gaming and moot court approaches so that the Jessup Moot Court, no longer rigidly tied to the traditional confrontational and adversary entity, will be exploited for the invention and adoption of more appropriate means for shaping our needed, future law.<sup>58</sup> Or it may be made available for testing the work of the courts themselves so that the current debate over the law promoting efforts of the advisory opinion courts can reach more substantial results and even substantive outcomes.<sup>59</sup> Assessment of such alternative settlement procedures may ultimately lead us to using them in place of the traditional courts and tribunals, or to supplement the work of those tribunals.<sup>60</sup> A similar assessment of the application and use of general principles of law as a means for strengthening the law of the global community may prove to

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58. Cf. Myres McDougal and Michael Reisman, *International Legal Essays*, at 306:

In a community which recognizes knowledge as a crucial scope and base value, an increasing number of individuals will tend to perceive themselves as participants in the shaping and sharing of intelligence.

As the pattern of science-based technology moves toward universality, traditional careers are abandoned for careers generated by the new knowledge. [Citation omitted]

The two authors in further clarification suggest that competent and experienced policy scientists may mediate between groups of physical scientists, for example, who have competing claims to authority.

59. The use of the traditional adversary process of litigation is likely to require alternatives to avoid the confrontational element of the tribunal. States assessing confrontation as an option are quick to discern that other means of confrontation may be more desirable in attaining their goals. The rise of the new institutions - fact-finding in the context of the law of war, the standing consultative commission of the Anti-Ballistic Missile Treaty to recommend the various paths to agreement, the institutions of numerous agencies and their authority to reach deeply into promoting the process of negotiation, concession and bargaining - are all familiar techniques that may replace adjudicatory and arbitrational procedures in the future. Numerous studies are available on the advisory opinion, its potential for shaping future "legislation," the overlap of problems concerning the concept of *forum non conveniens*, and so on.

60. Alternative dispute settlement procedures mentioned earlier in this paper may include those that take place in an adversary setting, or those in a cooperative or friendly setting. The latter may be designed to provide for greater party participation through the negotiation and guided negotiation stage, and less of party confrontation in tribunals and adversary settings. Also it is possible to design the procedures to afford greater participation in general in resolving disputes while the enterprise is on-going so that the delays and other problems will not be raised, or the obstacles of resentment will not occur.

be as valuable.<sup>61</sup> The call of these demands is therefore a call for imaginative and innovative collegiate efforts that will best serve a global community of growing interdependence.<sup>62</sup> For these purposes we can look for analogies, simulations, and models in the municipal legal system, particularly as it has grown to serve a more complex community, and a greater, more incessant, interaction of activities.<sup>63</sup>

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61. The application and standing of general principles of law as law to be applied by the International Court of Justice pursuant to its Statute's Article 38 has not been fully or comprehensively explored either by the Court or by commentators. See STUDIES, *supra* note 1, at 987-1019, for an important study of principles crucial to the framework of inquiry into the decision process. The authors describe this framework - and then later the favored principles - as follows:

I will rather simply recommend the continuous employment, in all our specialized roles, of a certain process of thought - a frame of reference, a method of inquiry, a disciplined and contextual mode of analysis - intended to promote the most effective use of our minds in bringing to bear upon inquiry and specific choice the most relevant findings and techniques of contemporary science and knowledge . . . .

Though my principal emphasis will be upon the importance of maintaining a flexible, policy-oriented, contextual approach to all problems, in an effort to attain the most direct and immediate contact with contemporary reality, I will develop in some detail certain suggested alternatives of policy which express my appraisal of the relevant goals, conditions, trends, and probable future developments. *Id.* at 990, 991.

The six primary principles are not principles of law in the traditional sense but are organizing principles enabling the shift toward strengthening public order to meet desired standards and outcomes, and to be facilitated by the adoption of common concepts. *Id.* at 999-1010.

62. A part of these efforts may require the adoption of interviews of past contestants and past participants in general to establish the Jessup moot courts and their refinements in the future. It might also benefit from those who have had experience in legal disputes brought before the International Court of Justice. The overall purpose of such efforts should be kept in view: the Jessup need not be a simulation of the practice before the ICJ, and, in operation, it is not such a simulation, but only an approximation. This leaves the way open to refining the competition and its rules to make it serve more emphatically the learning and probing processes.

63. The essays in the collection *An Introduction to Law*, 76 HARV. L. REV. (1962) might serve this purpose in part. The articles taken from various issues of the Review include Felix Frankfurter, *A Note on Advisory Opinions* 37 HARV. L. REV. 1002 (1924) (looking into the legislative implications of the advisory opinion and distinguishing the opinion from those that involve directly the *case* or *controversy* in the jurisdictional principle for subject-matter jurisdiction of the Federal Courts); see also JAMES B. THAYER, *ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 435 (1893) (considering the formal constitutive or constitution building processes in American practice). Thayer's article also contains a study with regard to advisory opinions. *Id.* at 459. For differing approaches, but showing the flexibility and innovative quality of American law, see Robert H. Jackson, *A President's Legal Opinion*, 66 HARV. L. REV. 1353 (June 1953). President Franklin Roosevelt's own opinion as to the Lend-Lease Bill that by-passed the Congress and perhaps the Constitution as well to establish a binding obligation with Britain during the second World War. *Id.* Other approaches are suggested in Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); the Brandeis dissent in *Myers v. United States* 272 U.S. 52, 293 (1926); and, BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).



# CREATING AND CONDUCTING IN-CLASS SIMULATIONS IN PUBLIC INTERNATIONAL LAW: A PRODUCER'S GUIDE

*Andrew L. Strauss\**

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## I. INTRODUCTION

I define an in-class simulation as any classroom exercise that attempts to depict real-life events. Simulations can be extremely elaborate attempts to enact complex proceedings, or they can be as simple as having two students spontaneously represent lawyers making opposing arguments during class discussion. What follows in this piece is an attempt to describe my own experience with certain kinds of simulations and to relate from that experience some lessons on conducting simulations. For those who conceptualize their simulations in ways very different from my own, what I have to say may be of limited application. I have chosen to organize this article using the metaphor of producing a show because I believe it is evocative of the drama intrinsic to making simulations exciting motivational tools for learning.

In Part II of this article ("Defining the Creative Mission"), I will begin by identifying what my goals are in constructing simulations. In Part III ("The Script"), I discuss the institutional settings in which I have chosen to place my simulations ("Finding the Right Setting"); the essentials of creating the simulation problem ("Identifying a Good Plot"); and constructing the procedural foundation for the simulation ("Defining Plot Structure"). In Part IV ("Casting the Simulation"), I address how I involve the maximum number of students in various active roles in the simulation. In Part V ("Directing the Simulation"), I discuss my role in helping students prepare for the simulation ("The Rehearsals") and in the actual conduct of the simulation ("The Performance"). In Part VI ("Costumes and Staging"), I suggest what students should wear during the simulation as well as how to prepare the classroom for the simulation. In Part VII ("The Reviews: Assessing the Performance"), I discuss how to give feedback to the students on their performance ("Constructive Evaluation") and how to grade the simulation ("The Grade"). Finally, in Part VIII ("Avant Garde-Looking Toward the Future"), I briefly allude to some creative possibilities for the next generation of simulations.

## II. DEFINING THE CREATIVE MISSION

In-class simulations can be, and have been, usefully employed in law school courses for some time. I believe they are particularly well-suited to public international law. While there are many possible reasons

for using simulations in international law, I am particularly concerned with meeting three primary objectives: first, to encourage active, dynamic learning; second, to improve student review and integration of doctrine; and finally, to demonstrate the range and vitality of international law.

#### *A. Active, Dynamic Learning*

I find simulations a very useful device to encourage active, dynamic learning. Simulations require students to think through legal and policy issues to applied ends. By actually being responsible for comprehensively applying the law in different contexts, students are pushed to integrate material and think creatively in ways that go far beyond discrete responses to traditional Socratic questioning. Simulations help develop such legally important skills as the ability to think spontaneously, to spot issues, to organize disparate ideas, and perhaps most importantly, to take personal responsibility for a comprehensive real-life-like work product.

#### *B. Review and Integrate Doctrine*

By concluding each substantive section of the course with a simulation, I am able to meet the additional objective of getting students to periodically review and integrate the doctrine covered in the course. Compared to traditional *cramming* for semester-end exams, this approach has the pedagogical advantage of encouraging students to assimilate the course material in manageable components. Overall learning is enhanced as students build throughout the course on their superior knowledge and understanding of previous doctrine.

#### *C. Demonstrate Range and Vitality of International Law*

Finally, I believe that it is important for students to see that international law, despite its differences from municipal law, is useful. I, therefore, additionally employ simulations to demonstrate concretely the range of uses for public international law. In the next section I will turn to explaining how I do this through my choice of simulation settings.

### III. THE SCRIPT

In scripting the simulation, the first step is to settle on an institutional setting and subject matter for the simulation. One must then *formulate the plot* or devise the scenario upon which the simulation will be

based and then *Define the Creative Mission* or establish the procedures which will give the plot form. What follows is first a summary of the settings and subject matter I use in my own simulations and then a discussion of the requirements for identifying and developing a successful plot.

### A. *Finding the Right Setting*

I demonstrate the range and vitality of international law by placing my simulations in a number of different institutional settings where international law is used. For example, my first simulation enacts testimony before a United States House of Representatives subcommittee where international human rights law and related policy issues are relevant. The question for subcommittee consideration is whether to cut off United States foreign aid to Kenya in response to violations of human rights. My second simulation presents students with the need to use international law in the conduct of international negotiations. In this simulation students represent, respectively, either the Israeli government or the Palestine Liberation Organization in negotiations leading up to the Oslo Accord. My third simulation gives students the opportunity to use international law before an international tribunal, specifically the International Court of Justice. In this simulation students debate before the Court the legality of the 1989 United States invasion of Panama. The fourth simulation requires students to use international law to inform a United Nations Security Council debate. In this simulation students recreate the Council's debate over whether to authorize the use of force to eject Iraq from Kuwait. Finally, the fifth simulation presents students with the opportunity to use international law before a domestic tribunal. Students are charged with arguing before the United States Supreme Court the legality of an American assertion of adjudicative jurisdiction over a fugitive who was abducted by American agents in Mexico.<sup>1</sup> These simulations, taken together, present students with the opportunity to review many different substantive areas of international legal doctrine as applied in a wide range of different institutional settings.

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1. See *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992).

## *B. Formulating a Good Plot*

### 1. Clash of Interests

As every writer knows, good character development requires a sound plot. Student character development in the context of in-class simulations is no different. The primary imperative is that the views that students represent are well-defined and divergent. Without this, the dialectical tension that allows for legal and related issues to be fleshed out will be lacking. This divergence of views is intrinsic to certain types of simulations such as oral arguments before courts. It, however, needs to be consciously structured into other types of simulations. For example, from my repertoire, divergence of views in hearings before congressional committees or in Security Council meetings must be explicitly built into simulations.

### 2. Fact or Fiction

The other primary issue that must be confronted in constructing simulations is whether, or to what extent, scenarios should be based on real events. I believe that using real events offers significant advantages. Not only is it more interesting for students to deal with topical issues, but I also believe students better use their scarce study time assimilating real-life historical and social facts than details from artificial hypotheticals.

There are, however, several issues that must be confronted when using real-life situations. When using fictitious scenarios, the professor as creator has the absolute ability to define the contours of the problem and to artificially decide exactly the amount of information that all students will, on an equal basis, receive about that problem. Out of the complexity of real-life problems, different students will quite possibly identify very different facts and issues as relevant to the designated simulation. If this happens, students will, in the conduct of the simulation, very likely end up talking past each other. In the worst case, certain students will have no information about, and even difficulty understanding, the situation as the other students have defined it. Efforts to get the simulation on track will then be very difficult. This can be avoided by tailoring the topic to the requirements of the simulation and then carefully communicating to the students the contours of the topic as adapted. This, however, is somewhat of an art because over-definition will rob the students of the chance to identify and characterize the issues on their own. When doing this, I

therefore attempt to define in great detail the negative parameters of the adapted topic — in other words, what the topic is *not* about. I then describe in very general detail the range of *possible* legal issues that *may be* involved.

When dealing with simulations based on real events, a related issue that should be specifically discussed with students is the extent to which license can be taken with the facts of the real situation as it exists. For example, in the Israeli/PLO negotiations, to what extent are the students limited to articulating positions that the parties have or would realistically have articulated in the past? Likewise, in the Security Council debate over ejecting Iraq from Kuwait, how restricted should the students be to furthering positions like those of the countries they are representing? It is important, I believe, that great liberties are not taken. Not only does part of the interest and challenge of a simulation based on real life events lie in the students attempting to identify and articulate the position of the parties they are representing, but also the underlying structure of the simulation *game* is dependent on the basic clash of positions between the various parties. Having said this, I also believe that students must have some flexibility in how they interpret these interests, so that their opportunity to work creatively within the structure of the simulation is not inhibited. Students should, for example, be able to come up with inventive solutions to sticking points in negotiations. Again, the latitude that students have in this area should be discussed with them before the simulation.

When reenacting proceedings such as appellate arguments, negotiations, or meetings that have actually transpired, students must be given an answer to the companion question of exactly how closely they should follow or not follow the proceedings as they actually occurred. I make it easy for students to see what happened. When students simulate the Security Council debate over Resolution 678, authorizing the Gulf War, I include the transcript from the relevant Security Council meeting in their materials. Likewise, when the students simulate the argument before the United States Supreme Court on the legality of exercising jurisdiction over a man who was kidnapped from Mexico by agents of the United States government, I include the Supreme Court *briefs from the actual Alvarez-Machain* case. It goes without saying that students should not be memorizing lines but should use references to actual proceedings, as a guide to understanding the types of arguments that can be made as well as

to styles of presentation so that they might better develop their own independent approach.

Finally, negotiating between fact and fiction in real-life situations can sometimes be an issue in the structuring of the simulations themselves. For example, in the Panama simulation, I address the need to create the context for litigation by postulating that Manuel Noriega escapes from federal prison in the United States, reassumes power in Panama, and brings a suit before the World Court against the United States.<sup>2</sup> A critical component of such postulation, of course, is stating clearly what is fact and what is fantasy. Even with respect to high profile events, one should not assume that all students will necessarily make the distinction on their own.

### *C. Defining Plot Structure*

Plot structure for purposes of this article connotes the procedural underpinnings that give definition to the simulation. A primary question that arises when addressing simulation procedures is how elaborate such procedures should be. Depending upon what one wishes to accomplish, simulations can be constructed either to approximate only a loose rendition of procedural reality or to directly mimic real life intricate protocols, conventions, and rules. Because I am trying to emphasize substantive international law and not legal, diplomatic, or bureaucratic practice, I generally keep procedure as minimal and simple as possible. No simulation, however, can proceed without some basic defined procedures. The instructor must think through in detail what those procedures are and communicate them clearly to the students. Without a clear, shared idea of procedure, the basic structure of the simulation will crumble.

The nature of the procedures, of course, depends upon the type of simulation being offered. When, for example, simulations require oral argument, the following procedural considerations need to be resolved: in what ways may team members<sup>3</sup> divide up their argument; <sup>4</sup> whether the

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2. In addition to this scenario being of course, completely fanciful, this type of suit would be impossible as the United States has withdrawn its acceptance of the Court's compulsory jurisdiction.

3. I use the typical moot court formula of assigning two students to advocate as teammates for each side.

4. Team members can divide responsibilities between, for example, argument and rebuttal, or alternatively, each one can be responsible for particular arguments. I usually leave it

facts of the case should be repeated to the court;<sup>5</sup> if there is to be a rebuttal (which I think is a good idea), how should time be allocated between argument and rebuttal; how soon after an advocate begins her argument should judges start their questioning; how should judges' questioning be coordinated; whether judges should be required to issue opinions; if so, in what form? I strongly emphasize that, whatever the nature of the simulation, you need to identify and resolve all possible procedural issues and clearly communicate these procedures to the students in advance of their preparation for the simulation.

#### IV. CASTING THE SIMULATION

##### A. *A Cast of Thousands?*

Deciding who and how many students get to participate, particularly in a larger class, is a difficult issue in simulations. As I have discussed, one of the great advantages of simulations is that they provide students with an opportunity for active learning. If only a few students out of a very large class are actively involved in a simulation, this advantage is easily defeated. I deal with this problem in several ways. First, if a class becomes too large, I simply do not use simulations. If the class is small enough to make simulations viable, I attempt to give major roles in each simulation to as many students as is workable. I find that the upward limit is usually about ten. For example, a litigation simulation can involve two teams of two litigants and a bench of six members. When I have the Security Council debate the Gulf War, I find it workable to permit a few more students to participate, allowing me to reproduce the fifteen members of the Security Council plus Iraq.

##### B. *Dealing With "Extras"*

One technique I have developed, to keep the whole of the class at least somewhat actively involved in the simulation, is to assign subsidiary roles to the students who are not assigned major roles. For example, in

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up to the students to decide how to allocate responsibility, but they should inform the Court as to the division of responsibility at the beginning of their argument.

5. I feel that they should not. While learning how to present the facts effectively is a valuable skill in itself, given the limited class time available, I prefer that students get right to the argument.



my Security Council deliberations, I have the members of the class who are not directly involved play the role of the press from delegates' respective countries. I give them time at the end of the class to ask delegates pointed questions about their representation of their country's interest. I instruct these students to view the proceedings actively and critically with an eye towards their participation in the dénouement. In my Congressional testimony simulation, the class members who are not directly involved act as non-subcommittee members of Congress performing a function similar to that of the press above. Finally, to democratize student involvement, I have every student play a primary role in at least one simulation during the semester. To make sure the class gets off on the right foot, I often recruit students to do the first simulation who I think are likely to be the best performers. If they live up to my expectations, a high initial standard is set.

## V. DIRECTING THE STUDENTS

### A. *The Rehearsals*

#### 1. The Role of the Professor

What is required of the professor will differ with the various stages of the simulation. Before students begin their preparation for the simulation, the professor should either orally and/or in writing explain the simulation and let students know what will be expected of them. In addition to topics that have already been covered (clearly defining the parameters of the simulation topic, identifying the extent to which students can or should take liberties with the topic as defined, and clarifying the simulation procedures and protocols), the professor should explain what constitutes good student performance. While performance demands will vary depending upon the general nature of the simulations being conducted and the specific roles that individual students play, there are certain basics of good performance that are constant and can be generally emphasized. Clear understanding of the facts, coherent integration of legal doctrine, rigorous application of facts to the law, and clear communication, both orally and in writing (if there is to be a written component), are the basic skills of lawyering that should, of course, always be emphasized.

In addition to giving general directions to the students as a whole about the simulations, I believe that it is very helpful to meet with the

simulation participants privately, before the simulation, to go over their preparation and planned presentation. Any doctrinal problems the student are having integrating the factual and legal issues, as well as tactical and strategic issues, can all be addressed. This helps encourage advance preparation and ensures that both the students and the professor are reading from the same page. Obviously students representing conflicting parties should be met with separately.

## 2. The Provision of Props

By *props* I mean the various research materials, which provide relevant factual and legal background that may be given to the students in advance of enacting simulations. I distribute sufficient props to the students to conduct the simulation, while allowing them, if they desire, to engage in further research on their own. I have settled on this approach as a compromise between limiting student research to a closed universe of provided materials and requiring that they engage in independent research.

Both the closed universe and independent research approach have relative advantages and disadvantages. The closed universe approach helps promote uniformity in student understanding and interpretation of events, which, as I have already explained, is important to the coherence of the simulation. In addition, it economizes on the amount of scarce study time students must spend preparing for the simulation. This, however, denies students a potentially valuable opportunity to practice research. By my compromise, I hope to provide a corpus of materials that will define the basic scope of the problem and allow students to focus their efforts on assimilation and presentation of materials. However, I do not want to deny interested students the opportunity to engage in focused research to enhance their arguments.<sup>6</sup>

## 3. Requiring a Written Product

Another major *rehearsal* or advance preparation question is the extent to which students should prepare a written product in anticipation of the in-class event. The advantages of requiring such a product are two-fold. Student preparation is probably the most important component of a successful simulation, and requiring a written product in advance of the

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6. As I have previously discussed, I independently attempt to be very clear about the overall definition of the problem.

classroom performance forces students to give thought to what they wish to accomplish in the simulation and/or how they wish to accomplish it. A writing assignment also has the potential to provide a valuable opportunity for students to practice and improve their writing skills. I require students to hand in a written product in advance of the in-class exercise, the character of which varies depending upon the nature of the simulation, and roles students are to play within it. For example, in judicial simulations I require each student making an oral argument to submit a short brief that is copied and distributed to opposing counsel and judges.<sup>7</sup> I require each student playing the role of a judge to submit a list of strategically organized questions for potential use in oral argument.

### *B. The Performance*

The professor's directorial role during the in-class portion of the simulation must also be considered. I limit my direct interventions in the in-class exercise to times when student interchanges begin to disconnect to the point that effective communication has broken down. I will then intercede remedially to try to give coherence to the discussion, on the order of

Mary, can you see how Carol said X and John said Y and that your point Z had nothing to do with the conversation even though you were using the same linguistic categories. Now try to make your idea responsive to what has been said. Other people should attempt to do the same.

Mitigating against liberally intervening is the importance for students to experience the independence of being responsible for their own errors and for recovering from them without the benefit of a safety net. On the other hand, given the need to make the class a beneficial learning experience for all of the students, I find that it is best not to let the discussion stray too far afield before intervening to give it structure. I explain to the students before the simulation the role I will be playing during the in-class exercise.

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7. As in the real world, this helps all sides in their preparation and aids in the creation of an intellectually coherent proceeding.

## VI. COSTUMES AND STAGING

I find that it is helpful to have students dress in character (i.e., in business clothes). It encourages them to take the simulation seriously and to stay in role, and it helps set the class off as something special.

Before class on the day of simulations, I will erect a simple set in the front of the classroom. For example, for oral arguments I will construct a simple courtroom with a podium from which counsel can address the court, and tables behind which the judges and the lawyers can sit. For a Security Council session, I will arrange the chairs for Council members in a semi-circular formation in front of the class. So that the rest of the students can best view the action, I place all seats so that none of the participants have their backs to the *audience*.

## VII. THE REVIEWS: ASSESSING THE PERFORMANCE

### A. *Constructive Evaluation*

I believe that an important part of the learning experience is for students to receive constructive feedback. One colleague of mine who uses simulations gives feedback privately in his office, so as to avoid the prospect of students feeling embarrassed before their classmates. I give feedback before the whole class (hopefully in as non-threatening a way as possible) so that everyone can benefit from hearing my interpretation of what transpired. In addition to making comments specific to particular simulations, I emphasize the criteria I have previously laid out to the students for general effectiveness: clear understanding and integration of the facts and the legal doctrine, and effective communication.

### B. *The Grade*

Student performance in simulations can be assessed for purposes of giving constructive feedback and/or for purposes of helping determine course grades. In the past, I have only made simulations one component of the student class-participation grade, which itself only counts marginally toward the final grade. I have not found that I have needed to use grades as an incentive to make students take simulations seriously, and I have preferred not to impose stress on students additional to the anxiety of performing in front of their classmates. In addition, given the kinds of simulations I have constructed, I would find it difficult to apply fair and uniform grading standards to students whose roles may have required

varying levels of participation. I know some professors who exclusively use simulations of the moot court variety and make student performance in them a major part of the students' final grade. They have reported success in doing so.

#### VIII. AVANT GARDE — LOOKING TOWARD THE FUTURE

What I have described in this paper is only one particular approach to creating simulations. While it is beyond the purpose of this paper to seriously explore alternatives I have not tried, I would like to conclude by suggesting possibilities that technology makes feasible for international law simulations of the future. I have always thought it strange that despite the alleged universality we claim for international law we, through our use of national casebooks and other materials, maintain a curiously parochial approach to teaching the subject. Applying communications technology to simulations could help us overcome this provincialism. American students could have joint simulations with students from other countries via the Internet. One of my colleagues in an advanced business class is trying something similar with students from elsewhere in the United States. Direct audio-visual contact is even a possibility. While this is now available in a rather primitive form over the Internet, existing non-Internet video conferencing technology makes high quality transmission possible. For example, my law school, which has two campuses, utilizes an interactive video system to link classrooms and other activities between our campuses. Such equipment (which uses phone lines) can be adapted for international use.<sup>8</sup> Advanced communications technology will undoubtedly have a major impact on legal education. This should be particularly true in international law courses, where communication between the remotely situated peoples of the various states that make up the global village is at the heart of the endeavor.

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8. The national telephone lines of the participants must be capable of carrying digital communications.

# CRIMES OF WAR: A PERSONAL ACCOUNT OF THE HORRORS REVEALED BY AN INVESTIGATION OF A NAZI WAR CRIMINAL

*Peter Watson* \*

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## I. INTRODUCTION

Crimes of war pose an inherent contradiction. They demand justice, but we find ourselves uneasy at putting our enemies on trial. Since Nuremburg, such issues have challenged our morality and confronted our conscience. Is it that we recoil from the spoils of the victor, taking illegitimate advantage of the vanquished? Is it that we do not wish to look too deeply at the crimes of others fearing in the process that our own may be discovered? Or is it that we do not wish to face the reality of what we do to each other in war?

There are always reasons why it seems better to leave matters alone, one reason being to avoid disturbing an uneasy peace. For example, after the Second World War the *Ratline*, as it became known, was a route to freedom for many of our former enemies. Soldiers, scientists, butchers and torturers, who shortly before had been our sworn enemies, were welcomed to our shores. The function of the *Ratline* was

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not to protect the innocent, but rather to conceal the guilty. As stated by Philip Noel Baker, "In our view, the punishment of war criminals is more a matter of discouraging future generations than of meting out retribution to every guilty individual. It is now necessary to dispose of the past as soon as possible."<sup>1</sup>

But the past was not disposed of, nor has it ever been disposed of in any of the wars and conflicts which followed. We can look at wars from Vietnam to Bosnia. The cry after the war is the same. It is a cry for justice; an eternal cry that will not be silenced. A cry which may be ignored in the short term, but at what price? Why does this cry for justice haunt us? Perhaps the answer is a selfish one: The love of justice in most men is simply the fear of suffering injustice.

The case I am about to discuss is a curious case. It can be termed many things: an indescribable brutality; an unbelievable horror; an acknowledgment of a forgotten holocaust; one of the greatest detective stories of the latter part of the 20th Century; the first British War Crimes trial since William the Conqueror; and, most importantly, a moment when a nation heard the cry for justice.

That same nation, Great Britain, which had at one moment in history stood alone against the might and power of Hitler, isolated in Europe as the last bastion of freedom and decency, was yet a home for those who had committed the worst atrocities imaginable. Britain the *Victor* had become Britain *The Nazi Safe House*. Then, a T.V. company and a journalist, unlikely champions of justice you may think, responded to a cry for justice which had been met with a deafening silence for almost half a century. Two documentaries were made, facilitating a change in Britain law. For the first time the retrospective prosecution of crimes committed outside of the territorial jurisdiction of the United Kingdom was allowed. More significantly, Britain faced the issue of war crimes: crimes against humanity, crimes against men, crimes against women and children — the forgotten holocaust in Lithuania.

On a more personal note, this was the most important, rewarding case I have ever dealt with, and also, unfortunately, the most horrific case I have ever dealt with. If an attorney is fortunate, she will have a chance to do something that has worldwide significance. She will have the chance to do something honorable. Simply, she will have a moment to do something right and worthwhile. This case was such a moment for me.

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1. Philip Noel Baker, 1948 British Cabinet Minister.

## II. THE STORY

### A. *Enacting the War Crimes Act*

In 1986 Robert Tomlinson was a television journalist for Scottish Television, Scotland's major independent television company. As an award-winning journalist, he was well regarded within his profession. He noticed newspaper clippings suggesting that Britain had up to seventeen Nazi War Criminals living in the country under false names. One was said to live in Scotland — so the story began.

Like *Watergate*, this story was only expected to be a short piece that would fill airspace on a slow news night. Instead, it led to Prime Minister Margaret Thatcher fighting one of the greatest battles of her political life to force a change in our law which was said to go to the heart of our unwritten constitution. It saw at first a governmental defeat, and then ultimately the use of the Parliament Act for the second time in British Parliament history to overrule the opposition of the House of Lords.

Tomlinson discovered a man called Gecas was living in Edinburgh who, it was said, was a war criminal. It was claimed he had participated in the hangings and shootings of men, women, and children, in the mass exterminations of Jews in Lithuania and he was on the wanted list of the Weisenthal Centre. Britain accepted him to her shores by the Ratline, and he lived comfortably in the Scottish Capital, safe from prosecution, since we could not prosecute a man for a crime which took place in 1941 in another country.

The story became much more important. Gecas had been interviewed by the United States Department of Justice, Office of Special Investigation (O.S.I.) in relation to their efforts to deport members of Gecas' battalion living in the United States. The Soviet Union sought extradition of Gecas in relation to their own war crimes investigation yet Britain not only gave him a home, we gave him protection from those who sought to punish him. This seemed bizarre to Tomlinson. He left for the Soviet Union with a film crew. Months later two documentaries would be shown across the United Kingdom: *Britain — Nazi Safe House* and *Crimes of War*. The latter became an international award winner.

This effect was one of disbelief and shock. Parliament debated. Newspapers chased after Gecas. The conscience of a nation was challenged. Many said, as the Government had in 1945, that these things were best left alone. What was the point of stirring up old memories after so many years? What could be done now? How could we prove these allegations? Perhaps these allegations were false anyway. However, the documentaries revealed some of the evidence gathered by the KGB, and



held by the Soviet Union. Survivors had been interviewed. Some who had taken part in these horrible events had spoken on camera. The United States was then, as it is today, pursuing soldiers of the same battalion. Enough was enough. Margaret Thatcher, a Prime Minister with her own view of what Britain stood for under her leadership, moved to do the unthinkable — change the law which prevented retrospective prosecution, a protection deeply rooted in our unwritten constitution. In the face of great opposition, and after much debate, the War Crimes Act was enacted.<sup>2</sup>

### *B. The Gecas Gamble: A Response to the Threat of Prosecution*

Gecas now in his late 70's was astute. He had a plan. The *Gecas Gamble* was clever. He decided to sue Scottish Television. He had just successfully sued the *London Times*, which had been unable to overcome the legal presumption that what they printed was untrue. Fortified with this victory, he gambled Scottish Television would also fail to prove the truth of their allegations. He gambled that Scottish Television would never get its witnesses to Britain, being that the witnesses were old or dead. He gambled that many obstacles lay in the path of Scottish Television, including that the documents were in the hands of the KGB. If there was a civil trial it would allow him to argue that any criminal trial should not take place due to the prejudice created by the civil case.

It was a clever answer to all his problems. He issued his writ — his luck was in! The Soviet Union was in political turmoil and with it the role and influence of the KGB was waning just at a time when their cooperation as a source of evidence was crucial. The new emergent Lithuania was not keen to become involved in raking over old wounds, exposing its role in this holocaust. In any event, the country had more important matters before them.

In July 1990 the writ was served; the battle had begun. The first question when sued is, do you settle? Fortunately this proved easy to answer, even for the insurers of Scottish Television. The allegations were so substantial that no one would be party to such a deal. This decision made, the hard part began. We had no idea how hard.

### *C. The Investigation*

The first team of lawyers and investigators were dispatched to Lithuania. In January 1991 the team was hard at work in the Lithuania capital, Vilnius. They were awakened at about 2:00 a.m. on a Sunday morning by the rumbling of tanks. The Soviet Union was breaking up;

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2. War Crimes Act, 1991, ch. 13 (Eng.).

their army of occupation was leaving, and with it their grip on power. The KGB, who had been supplying information and finding witnesses, sent 4 cars to Lietuva Hotel to evacuate our team to Russia. All of our sources of evidence; leads; and witnesses had gone.

Our team returned to Scotland, where the case against Scottish Television gathered pace. The time available to prove our case was narrowed to a matter of months. We needed a plan. The plan was the most ambitious and expensive I have ever been involved with. It required spending 2 million dollars in 5 months.

The 12th Lithuanian Police Battalion, Gecas' Battalion, had spread itself across the globe as the war ended. This was both an obstacle and an opportunity. Yes, we had the difficult task of finding them, but they were now isolated old men perhaps easier to extract information from.

We got help from the O.S.I. in the United States, the Weisenthal Centre in Israel, and many others. We dispatched a team of researchers to Nuremberg, and then hired an excellent firm of German attorneys. Names began to appear. Within 4 months we had inquiries running in Russia, the Ukraine, Poland, Hungary, Czechoslovakia, East Germany, West Germany, Australia, Israel, Lithuania, Canada and the United States. We had attorneys in most of these countries as well as teams of researchers — easy to see you can spend 2 million dollars!

The task was just a little daunting! We were investigating murders which happened in 1941, looking for evidence which would hold up in court. We decided the plan for evidence collection had to be twofold: documentary evidence and witness evidence. Given the passage of time and our pessimism about finding reliable eyewitness testimony, we needed documentary evidence especially.

The horrible story began to unfold as we ploughed our way through reams of documents and historical records. Some sources were well known and documented, such as the records at Nuremberg, but some, like the papers recovered from sealed vaults of the now former KGB offices in Lithuania, were a first.

Our hope was to uncover the origins of the 12th Lithuanian Battalion, and discover its role in what had taken place. We sought to document a history of killings, but found instead a holocaust. A picture began to emerge.

### 1. Documentary Evidence: A Story Told by Old Reports and Orders<sup>3</sup>

Gecas was the commander of the 12th Lithuanian Auxiliary Police Service Battalion. He was in command in Kaunas in 1941 and moved with his Battalion to Minsk in October 1941.

The German military command at Minsk associated Jews with anti-German partisan activity. It was the military view that the destruction of the Jews<sup>4</sup> was necessary for the proper pacification of the area. In August 1941 Himmler announced in Minsk that Hitler had declared as policy the annihilation of Jews and this was to include men, women and children. When the 12th Lithuanian Battalion arrived in Minsk the German military command had two complementary grounds, as they saw it, for killing Jews, that of pacification and to fulfill the policy of Hitler.

It was observed with the Jews that they often leave their residences in the flat country, probably emigrating towards the south, attempting to evade the operations initiated against them. Since they are all still making common cause with the communists and partisans, the total elimination of this element alien to the nation is being undertaken . . . .

. . . .

During a purge in the area Slutsk-Kleck by the 11th Police Battalion 5,900 Jews were shot.<sup>5</sup>

By persuading the Jews it was for their own safety, the Germans at this stage aimed to concentrate the Jews of Kaunas into a ghetto. The marking of all Jews with a yellow Star of David was required. Prior to the German invasion, about 20% of the population of Kaunas had been Jews. After what took place, they were virtually wiped out.

We established that 150 Lithuanian officials had been assigned to screen all towns, even prison camps, to ensure the arrest of Jews and have them taken to concentration camps where they were subject to what was

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3. For our purposes one feature of the Germans was to become crucial in underpinning and making possible our eventual success. I refer to a preoccupation with keeping detailed records. In the account to follow, various reports collected during our investigation will be discussed.

4. When references were made to Jews, this referred to the indiscriminate gathering of Jews of both sexes and all ages.

5. See *supra* text accompanying note 4.

described as *special treatment*, namely execution. Reference was made in a Report in 1941 to it being possible very quickly in Lithuania: to bring Lithuania circles to self-cleanse themselves so that the complete exclusion of Jews from official life was attained.

*Self cleansing* meant an action undertaken by indigenous people, rather than the Germans, to kill Jews in their territory without the active participation of Germans. The report went on record with some satisfaction that spontaneous programs were occurring in all cities.

In what has become known as the Jager Report, Jager, the commander of Einsatzkommando No. 3, recorded that by October 1941 about 70,000 souls had been executed. This figure includes killings outside Kaunas in many other small towns in Lithuania. Jager records on December 1, 1941:

I can now say that Einsatzkommando 3 has achieved the objective of solving the Jewish problem in Lithuania. There are no longer any Jews in Lithuania with the exception of these Jews and their families under forced labour.

I also wish to kill these Jews and their families. However, this brought sharp criticism from Civil Authorities . . . and the Army, resulting in an express direction: 'These Jews and their families may not be shot.' This was because of the economic considerations which required their services in the occupation, for the moment at least.<sup>6</sup>

So far as the killing of Jews was concerned, it was envisaged that the Jews would disappear completely by the end of 1942. By letter dated August 7, 1941, Major Franz Lechtaler wrote from Kaunas to the Lithuanian Commandant requesting two new battalions. A specific request was made and approved for the transfer of Lieutenant Gecevicus' (Gecas). He became the Commander of Platoon 3 of the 2nd Company of the 12th Lithuanian Battalion. We established that on August 27, 1941, Gecas was on the job.

By order No. 42 dated October 6, 1941, Gecas and his men were ordered to the areas of Minsk, Borisov and Slutsk, reference being made in the orders to the final extermination of Bolshevik partisans. Within 4 days of arrival in the area, Gecas' battalion was in action in the area of Rudensk. Six-hundred thirty persons, including communists, Jews and

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6 *Id.*

7. Once in Britain, the Lieutenant changed his name to Gecas.

other suspicious elements without identity papers were recorded as having been shot. Jews were in a category of their own, and only had to be Jews in order to be shot. There was no way that a Jew could demonstrate a right to live. It was understood Jews were to be shot partly because of a presumption that they were connected with the partisans, but mainly because Jews were to be killed in any case.

By October 1941 Gecas' battalion was primarily used to shoot Jews and communists. In a Report of the Smilovicze Operation of October 14, it is recorded that 1,300 heads were liquidated. The victims were specified as Jews, communists and elements hostile to Germans.

A further order dated October 16, 1941, refers to operations involving Gecas' battalion carried out in the Rudensk area. Specifically, it refers to 800 partisans, communists, Jews and other suspicious *riff-raff* who were detained and shot.

There was reference to the clearing out of a civilian prison camp in Minsk where 625 were liquidated. On the 18th of October, another prison camp was cleansed and 1,150 communists were shot. On October 21st, two companies of the police battalion were involved in an operation in Kojdanow, where 1,000 Jews and communists were liquidated.

When we examined the Reports of the Wermacht Commander for this area and time period, we could establish with mathematical certainty that six German or German Allied troops had been killed in combat with partisans and 10,940 partisans were captured. Of those captured, 10,431 were shot. It was also recorded that during a purge in Slutsk - Kleck an additional 5,900 Jews were shot.

There was great controversy over the massacre at Slutsk. On October 30, 1941, Carl, the Commissioner for Slutsk, wrote to the Commissioner General at Minsk as a follow-up to a telephone call on the 27th of October. He complained that a Lieutenant of a Police Battalion from Kaunas appeared at 8:00am on the 27th October explaining that he had an assignment to effect the liquidation of all Jews in Slutsk within two days. Carl had demanded to discuss the matter, but was told this was not possible. He was told that this action was to be carried out in all towns, and that two days had been allocated for Slutsk. Within those two days the town of Slutsk was to be cleared of Jews. There were an estimated 7,000 Jews in Slutsk. Carl protested violently, pointing out that such a liquidation of Jews must not be allowed to happen in such an arbitrary manner. He tried to intervene, but went on to record that all Jews without exception were taken out of the factories and shot or deported in spite of an apparent agreement to the contrary. We later established that deported meant taken just outside of town, out of earshot, to areas where pits were prepared and then they were shot.

Carl went on to complain that the shooting was chaotic. He referred to it as a picture of horror. He complained of indescribable brutality. He reported that some souls shot and buried in pits had not died, but had dug themselves out of their graves.<sup>8</sup> Carl concluded by asking that the police battalions be kept away from him in the future.

## 2. Eyewitnesses

We had reconstructed the history of the period, pieced together from documents available from many sources. We painted for the first time an outline of a largely forgotten holocaust. We were ably assisted throughout by Professor Hilberg of Chicago University, a world authority on the holocaust. He sent us out to find the people to prove the picture thus far sketched. We now had to find witnesses to test the documents against recollections; confirm that our reconstruction was right; and prove that we were not being conned by some fiendish KGB plot of misinformation — as Gecas was ultimately to claim in court as a last recourse.

This task was not easy. With the fall of the Soviet Union the KGB were no longer in place to provide witnesses. We started from the lists we had. I had a very fortunate meeting with a former KGB officer in need of some work. A short commercial exchange delivered a name; it was an early and exciting lead. He had been in a Police Battalion and was in a position to confirm or deny the horror revealed in the host of reports and documents now amassed. We set out for Alytus to meet a monster. Instead, we met, as in all cases, a grandfather. We met ordinary men. We learned the holocaust was not the act of madmen or butchers from hell; the holocaust had been at the hands of ordinary men.

### a. *Lenous Stonkus*

Lithuania was as short of food and fuel as it was of evidence! We had to travel out of Vilnius to find our witness Stonkus, and after a four hour drive in a car with no heater in temperatures of minus 20 degrees Celsius, we reached the address we had been given. Our first lesson in the murky duplicitous world of post-communist Lithuania was about to be learned.

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8. We were even able to find an eyewitness who fully implicated Gecas in the Slutsk massacre. The eyewitness, which we thought might prove difficult to obtain, and even if obtained, probably so unreliable as to be worthless, turned out to be quite the opposite. This involved, for the first time in the United Kingdom, persuading the Court to travel from Scotland and sit in Lithuania and hear some eyewitness testimony. The logistics of this alone could keep me speaking for another day. I leave that for another time!

We knocked on a door flanked by our translator and asked to speak with Lenous Stonkus. "He's dead," we were told. We were about to leave when I noticed an unhealthy interest in our presence being shown by a neighbor who was ostensibly working under the hood of his car. I approached, and, in a classic moment of Scottish legal thinking, extracted a ten dollar bill. I ripped the bill in half and had my translator explain that I wanted to meet Stonkus. The other half of the bill was his if this could be arranged. Ten dollars represented about two months wages, more than enough to persuade any neighbor to inform on another, especially in a country where informing on your neighbors was part of the culture. Within minutes we were on the road to the Stonkus hideaway. He had served twenty years in Siberia for war crimes at the hands of the Russians. The ex-KGB man who had sold me his name had also sold Stonkus a warning we were coming! The lesson was learned. Always ask how dead is dead?

Stonkus gave us background information and further names. He confirmed from our list who he thought was alive and those he knew to be dead. Perhaps for the first time since he had been released from a Siberian prison he confronted his past. Almost mechanically he recounted the sins of his youth. When asked about the Jews he looked both ashamed and fearful — fearful perhaps of retribution yet to come. I have no doubt the chill of Siberia revisited him at that moment. We left Stonkus frightened and surrounded by his grandchildren. We had wanted to hate him, detest him, and see him shamed. Instead, we left behind an old man — a grandfather loved by his family. The experience dissipated our anger, and left us confused.

*b. Antanas Aleksynas*

In our continuing search for eyewitnesses, one document we had trawled from our research proved crucial. A railroad manifest contained, with true obsessive detail, the movements of troops, including the seating assignment of each soldier. When placed against a map from that time period, which revealed many villages long since destroyed or renamed, we could use the manifest to trace the journey of the 12th Lithuanian Police Battalion. This confirmed the names of the soldiers, but we discovered something much more important. The train had stopped at places where we already knew massacres had taken place. Closer examination and further research revealed that this train took the 12th Battalion on its *Journey of Death*. Each time the train dropped off the battalion whether for a day or for a few days, the local town records would reveal a massacre. They would then re-board and this machine of destruction would move on. We sought out the soldiers who had traveled this journey.

Antanas Aleksynas was such a soldier. We found him, now in his late 70's, living in a shack outside Kaunas, bringing up two young children following the death of his son and daughter-in-law in a road accident. He had been at the very heart of what we were interested in. He was remarkably frank and forthcoming. He was prepared to give evidence against Gecas, but on two conditions. First, he would not leave Lithuania. Second, he needed a *pig sitter* for his pigs! The dollar can achieve wonders in such countries. It did so in this instance. A *pig sitter* was found.

He identified Gecas as the Platoon Commander, he confirmed that Gecas spoke German and took all his orders from the Germans. On their first operation they were taken to a small township. Local Russian police pointed to Jewish residents. Gecas ordered Alexsynas and others to round them up. The Jews were taken to a gravel pit — men, women and children, about twenty or thirty in all. They were told to lie down, and then, they were shot. On another occasion they were taken to a POW camp. The POWs were taken out of the camp to pig pits. Two pits were dug. They measured about fifteen to twenty meters long, two meters wide and 1.5 meters deep. After the pits were dug, the lorries went back with the prisoners and returned, this time with Jews. The Jews were lined up at the pits and shot. Afterwards, the officers would go and check for survivors and shoot them, finishing them off. Hundreds were involved on this occasion. Gecas was there giving orders. The killing started in the afternoon and went on until the evening.

Aleksynas described the two day operation at Slutsk as being part of a long catalogue of horror which involved the whole battalion. Gecas was in charge of his platoon. On this occasion over 1,000 men, women and children were killed. He went through incident after incident chronicling the mass annihilation of the Jews. He recalled that the order given by Gecas was to shoot at your own discretion.

c. *Mignos*

Mignos was the next to be interviewed, another grandfather, another ordinary man. He too remembered the operation at the pits. He agreed to give evidence. He identified Gecas, and gave an equally chilling and detailed account of these horrors.

d. *Goga*

Goga, another soldier, was actually born in the United States, but returned to Lithuania as a young child. He was very articulate and precise. He was to travel to Scotland to give his evidence. He recalled an incident in Rudensk at the end of November 1941, where the battalion had traveled



by train. They were told to encircle a town, and to round up the Jews — men, women and children. Within forty minutes the Jews had been herded to a gravel pit and shot. He remembered the whole battalion going to a POW camp in Minsk, where close to 10,000 prisoners were held. The prisoners were to be taken to pits and shot. The Germans formed a corridor, which the POWs would be forcefully marched through in small groups. Leaving their clothes behind, each group was taken to a pit, and then shot in the nude. This operation took about two days. When the soldiers had finished, the officers stood at the pits, and *finished off* those alive. It took place like a conveyor belt operation. All ten thousand souls perished.

e. Mrs. Pickholz

As I indicated at the outset, we had investigations going on almost anywhere we thought we could find a Lithuanian from this time frame. Our luck was now turning. We found a key witness in Florida, Mrs. Pickholz.

In 1941, she was sixteen, and living in Slutsk. Since her mother was dead, she lived with her father, three younger sisters, and her five-year-old brother. The Germans entered Slutsk in June 1941. Restrictions were immediately placed on all Jews. In August her father was taken away never to be seen again. She was then head of the household. On October 26, 1941, she was working when soldiers suddenly flooded the town. Jews were being rounded up. She saw her own family amongst those rounded up. One of her younger sisters saw her and tried to run to her, but was struck down by soldiers with rifles. These soldiers were Lithuanian. She blacked out.

She awoke to find herself concealed in a barrel; she had been hidden by friends. As she peered out between the cracks in the barrel, she watched and listened to shooting going on. Later, she got out and found many had been taken to camps nearby. She went to the camps, not wearing her Star of David. She was to find all were shot. She never saw her sisters or brother again. No Jewish children were left alive. The soldiers left. This all took place in only two days.

f. *Luba Fisk- The schoolteacher*<sup>9</sup>

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9. We had many other leads and investigations, some fruitful and some not so fruitful. Some like this one proved to be of no use to our case, but revealed another chapter of horror and human misery that must be told today if for no other reason than to bare witness to this human tragedy.

I received information from a confidential source that there possibly existed a key witness in Israel. All I was told was that she was a retired school teacher in her 70s, Lithuanian, and had one leg. That was it. I contacted a law firm that my firm uses in Tel Aviv, and placed my request. They hired a detective. Within forty-eight hours I got a call that such a woman was living in Afula in lower Galilee. We had been lead to believe she might identify Gecas as being involved in killings at the 9th Fort in Kaunas, a grim Lithuanian Belsen where thousands had been put to death.

Bob Tomlinson and I flew out to Ben Gurion Airport and rushed by car to Afula. We were met by Luba Fisk who indeed was a one legged retired school teacher originally from Lithuania. She told a heart-wrenching story. She had been a linguist; was married; and had a four-year-old child. They were confined to a ghetto. One day the soldiers arrived and people were being taken away in buses. The soldiers said that if the women could raise enough money or fetch enough gold, they would spare the children. They all ran in a frenzy bringing all they could find. It was taken, but so were the children and their parents. At the place of execution they were lined up to have their papers checked. The soldiers discovered that Luba spoke languages; there was a hasty discussion, and she was asked to stand to the right. Her four-year-old son was taken to rejoin the others. Moments later he was shot as she looked on. Luba lost her husband as well. She is now remarried and living in Israel. Regrettably for us this was an operation unconnected with Gecas. However, it was, and still remains for me, a chilling memory of a woman reliving pain beyond my imagination.

### 3. Piecing Together A Horrific Puzzle of Information

We moved on and unearthed all that Gecas had ever said in every interview and in every form ever recorded. He had been interviewed by the O.S.I. years before, and had given a deposition. He had subsequently given some stories to the press. We revealed a chain of lies, deceit, contradiction, and inconsistencies beyond repair or explanation. We compared these pathetic lies to our documents and witnesses as we prepared for court.

In Lithuania and in Scotland, it all began to come together: the proof of murders which occurred before I was born; the names of those killed; the names of the killers; and the records of the destruction. A holocaust was uncovered and revealed in all its horror.

### III. CONCLUSION

We won our case. The judgment was uncompromising.

I am clearly satisfied on the evidence as a whole upon the standard of proof agreed to apply to this case that the pursuer participated in many operations involving the killing of innocent Soviet citizens, including Jews in particular, in Byelorussia during the last three months of 1941, and in doing so committed war crimes against Soviet citizens who were old men, women and children. I further hold it proved that the pursuer was the Platoon Commander of the platoon in which Antanas Aleksynas served . . . and that that platoon participated specifically in the [operations mentioned in the documentary] . . . ."<sup>10</sup>

But what did all this achieve? It did not achieve a prosecution, for reasons I yet do not comprehend, the Prosecution authorities decided there was insufficient evidence for a criminal trial. Did we have a pyrrhic victory, serving only to open up old wounds, excite the press, and cause grief? Or did we serve the purpose of telling a story lost on a generation which looked on these matters as only *history*?

My answer is the answer given to me by Professor Draper who had given us much help. I hope you will agree with me it is the only answer:

If you, but think, of the talent, of the geniuses, of the scientists, of the artists, of the writers, of the poets, and of the tens of scores of thousands of ordinary, decent human beings who perished in these genocide acts, one is moved to say: By God, what right does any man order this to be done to people? It is so ghastly that I do not think that posterity can afford to forget it."<sup>11</sup>

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10. *Gecas v. Scottish Television PLC*, Sess. Cas., July 17, 1992, available in LEXIS, Scot Library, Cases File.

11. Draper, Law Professor (1991).

# THE LOGICAL NEXT STEP? AN INTERNATIONAL PERSPECTIVE ON THE ISSUES OF HUMAN CLONING AND GENETIC TECHNOLOGY

*Jason T. Corsover*

“If you’re a scientist, you believe that it is good to find out how the world works; that it is good to find what the realities are; that it is good to turn over to mankind at large the greatest possible power to control the world . . . .”

- Robert Oppenheimer on the Manhattan Project

“Thou shalt have no other gods before me . . . .”

- Exodus 20:3

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## I. INTRODUCTION

Imagine a child, about eight years old, playing touch football in the front yard with a group of neighborhood kids; a model youth, cute, kind, and relatively bright for his age. A pass is overthrown and bounces into the street; a street, like any other, located in the middle of a quiet neighborhood, in any city, anywhere. As the child chases the ball, he runs into the path of an unexpected car driving down the road. Killed on impact, the parents of the child, their only child, are devastated. They are unable to have anymore children, and feel they have lost their one and only chance to have a child. After a few months, the grief stricken parents are approached by a local fertility clinic and are given a proposal that could afford the couple an opportunity to not only have another child, but to have their child recreated. The procedure they described would use stem cells from the blood taken from the woman's umbilical cord, which was extracted and preserved at the time of her child's birth. The cells would then be placed inside an enucleated egg cell and implanted in the woman's uterus, where it would be allowed to develop naturally. Although wary of the process, but still stricken over the loss of their only child, the couple is assured of the safety of the procedure and elects to proceed. Nine months later, a beautiful baby boy and identical genetic copy of the deceased child, is born.

Now imagine this same situation, but instead of promising an identical genetic copy of the deceased child, the clinic offers to manipulate the genes and perhaps produce a girl, or another boy, but one with blue eyes and blond hair. Even more convenient, the clinic has a special menu allowing the couple to choose which traits the child will have, with choices available for intelligence, hair color, physical build, etc. Instead of being hit by a car, say the child dies due to a serious genetic disease. The opportunity may be available to produce an exact clone of the child, less those genes that are susceptible to the disease, or if need be change the sex of the child so that the disease will not become viable. Is this the future of child birth which we can expect with regard to the new technologies now under public and legislative debate?

Man is on the threshold of a new world, in which the ability to alter the very essence of humanity and its interaction with nature, is upon us. Through the science of genetic engineering the manipulation of the genetic composition of man, and that of all future generations, has advanced to the point where serious rational thinking must direct the potential course of progress in the areas of cloning and genetic technology. The goal of science is to produce the truth, and not peace of mind. Due to the conflict with moral, ethical, legal, and social issues, the pursuit of

scientific research must be limited within the bounds declared by all of mankind. These technologies, if applied to humans, will significantly alter the direction of the whole of humanity, in its efforts to improve upon the overall health and condition of society. For those who are concerned with the future debate over human rights, awareness of the potential scientific and technological advances must be achieved. If not, a lack of understanding on which questions should be asked, and what answers must be given will ensue. The sooner these issues are brought to the attention of every individual, the more beneficial the technology will become to all of humanity.

## II. ADVANCEMENTS IN CLONING TECHNOLOGY

Experimentation with animals utilizing cloning technology has been going on since the 1950's when scientists began to attempt the cloning of frogs. These early scientists used a procedure in which they took the nuclei, which harbors the DNA, of cells from tadpoles and in turn implanted them into nuclei-free fertilized frog eggs.<sup>1</sup> Attempts using this process resulted in many of the frogs dying soon after emerging from the eggs, and those that survived were grotesquely deformed or sterile.<sup>2</sup> Within twenty years, scientists reached the level of successfully cloning frogs, although prior to reaching adulthood the frogs were killed.<sup>3</sup> As the success in the cloning of frogs was achieved, scientists began to experiment with the cloning of other animals. During the 1980's, the first cattle, lambs, and piglets were cloned from the splitting of embryos.<sup>4</sup> However problems still exist. For example, cattle embryos grow twice as large as normal in the womb; sometimes killing both the calf and the mother.<sup>5</sup>

A major breakthrough was accomplished in the 1980's by Robert McKinnell at the University of Minnesota. McKinnell was able to clone frogs from 2- to 4-celled embryos using nuclear transfer.<sup>6</sup> Scientists extracted the nucleus from an embryonic cell of one species of frog and fused it with an egg from another species of frog whose nucleus was

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1. Charles Seabrook, *ScienceWatch A Mirror Science*, ATLANTA J. & ATLANTA CONST., Mar. 9, 1997, at C4.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Clair Wood, *Here a Sheep, There a Sheep .. And Human*, BANGOR DAILY NEWS (Me.), Feb. 28, 1997.

previously removed.<sup>7</sup> The resulting frog was an exact clone of the species providing the nuclear material. By 1984, nuclear transplantation had been used to successfully clone mice.<sup>8</sup>

In 1993, the advancements accomplished in cloning techniques reached world wide attention with the announcement by researchers at George Washington University. Utilizing an embryo splitting procedure, scientists created four individual human embryos by splitting a single human embryo at the 4-cell stage. Once the original embryo was split, each individual embryo was covered with an artificial zona pellucida, the protein covering an egg, and allowed to continue to divide, with some reaching the 32-cell stage.<sup>9</sup> Upon reaching the 32-cell stage, the embryos would have been able to be implanted into a woman's uterus.<sup>10</sup> In order to ensure that these embryos would not be able to develop into human beings, scientists selected embryos that were fertilized twice. Thus, these embryos contained an extra set of chromosomes which ensured that they would die sometime during their development.<sup>11</sup> Theoretically, this technique could potentially be used to create an infinite amount of clones, all derived from one original cell, and developed into genetically identical human beings. Although these embryos were never implanted, and were destroyed after six days, the breakthrough caused a public uproar over the ethical implications of the procedure.<sup>12</sup>

According to scientists involved with this research, one of the purposes for proceeding with this procedure was to elicit public debate over whether this type of cloning is acceptable.<sup>13</sup> Although the scientists were successful in gaining the attention that this research attained, the responses may not have been exactly what they were looking forward to. Negative reactions were received from fellow scientists, ethicists, and the general public. Because of this public reaction and until some type of concrete guidelines are developed, the scientists stated that they would suspend further research into the cloning of human embryos.<sup>14</sup> In defense of the research, project leader Dr. Hall responded, "We have not created

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7. *Id.*

8. *Id.*

9. Philip Elmer-Dewitt, *Cloning: Where do we Draw the Line*, TIME, Nov. 8, 1993, at 64.

10. *Id.*

11. *Id.*

12. Mona S. Amer, *Breaking the Mold: Human Embryo Cloning and its Implications for a Right to Individuality*, 43 UCLA L. REV. 1659, 1665 (1996).

13. *Id.*

14. *Id.*



human life or destroyed human life in this experiment."<sup>15</sup> Furthermore, scientists involved in this type of cloning research believe that as the logical progression that began with in vitro fertilization, human cloning is the next step in relieving human suffering from infertility, as well as many other therapeutical needs.<sup>16</sup>

International reaction to the research conducted at George Washington University was also mainly negative. The majority of countries, as well as international organizations, condemned the experiments and set forth an international debate on whether these types of experiments should be conducted on human beings. Prior to this, only a handful of countries had regulations that would prohibit these types of experiments on humans, but even these regulations were not specific enough to prohibit all types of experimentation. Germany stood out and had this research been conducted there, the scientists would have the potential to face up to five years in prison.<sup>17</sup> Other countries, such as England, had regulations that were thought to protect against human cloning by requiring a governing body to issue a license prior to any research being conducted.<sup>18</sup> But, as will be shown, the regulations were not prepared to cover all types of cloning techniques.

In 1997, at the Roslin Institute in Scotland, researchers, led by Dr. Ian Wilmut, performed what was thought of as an impossible task, and thus brought the world into a new dimension in cloning technology. Scientists there, were able for the first time to clone an adult mammal utilizing somatic cell nuclear transfer. Beliefs, prior to this experiment, were that DNA would not be able to guide the development of an embryo more than one time.<sup>19</sup> Thus, it was thought that cloning an adult mammal would be an impossible process. But with the birth of Dolly the sheep, scientists and the world are now confronted with a new technology that will most likely alter the future of human life.

What the scientists created was a sheep that contained the genetic material of only one parent and is basically a delayed twin of the adult sheep that donated the genetic material. To accomplish this task, scientists fused a normal adult cell and an unfertilized egg with no nucleus and allowed the new genome to begin its dividing process. A viable embryo was created after 277 attempts, and was reimplanted into another ewe. In

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15. Elmer-Dewitt, *supra* note 9, at 64.

16. *Id.*

17. *Id.*

18. *Id.*

19. Clive Cookson, *FT Guide to: Cloning*, FIN. TIMES, Mar. 3, 1997, at 10.

all, eight lambs were created, including Dolly, out of 834 fused pairs, one of which died immediately after birth.<sup>20</sup>

The success accomplished by the scientists at the Roslin Institute has the possibility to lead to great gains in the breeding of animals. With the ability to clone an adult mammal, scientists can replicate an animal with already known desirable traits. The breeding of sheep with fine wool, horses with great speed and power, cows with desirable milk qualities and nutrients, are some of the endless possibilities. Speculation within the scientific community is that within ten years, the breeding of animals with the capability to produce organs that are fit for human transplantation without the possibility of rejection is possible.<sup>21</sup>

Applying this technique to other mammals, including human beings, does not seem feasible at this time because many problem areas arise. First, there are many differences that exist between mammalian species in how they develop during the first few days of growth. The DNA of mammals differ in how quickly they take charge in the embryo's development process.<sup>22</sup> The embryos of different species will also differ in how they implant in the uterus and develop the placental connection.<sup>23</sup> A second problem area exists with current knowledge about the reprogramming abilities of the fused DNA.<sup>24</sup> At the present time, scientific knowledge of how normal programming occurs during development is lacking; thus, one can imagine the uncertainty in the reprogramming of DNA when it is stripped of its old proteins and replaced with the new ones inside the egg cell.<sup>25</sup> Other problem areas include the current success rate of attaining a viable embryo from the fused egg cells,<sup>26</sup> and the risk of mutated DNA being transferred from the adult into the new embryo.<sup>27</sup>

### III. TECHNIQUES USED IN CLONING

There are two main techniques utilized when researching cloning technology. The first is called blastomere separation and consists of

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20. *Prohibition of Fed. Funding for Human Cloning Research, 1997: Hearings on H.R. 922 Before the Subcomm. on Tech. of the House Comm. on Science*, 105th Cong. (1997).

21. Mona Charen, *Is Cloning a Victory over Death*, DET. NEWS, Feb. 27, 1997, at A15.

22. Elizabeth Pennisi & Nigel Williams, *Will Dolly Send in the Clones*, SCIENCE, Mar. 7, 1997, at 1415.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The success achieved in Scotland occurred in only 1 out of 277 attempts.

27. See Mark Ward, *The Sheep that Shook the World 'Dolly' Offers Much More Hope than Hazard*, MILWAUKEE J. & SENTINEL, Mar. 2, 1997, at 1.

splitting an original embryo; thus, creating multiple embryos, each containing the identical genetic composition. This technique has been used since the fifties to clone plants and animals and was the process behind the experimentation conducted at George Washington University on human embryos. The second technique, and the one which created the recent public debate over cloning technology, is somatic cell nuclear transfer. This cloning process basically entails replacing the nucleus of an unfertilized egg cell with the nucleus from another person's cell, containing their DNA; thus, allowing the replication of desirable traits in the resulting offspring. It is this technique, which was successfully performed in Scotland on the sheep, which has called for the countries of the world to enact regulations restricting the area of genetic research.

Embryo splitting, also called blastomere separation,<sup>28</sup> is the older and somewhat simpler of the techniques used in cloning. This technique creates multiple embryos with identical DNA by splitting the original embryo; thus, creating the possibility of implanting these newly created embryos into a woman's uterus and allowing them to develop into identical human beings.<sup>29</sup> In a theoretical sense, embryo splitting can be utilized to produce an infinite amount of identical humans, each one derived from an embryo which is either natural or one that is artificially created. Currently, this type of cloning is done from embryonic cells, which are removed from an animal's embryo at an early stage when it is still developing.<sup>30</sup> Because of this, predetermining the genetic traits for those that are desirable is not available.

Blastomere separation is the technique that was used by scientists at George Washington University to clone human embryos, and is readily available at many laboratories and fertility clinics around the world.<sup>31</sup> The technique involves acquiring an embryo and allowing it to develop in a petri dish until the 2- to 8- cell stage.<sup>32</sup> A chemical solution is then added to the dish that dissolves the zona pellucida covering the embryo.<sup>33</sup> Once the zona pellucida is dissolved, the cells contained within the embryo are

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28. Amer, *supra* note 12, at 1660.

29. Elizabeth Ann Pitrolo, *The Birds, the Bees, and the Deep Freeze: Is There International Consensus in the Debate over Assisted Reproductive Technologies*, 19 HOUS. J. INT'L L. 147, 157 (1996).

30. *Human Cloning Techniques* (last updated Feb. 29, 1996) <<http://cac.psu.edu/~gsg109/qs/em01002.html>> .

31. *Id.*

32. *Id.*

33. *Id.* The zona pellucida is a protective protein and polysaccharide membrane that covers the internal contents of the embryo, and provides the necessary nutrients for the first several cell divisions that occur within the embryo.

freed.<sup>34</sup> These embryonic cells, also known as blastomeres, are then collected and placed in separate petri dishes.<sup>35</sup> An artificially produced zona pellucida is then used to coat the embryonic cells and each cell is now considered to be a new embryo. Each embryo will contain identical genetic information and if allowed to develop, they will divide and eventually form a human being.<sup>36</sup>

There are many benefits that arise from this type of splitting procedure, as well as many detrimental effects that may ensue. The moral, legal, and ethical issues will be discussed in more detail later in this article, but some of the more prevalent benefits and problem areas deserve mention here. For example, through the research conducted at George Washington University, scientists were able to gain some knowledge on how to achieve the best results in dividing embryonic cells.<sup>37</sup> Studies showed that embryos that were split during the 2-cell stage achieved greater success in reaching the 32-cell stage, which is the stage at which implantation in a uterus is available.<sup>38</sup> Those embryos that were split at the 4- to 8-cell stage were fortunate to reach only a 16-cell stage.<sup>39</sup> As mentioned earlier, the embryos experimented on at George Washington were destined to die at an early stage and were denied the possibility of producing a human being because they were fertilized twice by more than one sperm cell.<sup>40</sup>

Another area of debate is that if this procedure is performed successfully on viable human embryos, cloned embryos could be stored frozen and then later thawed out for use in fertility procedures. The thawed embryo could be used by some parents to create a later born genetic twin or used to develop a replacement for a child who prematurely died. Embryo splitting may also increase the amount of embryos that are available for use during fertility procedures by limiting the need for putting the woman at extended risk during additional egg retrieval surgeries. Blastomere separation can at least double the amount of embryos that are retrieved during one embryo retrieval surgery.<sup>41</sup> Apart from the potential benefits that may arise, there are many issues that must be resolved

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34. *Id.*

35. *Id.*

36. *Human Cloning Techniques*, *supra* note 30.

37. *Id.*

38. *Id.*

39. *Id.*

40. Elmer-Dewitt, *supra* note 9.

41. June Coleman, *Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures*, 27 PAC. L.J. 1331, 1357 (1996).

concerning the ethical and legal effects of this procedure. First, this type of research is still highly experimental and potentially risky for the embryo.<sup>42</sup> Also moral issues surrounding the creation of life and psychological effects on the cloned child and donor child, as well as those for the parents and society at large must be considered.

The second and more difficult procedure is nuclear transfer, also called somatic cell nuclear transfer. According to scientists, the cloning of an adult mammal utilizing this technique was thought to be impossible until early in 1997. At this time a research team at the Roslin Institute in Scotland performed successful nuclear transfer to clone an adult sheep. Making the experiment even more dynamic is that three breeds of sheep were used in the process. The cell nucleus from a Finn Dorset sheep was substituted for the nucleus of an egg from a Poll Dorset, which was then implanted in a Scottish Blackface ewe.<sup>43</sup> The success of this research brought the debate over cloning technology, and the scientific and medical possibilities that may now be available, to front page news and elicited a furor of public and governmental debate over this new technology. Ethical, legal, and moral issues concerning the implications of utilizing the new biotechnical advances on the human race were, and continue to be, debated in legislatures, laboratories, and public places throughout the world. Somatic cell nuclear transfer of adult mammals now opens the door to the possibility of producing human beings with predetermined desirable traits.

Nuclear transfer, unlike embryo splitting, is a difficult procedure with a much lower rate of success.<sup>44</sup> As of the beginning of 1997, there were only six research facilities around the world with the capability of performing the same procedure as researchers at Roslin.<sup>45</sup> The procedure was accomplished by transferring the nucleus from an udder cell into an egg, whose DNA had been previously removed.<sup>46</sup> In order to be successful, scientists had to make the donor cell DNA behave much like the DNA of a sperm or unfertilized egg. This was achieved by depriving the cells of the full amount of nutrient-laden serum that is naturally supplied and in effect caused the cells to remain in the beginning stages of the cell cycle.<sup>47</sup> Causing many of the genes to shut down, this deprivation

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42. *Id.*

43. Christopher Wills, *A Sheep in Sheep's Clothing*, DISCOVER, Jan. 1998, at 22.

44. *See Ward, supra* note 27.

45. *Id.*

46. Pennisi, *supra* note 22.

47. *Id.*

ensured that the DNA had not replicated just prior to being transferred.<sup>48</sup> Using an electrical charge, the researchers then fused the donor cell with an unfertilized chromosome-extracted egg.<sup>49</sup> This new fused egg was now provided with a full complement of DNA from the original donor sheep and the egg began to divide and develop.<sup>50</sup>

In applying this technique to humans, as well as other mammals, a potential problem arises in how fast, in individual species, the DNA takes control of the development process. In this procedure with sheep, the first three cell divisions, the 8-cell stage, of the egg replicates its DNA without expressing any of the new genes, and all the work necessary for cell division comes from proteins and messenger RNAs contained in the original egg's unextracted cytoplasm.<sup>51</sup> During this process, the DNA loses its attached proteins and picks up the proteins contained in the cytoplasm, which in turn reprograms the DNA so the normal development of the embryo can occur.<sup>52</sup> While in sheep the DNA apparently gained control in the 8-cell stage, in humans, on the other hand, the new DNA is thought to take charge only after the 4-cell stage.<sup>53</sup> Overcoming this difference is detrimental to having success in this technique for human beings. Scientists also believe that the mammary gland cells used to attain the transferred DNA for the sheep included stem cells. Stem cells have a greater potential for development because they are an undifferentiated progenitor cell as compared to an ordinary epithelial cell.<sup>54</sup>

While negative reaction to the success achieved in this research has caused many countries to pass laws outlawing the use of this technique to clone human embryos, most of the current regulations use language that is too broad to condemn all experimentation. For example, under Britain's Human Fertilization and Embryology Act of 1990, human cloning is prohibited.<sup>55</sup> But the language used relates to the replicating a nucleus of an embryo with a nucleus taken from the cell of a person.<sup>56</sup> Furthermore, in defining an embryo, the Act states that an embryo means a live human embryo where fertilization is complete, or an egg in the process of

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48. *Id.*

49. *Id.*

50. Cookson, *supra* note 19, at 10.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Human Fertilization and Embryology Act, 1990, § 3(3)(d), (UK).

56. *Id.*

fertilization.<sup>57</sup> Therefore, based on the language of this Act, the research conducted at the Roslin Institute may not have been included in the prohibition, if proceeded on with humans, because no embryo was involved in the creation of the sheep.<sup>58</sup> Also, the cell that developed was not a gamete, a combination of sperm and egg, nor did it undergo fertilization.<sup>59</sup> In order to ensure protection from this type of cloning, regulations must become more specific in what exactly it is trying to prohibit.<sup>60</sup> Language used should also not be too over-reaching and overbroad; thus, preventing other types of research from being conducted that does not necessarily involve cloning.

#### IV. GENETIC ENGINEERING TECHNOLOGY

As a way to more completely understand a majority of the issues that are raised in proposing legislation regarding the restriction of cloning technology, a short introduction into other methods of genetic manipulation is discussed under this topic. Some of the procedures are currently utilized in genetic research by scientists, while others have the potential to be used in the near future. The relation of these technologies with that of cloning will become apparent as people understand the capabilities of science, even at this infant stage of knowledge. The dangers associated with utilizing the advancements in genetic manipulation by altering the constitution of the human genome, with that of cloning, creates fears of a mass produced predetermined society. This topic will provide only a limited discussion in these areas; highlighting the areas in which they relate to subject of cloning.

##### A. *IN VITRO FERTILIZATION*

In vitro fertilization is the process of uniting an egg and sperm outside the woman's body. During the procedure, usually seven or more eggs are surgically removed from a woman's ovary and, after maturing for approximately six hours, are combined with sperm and allowed to incubate for another twelve hours.<sup>61</sup> The removal of excess eggs is done to protect the woman against the future risks of repeat surgical procedures and

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57. *Id.* at § 1(a), (b).

58. Sharon Korek, *Following Dolly*, 47 NEW L.J. 428, 429 (1997).

59. *Id.*

60. *Id.* at 430. Such a rewording might read, "embryo means a live human embryo where fertilization is complete or where a cell has been modified, created, or altered such that it has the potential to develop into an embryo or fetus."

61. Coleman, *supra* note 41, at 1337.

hormonal therapy.<sup>62</sup> Two to four of the fertilized eggs are then implanted into the woman, who has undergone hormone therapy to prepare her uterus for the procedure.<sup>63</sup> All steps included, the complete procedure will take approximately two weeks with a basic cost of around \$8,000.<sup>64</sup> The unused fertilized eggs are then frozen<sup>65</sup> for use in the event a live birth does not result from the first implantation, or future pregnancies are desired. The eggs could also be used for research or for donation to another woman.

Internationally, *in vitro* fertilization, when used as a remedy for infertility, seems to have become a sanctioned technique and is regarded as a routine commercial transaction.<sup>66</sup> There are still differing views on the legal and moral status of pre-implantation embryos and embryo research between the nations of the world and until a consensus opinion is derived worldwide many problems will continue to persist. Currently, most research and experimentation on human embryos is financed with private funding, including funds from the IVF industry; thus, any government legislation should be focused on the procedures themselves and not on the funding the research receives.<sup>67</sup> With only about a ten to twenty percent chance of achieving a pregnancy with one embryo, proponents of *in vitro* fertilization and cloning technology argue that the odds for a successful pregnancy would increase significantly, if that one embryo can be cloned into three or four.<sup>68</sup>

## B. GENE THERAPY

Gene therapy consists of attempting to alter the genetic makeup of an individual by either deleting or inserting specific genes in order to enhance one's genetic profile.<sup>69</sup> Alteration takes place by adding or removing DNA to, or from, a defective gene in order to overcome the consequences of disease.<sup>70</sup> Through the efforts of projects, such as the Human Genome Project, scientists will be able to identify and locate the

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62. *Id.*

63. *Id.* at 1338.

64. Pitrolo, *supra* note 29, at 152.

65. See Coleman, *supra* note 41, at 1338. Remaining embryos are frozen in liquid nitrogen at -196 degrees centigrade in a process called cryopreservation; Pitrolo, *supra* note 29, at 152. Storage life of preserved human embryos may be from five to ten years.

66. Pitrolo, *supra* note 29, at 152.

67. Elmer-Dewitt, *supra* note 9.

68. *Id.*

69. Ralph C. Conte, *Toward a Theological Construct for the New Biology: An Analysis of Ralcher, Fletcher, and Ramsey*, 11 J. CONTEMP. HEALTH L. & POL'Y 429, 435 (1995).

70. *Id.*



genes that are responsible for the development of humans. While many will infer a eugenic philosophy is behind such a procedure, proponents of this technology state that the overall quality of human life is improved because individual and societal suffering will be reduced and in turn the individual and subsequent offspring are genetically more viable.<sup>71</sup> Currently, there have no been no reports of using gene therapy on human subjects, but the use of these types of procedures is becoming increasingly possible and probable.<sup>72</sup> Gene therapy does have the potential to help cure many diseases such as sickle-cell anemia, hemophilia, and cancer.<sup>73</sup>

Depending on the type of cells being altered, gene therapy can take two forms. Somatic cell alteration is the first type of gene therapy. In this process, alterations are made to those cells which make up a person's tissues or organs, known as somatic cells, and results in changes to only that individual and not their subsequent offspring.<sup>74</sup> Of the techniques used in gene therapy, somatic cell alteration poses less of an ethical problem because the process is complete with the individual, rather than altering future generations of humans, and provides a beneficial and therapeutic result.<sup>75</sup> The second and more controversial of the techniques is gametic genetic therapy. This type of gene therapy seeks to alter the genetic profile of both the individual and subsequent offspring by modifying the gametes, the sperm and egg used in fertilization.<sup>76</sup> By replacing a defective gene from an individual's genetic profile, the goals are to help either cure or alleviate the effects of a disease and also prevent the passing of the gene to future offspring. Besides the highly debated issue of interfering with human evolution, gametic genetic therapy also possesses the risk to nonconsenting individuals of contracting previously made errors from the original procedure.

### C. GENETIC SCREENING

Through technological advances, preimplantation genetic screening is available to prospective parents to evaluate human embryos for genetic defects and disease. For example, screening can be used to determine if a child is the recipient of a defective gene caused by the parents' genetic profile containing an inheritable disease. Because of success in the fields

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71. *Id.* at 437.

72. Coleman, *supra* note 41, at 1354.

73. *Id.*

74. Conte, *supra* note 69, at 436.

75. *Id.*

76. *Id.* at 435.

of in vitro fertilization, cyropreservation, and embryo biopsy, human embryos can be screened prior to implantation, for genetic defects and disease.<sup>77</sup>

Similar to a normal in vitro fertilization procedure, the woman's egg cells are removed and fertilized with sperm outside the body.<sup>78</sup> Upon achieving the 8-cell stage, one cell is removed from each embryo, through a vacuuming procedure, and DNA analysis is performed. From the genetic testing, scientists are able to identify the embryos that are free from disease and these embryos are then implanted back into the uterus to continue development.<sup>79</sup> Currently, screening procedures have been successful in locating diseases such as cystic fibrosis, Duchenne muscular dystrophy, Tay-Sachs disease, and thalassemia.<sup>80</sup> With continued research, scientists may be able to detect more diseases and work towards methods of prevention and as an ultimate goal, their extinction.

#### D. EUGENICS

Eugenics can be described as a process in which technology is utilized to improve the human genetic profile and in turn improve the human species as a whole. This can occur positively, through the development of desirable or superior traits, or negatively, by reducing or eliminating less desirable genes.<sup>81</sup> Although the mere mention of eugenics connotes the memory of the atrocious experiments conducted by the Nazis, eugenic practices currently take place in the United States and throughout the world. Required testing for couples with inheritable diseases, statutes prohibiting incest, and pre-birth knowledge of the child's sex or genetic defects which may result in an abortion, can all be described as negative eugenic practices.<sup>82</sup> The detection and sterilization of many unwanted genetic diseases, such as sickle cell anemia or Tay-Sachs disease, allows the parents the choice of whether or not to reproduce or avoid a pregnancy.

Eugenic ideology has been present in society dating back to Plato's *Republic*, in which he sponsored the ideal that through selective breeding,

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77. KARL DRLICA, UNDERSTANDING DNA AND GENE CLONING 275 (John Wiley & Sons, Inc. 1997).

78. *Id.*

79. *Id.*

80. *Id.*

81. John R. Harding Jr., *Beyond Abortion: Human Genetics and the New Eugenics*, 18 PEPP. L. REV. 471, 477 (1991).

82. *Id.* at 478, 479.

the foundation of a superior class of beings can be formed.<sup>83</sup> In the 1800's, Sir Francis Galton, cousin of Charles Darwin, chose the term eugenics to describe the process of selective breeding in humans, which would allow those superior blood lines to prevail over less suitable breeds.<sup>84</sup> During this time, Gregor Mendel began the ground work for today's genetic research by experimenting with the selective breeding of pea plants.<sup>85</sup>

Scientists in the United States became involved in eugenic philosophy and genetic technology in the early 1900's. The fear that immigrants and lower class people would overpopulate the United States and cause a social decline flourished and prevention of their procreation was advocated. In 1912, the United States Public Health Service began testing incoming foreigners to determine intelligence and the extent of their feeble-mindedness.<sup>86</sup> As a result, the Immigration Restriction Act of 1924 was enacted and mandatory quotas were selected limiting the amount of immigrants from a particular country from entering the United States.<sup>87</sup> Eugenically motivated, laws permitting involuntary sterilization of certain groups were enacted in thirty-two states by 1932.<sup>88</sup>

The decline of the eugenic movement began with the decision handed down by the Supreme Court in *Buck v. Bell*, upholding the constitutionality of a Virginia compulsory sterilization statute.<sup>89</sup> Although the statute was upheld, the popularity of the movement began to fade and several states began removing these types of laws from their books. Around this same time, researchers in psychology and sociology began to associate the influence of the environment with genetics in determining one's characteristics.<sup>90</sup> With the publicized eugenic experimentation conducted by the Nazis, the movement was all but dead and research seemed to be headed into a different direction. That was until 1953 and the postulation of the double helix of DNA as the chemical basis of heredity was discovered by Watson and Crick.<sup>91</sup> This event, included with the success achieved in breaking the DNA code, began what is known

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83. *Id.* at 480.

84. *Id.*

85. *Id.*

86. *Id.* at 481. According to the tests - 83% of Hungarians, 87% of Russians, 83% of Jews, and 79% of Italians demonstrated a source of feeble-mindedness.

87. Harding, *supra* note 81, at 481.

88. *Id.*

89. *Id.*; see *Buck v. Bell*, 274 U.S. 200 (1927).

90. Harding, *supra* note 81, at 482.

91. *Id.* at 483.

as the New Eugenics and brings us to the advancements that were recently achieved.

### E. HUMAN GENOME PROJECT

The Human Genome Project is an international collaboration of countries and scientists working together in an effort to map and sequence the entire human genome. It is intended bring together and organize the work produced by hundreds of laboratories in dozens of countries, in order to decode the secrets of the human genome. Among the many goals of this project are to discover more effective ways to treat and prevent disease, increase genetic screening abilities, and of greatest importance, reduce pain and suffering throughout the human species. Theoretically, once a map of human genome is complete, scientists and physicians will be able to screen an embryo for both beneficial and deleterious genetic characteristics.<sup>92</sup> Medically, potential genetic disorders could thus be predicted and prevented and normal genes identified in order to augment current scientific knowledge.<sup>93</sup> Because of a rekindled belief that genes, rather or at least to a greater extent than environment, determine an individual's intelligence, longevity, health, and other personal characteristics, the project looks to a future of parental selection and control over offspring characteristics and greater screening capabilities, which will in turn lead to an increase in the abortions of fetuses containing genetic disease.<sup>94</sup>

Internationally, countries are working together to organize their respective works in order to rapidly gain success in the mapping and sequencing of the human genome. The United States, which began the Project, is the largest contributor and has allocated at least three billion dollars to the fifteen year initiative, making it the most expensive biology study ever conducted by the United States.<sup>95</sup> The United States had initially focused their research in the mapping of the genome rather than the sequencing,<sup>96</sup> but because of positive assessments, new goals for the project

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92. Conte, *supra* note 69, at 434.

93. *Id.*

94. John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 422 (1996).

95. *Human Genome Project* (visited Sept. 26, 1997) <<http://cac.psu.edu/~gsg109/qs/em02002.html>>.

96. G. Kenneth Smith & Denise M. Kettelberger, *Patents and the Human Genome Project*, 22 AIPLA Q.J. 27, 29 (1994). The decision to initially focus efforts on mapping the human genome rather than total sequencing was based on the enormous size of the human genome, which comprises approximately three billion basepairs, with the specific order of the basepairs encoding genetic information. The necessary technologies were already available to map genes onto chromosomes, thus increasing map resolution was given priority, with

have been drafted.<sup>97</sup> In Great Britain, the thrust of the research has been in creating cDNA libraries and the mapping and sequencing of cDNA clones.<sup>98</sup> France has been a major contributor to the research by working on the construction of a human genetic map based on known DNA markers. Italy has also pitched in spreading around their research into the fields of preparing cell lines and mapping, gene sequencing, and working on improving the speed of current gene sequencing.<sup>99</sup>

Varying opinions on the legitimacy and moral implications concerning this type of project have kept some countries from participating, but others are beginning to contribute. Japan, who previously thought the project was not "pure science," has recently been active in developing and improving instrumentation and techniques for automated DNA sequencing.<sup>100</sup> While a total genome project has been discouraged because of its possible eugenic implications, Germany has even begun to participate, focusing their study on genetically inheritable diseases.<sup>101</sup> The United Nations became involved in the international effort in 1988, with the creation of the Human Genome Organization. The organization, referred to as HUGO, was established to coordinate the researchers from different countries in order to avoid duplication of efforts and unnecessary competition. HUGO was also created to foster public debate on the issues of scientific, ethical, legal, and commercial implications of the various genome projects.<sup>102</sup>

The Human Genome Project has not escaped heavy criticism and legal and moral challenges have been presented against the funding of such a study. Although the Project has been successful in locating the genes for some diseases,<sup>103</sup> opposition is strong and persistent. The lack of respect towards individual autonomy and uniqueness are the most frequently presented arguments, but other concerns do arise. Criticism over the enormous funding this project has garnished is another issue that is much debated. Because only approximately two to five percent of the human genome is supposedly of potential use to scientists, critics argue that

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sequencing of known genes to follow. Total genomic sequencing would complete the latter stages of the project.

97. *Id.* at 29.

98. *Id.* at 34.

99. *Id.* at 32.

100. *Id.* at 34.

101. *Id.*

102. Kettelberger, *supra* note 96, at 37.

103. *Id.* at 42. As a direct result of the Human Genome Project, the locus for myotonic dystrophy, a form of muscular dystrophy that affects 1 in 8500 people, was recently discovered.

funding should be allocated to lesser fields of study that are fundamental to the research of these larger more expensive projects.<sup>104</sup>

## V. INTERNATIONAL AND DOMESTIC LEGISLATION

In evaluating the existing and proposed legislation from around the world, it must first be understood that any success achieved in the areas of cloning human beings and other biotechnologies will have an enormous impact on all of humanity, including all future generations. The potential ability to produce and control the development of human beings, enhancing the favorable genetic characteristics, while eliminating unwanted traits, will enable man to not only exhibit God-like powers, but to determine the fate of humankind, as we know it today. These are issues which concern every person, in every walk of life, throughout the world, and which all countries must work together, as one, to ensure that mankind as a whole is capable of handling this awesome power. In today's world, described as a global-community, ease of communication and transportation must force countries to work in unison to ensure that the best result for the benefit of all of humanity must prevail. Anything less would create an atmosphere of procreative tourism, in which people will travel to those countries offering less restricting reproductive choices.<sup>105</sup>

Currently, legislation is based on the ideological beliefs expressed within a particular country. For example, legislation in Great Britain is based on the principle of individual freedom.<sup>106</sup> Thus, human embryo research and the availability of artificial reproductive technology is permitted, and in some cases encouraged.<sup>107</sup> German legislation, on the other hand, is inspired by the principle of human dignity, and as such research on human embryos is severely restricted or completely prohibited.<sup>108</sup> Religious beliefs also play a major role in this area of legislation, contributing to the moral and ethical implications that must be protected against. In France, Christianity has been influential in legislation protecting the principle of human dignity.<sup>109</sup>

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104. *Id.* at 38. Only 50,000 to 100,000 genes are estimated to be contained within the human genome. The remaining 95-98% of the genome is defined by some as junk and of little or no use.

105. Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical, and Social Issues*, 17 AM. J. L. & MED. 329, 333 (1991).

106. Noelle Lenoir, *French, European, and International Legislation on Bioethics*, 27 SUFFOLK U. L. REV. 1249, 1252 (1993).

107. *Id.*

108. *Id.*

109. *Id.* at 1259.

Similarities do exist among the laws of many countries, although it must be reiterated that with these technologies it is the differences that are most important. Currently, a majority of countries prohibit extreme forms of genetic engineering, such as cloning or creating chimeras and any non-therapeutic interventions on a human embryo that seeks to alter the genetic patrimony of an individual.<sup>110</sup> Eugenic practices and sex selection, except in cases of sex-linked diseases, are also prohibited by many countries.<sup>111</sup> Therapeutic experimentation on human embryos, within the first fourteen days of development, is legal in many countries, although there are internationally recognized standards which must be met.<sup>112</sup>

Included in the following sections are legislation, recommendations, and proposed regulations from individual countries and international organizations.

## A. European Organizations

### 1. European Parliament

The issues of cloning and other new biotechnologies have been addressed by the European Parliament since 1989. In that year, the European Parliament passed a resolution stating a concern that embryo research should be limited to only those circumstances where a benefit to the welfare of the endangered child can be demonstrated and any arbitrary experimentation should be prohibited.<sup>113</sup> Human cloning, industrial and commercial use of embryos, and trade in frozen embryos were also prohibited and must be subject to criminal penalties.<sup>114</sup> In another resolution that year, the European Parliament recognized that human life should be protected from the moment of fertilization and that waste embryos remaining from in vitro fertilization procedures should be eliminated.<sup>115</sup>

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110. Knoppers, *supra* note 105, at 329.

111. *Id.*

112. *Id.* at 340. The four conditions that research must meet are: 1) scientific validity as verified by a review committee; 2) the free and informed consent of the participants; 3) the balance of the risk-benefit ratio; 4) conformity of the research with the notion of public order. Provided that these conditions, the majority of countries, except for Germany, Denmark, Austria, and Norway, would allow therapeutic research on the human embryo.

113. Resolution on the Ethical and Legal Problems of Genetic Engineering, 1989 O.J. (C 96) 165, 169.

114. *Id.* at 170.

115. Resolution on Artificial Insemination, In Vivo, and In vitro Fertilization, 1989 O.J. (C 96) 171, 172.

The European Parliament further defined their recommended restrictions and expanded upon the procedures that it deemed to be prohibited in a resolution passed in 1996. Here, any form of manipulation on the human genome which modifies or seeks to modify the germ line, as well as any consumptive research on and production of human embryos for research purposes only must be banned by law.<sup>116</sup> Furthermore, developing tests in the future that may predict behavioral traits or genetic testing for disease, except for those circumstances in which there is currently effective treatment or preventive measures regarding that particular disease, must be strictly prohibited.<sup>117</sup>

## 2. European Commission

In 1994, the European Commission reconstituted its Group of Advisors on the Ethics of Biotechnology and instituted a mission whereby the ethical aspects of biotechnological experimentation within the European Union should be assessed and the potential implications that such activities would have on individuals and society identified.<sup>118</sup> In coordination with the European Parliament, the European Commission has denounced attempts to clone human beings and is considering whether to seek a strict moratorium on the level of the Council of Europe or the United Nations.<sup>119</sup>

Attempts to patent discoveries and knowledge in the area of biotechnology have also been addressed by the European Commission and the opinions handed down have denied patentability to the human body or any of its elements.<sup>120</sup> Specifically, the simple knowledge of the complete or partial structure of a gene and the human body, at any stage of development or constitution, does not constitute patentable elements.<sup>121</sup> On the other hand, patentability may be afforded to the identification of the function attached to a human gene if it offers new possibilities such as the production of new drugs, or if the intended use of the patent is sufficiently identified and specific.<sup>122</sup>

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116. Resolution on the Protection of Human Rights and Dignity with Regard to the Application of Biology and Medicine, 1996 O.J. (C 320).

117. *Id.*

118. *Bioethics: Greens Call for Public Debate*, EUR. ENV'T, Mar. 15, 1994, § 48.

119. *European Union and European Parliament Denounce Human Cloning*, DEUTSCHE PRESS-AGENTUR, Mar. 11, 1997.

120. *Group of Advisors on the Ethical Implications of Biotechnology of the European Commission Opinion on the Ethical Aspects of Patenting Inventions Involving Elements of Human Origin*, 48 INT'L DIG. OF HEALTH LEGIS. 91, 92 (1997).

121. *Id.* § 2.2, 2.3.

122. *Id.* § 2.5.



### 3. European Union

The European Union, made up of twelve major European states, encompasses an economic dimension and has broad power to enact strict and precise regulations concerning industry and research. Working through the European Commission's Advisory Group on Ethics in Biotechnology, the European Union has sponsored recommendations which are to be issued at the end of May 1997.<sup>123</sup> Of the main issues discussed by the Group, the first is that the position to condemn human cloning is basically unanimous in European nations. Through a comparison of national legislative systems, bans of human cloning are in some countries expressly prohibited, while in others it is approached implicitly from other principles demonstrated in the law.<sup>124</sup> The cloning of Dolly has led to an increased awareness that an international agreement on the condemnation of human cloning is necessary.<sup>125</sup> A second issue discussed is in regard to animal cloning and its commercial applications. While the Group has stated that no commercial application has been applied to animal cloning, the feasibility of such an application is growing near.<sup>126</sup> The Group has expressed concern that the well-being of the animals and the ethical principles of animal protection must be reaffirmed with regard to the aspects of cloning.<sup>127</sup>

According to the joint European Parliament/Council of Europe decision of April 26, 1994, financing for germinal gene therapy, as well as research for human cloning, was prohibited by any Community.<sup>128</sup> While the Union was within their legal competence in prohibiting these acts, there are no penal or ethical prerogatives attached.<sup>129</sup>

### 4. Council of Europe

With a membership of forty countries, the Council of Europe has a focused participation in the issues of human rights. Beginning in 1990, the Council has adopted many policies and recommendations concerning the application of science and technology to the human genome. In that year, the Council adopted guidelines outlining the scope of the analysis into the

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123. *First Guidelines of Advisory Group on Ethics in Biotechnology at end of a Hearing with Parliamentary Experts and Interest Groups*, AGENCE EUROPE, Apr. 30, 1997.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *First Guidelines*, *supra* note 123.

human genome in order to promote harmonious development in the European Community while pursuing scientific and technical excellence.<sup>130</sup> The goals of these guidelines include the encouragement of cooperation between European research facilities in furthering the development of existing technologies, while promoting the generation of new lines of research.<sup>131</sup> The overall objective of the program is to gain a better understanding of genetic functions and to fight against diseases arising from genetic variation, through the use of early diagnosis, prevention, and improvement of prognosis and therapy.<sup>132</sup> While the goals seem to allow for a broad range of experimentation to be conducted, some forms of research are specifically excluded. Any alteration of germ cells or any stage of embryo development with the aim of modifying human genetic characteristics in a hereditary manner is prohibited, as is somatic gene therapy, except in cases of somatic actual or potential medical applications.<sup>133</sup>

Many issues concerning research and experimentation were left unresolved by the decision in 1990. Among these issues are the rights that are afforded to the embryo and at what point should research on embryos be prohibited. A number of countries consider the embryo to be a human being at the time of creation and ban all nontherapeutic research, while others authorize research to be conducted until the fourteenth day of development.<sup>134</sup> Some countries permit the creation of embryos for research purposes, while others allow only nonviable embryos to be used.<sup>135</sup> The Council began addressing many of these issues, beginning with human cloning, in July of 1997. On July 1, the Council agreed to adopt a proposal prohibiting any act aimed at creating a genetically identical being, whether dead or alive.<sup>136</sup> This amendment to the Convention on Human Rights and Biomedicine will apply to only those who are signatories to the Convention, and at present time only twenty-two countries have agreed to their ban on human cloning.<sup>137</sup> Further discussion regarding this amendment is scheduled for September of 1997.

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130. Council Decision 90/395/EEC, 1990 O.J. (L 196).

131. *Id.* Preamble.

132. *Id.* § 4.1(Evaluation Criteria).

133. *Id.* § 4.4(2), (4), (5) (Evaluation Criteria).

134. Lenoir, *supra* note 106, 1260.

135. *Id.*

136. *Council of Europe Agrees to Ban Cloning of Humans*, DEUTSCHE PRESSE-AGENTUR, July 1, 1997.

137. *Id.*

Later, in July of 1997, the European Council adopted the Convention on Human Rights and Biomedicine. As a basis for this Convention, the interests and welfare of the human being shall prevail over the sole interest of society or science and the respect for individual integrity and the fundamental freedoms with regard to the application of biology and medicine is guaranteed.<sup>138</sup> Each party to the Convention shall conform their internal law to the provisions of the Convention, either by directly applying them in domestic law or by enacting the necessary legislation to give them effect.<sup>139</sup>

According to Chapter Four of the Convention concerning the human genome, only interventions undertaken for preventive, diagnostic, or therapeutic purposes are permitted.<sup>140</sup> Predictive testing of genetic diseases or to detect a genetic predisposition towards a genetic disease may be performed only for health purposes or scientific research linked to health purposes.<sup>141</sup> Developments in genetics now make it possible to detect those who carry specific genes for major single gene disorders,<sup>142</sup> and also those who are at risk of developing major disorders later in life.<sup>143</sup> Any intervention of the human genome which seeks to modify the genome of any descendants, modify genetic characteristics not related to a disease, or select the sex of the future child is prohibited, except for situations where a sex-related hereditary disease is present.<sup>144</sup>

As a general rule, scientific research in the fields of biology and medicine shall be carried out freely, subject to provisions ensuring the protection of the human being and the conditions set forth by the Convention.<sup>145</sup> The protection of persons undergoing research is expressed by conditions which must be met, including: there is no alternative of comparable effectiveness to research on humans, the risks which may be incurred by that person are not disproportionate to the potential benefits of the research, and the research project has been approved by a competent

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138. Convention on Human Rights and Biomedicine and Explanatory Report, Apr. 4, 1997, - Art. 1, 2, 36 I.L.M. 817, 821 [hereinafter Convention on Human Rights].

139. *Id.* at 829, Art. 2(20).

140. *Id.* at 822, Art. 13.

141. *Id.* at 822, Art. 12.

142. *Id.* at 833, Art. 12(78). Examples of major single cell disorders that can be detected; cystic fibrosis, hemophilia, and Huntington's disease.

143. *Id.* at 834. Examples of disorders that may develop later in life; heart disease, cancer, and Alzheimer's disease

144. Convention on Human Rights, *supra* note 138, at 822, Art. 13, 14.

145. *Id.* at 822, Art. 15.

body after an independent examination of its aim and scientific merit.<sup>146</sup> The creation of embryos for research purposes is prohibited, but where domestic law allows for research on embryos in vitro, the law must also ensure adequate protection of those embryos.<sup>147</sup> Thus, while domestic law may allow research to be conducted on embryos, the Convention does mandate that no research be permitted after the fourteenth day of development.<sup>148</sup>

Lastly, the parties to the Convention shall provide judicial protection that is appropriate to prevent any unlawful infringement on the principles and rights set forth in the Convention.<sup>149</sup> Furthermore, the parties are to elicit public debate over the medical, social, economic, ethical, and legal issues that are relevant to these types of research. Nations may organize appropriate methods for encouraging public awareness of the fundamental questions raised.<sup>150</sup>

## B. Individual European Countries

### 1. Germany

In what seems to be an effort to exorcize past atrocities, Germany has taken a hard line approach towards the issues of cloning and genetic experimentation. Under the German Constitution, an embryo does have the right to life, and causing the destruction of a human life, even if in the form of a nonviable fetus, is punishable by law.<sup>151</sup> Going farther than any other country in the prohibition against genetic technologies, Germany passed the Embryo Protection Law in 1990. Among the most specific legislation passed by any country, this law prohibits activities ranging from the cloning of humans and embryo research to improper uses of reproductive technologies. As was stated to the German Parliament by Friedrich-Adolf Jahn, the parliamentary state secretary in the justice ministry, "Because man is not the creator, he must content himself with being part of creation. Thus not all that is technically feasible is

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146. *Id.* at 822, Art. 16.

147. *Id.* at 823, Art. 18.

148. Lenoir, *supra* note 106, at 1260.

149. Convention on Human Rights, *supra* note 138, at 823, Art. 23.

150. *Id.* at 824, Art. 28.

151. Elizabeth Ann Pitrolo, Comment, *The Birds, the Bees, and the Deep Freeze: Is There International Consensus in the Debate over Assisted Reproductive Technologies*, 19 HOUS. J. INT'L L. 147, 188 (1996).

allowed."<sup>152</sup> Violations of prohibited activities can vary from three to five years in prison and/or fines.

Specifically, one of the law's prohibitions goes directly at the issue of cloning human beings and imposes up to five years imprisonment, or a fine, for any person who artificially causes a human embryo to develop with the same genetic information as another embryo, fetus, or living or deceased person.<sup>153</sup> Other prohibitions aim at the manipulation of human genes by offering the same punishment to any person artificially altering the genetic information of a human germline cell, creating chimeras or hybrids, and artificially selecting the sex of an offspring, except in cases of serious gender linked diseases.<sup>154</sup> Research involving the artificial modification of the genetic information of a germline cell situated outside the body is allowed if there is no possibility of its being used for fertilization.<sup>155</sup>

In response to the research conducted in the United States and the development of Dolly in Scotland, Germany has called for international ban on all efforts to clone human beings. Subsequent to the human embryo splitting completed at George Washington University, Germany publicly denounced the experimentation and expressed great concern that these events should not be repeated in Europe.<sup>156</sup> Remembering the atrocities that resulted during the Nazi regime, Germany has been outspoken against any manipulation of human embryos. After the results in Scotland were made public, Germany again expressed dismay over the events and called for the prohibition against applying cloning technologies to humans.<sup>157</sup> In order to express the significance of banning this type of research, Germany has refused to sign any declaration or convention that does not include an unambiguous condemnation of human cloning.<sup>158</sup>

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152. Rolf Soderlind, *Germany Passes Law Against Surrogate Mothers and Human Cloning*, REUTERS NEWS SERVICE - W. EUR., Oct 24, 1990.

153. Embryo Protection Law of 13 Dec. 1990, ch. 6 § 1(BGBl. I, 19 Dec. 1990, at 2746-2748), reprinted in 42 INT'L DIG. OF HEALTH LEGIS. 60, 62 (1991).

154. *Id.* ch. 5 S1, ch. 7, ch. 3

155. *Id.* at 62, ch. 5 S 4.

156. *Call to Halt Human Cloning*, PRESS ASS'N NEWSFILE, Oct. 26, 1993, at 000.

157. *German Scientists Join in Call for International Ban on Human Cloning*, THE WEEK IN GERMANY, May 9, 1997.

158. *Id.*; See also *supra* note 150. Germany abstained from voting on the Convention on Human Rights and Biomedicine for reasons including lack of protection for the handicapped.

## 2. France

Being a country who believes in advancing the progress of biotechnology in order to cure disease and disabilities, France has taken a somewhat different approach towards legislating scientific and medical research. Under the French Constitution, the rights of the individual extends not only to privacy and individual freedom, but also to an individual's right of access to social advantages.<sup>159</sup> On the other hand, the Constitution also justifies the state intervening into the affairs of science and medicine, through the regulation of medical practices and of gaining access to the biotechnological advances.<sup>160</sup> Therefore, the legislation that emerges from France expresses both the notions of individual liberty and freedom of research and that science must advance.<sup>161</sup>

In creating a bioethics bill, French legislators looked to satisfy both scientists and ethicists in limiting the areas that human embryo research may be conducted. The bill expresses regulations concerning the protection and respect of the human body, utilization of cells, organs and tissues, and research agenda. To begin with, the integrity of the human body may only be violated in the event of a therapeutic necessity of the person involved, although the genetic study of an individual's characteristics may be undertaken for scientific or medical purposes.<sup>162</sup> Any attempt to perform a eugenic procedure aimed at organizing the selection of persons or any alteration made to the genetic characteristics with a view towards modifying a person's lineal descent is subject to receiving a penalty of up to twenty years imprisonment. Among the procedures also prohibited by the bill and for the protection of the human embryo are using human embryos for industrial or commercial purposes and performing in vitro fertilization of human embryos for research or experimental purposes.<sup>163</sup>

Concern over the bioethics bill has emerged from both scientists and ethicists, stating that the language expressed in the bill does not give researchers clear guidance about what they can and cannot do.<sup>164</sup> Issues of preimplantation diagnosis and cloning still seem to be unresolved and under certain circumstances may still be allowed. To gain a clearer

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159. Lenoir, *supra* note 106, at 1250.

160. *Id.* at 1252.

161. *Id.*

162. Law No. 94-653 of July 29, 1994, J.O., July 30, 1994, No. 175, at 11056-11059, Art. 16(3), (10), reprinted in 45 INT'L DIG. OF HEALTH LEGIS. 453, 498 (1994).

163. *Id.* Div. 3 Art. 511-17, 511-18.

164. Axel Kahn, *Researchers Nervous About Bioethics Bill; France*, 263 AM. ASS'N FOR THE ADVANCEMENT OF SCIENCE 463 (1994) (statement by geneticist Axel Kahn).

understanding on what exactly is prohibited, the language used in French legislation needs to be more specific in order to prevent misuses and abuses of biotechnological advances.

### 3. Spain

Spain has enacted legislation aimed specifically at regulating assisted reproduction procedures and the use of human embryos in research in two laws passed in late 1988. Among the procedures expressly forbidden were the creation of human beings by cloning or other procedures directed to the selection of traits or the creation of human beings by cloning in any of its variants, or any other procedure capable of yielding several identical humans.<sup>165</sup> Creating pre-embryos from persons of the same sex, creating an individualized human in a laboratory, and employing genetic manipulation for military or any other purposes, in order to produce biological weapons are also specifically prohibited and considered very serious offenses.<sup>166</sup> The law does permit embryo research to be performed as long as it is focused on enhancing the embryo's viability or detecting hereditary diseases. Authorization for research on pre-embryos in vitro is permitted in situations where the research has a diagnostic, therapeutic or prophylactic purpose.<sup>167</sup> There are exceptions to these goals, including when the pre-embryo involved is non-viable or research can not be scientifically performed on animals.<sup>168</sup>

In the second law, passed in 1988, governing the issues of donation and use of human embryos. Research in genetic technologies using human genetic material may be performed for diagnostic purposes in respect of genetic or hereditary diseases, for therapeutic purposes mainly concerning sex selection in the event of sex-linked diseases, and for research purposes in which the study of DNA sequences of the human genome, their location and functions, as well as other research takes place.<sup>169</sup> Research is also permitted in the area of industrial purpose, which entail a preventive, diagnostic, or therapeutic characteristic.<sup>170</sup> Moreover,

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165. Law No. 35/1988 of Nov. 22, 1988 on Assisted Reproduction Procedures, B.O.E., 1988, 282, ch. 6 § 20(k), (l), *reprinted in* 40 INT'L DIG. OF HEALTH LEGIS. 1, 82 (1994). Seems to imply a prohibition of both twinning and nuclear substitution.

166. *Id.* ch. 6 § 20(o), (s), (v).

167. *Id.* ch. 4 § 15(2).

168. *Id.* ch. 4 § 15(3).

169. Law No. 42/1988 of Dec. 28, 1988 on the Donation and Use of Human Embryos and fetuses or their cells, tissues, or organs, B.O.E., 1988, 314, ch. 3 § 8, *reprinted in* 42 INT'L DIG. OF HEALTH LEGIS. 1, 66 (1989)

170. *Id.*

utilization of human gametes and of fertilized and developed ova is permitted until the fourteenth day following fertilization.<sup>171</sup>

#### 4. Switzerland

While there are currently no laws specifically prohibiting the use of cloning technology on human beings, Switzerland has taken steps to restrict the field of embryo research and infertility procedures. Dating back to 1987, the Swiss Health Council has set forth guidelines prohibiting any research to be conducted on human embryos and has restricted the storage of embryos for the duration of an individual in vitro fertilization procedure.<sup>172</sup> Also in 1987, any interventions on the genetic material of human cells was banned by law.<sup>173</sup> Furthermore, the misuse of and trade in embryos for pharmaceutical purposes has been prohibited.<sup>174</sup>

#### 5. Norway

According to Norwegian legislation, any research on human embryos is strictly banned and criminal sanctions for research on fertilized eggs are available.<sup>175</sup> Although domestic research is banned, the use of embryo research, including cloning, conducted outside the country and brought into Norway for clinical use may not be necessarily prohibited.<sup>176</sup>

#### 6. Sweden

Unlike other countries in Northern Europe, Sweden's current legislation would seem to allow research on embryos. This includes either those embryos left over from infertility treatments or ones created for research purposes.<sup>177</sup> Sweden prohibits the implantation of an egg fertilized outside the woman's body, unless, among other conditions, the egg is the woman's own and has been fertilized with her husband's or cohabitant's sperm.<sup>178</sup> No other domestic legislation involves embryonic procedures, thus the language of Law no. 711 leaves open the possibility that research

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171. *Id.* at 68.

172. Stuart Hornett, *Embryos and Europe: What Prospects for Harmonization*, 141 *NEW L. J.* 713, 715 (1991).

173. Directive of Feb. 2, 1987 on in vitro fertilization and embryo transfer for the treatment of human fertility, 39 *INT'L DIG. OF HEALTH LEGIS.* 1, 82 (1988).

174. *Id.*

175. Hornett, *supra* note 172, at 715.

176. *Id.*

177. *Id.*

178. Law No. 711 of June 14, 1988 on fertilization outside the human body, 40 *INT'L DIG. OF HEALTH LEGIS.* 1, 93 (1989).



on human embryos, as well as cloning, is permissible. Nonetheless, those who breach this law, through habitual offenses or seeking commercial gain, shall be liable to a fine or a minimal prison sentence.<sup>179</sup>

### 7. Denmark

While there is no specific legislation covering genetic procedures such as cloning, Denmark has established a biomedical research ethics council which does have an underlying philosophy that human life begins at fertilization.<sup>180</sup> Under this authority's recommendation, harmful embryo research should be prohibited and embryos should not be created for research purposes only.<sup>181</sup> Until the creation of specific legislation, the ethics council has imposed a moratorium on embryo research.<sup>182</sup> Denmark does permit fertilized human oocyte research to be performed as long as it is accordance with the established guidelines.<sup>183</sup>

### 8. Other European Countries

Other individual countries have passed some types of legislation with regard to new genetic engineering procedures, but in most cases they are recommendations set forth by ethical and medical organizations and government-sponsored councils. In Greece, legislation has been passed in which in vitro fertilization and embryo freezing has been banned.<sup>184</sup> Recommendations suggested in Italy proposes that all embryo research be subject to criminal penalties.<sup>185</sup> Lastly, in the Netherlands proposals permitting embryo research in limited circumstances have been suggested. Following the recommendations handed down by the Council of Europe's Commission of Experts on Progress in the Biomedical Sciences, the creation of embryos for research purposes should be banned and allowing research on surplus embryos only in limited situations.<sup>186</sup>

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179. *Id.*

180. Hornett, *supra* note 172, at 714.

181. *Id.*

182. *Id.*

183. Pitrolo, *supra* note 151, at 186.

184. Hornett, *supra* note 172, at 714.

185. *Id.*

186. *Id.*

### C. Commonwealth Countries

#### 1. Great Britain

The creation of Dolly, achieved by scientists in Scotland, exposes the significance of how important unambiguous and detailed legislation is to protect against abuses of genetic technology. It can also be said that the success in Scotland is another example of how quickly science can progress and how difficult it is for the legislature to keep up. Legislation in Great Britain prior to Dolly, while quite liberal in many respects, was thought to prevent against the cloning of human beings. But if success in cloning humans was achieved by utilizing the same techniques as those used in Scotland, it would not be considered to fall under current legislation.

Legislation concerning research on embryos and the subsequent development of them is focused in the Human Fertilization and Embryology (HFE) Act of 1990. The Act establishes the HFE Authority in order to regulate infertility treatments and to grant licenses to conduct embryo research.<sup>187</sup> Under the law, an embryo is not treated as having a right to life and is not afforded the same status as a human being.<sup>188</sup> Therefore, the Authority is permitted to grant licenses that allows for research to be conducted on human embryos.<sup>189</sup> For example, a person is prohibited from creating an embryo for research, except if in pursuance of a license.<sup>190</sup> Other activities which are permitted are the destructive research on surplus embryos and those created specifically for research,<sup>191</sup> destruction of embryos which are kept in storage in excess of statutory limits,<sup>192</sup> and the screening out of defective embryos prior to implantation in a woman.<sup>193</sup> There are situations in which the Authority is not permitted to issue a license, including keeping or using an embryo after the appearance of the primitive streak,<sup>194</sup> or altering the genetic structure of any cell while it forms part of an embryo, except in situations in which it is

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187. Human Fertilization and Embryology Act, 1990, § 5, 11 (UK).

188. Pitrolo, *supra* note 151, at 172.

189. Human Fertilization and Embryology Act, *supra* note 187, § 11, 12.

190. *Id.* § 3(1)(a).

191. *Id.* Sched. 2 § 3.

192. *Id.* § 14(1)(c). Current statutory storage period for embryos is 5 years.

193. *Id.* Sched. 2 § 1(d).

194. *Id.* § 3(3)(a) - According to the HFE Act., section 3(4), the primitive streak is to be taken to have appeared in an embryo not later than the end of the period of 14 days beginning with the day when the gametes are mixed, not counting any time during which the embryo is stored.

permitted.<sup>195</sup> Another prohibited activity, and one which has caused the greatest concern over insufficient legislation, is the replacing of a nucleus of a cell of an embryo with a nucleus taken from the cell of any person, embryo, or subsequent development of an embryo.<sup>196</sup> An embryo is defined by the Act as a live human embryo where fertilization is complete and references to an embryo include an egg in the process of fertilization.<sup>197</sup> Thus, the legislation seems to suggest that cloning by nuclear substitution is prohibited and cloning by embryo splitting is permitted with a license from the HFE Authority.

The creation of Dolly consisted of fusing an adult sheep fetal cell with an enucleated egg cell and implanting the egg into a third ewe. Thus, it was not an embryo in the true biological sense and would not be considered an embryo under the definition set forth in the Act. Furthermore, the development of the artificially created cell did not consist of a gamete, an egg or sperm, nor did it undergo fertilization, fusion of an egg and sperm, allowing it to escape the definitions of the Act.<sup>198</sup> Based on this, the application of this technique to clone human beings would not be prohibited by the cloning provisions currently in place. This same technique may also elude the prohibition against the altering of the genetic structure of a cell while it forms part of an embryo, because the cells utilized by the researchers in Scotland would not fall within the definition of an embryo defined in the Act.<sup>199</sup>

As is shown by the events in Scotland, legislatures in every country must be particularly specific when drawing up appropriate legislation. With the ever increasing pace of discovery in the field of genetic research, laws banning potentially detrimental activities must be able to encompass not only what is currently feasible, but also what will be feasible in the future. In Great Britain, a rewording of the definition of an embryo and the adding of prohibitions against the techniques utilized in Scotland is necessary to prevent unwanted abuses. An example of a possible embryo definition would be one which reads "embryo means a live human embryo where fertilization is complete or where a cell has been modified, created, or altered such that it has the potential to develop into an embryo or foetus."<sup>200</sup>

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195. Human Fertilization and Embryology Act, *supra* note 187, Sched. 2 §§ 3,4.

196. *Id.* § 3(3)(d).

197. *Id.* § 1(1)(a), (b).

198. Sharon Korek, *Following Dolly*, 147 NEW L. J. 428, 429 (1997).

199. *Id.*

200. *Id.*

## 2. Australia

Because of the lack of constitutional power in the federal government to intervene in reproductive technologies, individual Australian states are free to enact their own legislation.<sup>201</sup> Thus, achieving uniform regulations remains a primary goal in Australia, in order to prevent *border hopping* from occurring. Currently, human cloning is only prohibited in Victoria and Western Australia, while in the other states the issue remains unclear. In these two states, an embryo receives a status, while not that of *personhood*, in which it deserves more respect than an entity created solely for research purposes.<sup>202</sup> The remaining states follow the guidelines set forth by the National Health and Medical Research Council, which technically allows cloning, but recommends that it is ethically unacceptable.<sup>203</sup>

The Human Reproductive Technology Act of Western Australia considers the only justification for fertility procedures, to be conducted outside the woman's womb, is for assisting the couple who donated the genetic materials to have children.<sup>204</sup> While recognizing that certain experimentation and research is not harmful and in some cases may be allowable, fertilizing an egg for other than implantation purposes is not approved.<sup>205</sup>

Victoria has enacted specific legislation directed at cloning and embryo research. Under the Infertility Treatment Act of 1995, it is Parliament's intention that human life should be preserved and protected and the welfare of any person born as a result of fertility procedure is paramount.<sup>206</sup> In response to this intention, Victoria has banned outright, certain procedures such as, cloning<sup>207</sup>, using embryos or zygotes removed from the body,<sup>208</sup> and mixing gametes, zygotes, or embryos from more than one person.<sup>209</sup> Furthermore, many provisions of the Act place restrictions on attempts to conduct embryo research when performed outside the woman's body. Among the initial restrictions are approval of a licensing

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201. Judy Friend & Richard Ogier, *Gap in Australian Laws on Cloning*, (visited Sept.25,1997) <<http://www.ozemail.com.au/search/283U2.html>> .

202. Pitrolo, *supra* note 151, at 176. (Waller Committee recommendations).

203. Friend, *supra* note 201.

204. Human Reproductive Technology Act, 1991, (Austl.).

205. *Id.*

206. Infertility Treatment Act, 1995, § 5(1)(a), (b) (Austl.).

207. *Id.* § 47.

208. *Id.* § 44.

209. *Id.* § 46.

authority on the research to be performed and a following of the regulations that they provide.<sup>210</sup> Research aimed developing an embryo to syngamy and destructive research are not to be approved by the Authority.<sup>211</sup> Moreover, research involving embryos is not permitted for embryos that are unfit for implantation or if the embryo is transferable, research is not permitted if the particular research would deem the embryo untransferable or harm the embryo.<sup>212</sup>

Legislation in Victoria also restricts certain procedures with regard to genetic manipulation and offers penal provisions for performing prohibited experimentation. Alteration of the genetic constitution of a gamete used to form an embryo or zygote or to be used in a fertility procedure is prohibited, as well as, altering the genetic, nuclear, or pro-nuclear constitution of an embryo or zygote.<sup>213</sup> Exceptions do exist should the alteration of somatic cells be necessary for therapeutic purposes.<sup>214</sup> Lastly, alteration to select the sex of a child is prohibited except in situations where it is necessary to avoid the risk of transmission of a genetic abnormality or disease to the resulting child.<sup>215</sup>

### 3. New Zealand

Although there has been no reports of any activity in the area of cloning, New Zealand has begun to address this issue as well as others concerning genetic engineering. Currently, the only regulation on the matter is that any new medical procedure must gain approval before an ethics committee.<sup>216</sup> Admittedly behind other commonwealth countries, such as Australia and Great Britain, proposed legislation is seeking to ban certain unethical practices including, human cloning, commercial surrogacy, and the sale of embryos and gametes.<sup>217</sup>

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210. *Id.* § 22, Part 8

211. Infertility Treatment Act, 1995, §§ 25, 26 (Austl.).

212. *Id.* § 24.

213. *Id.* § 39.

214. *Id.*

215. *Id.* § 50.

216. Helen Bain, *New Bill to Ban Cloning of Humans*, THE DOMINION (WELL.), Mar. 14, 1997, at 2.

217. *Id.*

## D. North America

### 1. United States

Any effort to condemn the cloning or genetic manipulation of human beings on a world wide basis is meaningless unless the United States agrees to abide by the legislation. The United States has taken a leading role in the exploitation of genetic technology, being the initiator of the Human Genome Project and spending an unprecedented amount of money funding research.<sup>218</sup> But, because of limitations encountered within the United States Constitution, scientists conducting genetic research have less governmental intrusion, then would be encountered in other countries. The lack of federal regulations concerning privately funded institutions, because of the absence of constitutional power to govern assisted reproductive technologies,<sup>219</sup> has enabled private institutions to remain unconstrained when initiating research. Currently, the United States does not have any laws prohibiting cloning procedures, although some state and federal laws and policies, discussed later, may have some application. The constitutional and legal arguments, as well as the moral and ethical issues, that are in some respects unique to American society and thus constrain legislative efforts, will also be discussed more completely under their respective headings.

The lack of federal regulation over genetic technology first came to the public's attention when in 1993, researchers at George Washington University successfully split a human embryo and allowed partial development to occur.<sup>220</sup> Negative reaction condemning the experiment was expressed from scientists, ethicists, and the general public from the United States, as well as around the world. No legislation was passed in response to the success, and research resumed at its normal pace, without interference. With the announcement of the creation of Dolly in 1997, issues of cloning and genetic research once again came to forefront of public debate.

President Clinton, in response to news from Scotland, announced that effective March 4, 1997, no federal agency may support, fund, or

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218. Smith, *supra* note 96, at 3. An estimated \$3 billion will be spent on the Human Genome Project.

219. Pitrolo, *supra* note 151, at 201. Overshadowed by constitutional protections, jurisdiction regarding assisted reproductive technologies falls within the realm of state governments.

220. See discussion *infra* Part II Advancements in Cloning Technology.

undertake cloning activities.<sup>221</sup> While previously only funding aimed at research on human embryos was federally restricted, loopholes became apparent and President Clinton's announcement further restricted federal funds from being used in any way towards research into the cloning of human beings.<sup>222</sup> Describing the issue as one which is not only a matter of scientific inquiry, but of morality and spirituality as well, the President urged a voluntary moratorium to the entire scientific and medical community, every foundation and university, and every industry that supports work in this area, to follow the federal government's example.<sup>223</sup> The moratorium would consist of abandoning all research concerning the cloning of humans until an appointed National Bioethics Advisory Commission and the nation as a whole, has had a chance to debate the all the possible implications.<sup>224</sup>

In June of 1997, the National Bioethics Advisory Commission (NBAC) published their report and recommendations on the issue of cloning human beings.<sup>225</sup> Within the report, the NBAC acknowledges the fact that regulations concerning private institutions is basically nonexistent. In effect, only those institutions who conduct research with the aid of federal funding or who have executed multiple assurance agreements with the federal government are subject to the regulatory provisions.<sup>226</sup> As such, it is only these institutions which must adhere to the prohibition against the cloning of humans, as well as the restrictions governing the use of human subjects in research.<sup>227</sup> The report also explores the potential benefits that may be derived from acquiring cloning technology, such as in the areas of medical research and agriculture, but because of their potential use in humans, these activities must be currently restricted.

Among the recommendations handed down by the NBAC are that the current moratorium on the use of federal funding to support cloning activities be continued and that private institutions should voluntarily adhere to the moratorium because at this time, an attempt to clone a human

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221. *Remarks By President Clinton Announcing the Prohibition on Federal Funding for Cloning of Human Beings*, FED. NEWS SERVICE, Mar. 4, 1997, at White House Briefing [Hereinafter Remarks by President Clinton].

222. *Id.*

223. *Id.*

224. *Id.*

225. *Report and Recommendations of the National Bioethics Advisory Commission* (final draft June 6, 1997) <<http://www.washington-fax.com/pass/doc-sets/bioethics/nbac/index-nbac-rep0697.shtml>> [hereinafter NBAC Report].

226. *Executive Summary, NBAC Report* (visited Sept. 25, 1997) <<http://www.washington-fax.com/pass/doc-sets/bioethics/nbac/nbac-rep0697-0-05.shtml>> .

227. *Id.*

being would be irresponsible, unethical, and unprofessional.<sup>228</sup> Therefore, the cloning of a human being, no matter the reasons for or the source of funding, should at this time be prevented and prohibited. Further recommendations call for a sunset clause to be inserted in any proposed federal or state legislation that would provide for review period after three to five years in order to reexamine whether a further prohibition is necessary.<sup>229</sup> If a legislative ban is not enacted, or once enacted is subsequently lifted, all efforts to utilize somatic cell nuclear transfer to create a child should be preceded by controlled research governed by independent review and standards relating to the protection of human subjects.<sup>230</sup>

According to the NBAC, the language incorporated into any legislation or regulatory action must be carefully chosen in order to protect against interference with permitted areas of scientific research.<sup>231</sup> Regulations must not impede upon the areas of animal cloning, cloning DNA sequences and cell lines, and those fields of research which have already provided important scientific and biomedical advances.<sup>232</sup> The NBAC further recommends that the United States should cooperate with the international community to enforce those aspects which are common to their respective cloning policies.<sup>233</sup> An example of this was accomplished at the G7 Summit of Economic Countries in June of 1997, in which the heads of states from member countries endorsed a worldwide ban on cloning humans.<sup>234</sup>

Federal legislation has been proposed in Congress which place restrictions on the use of federal funds for research into human cloning technology. The Human Cloning Research Prohibition Act, which proposes to deny the use of any federal funds to conduct or support any research that involves producing a human clone through the use of a human somatic cell, was introduced to the House of Representatives.<sup>235</sup> A similar bill was submitted in the Senate, which seeks the same ban on the use of federal funds and goes on to further define the prohibition on

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228. *Recommendations, NBAC Report* (visited Sept. 25, 1997) <<http://www.washington-fax.com/pass/doc-sets/bioethics/nbac/nbac-rep0697-0-06.shtml>> .

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Hearings, supra* note 20 (G7 member countries - U.S., Japan, Germany, England, France, Italy, and Canada).

235. *Id.*



cloning as the "replication of a human individual by the taking of a cell with genetic material and the cultivation of the cell through the egg, embryo, fetal, and newborn stages into a new human individual."<sup>236</sup>

Legislation related to genetic and fertility research, previously enacted, may have some application to the prohibition on human cloning. The Fertility Clinic Success Rate and Certification Act of 1992 requires that clinics using assisted reproduction techniques be federally monitored.<sup>237</sup> This act is designed to cover all laboratories and treatments that involve the manipulation of human eggs and embryos.<sup>238</sup> During the 1980's, fertilization clinics became quite successful in the absence of any federal regulation. Currently, at least ten fertility clinics located in the United States have the technology to conduct somatic cell nuclear transfer experimentation.<sup>239</sup> According to reports, a Wisconsin company, ABS Global, has already claimed to have improved upon the techniques used in Scotland, by creating cow embryos from the skin, bladder, and udder cells of an adult cow.<sup>240</sup> To further increase the concern over fertility clinics, no professional society in the infertility field has publicly expressed agreement to the proposed moratorium against cloning technology, unlike the American Medical Association and other organizations in the medical field.<sup>241</sup>

Another area of related federal legislation is concentrated in the field of patents. According to the Transgenic Animal Patent Reform Act of 1988, human beings are not included in patentable subject matter.<sup>242</sup> Unfortunately, no definition is included in the Act and problems may occur in determining what genetic material is considered to constitute a human being.<sup>243</sup> One year earlier, non-naturally occurring nonhuman multi-cellular living organisms, including animals, was determined by the United States Patent and Trademark Office to be subject matter that is patentable.<sup>244</sup> This, as expected, created an uproar among theologians and

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236. *Proposed Legislation*, § 368, *NBAC Report* (visited Sept. 25, 1997)

<<http://www.washington-fax.com/pass/doc-sets/bioethics/nbac/nbac-rep0697-5-12.shtml>> .

237. *Executive Summary*, *supra* note 226.

238. *Id.*

239. *Id.*

240. *Wills*, *supra* note 43.

241. *NBAC Report*, *supra* note 2265.

242. George P. Smith, II, *Toward an International Standard of Scientific Inquiry*, 2 HEALTH MATRIX 167, 180 (1992).

243. *Id.*

244. *Id.*

critics, who claimed that animals and other heavenly created creatures will be equated as products manufactured for the marketplace, and not as sentimental beings.<sup>245</sup>

Individual states have also begun to propose legislation concerning cloning and related technologies. Alabama has taken the largest step, proposing legislation that bans the use of governmental funds for any research using cloned cells or tissues.<sup>246</sup> Missouri and Maryland have introduced bills seeking to ban the use of governmental funds for cloning an entire individual.<sup>247</sup> Bills that prohibit the cloning of an entire individual, regardless of the funding source have proposed in some states including, Alabama, California, Illinois, New Jersey, New York, North Carolina, Oregon, and West Virginia.<sup>248</sup> Florida and California have bills proposed that explicitly ban any research using cloned cells or tissues.<sup>249</sup> Lastly, bills that might unintentionally ban research using cloned cells or tissues have been introduced in South Carolina and New York.<sup>250</sup>

## 2. Canada

Canada has taken broad steps through recommendations and criminal sanctions in order to restrict the permissible circumstances in which certain genetic technologies may be used. As early as 1993, recommendations were set forth that banned any research utilizing human embryos that were focused on cloning technology, pre-natal sex determination for other than therapeutic reasons, and for establishing a commission to oversee fertility laboratories and other clinics involved in fertility research.<sup>251</sup>

In 1995, Health Canada expressed additional recommendations regarding genetic technologies. According to these newer recommendations, human embryo research should only be allowed when approved by a National Regulatory Body. This does allow many procedures to still be undertaken and does not specifically prevent any procedure from being performed. Among the guidelines presented for the regulatory body to follow in selecting which experiments may be performed on human embryos are that it is necessary for the improvement of the human condition, inquiry into using animal or non-human models

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245. *Id.*

246. *Proposed Legislation, supra* note 236.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Pitrolo, *supra* note 151, at 182.

has been exhausted, and the research is of the highest scientific quality.<sup>252</sup> Viable human embryos may be used but only when a compelling case is made that non-viable embryos cannot be successfully employed.<sup>253</sup> Any research that is permitted on human embryos may not be performed ex utero later than fourteen days after fertilization.<sup>254</sup> The regulatory body may also consider permitting the fertilization of human ova for research purposes only, should the potential benefits to society or future offspring require that the experimentations occur.<sup>255</sup> Human cloning, chimeras, as well other forms of experimentation are prohibited without the regulatory body's explicit approval, and in the case that a regulatory body is not formed, these types of experiments are specifically banned.<sup>256</sup>

In 1996, Canada introduced criminal sanctions in order to prevent many of the new genetic technologies from being performed. Under the Human Reproductive and Genetics Technologies Act, penalties of performing these outlawed practices will range from prison terms of up to ten years and/or fines to a maximum of \$500,00 Canadian.<sup>257</sup> Among the areas of research to be criminalized are; human embryo cloning, germline alteration, research involving maturation of sperm or eggs outside the human body, the creation of embryos for research purposes only, and any research conducted on embryos later than fourteen days after fertilization.<sup>258</sup>

## E. Asia and Japan

### 1. Japan

Currently, Japan does not have any specific legislation regarding cloning or the manipulation of human embryos. Scientists proceed on the basis of their own conscience and set of morals.<sup>259</sup> Guidelines concerning

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252. *Final Report of the Multidisciplinary Discussion Group on Embryo Research assembled by Health Canada in 1995*, 48 INT'L DIG. OF HEALTH LEGIS. 131, 229, (1997).

253. *Id.* at rec.4.

254. *Id.* at rec.3. Follows internationally accepted standards.

255. *Id.* at rec.10.

256. *Id.* at rec.11, 12. Among the research prohibited in the absence of a regulatory body are; human cloning, chimeras, production of interspecies embryos, and transgenic human embryos.

257. Wayne Kondro, *Canada gets tough with Reproductive Technologies*, THE LANCET, June 22, 1996 (discussing the June 14, 1996 Human Reproductive and Genetics Technologies Act).

258. *Id.*

259. *Analysis: Cloning Reports, Reactions Ripple Back to Japan*, ASIA PULSE, Mar. 7, 1997.

the manipulation of human embryos have been released by the Japan Society of Obstetrics and Gynecology, but the research conducted in government-funded and private sector laboratories are still without any clear cut regulations.<sup>260</sup>

Although the Education Ministry has decided, for the present time, not to allocate funding towards research on cloning human beings through the use of human tissues because of ethical issues, knowledge concerning the legal responsibilities of cloning research are still unknown.<sup>261</sup> No laws, regulations, moratoriums, or other restrictive measures regarding the research of cloning human beings are currently being considered by the Education Ministry.<sup>262</sup> In the area of animal cloning, Japan is highly advanced and the Education Ministry does plan to continue the funding this type of research. Utilizing embryo splitting techniques, universities in Japan has been successful in the cloning of farm animals and mice, but currently, they have not achieved any success in the cloning mammals.<sup>263</sup>

## 2. Hong Kong

Scientific research in cloning is basically a self regulating technology with no prohibitions and the subject has not been addressed in the country's courts or legislature.<sup>264</sup> Public concern, in respect to cloning technology, is focused on the well-being of the resulting children and the effects on family relationships.<sup>265</sup> In 1992, the Committee on Scientifically Assisted Human Reproduction published recommendations, attempting to answer these concerns, with some focused on research in this area.<sup>266</sup> Among the recommendations are that guidelines should be constructed concerning what is allowable in embryo research.<sup>267</sup> Included in these guidelines should be a prohibition that no embryo should be created deliberately for research and that no research should be allowed following the fourteenth day after fertilization.<sup>268</sup> Furthermore, standards regarding

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260. *Id.*

261. *Ministry Decides not to Fund R&D on Cloning Humans*, JAPAN ECON. NEWSWIRE, Mar. 7, 1997.

262. *Id.*

263. *Cloning Reports*, *supra* note 259.

264. Pitrolo, *supra* note 151, at 193.

265. *Id.*

266. *Id.* at 194.

267. *Id.*

268. *Id.*

storage of gametes and embryos need to be set forth and any commercial surrogacy should be prohibited.<sup>269</sup>

### 3. China

Unlike most other countries, China has taken a very conservative approach on the issue of cloning humans, as well as cloning all other life forms. The Chinese Academy of Science has banned human cloning and recommended that guidelines regulating animal cloning be established and the responsibilities and rights of scientists be set forth.<sup>270</sup> Evaluation of the legal and ethical concerns of animal cloning should be accomplished by a newly created national body.<sup>271</sup> The Academy of Science believes that danger to the environment and ecological hazards may occur through any application of cloning technologies to any living species.<sup>272</sup> Traditional societal beliefs still exhibit a reluctance to accept children born through artificial insemination and in vitro fertilization procedures.<sup>273</sup>

### 4. Malaysia

Believing that it would be against God's plan to have multiple clones of an individual existing at the same time, Malaysia has officially prohibited the cloning of human beings.<sup>274</sup> Although the cloning of humans is banned, the government will allow the cloning of certain animals to continue under conditions such as, reproducing quality livestock or saving an endangered species.<sup>275</sup>

### F. Middle East

Islamic religious experts and scholars at a meeting of the Islamic Educational, Scientific, and Cultural Organization has recommended a prohibition of cloning research on human beings, but have accepted the cloning of animals and plants.<sup>276</sup> Although these recommendations are not a final *fatwa*, religious ruling, and until the *Sharia*, Islamic law, allows the technology of cloning humans to be explored, Muslim countries are urged

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269. *Id.*

270. *China Bans Human Cloning*, DEUTSCHE PRESSE-AGENTUR, May 13, 1997.

271. *Id.*

272. *Id.*

273. Pitrolo, *supra* note 151, at 184.

274. *Malaysia Bans Human Cloning*, DEUTSCHE PRESSE-AGENTUR, Mar. 18, 1997.

275. *Id.*

276. *Islamic Organization Recommends Human Cloning Ban* (visited Sept. 23, 1997) <<http://www.d-b.net/dti/970618casablanca.txt>>.

to adhere to the ban.<sup>277</sup> In anticipation of foreign intrusion into Islamic countries, recommendations emerged that call for governments to enact the necessary legislation to prohibit foreign involvement in human cloning research.<sup>278</sup> The Organization based their recommendations on the belief that the direction that this technology is headed is unsafe and has immoral objectives.<sup>279</sup>

Other countries in this region have expressed opinions regarding embryo research and cloning technology. Israeli law may allow research on human embryos, but have stated that they are against cloning procedures.<sup>280</sup> Liberally minded in the area of fertility treatment, in vitro procedures for infertile couples are permitted and encouraged and because embryos are not considered living human beings until being born, under Rabbinic law, they are considered only as property.<sup>281</sup> In an opposite direction, the pro-Iranian Hezbollah faction has expressed an acceptance of cloning procedures. According to Sheikh Mohammed Hussien Fadallah, the spiritual guide of the Hezbollah, these scientific procedures have been discovered because God has allowed it to happen, and should therefore not be seen as an attempt to intervene in divine creation.<sup>282</sup> Furthermore, the Ayatollah Nasser Makarem-Shirazi, a major figure in the ultra-strict Islamic clergy of Iran, believes that human cloning will happen and that the clergy should begin studying the technology in order to be better suited to cope with the potential problems that may occur.<sup>283</sup>

### G. South America

Argentina is one of the few South American countries that have entered into the bioethical debate of genetic technologies. While they currently do not address the cloning issue, recommendations have been presented that prohibits experimentation on embryos and genetic manipulation is allowed only for therapeutic reasons.<sup>284</sup> Sex selection in embryos is also prohibited except in situations where genetic disorders may

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277. *Id.*

278. *Id.*

279. *Id.*

280. *Hezbollah Mentor Says "God Allowed" Cloning*, DEUTSCHE PRESSE-AGENTUR, Mar. 13, 1997.

281. Pitrolo, *supra* note 151, at 195.

282. Hezbollah, *supra* note 280.

283. *Islamic Leader Braces Clerics for a Future with Human Cloning*, BIOTECHNOLOGY NEWSWATCH, Oct. 6, 1997, at 3.

284. Pitrolo, *supra* note 151, at 180.

be prevented.<sup>285</sup> The Senate Commission has also expressed that fertility procedures should only be allowed for infertility problems and not as an alternative means for achieving a pregnancy.<sup>286</sup>

## H. World Organizations

### 1. The Vatican

From as early as 1987, the Vatican has publicly expressed concern and condemnation towards any technology aimed at assisted fertilization and cloning procedures. The belief that any non-therapeutic experimentation and freezing of embryos offends the dignity of fetal human life, the Vatican has urged countries to ban these procedures.<sup>287</sup> Reports of the experimentation conducted at George Washington University, prompted the Vatican to publicly condemn the scientists and conclude that the research was not justified and defied all legal barriers.<sup>288</sup> While understanding the importance of the genetic research, concern that a lack of respect for human dignity and the potential treatment of children as products of technology is overriding in their disapproval of genetic experimentation.<sup>289</sup> Upon learning of the success of researchers in Scotland, the Vatican has again become outspoken, calling for all efforts to clone human beings to be banned. The Church has expressed concern that psychologically cloned humans would be harmed by being constantly aware of a "real" or even "virtual" presence of his other(s).<sup>290</sup>

### 2. World Health Organization

The World Health Organization (WHO) is a multinational organization charged with addressing national and international disparities in health standards.<sup>291</sup> In considering the ethical implications of cloning and genetic technology, the Organization has recently held that, because of

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285. *Id.*

286. *Id.* at 181.

287. *Vatican Condemns American Cloning of Human Embryo*, AGENCE FRANCE PRESSE, Oct. 25, 1993.

288. *Id.*

289. *Id.*

290. *Pontifical Panel says Souls are Unclonable* (visited Sept. 23, 1997) <<http://www.d-b.net/dti/970624vatican.txt>> .

291. *WHO Condemns Cloning of Humans as Ethically Unacceptable*, DEUTSCHE PRESSE-AGENTUR, May 14, 1997. Currently there are 191 member nations involved in the WHO.

respect for human dignity, the application of cloning research for the replication of humans is ethically unacceptable.<sup>292</sup> While the group realizes that there is a freedom to access the benefits of ethically accepted scientific progresses, necessary guidelines and safeguards must be put forth in national and international legislation. Among the forms of experimentation that are regarded as ethically unacceptable are; human cloning, alteration of the germ-cell genome, interspecies fertilization, and the creation of chimeras.<sup>293</sup> The WHO's resolution is not intended to prohibit all forms of cloning and some applications are acceptable.<sup>294</sup> The recommendations of the WHO are to be used as a starting point for an international public debate and individual countries are urged to enact conforming legislation on the domestic level.<sup>295</sup>

During the 50th World Health Assembly meeting in Geneva, delegates adopted a resolution affirming the views of the WHO and declaring that the cloning of human beings is ethically unacceptable and contrary to human morality and dignity.<sup>296</sup> Because of unprecedented ethical implications that cloning and the more extreme forms of genetic experimentation possess, development in genetic research must be carefully monitored.<sup>297</sup> Further assessment of international reactions to the legal aspects involved with cloning are to be discussed at the 1998 World Health Assembly.<sup>298</sup>

## VI. DEBATE: MEDICAL ISSUES

The benefits that can be potentially achieved through cloning and genetic research, medically speaking, are significant and could produce an overall healthier society. In the fight against serious genetic diseases, these technologies could prove pivotal in their prevention and possible extinction. Areas of research, including disability prevention, organ transplant, infertility, and aging, can all be aided by knowledge in these

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292. *WHO Director-General Condemns Human Cloning*, (visited Sept. 26, 1997) <<http://www.who.ch/press/1997/pr97-20.html>>. Human reproduction should not be confused with human replication.

293. *Id.*

294. *Id.* The cloning of human cell lines is routine procedure is used for research on curing diseases such as cancer. Animal cloning also offers opportunities to advance biomedical research on diagnosis and treatment of diseases affecting human beings.

295. *Id.*

296. *WHO States its Position on Cloning in Human Reproduction*, (visited Sept. 26, 1997) <<http://www.who.ch/press/1997/97wha9.html>>.

297. *Id.*

298. *WHO Adopts Resolution Against Cloning Humans* (visited Sept. 23, 1997) <<http://www.d-b.net/dti/970516who.txt>>.



fields. In order to accommodate both the proponents and critics of genetic research, a balancing must occur between the goals of achieving an improved and healthier society and the protection of an indeterminable amount of embryos that will be destroyed through experimentation.

Many of the arguments supporting the continuation of cloning research come from those in the infertility field. Through cloning technology, couples who before had to rely on sperm or egg donors, can now use their own DNA for the offspring. For couples who are no longer fertile, they may wish to clone the DNA of a previous child or should a child die prematurely, their DNA can be replicated to give birth to another child. With the process of blastomere separation, a woman going through an in vitro fertilization procedure can elect to split the embryo and cryopreserve those embryos not necessary for achieving pregnancy. This will protect the woman from having to repeat potentially harmful fertilization treatment. Furthermore, regulations regarding cloning technology may in effect restrict otherwise legitimate genetic testing. For example, embryos used in IVF procedures that are determined to be carriers of certain diseases, such as cystic fibrosis, may be disregarded in order to implant healthy and viable embryos.<sup>299</sup>

The search for treatments with brain and nervous system damage can also be aided by research using human embryos. Embryonic stem cells, because they are undifferentiated and can develop into almost any type of cell in the body, could be used to replace the damaged cells.<sup>300</sup> This undifferentiated status, along with their fast development, enables these stem cells to evade an attack by a person's immune system.<sup>301</sup> The large amount of these cells that would be needed to repair damage would most likely make cloning a necessity. Another area for a potentially beneficial use of genetic technology is in the field of cancer research. Because cancer cells develop at approximately the same rate as embryonic cells, scientists, through embryo research, may be able to slow down or even prevent the spread of cancer.<sup>302</sup>

Bone marrow transplants and skin grafts could each be performed easier with the help of cloning technology. A cryopreserved embryo can be implanted and allowed to develop in order to procure transferable matter.<sup>303</sup> With improved technology, an embryo may not even have to be

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299. Shari Roan, *In Our Own Image*, L.A. TIMES, Apr. 29, 1997, at A13.

300. *Human Cloning Techniques*, *supra* note 30.

301. *Id.*

302. *Id.*

303. *Id.*

brought to full term in order to be useful.<sup>304</sup> Lastly, the prevention of miscarriages due to chromosomal imbalances may also be improved.<sup>305</sup> Current figures estimate that over fifty percent of miscarriages occur from these imbalances and through genetic screening and experimentation, avoidance of this trauma may be possible.<sup>306</sup>

For those individuals that are against permitting cloning and other genetic technologies to be researched, equally persuasive arguments are expressed. First, there is not much justification in permitting thousands of embryos to be manipulated through experimentation and ultimately destroyed for the benefit of producing a single cloned person.<sup>307</sup> While the embryo is not afforded protection equal to that of an adult human, many people feel that it should still receive a special status. An unsettling feeling emerges from the knowledge that a significant number of embryos, that have the potential to achieve life, will be sacrificed in the pursuit of science. Critics further argue that the increase in the rate of achieving a successful pregnancy by splitting embryos during an IVF procedure is a misleading figure and is due to the genetic heterogeneity of the transferred embryos and not to increased amounts.<sup>308</sup>

Fear of eugenic procedures and memories of past horrors entails another reason to prohibit such research from being conducted. The ability to manipulate the genetic foundation of man and to literally control creation is a power which if misapplied could result in the loss of freedom, individuality, and human dignity, for the present, as well as future generations. Logic dictates that if the ability to control genetic characteristics is developed, a so-called positive eugenic program will emerge. Positive eugenics selects those traits which are most beneficial and encourages those with the finest genetic profiles to breed. A predictable outcome of this would entail the increased selection of particular traits and thus, a large scale effort to produce similar or identical types of humans. Nature's process of natural selection is suspended and the reality of a "Brave New World" is upon us.

The pivotal questions posed to protect against abuses is therefore, who will control the process, and how will the selection of genetic characteristics be chosen. The answers are potentially as disturbing as the questions asked. Under governmental control, fears of a manufactured

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304. *Id.*

305. Conte, *supra* note 69, at 440.

306. *Id.*

307. Pirrolo, *supra* note 151, at 199

308. Debra Feuerberg Duffy, *To Be or Not to Be: The Legal Ramifications of the Cloning of Human Embryos*, 21 RUTEGERS COMPUTER & TECH. L.J.189, 216 (1995).

society, much like "A Brave New World,"<sup>309</sup> are imagined. A world of humans with pre-determined characteristics and capabilities could benefit the efficiency, productivity, and manageability of society as a whole. Other governmental fears include, new forms of biological warfare, armies of soldier clones, and the extinction of those found unacceptable to society. Private control over these processes does not erase the fear of abuses. One can imagine menus offering a price list of particularly desirable traits, checklists for couples who would like to opt for specific genetic packages. For the right price, one may have the option to purchase the DNA of a world class athlete, award winning actor, or a beautiful supermodel. As was stated by George Annas, a medical ethicist at Boston University, "Maybe if this were Nazi Germany, we would worry more about the government, but we're in America, where we have the private market. We don't need the government to make the nightmare scenario come true."<sup>310</sup> Fortunately, time is on the side of reason and technology has not progressed to the point where many of the fears expressed will become reality.

Opponents to cloning and other forms of genetic engineering also rely on currently inconclusive information on the long term effects of implanting an adult's DNA into a new being. Fear that the DNA may have mutated to the effect of causing damage to the recipient is one frequently made argument.<sup>311</sup> The recipient may experience rapid aging or suffer more degenerative disease than normal.<sup>312</sup> Other arguments against these procedures are what legal and societal rights are to be afforded to the clone, and a fear that man might insinuate that cloning their own DNA might in turn allow them the opportunity to live forever.

## VII. DEBATE: LEGAL ISSUES

With the United States being so heavily involved in the efforts of the Human Genome Project and many other genetic research projects, the legal freedoms guaranteed by the United States Constitution become pivotal issues in the debates over legislation. Legislation enacted throughout the world may prohibit particular areas of research, but if the United States does not agree to accommodate those restrictions, any legislation is virtually meaningless. Traditionally, scientists in the United States assume that, absent a specific and justifiable prohibition, there is

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309. See generally ALDOUS HUXLEY, BRAVE NEW WORLD (HarperPerennial 1946)(1932).

310. Elmer-Dewitt, *supra* note 9.

311. Cookson, *supra* note 19.

312. *Id.*

freedom to act.<sup>313</sup> This implied freedom, combined with arguments limiting governmental intrusion into fundamental liberties, opens the door to highly complicated debate. With a population consisting of individuals from a multitude of different backgrounds, religions, races, economic status, etc., the difficulty in achieving a consensus opinion on any issue is enormous. Add in personal emotions and moral values, and the debate becomes that much more diluted and difficult to define. Although there are opinions which are not common to all Americans, the collective force of strong objections to the use of cloning on human beings makes a case that it should be against the public policy to conduct this type of research.<sup>314</sup>

In the United States, the amount of governmental intrusion that is permissible on an individual's liberty is dependant upon the classification of the liberty at issue. In the case of ordinary liberties, such as to drive a car, most any reason will be sufficient for government restrictions. For an intrusion upon a fundamental right, those rights mentioned in the Constitution or necessary for a system of ordered liberty, strict scrutiny analysis is performed and a compelling reason is needed for an infringement. Fundamental rights have been defined by the Supreme Court to be those rights so deeply rooted in our culture and history as to be assumed by the public as being beyond casual governmental interference.<sup>315</sup> If a right is not determined to be fundamental, only a rational basis test is utilized before the state may interfere with it.

According to the Supreme Court, Americans have the constitutional right to procreative freedom. The Court found in, *Eisenstadt v. Baird*, that in matters so fundamentally affecting an individual, such as the decision whether to bear or beget a child, it is the right of the person to be free from unwarranted governmental intrusion.<sup>316</sup> Inferences are made based on this holding, that included in the right to have a child is the right to avoid carrying the child to term either through the use of abortion or contraceptives.<sup>317</sup> The dilemma then becomes whether the fundamental right to either give birth or abort a child implies the right to deny life based upon undesirable genetic characteristics or to create life through cloning procedures.

In order to determine whether cloning a human would be protected as a fundamental procreative liberty, the question that must be answered is whether cloning is considered as a form of reproduction or as only

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313. *Executive Summary, NBAC Report, supra* note 226.

314. *Id.*

315. *Id.*

316. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

317. *Duffy, supra* note 308, at 195.

replication. With reference to *Skinner v. Oklahoma*, where according to dicta, coital reproduction is considered a fundamental right, non-compelling state interference with infertility procedures should also be invalidated in the case where the treatment is necessary to allow coitally infertile couples to reproduce.<sup>318</sup> In previous cases discussing procreative liberties, procreation has been assumed to involve interdependent reproductive cooperation between a man and a woman, at least on a biological level.<sup>319</sup> Furthermore, it has been assumed that a vertical transmission of genes, between parent and child, would occur, but through cloning by somatic transfer, genes may be transmitted within a generation.<sup>320</sup> Through the use of embryo splitting, a couple undergoing an infertility procedure may wish to produce more than one child with a particular genome. This may fall within the definition of procreation because the genome that is cloned is from the persons themselves or from an embryo or child that was created from their gametes.<sup>321</sup> Without the use of the person's own genes or gametes, the resulting offspring would be product of replication and not reproduction. Although to some this may be considered to be reproduction, because the process is so deviant from the commonly understood definition, it may not be treated as representing the same fundamental rights.<sup>322</sup> Should the creation of an offspring through cloning technology be regarded as reproduction and protected as a fundamental right, the government must set forth compelling reasons in order to validate their infringement. Among the various reasons to prohibit cloning are that through the use of this technology human identity would become predictable and be inconsistent with the maintenance of free will.<sup>323</sup> This is speculated to lead to a weakening of the traditional social constructs found within the family unit and the diminution of the political institutions that focus on restricting coercive manipulation of individuals and fostering individual autonomy.<sup>324</sup> Opponents counter this argument by eliciting the fact that the government has a compelling interest to minimize human suffering and maximize the social good that be achieved through cloning technology. Along with the dilemma that cloning poses to procreative

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318. Robertson, *supra* note 94, at 426.

319. NBAC Report, *supra* note 225.

320. *Id.*

321. Robertson, *supra* note 94, at 438.

322. *Id.*

323. George P. Smith, II, *Pathways to Immortality in the New Millennium: Human Responsibility, Theological Direction, or Legal Mandate*, 15:2 ST. LOUIS U. PUB. L. REV. 447, 458 (1996).

324. *Id.*

liberty, the pre-birth control over genetic characteristics also comes into the debate. To some, logic dictates that if a woman has the right to avoid birth for any reason, she should be entitled to avoidance for a particular reason.<sup>325</sup> Going a step further, a woman should have the right to reproduce under the circumstances in which she is confident that her child will have particular genetic traits.<sup>326</sup> With the advancements of genetic research, the pre-birth ability to detect genes that are susceptible to disease is improving and is already routinely in use in some situations.<sup>327</sup> Through the continued research in projects, such as the Human Genome Project, the number of diseases that can be detected prior to birth will increase. Interference with one's procreative freedom will occur through the denial of information that may be given to the parents that would effect their decision of whether to reproduce.<sup>328</sup>

If pre-birth selection is determined to be included as a fundamental right, the state must have a compelling reason in order to impede upon that right and a showing of tangible harm to others would probably be necessary. Anything less may not be enough to overcome, at least, the potential pre-birth screening capabilities associated with genetic research. Utilizing an objective test, the materiality of a gene's characteristics to procreative decisions should determine the amount reason necessary to interfere legislatively. Thus, genes which identify serious disease would probably elicit the strict scrutiny test in order to impede, while genes used for nontherapeutic enhancement, intentional diminishment, or cloning would require only a rational basis.<sup>329</sup>

## VIII. DEBATE: ETHICAL ISSUES

### A. *Moral Status of the Embryo*

Any discussion or legislation on the topics of cloning and human embryo research must necessarily entail the moral status afforded to the embryo. Countries, and people alike, have opposing views on whether, or under what conditions, research on human embryos may be pursued. There are generally three viewpoints that emerge on the status, or

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325. Robertson, *supra* note 94, at 427.

326. *Id.*

327. *Id.* at 429. Medical specialists routinely screen Ashkenazi Jews, African Americans, siblings of those with cystic fibrosis, and other groups to determine their status as carriers of genetic diseases. Doctors also screen over 60% of American pregnancies for neural tube defects.

328. *Id.*

329. *Id.* at 436.

protection, that an embryo is given.<sup>330</sup> Under the first, an embryo is afforded the same protections as any other human being from the moment the egg is fertilized, thus granting the right of an opportunity for life.<sup>331</sup> The second view equates the embryo with any other human tissue, allowing research prior to its viability and with proper consent.<sup>332</sup> The final and majority viewpoint does not equate the status of an embryo with that of a person, but due to the potential for life, more respect is granted than that of ordinary tissue or animal embryos.<sup>333</sup> Proponents of this view allow embryo research to be conducted until the fourteenth day after development began or until the time the embryo can experience brain activity and pain, prior to the appearance of the primitive streak. The majority of countries and international organizations that permit human embryo research to be conducted follow the third viewpoint, with most European nations following the fourteen day limitation.<sup>334</sup>

Constitutional power to regulate these areas of research, along with controlling so-called procreative liberties, varies among the countries of the world, and in most situations the third viewpoint implies a compromise between the first two opposing views. In direct connection with the dilemma that surrounds the abortion debate, individual viewpoints, apart from their government's desired ideology, are deeply entrenched in their own personal beliefs and opposition is not readily accepted. With abortion, some feel that an embryo has the right to life, while others do not afford the embryo such a right. Many believe that it is each individual's choice on whether to partake in an abortion, while others feel that the potential for life creates the obligation to provide the embryo with at least the opportunity for life. Simply put, it is an issue concerning the life or death of the individual embryo, or embryos, involved. What distinguishes the status issue with cloning and genetic technologies from abortion is that the issue is not life or death, but the potential genetic manipulation of future generations and the creation of life when there was none.

### *B. Individuality and Human Dignity*

Critics claim that by cloning humans, children will receive treatment equal to that of a commodity and human dignity and individuality will be diminished. Utilization of splitting techniques to create multiple

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330. See generally Coleman, *supra* note 41, at 1340.

331. *Id.*

332. *Id.*

333. *Id.*

334. See discussion *infra* Council of Europe, International and Domestic Legislation.

clones of a particular embryo will install a feeling of lessened self-worth in the resulting clones because of the association with being artificially manufactured and the knowledge that, not only are you a copy of another, but that there are multiple copies of you.

The lack of harm resulting from the existence of naturally occurring identical twins is often argued as a reason for allowing the use of cloned embryos.<sup>335</sup> Opponents counter this argument by claiming that significant differences between the two make the analogy inappropriate.<sup>336</sup> Initially, while there is a naturally occurring limitation in the number of identical twins born during one birth, usually two or three, with cloning, an infinite amount of embryos can theoretically be produced.<sup>337</sup> Another distinction is that with natural identical twins, birth occurs within a limited time frame, usually moments from each other, but with cloning, birth can occur years apart and with different mothers.<sup>338</sup>

This second distinction brings about an interesting dilemma that has the potential to occur. A child may be faced with a devalued self-worth in light of an identical twin or multiple twins being developed many years subsequent to his or her own birth. This original child may be attached to the notion that he or she is a unique individual and can thus be harmed by some potential future circumstance.<sup>339</sup> This situation also touches on the issue of whether an embryo or a child has the right to individuality and protection against the copying of their genetic composition. While under current conditions it is the rights of the parents which determines what procedures will be accomplished, the existing child is a human being and deserves the same rights as any adult human being, in determining the exploitation of their own unique genetic make-up.

## IX. DEBATE: RELIGIOUS ISSUES

### Religion vs. Science

The delicate balance that has been created between the advancement of science and the maintenance of fundamental religious beliefs is being threatened by the achievements that have been produced in the area of genetic engineering. Confrontation on issues, such as creation and evolution, have come center stage in the wake of the potential opportunities that are presented as a result of recent advancements. Man,

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335. Amer, *supra* note 12, at 1683.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*



through science, is on the threshold of discovering procedures which will allow the manipulation and control over processes that until now, have only been known to nature and *God*. The gap that exists between what can be explained by analytical science and that which is answerable through religious faith is shrinking in the favor of science. But for science to achieve beneficial results for all of humanity, religion must have its place in the debate. The moral and spiritual ideals represented by religion must not be discarded for the sake of scientific progress.

In the new world of genetic engineering, religion's role in society must be re-evaluated in order to help define the most beneficial route to improving life through technology. Fundamental religious teachings on the God-like ability to create life is being tested by potential achievements in genetic manipulation. Opposing views between the many religions further complicates issues on, among other things, the amount of protection given to, or the potential for, human life and permissible areas of genetic research. For example, the Vatican, in condemning attempts to clone humans, warned that because only God can create the spiritual soul, resulting clones will be psychically damaged.<sup>340</sup> With an opposite view, the spiritual guide for the Moslem Hezbollah, Sheikh Mohammed Hussein, claims that because God has allowed science to progress, research into cloning should continue.<sup>341</sup> Lesser debated issues concerning genetic technologies also may encompass opposing religious views. One example is that increased screening for genetic-based diseases will lead to a greater amount of abortions for genetically damaged embryos or fetuses. This situation presents a dilemma for those religions who regard the moment of conception, as when the obligation to protect life begins. The question becomes whether the benefits of providing an improved life to many individuals outweighs the effect of denying life to those who may be genetically handicapped.

The pursuit of scientific achievement must balance its efforts with the moral and spiritual principles expressed in religion. While it is of little doubt that the benefits of cleansing mankind of the burdens of disease and improving overall health is of significant importance and should be continued to be researched, experimentation must proceed within reasonable bounds and protect the cherished notions of birth, dignity, and individuality. Genetic engineering must be used for the greatest societal good and minimize human suffering in order to preserve the integrity of creation and evolution. Memories of the past atrocities that occurred with the Nazis and fear of what can be envisioned should genetic manipulation

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340. *Vatican*, *supra* note 287.

341. *Hezbollah*, *supra* note 280.

be used for unsavory purposes, must be combined with moral and spiritual ideals to prevent any misapplication against societal good in these areas of research.

## X. DEBATE: THEOLOGICAL ISSUES

Related to the religious issues, theologians have expressed their views on the potential to clone humans and manipulate their genetic constitution. As a fundamental belief, human life is sacred and liberty is a basic right granted to man out of respect for their autonomous and free nature.<sup>342</sup> From there, differing views are formed on how man should handle the knowledge to manipulate creation and control the genetic development of their own species. Some are based on the principle that this science dehumanizes and objectifies the individual by defining the individual's spirit as a mere product of his or her genome.<sup>343</sup> Others take a more consequentialist approach, focusing on whether the results are beneficial given a particular situation.<sup>344</sup> Understanding the importance of the potential benefits that may be achieved, the Roman Catholic Church has even expressed a willingness to condone some circumstances of genetic therapy in conditions of therapeutic necessity.<sup>345</sup> However, any attempt to modify the human genome in a eugenic fashion is strictly against the dignity and identity of man.<sup>346</sup>

Proceeding with caution in the area of genetic engineering, because of a respect for the human spirit, is the basis of thought under the deontological approach.<sup>347</sup> As free and truth seeking individuals, humans can not be the subject of genetic or scientific determination and science must be prohibited from progressing at the expense of the human spirit.<sup>348</sup> If it can be reasonably predicted that no grave harm will be done to the subject and its purpose is to alleviate suffering, genetic therapy may be permissible.<sup>349</sup> Theological beliefs expressed under the consequential theory takes a more fatalistic approach leaning, towards man's inherent nature to manipulate their existence. Justification is realized when the act of manipulation, and the means used to achieve the act, exhibits the

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342. Conte, *supra* note 69, at 442.

343. *Id.* at 449.

344. *Id.* at 448.

345. *Id.* at 449.

346. *Id.*

347. *Id.*

348. Conte, *supra* note 69, at 449.

349. *Id.*

greatest societal good for the greatest number of people.<sup>350</sup> Simply put, "[t]he concept of autonomy in bioethics, as well as the individual as a free spirit in theology, is obliterated for the sake of the utility driven social order."<sup>351</sup>

These arguments, as well as those in the religious area, have a basis in the moral and spiritual foundation that society is built upon. Before proceeding with genetic research, scientists must understand what is at stake through the methods utilized and the results that are to be achieved. The moral quality of experimentation is dependant upon the nature of the parties engaging in the procedure, the actual and intended results on the whole human being, and the technological methods employed.

## XI. A LOOK TOWARDS THE FUTURE

In the absence of a world wide consensus on the limitations regarding cloning and other genetic technologies, those countries permitting less regulated research will be seeking to cash in on the rapidly expanding biotechnology industry. Some estimates value the market for genetic products and services at over \$100 billion, and with the rapid progression of discovery, these estimates are probably conservative.<sup>352</sup> Corporations, and countries alike, are currently in a spirited race to surpass recent advancements, and discover new and profitable techniques in the areas of animal cloning, disease prevention, and gene identification. With the enormous amount of potential profit, pressure to permit continued research, in areas which may be soon prohibited due to overbroad and rushed through legislation, is coming in from scientists and lobbyists in almost every area of genetic research.

### *A. Government and Corporate Interaction*

An enlightened look into the future of partnerships between countries and corporations is occurring in the present time. The first example is centered in Iceland, where with the aid of private United States' investments and the cooperation of the Icelandic public and the government, a genomic company deCode has ventured into twenty-first century research. Utilizing a positional cloning technique, deCode identifies disease-causing genes by looking at the physical characteristics of

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350. *Id.* at 448.

351. *Id.*

352. *Looking for Financing, Equity, and Debt: TELECLONE INC., FIRST LIST: SEEKING ACQUISITIONS*, Nov. 1, 1997.

a disease and working back to its genetic basis.<sup>353</sup> Through this process, researchers have had successful progress in the areas of familial essential tremor and multiple sclerosis.<sup>354</sup> A priority in the project was locating a genetically ideal population base and with the approval of the government and the subject population, Iceland is the perfect fit. With its genetic homogeneity, descended almost exclusively from Norwegian nobles and extensive genealogical records dating back more than two hundred years, the Icelandic people are the ideal model group to research.<sup>355</sup> Add in a top-notch national health care system and a large tissue bank and a virtual Eden is established for the goals of the project.<sup>356</sup>

Claiming to be one of the most technologically advanced companies in the world, deCode reports to be able to map up to twelve complex diseases per year through sequencing operations which are able to generate 300,000 genotypes per month.<sup>357</sup> Subject to governmental approval, deCode plans to establish a database, called GGPR, containing the genotypes, genealogy, and phenotypes of the Icelandic population.<sup>358</sup> This will allow the identification of diseases which occur in specific families and determine its genetic basis through generational inheritance of the disease.

An opposite situation has occurred in Manila, where in an effort to combat *bio-piracy*, the government has attempted to prevent foreign corporations from patenting genetic material found in their territory. As of September 1, 1997, the government has voided any agreement with multinationals granting the right to isolate and patent genetic material from flora and fauna located in the Philippines.<sup>359</sup> Any bio-prospecting must be accomplished with a government license and the consent of the community involved.<sup>360</sup> Similar concerns have been raised in Indonesia and other countries, but lack of adequate enforcement allows illegal exporting to be done.<sup>361</sup>

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353. *deCode Genetics puts Iceland on the Map*, MARKETLETTER, OCT. 13, 1997.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. Choong Tet Sieu & Keith Loveard, *Biotech: Magic Genes*, ASIaweek, Sept. 5, 1997.

360. *Id.*

361. *Id.*

### B. Recent Progress

To illustrate how quick progress is being achieved, since the time I began research on this topic, the technology used to create Dolly the sheep has already been reported to be improved upon. According to officials at ABS Global Inc., located in Wisconsin, three genetically identical calves have been produced from a single fetal calf tissue and ten cows are currently impregnated with clones from a single adult bull cell.<sup>362</sup> Rather than starving the cells of growth factors and nutrients like researchers in Scotland, ABS advanced the process by creating stem cells by using a special formula of growth hormones to modify specialized cells.<sup>363</sup> Through the successful use of this new procedure, ABS claims that safety concerns are minimized, and cloning a human, should that route be taken, would become a much technically safer process.<sup>364</sup>

Recent corporate influence in cloning technology has also begun to produce therapeutic benefits for man through efforts in animal cloning. Two companies, Genzyme Transgenics Corporation and Advanced Cell Technology Inc. have joined efforts to clone transgenic cattle which produce milk laced with human therapeutic proteins.<sup>365</sup> Advanced Cell utilizes a proprietary method of cloning, in which they introduce a gene into fetal fibroblast cells in culture and then transfer the nuclei of those cells into enucleated egg cells.<sup>366</sup> The resulting embryos, all female, are implanted into surrogate mothers, thus creating a herd in one generation.<sup>367</sup> Genzyme Transgenics, on the other hand, has previously produced transgenic goats capable of producing Antithrombin III, a human protein, in their milk.<sup>368</sup> Together, they aim to produce cattle containing human serum albumin, a market currently valued at \$1.5 billion.<sup>369</sup> Human serum albumin is used to regulate the balance of protein and fluids in the blood of patients who are undergoing major surgery or suffering from burns, shock, or malnutrition.<sup>370</sup> This is only one example of a recent advancement in

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362. *Wisconsin Researchers Clone Three Genetically Identical Calves*, TRANSPLANT NEWS, Aug. 31, 1997.

363. *Id.*

364. *Id.*

365. Lisa Seachrist, *Genzyme Transgenics, Advanced Cell Clone Cows to Produce Human Albumin*, 8 BIOWORLD TODAY 196, Oct. 9, 1997.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

genetic engineering and new discoveries are being reported in newspapers and trade magazines everyday.

### C. *The Future?*

If the technologies associated with cloning are allowed to progress, what will the future of child birth look like? Will corporations begin soliciting customers by offering menus of genetic characteristics for one to choose from? How about those opportunistic businessmen who compile licensing agreements from world-class athletes, famous actors, and beautiful supermodels, to sell cloned DNA to the highest bidders? The possibilities and the horrors seem endless when considering the effect the free market will have on profiting from these potential procedures.

One such entrepreneur took the initiative and began a business called Geneti-Pet, where pet owners can one day receive a clone of their beloved deceased pet. For a minimal fee of only \$75, a blood retrieving kit is sent to you, for a veterinarian to take a blood sample.<sup>371</sup> With an additional cost of \$200 per year, your pet's genetic composition is cryogenically frozen until technology becomes available to replicate the DNA.<sup>372</sup>

For those seeking to invest their money into the potential of cloning, opportunities exist to invest in genetic research corporations. Besides previously established companies, which are privately financed or located on the many stock markets, companies are now soliciting investors in trade magazines and on the Internet. One such company is Teleclone Inc., who hopes to generate enough capital to maintain genetic laboratories to clone genes and provide genetic services and products.<sup>373</sup> Another potential investment is in the Raelian Movement, a religious organization claiming that life on earth was scientifically created in laboratories.<sup>374</sup> The organization is seeking to establish a laboratory in a country allowing cloning to be achieved and to sponsor private American laboratories that no longer receive funding due to the federal ban. Looking to charge upwards of \$200,000 to clone an embryo, the Raelians will also provide an insurance service to provide storage of a child's DNA in order to clone a prematurely deceased child.<sup>375</sup> For a final look at a potential future

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371. Sean Griffin, *A Bowser in a Bottle*, THE NEWS TRIB. (TACOMA, WA.), Feb. 1, 1994, at A1.

372. *Id.*

373. *Looking for Financing*, *supra* note 352.

374. *Rael Creates the First Human Cloning Company* (visited Sept. 25, 1997)

<<http://rael.org/English/pressreleases/clone.html>> .

375. *Id.*

situation, Dream Tech International, an Internet site, offers a sampling of hypothetical order forms and company benefits that encompass a futuristic human cloning company.<sup>376</sup>

## XII. CONCLUSION

As the world is on the threshold of entering a new millennium, the ability to manipulate the existence of humanity in a way never before experienced is presented before us. Potential advancements in genetic engineering technology offers man the power to create and control the future development of life on earth and the ability to alter nature in a truly God-like manner. The awesome responsibilities and implications derived from these advancements must not be taken lightly and the principles of human dignity and individuality should not be forsaken. The ramifications implicit in modifying the genetic composition of man will affect all individuals, no matter their location or status in society. The positive benefits to the overall health and improvement of the human species must be balanced by the effects research will have on potential life and the loss of individual freedoms which may ensue. In simple terms, the path in which science chooses to progress will have the effect of altering not only present society, but all future generations of offspring.

An international consensus is an absolute in issues of this magnitude. With the potential for enormous profits, anything less than a world wide agreement, in either direction, is necessary to protect against procreative tourism and corporate influence in these areas. While that notion is admirable, in today's society economy-driven legislation and corporate lobbying are major influences in dictating the course of regulations. In this matter, the decision must be one which is beneficial to all of man, and not to those who stand to profit off of this technology.

Positive arguments in favor of conducting research in these areas of science are very convincing and the potential medical and social benefits to society are inspiring. The prevention or extinction of serious disease and the reduction of overall human suffering are admirable goals and should be pursued with the utmost effort. Proponents of cloning research also point to other areas of research including psychology, sociology, and anthropology, that support the view that the environment which one develops from and the experiences one encounters, along with genetic composition, determine the actual identity of an individual. Therefore, attempts at cloning would not be detrimental to the principles of human

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376. *Dream Tech International* (visited Sept. 25, 1997) <<http://www.d-b.net/dti/about.html>>.

dignity and individuality and should thus be research in order to achieve the potential benefits to society, as a whole.

Although the proponents have convincing views, so do the critics of these procedures. With the lack of any conclusive information on the implications that cloning and genetic manipulation would cause on humanity, opponents are reluctant to accept any research that may be abused with such disastrous consequences. The risks involved, not only to personal freedoms, but to the subjects involved in any experimentation, are not justified by the possibilities that have the potential to be achieved. Basic religious and personal beliefs are at stake, and many people are not willing to reject long-standing ideals for the benefit of science.

Favorable public reaction to these new biotechnologies is consequential to their gaining approval to be researched and so far the response has not been positive. According to a Time/CNN poll conducted in 1993, three out of four Americans found the idea of cloning humans to be deeply troubling and forty percent would put a temporary halt on any research.<sup>377</sup> Regarding moral and religious issues, sixty-three percent of those polled believed cloning was against God's will and fifty-eight percent thought that cloning was morally wrong.<sup>378</sup> Furthermore, forty-six percent of Americans were favorable towards imposing criminal sanctions for attempting to clone a human being.<sup>379</sup>

At the outset of researching these issues it was my opinion that any attempt at cloning or genetically manipulating an individual was wrong, as it was against my own personal beliefs and moral foundation. During my research, my opinion varied on an almost daily basis, depending on whose views I was reading and the benefits and risks that were involved. Now at the conclusion of writing this paper, confusion exists and although I still believe it is wrong, I am hesitant in discounting all the potential benefits to society that may be achieved through continued research. In my life, I have not experienced the untimely death of a young child or have child who is seriously affected by a genetic disease. I do not understand the grief that a parent must feel in the loss of a child, or the mindset of those who would want to replace a deceased child with a cloned copy. As a single man, without any attempts at conceiving a child, I also do not understand the pain of infertility for myself, or that of a spouse.

The reason I say these things is because I do understand that these issues must be debated by all of mankind and views from those who have experienced many of the issues involved must be heard, thus allowing

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377. Elmer-Dewitt, *supra* note 9.

378. *Id.*

379. *Id.*



everyone to realize the true implications that are involved. As a member of the human race, my opinion, as well as others must be considered by governments in deciding what direction to proceed in and what will be most beneficial to man.

At the present time and with so much still to learn, any attempt to clone a human being or modify the genetic composition of an individual, which would have the effect of alter future generations, should be prohibited. Until such time that the public is favorable towards these procedures and information is offered which is convincing in eliminating the fear of abuses, science must not proceed in this direction.

# MADE IN AMERICA: LATIN AMERICAN CONSUMERS MEET THEIR MAKER

*Jessica Garcia\**

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## I. INTRODUCTION

In recent years, individuals living in the United States have exported various supplies to people in third world countries. In particular, many goods have been exported to Latin American countries, including Cuba. The large influx of American made products that have been

transported into these countries has given rise to the issue of liability of the American manufacturers concerning injuries to third party recipients. The area of tort law that has received great attention is the practice of products liability. Products liability law has served an instrumental part in protecting, warning, and enforcing the liability between manufacturer, consumer, and user.

Problems arise when the user, who usually is an indigent individual, suffers great injury yet does not have easy access to the American courts. In order to protect both manufacturers and users, the legislature has enacted laws that deter or eliminate the exportation of goods from the United States into these third world countries.

This article will address the issues that surround the products liability field concerning American manufacturers and international users. Specifically, this article will focus on the relations between the United States and Latin American countries. A discussion of Cuban law and liability will also be addressed in consideration of the Helms-Burton Law. A comprehensive study composed of the American manufacturers along with the remedies and protections that international users are entitled to, will encompass this analysis. Also, the issues of jurisdiction and user limitations concerning bringing an action against an American manufacturer will be discussed.

## II. A HISTORICAL BACKGROUND OF CUBA'S LEGAL SYSTEM

### A. *The American Influence*

Cuba attained liberation after the Spanish-American War in 1898 leading to a new regime that led to the creation of the Cuban legal system.<sup>1</sup> The involvement of America in the War led to the adoption of many American legal concepts that were inculcated by Cuba's emerging government.<sup>2</sup> Among the many legal concepts that were adopted from the American government was the idea of the separation of powers.<sup>3</sup> From the Spanish, Cuba accepted many of the concepts concerning the civil law.<sup>4</sup>

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1. Eugene Whitlock, *Revolution in the Balance: Law and Society in Contemporary Cuba*, 93 MICH. L. REV. 1835 (May 1995) (book review).

2. *Id.*

3. *Id.* at 1836.

4. *Id.* at 1835.

After the defeat of Batista by Fidel Castro in 1959, Castro took control of Cuba and molded it to create a socialist democracy.<sup>5</sup>

### *B. The Infiltration of Castro's Socialist Regime*

Fidel Castro's control dramatically changed the Cuban legal system. Castro wished to mold this tiny island into a socialist democracy.<sup>6</sup> His goal was to follow the political and legal philosophies of other successful socialist countries such as the Soviet Union.<sup>7</sup> The ideological theory of the *socialist legality* is a set of laws that every socialist government follows.<sup>8</sup> By studying other successful *socialist* countries, the legal system is created and followed in order to attain a similar legal system.<sup>9</sup>

Seventeen years after Fidel Castro overtook the Cuban government, the first socialist constitution was adopted.<sup>10</sup> In 1979, the socialist constitution expressed the limitations on the citizens of Cuba concerning many areas including free speech.<sup>11</sup> The socialist theory gives the countries' citizens the illusion of equality and freedom.<sup>12</sup> Through this socialist regime, Castro has taken away a citizen's rights and replaced it with an illusion of freedom. Among many of the freedoms and inhumane treatment suffered by the Cuban citizens is the quarantine of HIV positive patients.<sup>13</sup> As stated by Debra Evenson, this quarantine follows the socialist governmental view that the masses are more important to protect than the individuals.<sup>14</sup>

### *C. Cuba's Current Legal System*

The legal system in Cuba presents opposing parties working together to reach a common goal.<sup>15</sup> The judicial system was reformed following the Castro regime.<sup>16</sup> The reason for the reform of the judiciary

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5. *Id.*

6. *Id.* at 1836.

7. Whitlock, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1837.

12. *Id.*

13. Whitlock, *supra* note 1.

14. *Id.*

15. *Id.* at 1837.

16. *Id.* at 1839.

system was to punish those individuals who did not comport with the ideology of the current regime.<sup>17</sup> Nevertheless, corruption among officials still exists due to their immense political involvement.<sup>18</sup> Contrary to belief, the judges are not forced to be members of the Communist Party.<sup>19</sup>

The need for currency has forced the Cuban government to adjust the economic policy in order to foster a successful government.<sup>20</sup> The business opportunities created with foreign parties has created many joint ventures in the hope of fostering a profitable government.<sup>21</sup> In order to achieve this goal, the Cuban government has reformed the economic policy in order to promote the business relationship with foreign investors.<sup>22</sup>

### III. CONFLICTS OF LAW

#### A. *Establishing Jurisdiction Against Foreign Defendants*

It is important to choose the best forum in which to bring a lawsuit in order to further and protect the international relations between the United States and the Latin American countries.<sup>23</sup> This may lead to forum shopping either by the plaintiff or the defendant.<sup>24</sup> Courts usually determine the proper forum by balancing the interests and policy of the two countries.<sup>25</sup> The United States Supreme Court has addressed the issue concerning choice of law on numerous occasions.<sup>26</sup> In a recent decision, it was held that personal jurisdiction could be exercised against a foreign defendant who is present within the state.<sup>27</sup> The courts have held that the plaintiff can bring the lawsuit into the forum that offers the best choice of

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17. *Id.*

18. Whitlock, *supra* note 1, at 1837.

19. *Id.* at 1839.

20. *Id.* at 1837.

21. *Id.*

22. *Id.*

23. Linda Silberman, *Trial Evidence, Civil Practice, and Effective Litigation Techniques in Federal and State Courts*, C607 A.L.I. 775, 777 (1991).

24. *Id.* at 778.

25. *Id.*

26. *See Ferens v. John Deere Co.*, 110 U.S. 1274 (1990) (Plaintiffs bringing suit in a forum that allows the party to have and maintain a satisfactory choice of law even when the case is removed to federal court).

27. *See Adolf v. A.P.I.*, 737 F. Supp. 1087 (D.N.D. 1990) (Canadian defendant sued for damages arising out of a conspiracy to hide the health hazards of asbestos. The court held that the plaintiffs established jurisdiction against all defendants as co-conspirators).

law.<sup>28</sup> The negative repercussion to these decisions is that this promotes forum shopping.<sup>29</sup>

It is still required that the defendants have minimum contacts with the forum state before the jurisdiction can be decided.<sup>30</sup> The purpose of the minimum contacts requirement is to enhance the jurisdictional requirements.<sup>31</sup> Among factors to consider for jurisdiction is the foreseeability of the product's use in that forum.<sup>32</sup> American manufacturers may have the knowledge that international users will use the product they are creating.<sup>33</sup> In this situation the manufacturer has placed themselves within the reach of the jurisdictional statute.<sup>34</sup> This would offer sufficient intention for minimum contacts.<sup>35</sup> Therefore, an international plaintiff could seek federal jurisdiction within the state in which the product was manufactured.<sup>36</sup> The jurisdictional state is determined by where the manufacturers' headquarters are located.<sup>37</sup> Where the item is manufactured is usually and where other business dealing occur are considered the manufacturers headquarters.<sup>38</sup> In the event that the American manufacturer participated in a conspiracy, as to their knowledge of the defective product, jurisdiction will be granted against the members of the conspiracy.<sup>39</sup> As to product liability insurers, jurisdiction will be subject to the forum in which the insured manufacturer conducted business.<sup>40</sup>

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28. Silberman, *supra* note 23, at 778.

29. *Id.*

30. *Id.* at 783.

31. *Id.*

32. *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

33. Silberman, *supra* note 23, at 792.

34. *Id.* at 782.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Piper Aircraft*, 454 U.S. at 235.

39. *Id.* at 782.

40. *Eli Lilly v. Home Insurance Co.*, 794 F.2d 710 (D.C. Cir. 1986). Insurer was subject to jurisdiction when the company they insured was in the forum in which they did business. *See also Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911 (9th Cir. 1990).

### B. *The Forum Non Conveniens Doctrine*

The desire to limit forum shopping has led to many decisions restricting the plaintiffs from bringing suit against defendants.<sup>41</sup> As in *Piper Aircraft v. Reyno*, the Supreme Court held forum non conveniens in order to maintain the convenient method of law.<sup>42</sup> The application of American law was the best alternative as a convenient method for the defendant. The Supreme Court believed that had the forum non conveniens doctrine not been applied, international plaintiffs would have a legal basis to sue American defendants in United States courts for accidents that occurred in international countries.<sup>43</sup> The application of this doctrine has been diverse.<sup>44</sup> If it is believed that a party would lose the benefit of a choice of law, the courts will refuse to discharge the lawsuit based on the doctrine of forum non conveniens.<sup>45</sup> When courts are aware that conflicts of law exist that may hinder a plaintiff's case, the forum will be maintained.<sup>46</sup> There is a good faith need to offer an innocent plaintiff the best law applicable. Lawsuits brought by international plaintiffs still meet diverse application of jurisdictional law.<sup>47</sup>

### C. *Choice of Law Applied In Products Liability Cases*

Concerning the jurisdictional law to be applied in products liability cases, courts follow the law of the state in which the manufacturer's headquarters are located.<sup>48</sup> Factors including where the item is manufactured, the regulations that are followed, and the distribution, all contribute to the applicable choice of law that the court will apply.<sup>49</sup> The choice of law in the jurisdiction may also affect the barring of the lawsuit based on differing statutes of limitations and repose in each state.<sup>50</sup> Courts offer diverse rulings in this area, but usually apply the statute of limitations

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41. Winton D. Woods, *Suits by Foreign Plaintiffs: Keeping the Doors of American Courts Open*, 8 ARIZ. J. INT'L & COMP. L. 75, 81 (1991).

42. *Piper Aircraft*, 454 U.S. at 235.

43. Silberman, *supra* note 23, at 784.

44. *Id.*

45. *Id.* at 796.

46. *Id.* at 797.

47. *Id.* at 783.

48. Russell J. Weintraub, *A Proposed Choice of Law Standard for International Product Liability Disputes*, 16 BROOK J. INT'L L. 225, 228 (1990).

49. Silberman, *supra* note 23, at 792.

50. *Id.*



that pertains to the manufacturer's state.<sup>51</sup> Application of extended statute of limitations may be done to benefit a plaintiff that would otherwise lose a claim.<sup>52</sup> Usually it is a resident plaintiff who is receiving the benefit of the extended statute of limitations.<sup>53</sup> Courts that apply the public policy rationale and dismiss a barred claim based on the running of the statute of limitations, have an interest in punishing the manufacturer whose principal place of business is where the plaintiff brought suit.<sup>54</sup> A transferred case that is moved to another federal court is required to impose the statute of limitations that the transferor courts would have to apply.<sup>55</sup>

#### IV. FOREIGN SOVEREIGN IMMUNITIES ACT

##### A. Application to Commercial Activity

Jurisdiction over foreign states can be provided in the United States through the enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>56</sup> The FSIA allows the United States to obtain subject matter jurisdiction over the foreign states in both the federal and state courts.<sup>57</sup> Any public or commercial activity that places the foreign states in contact with the United States gives rise to jurisdiction in the United States under the FSIA.<sup>58</sup> Many courts have held that when a foreign state enters into a contract, it waives the sovereign immunity and assumes the laws of the States.<sup>59</sup> Immunity of foreign tortfeasors is addressed in two situations concerning the restrictive theory, which extends to public activities conducted by foreigners.<sup>60</sup>

If the foreign tortfeasor is joined with another defendant, the United States dismisses the action based on the immunity clause of the

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51. See *Tomlin v. Boeing Co.*, 650 F.2d 1065, 1071 (9th Cir. 1981).

52. See *Dent v. Cunningham*, 786 F.2d 173 (3rd Cir. 1986).

53. *Id.*

54. See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

55. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964). Defendant motioned for court to apply the statute of limitations that would have been applied by the court that transferred the case to the Supreme Court.

56. Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611 (1988 & Supp. II 1990).

57. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

58. J. Thompson Thorton & Aurora A. Ares, *The Foreign Sovereign Immunities Act of 1976: Misjoinder, Nonjoinder, and Collusive Joinder*, 58 J. AIR. L. & COM. 703,704 (Spring 1993) citing, H.R.REP. No. 94-1487 94th CONG., 2d Sess 32 (1976).

59. See *Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703 (D.D.C. 1988).

60. H.R.REP. No. 94-1487, *supra* note 58, at 6613.

FSIA.<sup>61</sup> The exceptions provided to the foreign sovereign immunity that fall under the category of public or commercial activity are described in the FSIA.<sup>62</sup> If the foreign state regularly conducts commercial activity in the state, the activity will be analyzed to determine if it is considered a regular course of conduct within the state that serves as an exception to the immunity.<sup>63</sup> If the foreign corporation conducts activities within the “*regular course of commercial conduct*” such as state trading, then it will be considered a commercial activity, which does not qualify for the immunity.<sup>64</sup> If profit is earned through the trading, it is certain to be classified as a commercial activity.<sup>65</sup> This analysis is similar to the minimum contacts rationale in determining intrastate jurisdiction. Consideration must be given to whether the activity is public or private in nature also.<sup>66</sup> This issue was discussed in *Rush-Presbyterian-St. Luke’s Medical Center v. Hellenic Republic*, where a Greek national contracted with the American hospital for a kidney transplant.<sup>67</sup> In deciding whether the foreign contract was commercial or sovereign, it was determined that any private person would enter into a contract in a similar situation.<sup>68</sup> Medical services are customarily entered into for the benefit of private parties.<sup>69</sup>

A commercial contact requires that the foreign state have *substantial contact* with the state.<sup>70</sup> The language of the act has been considered broad. The broadness of the act has resulted in its failure to provide adequate recourse to those injured by foreign states.<sup>71</sup> If an American plaintiff is affected by a foreign sovereign owned corporation that has no connection with the United States, the action is barred in the United States.<sup>72</sup> Numerous cases have established that a “nexus” is required between the commercial activity in the United States and the

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61. See *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989).

62. 28 U.S.C. §1603(d) (1990).

63. *Id.*

64. H.R.REP. No. 94-1487, *supra* note 58, at 6614-15.

65. *Id.*

66. *Id.* at 6615.

67. *America West*, 877 F.2d at 574.

68. H.R.REP. No. 94-1487, *supra* note 58, at 6615.

69. *America West*, 877 F.2d at 581.

70. 28 U.S.C. §1603(e) (1988).

71. *Ares*, *supra* note 58, at 708 *citing*, 16 Av.Cas. (CCH) 17, 880 (D.D.C. 1981).

72. *Ares*, *supra* note 58, at 707.

foreign country in order for any personal injury claim to be recoverable.<sup>73</sup> The nexus test is applied when a claim is brought concerning a sovereign and commercial element.<sup>74</sup> Many of these cases have involved air craft accidents and American plaintiffs.<sup>75</sup> Factors that are considered as creating a nexus include purchasing the product in the United States.<sup>76</sup> Products that are bound for the United States are also considered to have a sufficient nexus to create a commercial activity that will allow an exception to the immunity.<sup>77</sup> Courts have also applied the commercial activity exception to situations that include loss of product use.<sup>78</sup> If the item affected interferes with an important function of commercial conduct that is regularly conducted by a state, the immunity is assumed not to exist.<sup>79</sup> This analysis goes to the *doing business* test for commercial activity that also denies immunity.<sup>80</sup> If a country regularly conducts business with the United States and the accident arose within the activity, the immunity does not apply.<sup>81</sup>

### B. *The United States and Extraterritorial Power*

When the United States involves itself with commercial activity in a foreign state the exception to the immunity will also apply.<sup>82</sup> The involvement of the United States in the commercial activity of the foreign state that results in monetary enrichment by the foreign state is sufficient to satisfy the exception of the immunity.<sup>83</sup> Yet, the misconduct of the commercial activity must have occurred in the United States.<sup>84</sup> If the negligent act occurs in the foreign state, no cause of action can be brought

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73. See *Gemini Shipping Inc. v. Foreign Trade Org. for Chem & Foodstuffs*, 647 F.2d 317 (2d Cir. 1981); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989).

74. *Id.*

75. See *Santos v. Comagnie Nationale Air France*, 934 F.2d 890 (7th Cir. 1991); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989).

76. Ares, *supra* note 58, at 711.

77. *Id.*

78. *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983).

79. *Id.* at 84.

80. Ares, *supra* note 58, at 712.

81. *Id.*

82. 28 U.S.C. § 1605(a)(2) (1990).

83. Ares, *supra* note 58 at 713.

84. See *Harris v. Vao Intourist, Moscow*, 481 F. Supp 1056 (E.D.N.Y. 1979).

based on the immunity.<sup>85</sup> No exception will apply when the occurrence resulted outside the United States territory.<sup>86</sup>

Another situation in which the commercial activity exception to the immunity applies is when the activity that is conducted in the foreign state directly effects the United States.<sup>87</sup> Usually personal injuries are nonrecoverable under this situation even if loss will have an effect on the United States.<sup>88</sup> The exception will apply as in the case involving a collision between two vessels in international waters.<sup>89</sup> When the activity effects the income that directly leads to the United States, the immunity exception will extend to the United States.<sup>90</sup>

The FSIA does not allow the application of the immunity concerning counterclaims or cross claims against the foreign state.<sup>91</sup> When the counterclaim involves the same "transaction" in which the original claim arose, the sovereign immunity will not apply.<sup>92</sup> The Federal Rules of Civil Procedure 13 is applicable in situations involving counterclaims and cross-claims.<sup>93</sup>

## V. JOINDER OF PARTIES

The ability to bring in a foreign state into a lawsuit is provided for in the Federal Rules of Civil Procedure 20.<sup>94</sup> The Federal Rule provides that any defendant may be "jointly, severally, or in the alternative" be joined in order for the plaintiff to seek relief.<sup>95</sup> The occurrence must have arisen in the same situation amongst all the defendants in order for there to be proper joinder of parties.<sup>96</sup>

A defendant may also bring a third party claim against a foreign state only under the Federal Rules of Civil Procedure 14.<sup>97</sup> In order to

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85. *Id.* at 1061.

86. *Id.*

87. *See In re Rio Grande Transport, Inc.*, 516 F. Supp. 1155, 1163 (S.D.N.Y. 1981).

88. *See Upton v. Empire of Iran*, 459 F. Supp., 264, 266 (D.D.C. 1978). The court held that no direct effect could be found when Americans sued the country of Iran when the roof of an airport terminal collapsed killing several Americans.

89. *Rio Grande*, 516 F. Supp. at 1163.

90. *Id.*

91. 28 U.S.C. § 1607 (1988).

92. *See In re Oil Spill by Amoco Cadiz*, 491 F. Supp. 161, 161 (N.D. Ill. 1979).

93. *Id.* at 168.

94. FED. R. CIV. P. 20.

95. *Id.*

96. *Id.*

97. FED. R. CIV. P. 14.

properly bring a third party claim the third party plaintiff must have a claim for contribution or indemnity and must involve one of the foreign sovereign immunities enumerated in the FSIA.<sup>98</sup> Establishing these two elements allows a third party plaintiff to implead a foreign state properly into the United States for litigation in the lawsuit.<sup>99</sup> If the Federal Rules of Civil Procedure are not properly followed the claims may be dismissed.<sup>100</sup>

## VI. NONJOINER OF PARTIES

### A. Dismissal of Lawsuits Based on Application of FSIA

The enactment of the FSIA has led to the dismissal of many cases being removed from state to federal courts.<sup>101</sup> In this instance, the foreign state defendant can seek a dismissal based on forum non conveniens.<sup>102</sup> This is an option that is not available in a select number of state courts. The removal based on forum non conveniens has led to the nonjoinder of otherwise liable foreign state defendants.<sup>103</sup> The FSIA's statute concerning the removal of lawsuits are allowed when requested by third party defendants of foreign states.<sup>104</sup> The purpose of the statute was to enhance the uniformity of federal courts involving foreign state parties. When no foreign defendant is involved in lawsuits, the dismissal is permitted under the theory of forum non conveniens.<sup>105</sup>

### B. The Removal Statute of the FSIA

#### 1. A goal for uniformity

In order to achieve the goal of uniformity amongst the federal courts, the removal statute of the FSIA eliminated a right for trial with a jury, it also eliminated a jurisdictional amount, and included a removal authority.<sup>106</sup> Exercising federal court jurisdiction over foreign defendants is

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98. Ares, *supra* note 58, at 718.

99. See *In re Oil Spill by Amoco Cadiz*, 491 F. Supp. 161, 168 (N.D.ILL. 1979).

100. Ares, *supra* note 58, at 718.

101. Kathleen M. Keith, Note, *Removal Under the Foreign Sovereign Immunities Act of 1976*, 15 SUFFOLK TRANSNAT'L L.J. 868, 868 (1992).

102. *Nolan v. Boeing Co.* 919 F.2d 1058 (5th Cir. 1990).

103. Ares, *supra* note 58, at 719.

104. *Nolan*, 919 F.2d at 1061.

105. Ares, *supra* note 58, at 720.

106. *Id.*

addressed in the provision of 28 U.S.C. Section 1441 (d).<sup>107</sup> That section states that "any civil action brought in a State court against a foreign state" is allowed removal to another district court where the lawsuit has been brought.<sup>108</sup> The request for removal of an action removes the entire suit, including those involving multi-party defendants who wish to keep the lawsuit in the state court.<sup>109</sup> The drafters intended the foreign defendants to have the opportunity to remove in order to promote uniform law in conformity with the other states.<sup>110</sup> The primary purpose is to develop consistent laws and results concerning lawsuits that involve foreign states and the United States.<sup>111</sup> This expansive interpretation of laws has led to the placement of powers upon the federal courts in reaching consistent laws that will not conflict with state law.

The removal of claims to federal court is interrelated with pendent party jurisdiction.<sup>112</sup> The FSIA has been affirmed to authorize pendent party jurisdictions in order to reach their intended purpose of uniformity even when only minimal diversity would exist.<sup>113</sup>

The relaxed standards applied by the FSIA removal statute that has also been applied when a foreign plaintiff is involved, has led to the parties using "non" good faith methods of keeping a claim in state court.<sup>114</sup> Certain methods used have involved the joinder of nondiverse parties in order to prevent removal based on diversity.<sup>115</sup> Foreign states that are liable have also been left out of lawsuits in order to prevent removal pursuant to the FSIA.<sup>116</sup>

## 2. Fraudulent joinder of parties

Fraudulent joinder of parties is addressed when a party improperly seeks to defeat the existence of federal jurisdiction.<sup>117</sup> The FSIA removal statute does not involve this issue which pertains to the removal concerning

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107. 28 U.S.C. § 1441(d) (1988).

108. *Id.*

109. H.R.REP. No. 94-1487, *supra* note 58, at 6611-12.

110. *Id.*

111. *See* Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-87 (1983).

112. *See* Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1376 (5<sup>th</sup> Cir. 1980).

113. *Id.*

114. Ares, *supra* note 58, at 726. *See also*, Dow Chem. Co. v. Castro Alfaro, 498 U.S. 1024, 1024 (1991); Houston v. Caldwell, 359 So. 2d 858, 859 (Fla. 1979).

115. Ares, *supra* note 58, at 726.

116. *Id.*

117. 28 U.S.C. § 1441(a)-(b) (1988).

diversity situations.<sup>118</sup> The invalid creation of jurisdiction in order to remove a case to federal court is regarded as collusive joinder, which eliminates federal jurisdiction when joinder is improper.<sup>119</sup> The most common example when improper jurisdiction through collusive joinder exists is when a party names a beneficiary from the state to handle the action and creates jurisdiction.<sup>120</sup> The reason for the appointment must be determined in order to establish whether diversity has been improperly granted.<sup>121</sup> The federal courts require that the moving party claiming collusive joinder provide evidence showing that removal of jurisdiction has been improperly provided.<sup>122</sup>

### 3. Benefits received by foreign defendants

The involvement of a foreign state in tort litigation within the United States greatly affects the way a lawsuit is challenged.<sup>123</sup> The Foreign Sovereign Immunities Act allows plaintiff's the ability to bring in a foreign tortfeasor through it's exceptions and limits. Yet, once the foreign state defendant is within the United States boundaries, the foreigner is given many opportunities to remove to federal court and reach a more relaxed federal court system.<sup>124</sup> The ability to remove gives the defendant an easier opportunity to defensive actions that will either reduce their liability or eliminate the claim brought against them.

## VII. CONSTITUTIONAL ISSUES CONCERNING INTERNATIONAL LAW

### A. *Maintaining Uniformity in Law between the Countries*

Constitutional issues relating to the rights of international plaintiffs and defendants extend to these parties through application of United States constitutional law.<sup>125</sup> In order for a state to apply their local law in international matters, the law must not violate any public international law.<sup>126</sup> This theory is applied in order to prevent conflicting laws between

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118. *Verlinden*, 461 U.S. 480 at 491-93.

119. *See Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989).

120. 28 U.S.C. § 1359 (1983).

121. *See O'Brien v. Avco Corp.*, 425 F.2d 1030 (2d Cir. 1969).

122. 28 U.S.C. § 1359 (1983).

123. *Ares*, *supra* note 58, at 742.

124. *Id.*

125. Mark B. Rockwell, *Choice of Law in International Products Liability: "Internationalizing" the Choice*, 16 SUFFOLK TRANSNAT'L L. REV. 69 (Fall 1992) *citing* RESTATEMENT (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1986).

126. *Id.* § 9.

the United States and foreign countries. Uniformity of law is the primary concern of the United States in overseeing proper application of law.<sup>127</sup> The choice of law in the states has been addressed in the Second Restatement.<sup>128</sup> The Second Restatement has stated that "a court may not apply the local law of its own state to determine a particular issue unless such application of this law would be reasonable in the light of the relationship of the state and of the other states to the person, thing, or occurrence involved".<sup>129</sup> In products liability cases, a state applying its own damages and liability laws may be forced to forfeit their jurisdictional requirements in order to maintain uniformity in the international law realm.<sup>130</sup>

### *B. Constitutional Protection for International Parties*

Further, the constitutional protections will be extended to international parties when challenged. When international parties have argued jurisdiction, the Due Process Clause of the Fourteenth Amendment has been regarded.<sup>131</sup> Courts have held that due process is extended to any foreign defendant as it would be to any American defendant.<sup>132</sup>

## VIII. THE HELMS-BURTON ACT

### *A. An Act to Promote Democracy in Cuba*

One way that the United States has attempted to apply constitutional issues to international incidences is regarded in the Cuban Liberty and Democratic Solidarity Act of 1996.<sup>133</sup> Also known as the Helms-Burton Act, the United States has attempted to provide for extraterritorial control of foreign countries.<sup>134</sup> The primary goal in enacting the Helms-Burton Act was to prevent the investment of business in Cuba

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127. *Id.*; cf. Earl M. Maltz, *Visions of Fairness — The Relationship Between Jurisdiction and Choice of Law*, 30 ARIZ. L. REV. 751, 759 (1988).

128. RESTATEMENT (THIRD) *supra* note 125.

129. *Id.*

130. Mark B. Rockwell, *Choice of Law in International Products Liability: "Internationalizing" the Choice*, 16 SUFFOLK TRANSNAT'L L. REV. 69, 90 (1972).

131. *See Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

132. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1984). The Court held that the international defendant had due process rights that were equal to those of any American citizen.

133. Act of Mar. 12, 1996, Pub.L.No. 104-114, § 1 et seq., 110 Stat. 785.

134. *See Iran and Libya Sanctions Act of 1996*, Pub. L. No. 104-172, 110 Stat. 1541-1543.



and stop foreign trade.<sup>135</sup> The United States has sought to liberate the Cuban people through promoting a democratic change in Cuba. The supporters of the Act hope that through the prevention of investment and trade with Cuba, the repercussions will affect the government leading to the downfall of the Castro regime.<sup>136</sup>

A controversial battle was waged before the signing of this Act on March 12, 1996.<sup>137</sup> What prompted President Clinton to sign the Act into law was the killing of four individuals, two Americans and two Cubans over international waters by the Cuban military.<sup>138</sup>

### B. *The Protection of United States Nationals*

The Helms-Burton Act attempts to enforce their goals of protection and change through restricting trade thereby affecting the Cuban economy.<sup>139</sup> Through the "Protection of Property Rights of United States Nationals", the Helms-Burton Act states that any violation within the provisions of the Act will lead to civil liability.<sup>140</sup> Liability will be imposed when a commercial activity is conducted affecting property that Castro obtained from Cuban-American citizens during the revolution.<sup>141</sup> This provision offers a private right of action that can be enforced by any American national against foreign investors and businesses.<sup>142</sup> Regular commercial activity by any foreign corporations or individual is subject to liability based on their investments within Cuba.<sup>143</sup> Extraterritorial powers are given to the United States through the application of this provision.<sup>144</sup>

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135. See Department of Justice Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955 (1996).

136. See *id.*

137. Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial federal Legislation and the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 46 CATH. U.L. REV. 907, 917 (Spring 1997), citing, *President Signs Cuba Sanctions Bill After It Passes House by Big Margin*, 13 INT'L TRADE REP. (BNA) No. 11, at 421-23 (Mar. 13, 1996).

138. On February 23, 1996 four men were killed while flying over international waters. They were on a mission for Hermanos Al Rescate when Cuban missiles were shot hitting the two planes. Two were Cuban Americans and two were Cuban immigrants. It has been proven that the two planes were not flying in Cuban territory.

139. H.R. REP. No. 104-468, at 43 (1996).

140. See § 301-306, 110 Stat. at 814-22.

141. See § 302(a)(1), 110 Stat. at 815.

142. See § 302, 110 Stat. at 815-17.

143. Department of State, *Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act*, 61 Fed. Reg. 30,655-56 (1996).

144. See *id.*

If a foreign entity or individual is found to be "trafficking" business involving property confiscated from American nationals within Cuba, they will be liable.<sup>145</sup> This involves innocent parties as well.<sup>146</sup> Concerning money made from a business venture in Cuba; the bank that holds the money may be liable under the provision.<sup>147</sup> Any company may be liable under Article III even when their involvement is slight and indirect.<sup>148</sup>

### C. Constitutional Issues Arising From the Enactment

When the Act was enacted, many opponents argued that it violated the Due Process Clause of the Fourteenth Amendment towards international defendants.<sup>149</sup> The Due Process Clause is meant to protect foreign defendants from any jurisdictional applications that may be regarded as unjust and unequal.<sup>150</sup> The broad language of the provision has stimulated the due process argument.<sup>151</sup> In particular, Article III, regarding the implication of civil liability, was suspended because of the possible violation of the Due Process Clause.<sup>152</sup> President Clinton chose to suspend the enforcement of Article III based on the application of civil liability to all foreign parties outside of the United States jurisdiction.<sup>153</sup> This American made law was forcing an entire world to be subject to liability if they violated the provisions. Through the enforcement of Article III, the United States would be extending their powers beyond their limit.<sup>154</sup>

Due Process challenges by foreign defendants arise in matters concerning personal jurisdiction.<sup>155</sup> The application of the Due Process

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145. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 425 (1996).

146. Department of State, *Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act*, 61 Fed. Reg. 30,655-56 (1996).

147. Sumner, *supra* note 137, at 920, citing, Matias F. Travieso-Diaz, *Why Lawyers Love the Cuba Bill*, J. COMM., Mar. 18, 1996, at 6A.

148. Department of State, *Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act*, 61 Fed. Reg. 30,655-56 (1996).

149. Bret A. Sumner, *Comment, Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 46 CATH. U.L. REV. 907 (Spring 1997).

150. U.S. CONST. amend. V.

151. Sumner, *supra* note 149, at 944.

152. See EEOC v. Arabian Am. Oil Co., 499 U.S. 224 (1991); United States v. Thomas, 893 F.2d 1066 (9th Cir. 1990); and United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

153. Thomas W. Lippman, *Clinton Suspends Provisions of Law That Target Cuba; Move Defuses Spat with Major U.S. Allies*, WASH. POST, Jan. 4, 1997, at A1.

154. Sumner, *supra* note 149, at 914.

155. *Id.* at 923.

Clause restricts Article III of the Helms-Burton Act regarding the extraterritorial policies against foreign defendants.<sup>156</sup> Certain countries have responded to the United States extraterritorial policies by enacting laws that prevent the United States from forcing their discovery and enforcement laws.<sup>157</sup> Such blocking statutes protect the citizens of the country from United States enforcement orders and judgment.<sup>158</sup> The Supreme Court has held that blocking statutes do not bar the United States from enforcing foreign citizens from supplying information that is requested concerning extraterritorial cases.<sup>159</sup> Although a foreign citizen will face liability in their home country, the United States is still entitled to enforcement of their orders and judgments.<sup>160</sup>

#### *D. Blocking Statutes: Methods to Deter the Act*

Mexico along with Cuba and other nations has created blocking statutes in order to defer the Helms-Burton Provision of Article III.<sup>161</sup> The effect of these blocking statutes will definitely prevent the Helms-Burton Act from achieving its goals.<sup>162</sup> In particular, Canada revised their blocking statute when the Helms-Burton Act was enacted.<sup>163</sup> The Foreign Extraterritorial Measures Order (FEMO) bans any Canadian individual or corporation from adhering to the Helms-Burton Act.<sup>164</sup> The FEMO interprets any legislation by the United States that interferes with the "trade or commerce between Canada and Cuba" to be extraterritorial.<sup>165</sup> The application of this statute severely limits the United States' extraterritorial power.

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156. *Id.* at 944.

157. R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 GEO. WASH. J. INT'L L. & ECON. 315, 325-26 (1995).

158. Sumner, *supra* note 137, at 933, *citing*, GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 367-73 (2d ed. 1992).

159. *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 543-46 & n.29 (1987). A French blocking statute was brought before the Supreme Court which held that it did not affect the United States order to present evidence in a case involving international parties.

160. BORN & WESTIN, *supra* note 158.

161. Jorge A. Vargas, Mexico: Act to Protect Trade and Investment from Foreign Norms that Contravene International Law, 36 I.L.M. 133, 134-43 (1997).

162. Sumner, *supra* note 149, at 958.

163. Sumner, *supra* note 137, at 955, *citing*, *EU Approves Blocking Legislation in Reaction to Helms-Burton Act*, 13 INT'L TRADE REP. (BNA) No. 13, 1243 (July 31, 1996).

164. R.S.C. ch. F29 §§3-6, at 612-13.

165. *Id.* at 612.

### *E. Extraterritorial Control: Jurisdiction Over Foreigners*

As a federal law, the Helms-Burton Act is entitled to subject matter jurisdiction over foreign countries.<sup>166</sup> The Act's intent is clearly stated through congressional notes as being extraterritorial.<sup>167</sup> Due process is still applied in order to prevent unreasonable application of jurisdiction.<sup>168</sup> Subject matter jurisdiction is determined by measuring the minimum contacts of the foreign defendant with the United States.<sup>169</sup> In order to establish minimum contact, the contact between the foreign defendant and the United States must be reasonable and the relationship of the action that has arisen must be sufficiently related to the contacts.<sup>170</sup> A defendant who is brought into the lawsuit for indirect association with the Helms-Burton violation can argue lack of personal jurisdiction based on the lack of sufficient and reasonable contact.<sup>171</sup> This argument will prevent the application of personal jurisdiction based on the lack of minimum contacts between the defendant and the United States.<sup>172</sup>

The long and powerful hand that the United States seeks to extend over foreign nations will have to be routinely examined in order to maintain harmonious foreign policy. Through the Helms-Burton Act, the United States is exercising a power that is not welcomed and will be regarded with animosity. The Helms-Burton Act allows any foreign manufacturer that has dealt with Cuba to be liable to any plaintiff who has been injured.<sup>173</sup> Based on their violation any plaintiff may bring suit against a defendant supplying them with subject matter jurisdiction and being reassured that personal jurisdiction will be met through the minimum contacts analysis.<sup>174</sup> Although reaching the defendant may be a struggle if blocking statutes exist, the courts will certainly find a way to reach an international tortfeasor pursuant to the Act.<sup>175</sup>

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166. Sumner, *supra* note 149, at 947.

167. *Id.*

168. *Id.*

169. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

170. *Id.* at 319.

171. *See* §302(a), 110 Stat. 814.

172. *Id.*

173. Sumner, *supra* note 149, at 934.

174. *Id.* at 172.

175. *Id.* at 159.

## IX. WHAT TIME LIMITATIONS APPLY?

### A. *Promoting Effective and Speedy Claims*

Statutes of limitations and repose were designed in order to protect defendants from claims that no longer exist.<sup>176</sup> If a claim has outlived the necessary time, the plaintiff no longer has a basis to bring the suit.<sup>177</sup> The purpose of enforcing statute of limitations is to protect the availability of evidence, and prevent the loss and contamination of witnesses.<sup>178</sup> A plaintiff is not left unjustly without recourse if he or she is unable to timely bring about the cause of action.<sup>179</sup> The statute of limitations will be tolled in the event that a good faith reason exists for the inability to bring suit.<sup>180</sup> In this situation the statute of limitations is suspended until the plaintiff is fully capable of bringing suit.<sup>181</sup>

### B. *Service of Process to Foreign Defendants*

Service of process can significantly affect the statute of limitations. The statute of limitations is suspended when the defendant who is an individual is out of the state.<sup>182</sup> In the event that the defendant is a corporation who is unable to be served either through mail or an agent the statute of limitations does not toll.<sup>183</sup> The Hague Convention on Service Abroad has prevented service of process through mail for certain countries.<sup>184</sup>

#### 1. The impact of the Hague Convention

The Hague Convention on Service Abroad gives countries the option to protest service of process by mail.<sup>185</sup> The foreign corporations

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176. Leslie Blankenship, Comment, *For Whom the Statute Tolls-The Statute of Limitations as Applied to Foreign Defendants in Countries which do not Permit Service by Mail*, 27 SANTA CLARA L. REV. 765 (Fall 1987).

177. *Id.*

178. R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

179. Blankenship, *supra* note 176, at 766.

180. *Id.* at 765.

181. *Id.*

182. *Id.* at 766.

183. *Id.*

184. CAL. CORP. CODE § 351 (West 1982 & Supp. 1987).

185. Leslie Blankenship, *For Whom the Statute Tolls — The Statute of Limitations as Applied to Foreign Defendants in Countries Which do not Permit Service by Mail*, 27 SANTA CLARA L. REV. 765-771 (Fall 1987), *citing*, The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; Martindale-Hubbell Law Directory, pt. VII, 1 (1985).

within the countries that object to the service of process by mail take the position of the objecting country.<sup>186</sup> If the foreign corporation cannot be served by mail no other statutory service is available.<sup>187</sup>

## 2. Tolling Statutes: Non-Hague Convention Countries

Countries that do not follow the Hague Convention on Service Abroad are subject to different tolling requirements.<sup>188</sup> As stated in *Coons v. American Honda Motor Co. of Japan*, when a foreign corporation does not have an agent to accept service of process within the United States and does not have a business within the state, the statute of limitations is indefinitely suspended.<sup>189</sup> This products liability case was brought against the American Honda Company and the Honda Company of Japan.<sup>190</sup> Because the American Honda Company had business within the state, the statute did not toll, yet the Honda Company of Japan did not satisfy the dismissal requirements based on the tolling of the statute of limitations.<sup>191</sup> It has continuously been held that a foreign company that has no agent to accept service of process and does not accept service of process by mail will be subject to suit indefinitely.<sup>192</sup>

### C. Tolling Avoidance: Appointment of Agent

A foreign corporation can avoid the indefinite possibility of a lawsuit by appointing an agent within the state.<sup>193</sup> As in California, if a foreign corporation files with the Secretary of State providing an agent who can accept service of process the indefinite liability no longer exists.<sup>194</sup> In order for service of process to be effective, compliance with the Hague Convention on Service of Process Abroad and non-residency of the foreign corporation is required.<sup>195</sup> This statute concerning the service of process protects both the plaintiff and any foreign defendant.<sup>196</sup> As in California,

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186. *Id.*

187. CAL. CORP. CODE §§ 2105, 2110, 2111 (West 1975).

188. Blankenship, *supra* note 176, at 774.

189. 176 N.J. Super. 575, 424 A.2d 446 (1980). The Supreme Court of New Jersey held that since the company had not assigned an agent and did not have a place of business within the United States, the statute of limitations was tolled indefinitely.

190. *Id.*

191. *Id.*

192. Blankenship, *supra* note 176, at 774.

193. *Id.* at 781.

194. *Id.*

195. *Id.*

196. *Id.* at 780.

the appointment of an agent would promote the reputation of the foreign corporation as dependable and trustworthy.<sup>197</sup> The foreign corporation appointment represents care regarding their responsibilities and service to their customers.<sup>198</sup>

## X. ALTERNATIVE METHODS TO TRIAL

The influx of lawsuits has led to the flooding of cases that appear before the court system. With this increase in lawsuits, judges, lawyers, and clients have sought to find an easier method of resolving disputes in an economically sound way both in time and money. Going to trial is not always the most beneficial means of resolving a dispute. If both parties wish to lessen the publicity and reach an adequate and timely settlement concerning the dispute, alternatives are available that will be in the best interest of both parties. An analysis of alternative methods to resolution can be chosen by the parties or ordered by the court in the hopes of reaching a resolution without going to court.

### A. *An Analysis of Japan's Alternative Dispute Methods*

One foreign country that has developed alternative methods of dispute resolution is Japan.<sup>199</sup> Among the alternative methods are reconciliation, chotei, and conciliation.<sup>200</sup>

#### 1. Reconciliation

Reconciliation requires that both parties contemplate their situation in the relationship along with their goals.<sup>201</sup> This method compulses the parties to attend negotiations in order to achieve satisfactory resolutions that will benefit both parties.<sup>202</sup> The resolution guarantees that both parties will mutually meet an end result.<sup>203</sup> This extrajudicial action promotes a solution that is in the best interest of the parties.<sup>204</sup>

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197. *Id.* at 786.

198. Blankenship, *supra* note 176, at 774.

199. Wendy A. Green, Comment, *Japan's New Product Liability Law: Making Strides or Business as Usual?*, 9 TRANSNAT'L LAW. 543, 579 (Fall 1996).

200. *Id.*

201. Marcy Scheinwold, Comment, *International Products Liability Law*, 1 TOURO J. TRANSNAT'L L. 257, 258 (1988).

202. Lucille M. Ponte, *Guilt by Association in United States Products Liability Cases: Are the European Community and Japan Likely to Develop Similar Cause-in-Fact Approaches to Defendant Identification?*, 15 LOY. L.A. INT'L & COMP. L.J. 629, 659-60 (1993).

203. Scheinwold, *supra* note 201, at 279.

204. *Id.*

## 2. Chotei

Chotei places the parties before a committee that is designated to attend to the dispute.<sup>205</sup> The committee promotes a compromising agreement that will deter litigation.<sup>206</sup> Once an agreement is met, it is placed in writing, which will result in a final judgement.<sup>207</sup> The parties themselves solicit a committee, but one may be appointed by the courts.<sup>208</sup> If the parties fail to reach a settlement, the dispute fails and is sent to the court system.<sup>209</sup> Once the dispute returns to the court system the committee can make suggestions that will help in reaching a just settlement.<sup>210</sup>

## 3. Conciliation

The alternative dispute resolution method of conciliation provides a non-judicial approach to settling common claims.<sup>211</sup> Disputes are resolved by both parties reaching a unanimous solution.<sup>212</sup> This method of dispute resolution is the most common and the most economic.<sup>213</sup> Usually the parties seek conciliation before litigation begins, but it may also be requested by the court in order to promote a settlement.<sup>214</sup> Conciliation most resembles the arbitration and mediation methods of resolution.<sup>215</sup>

Through the adoption of alternative resolution disputes, Japan has promoted opposing parties to come together and reach a settlement. These alternative dispute resolutions work best in disputes involving domestic and employment issues.<sup>216</sup> The use of these methods have been incorporated between corporations and injured plaintiffs in products liability claims, yet

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205. Lucille M. Ponte, *Guilt by Association in United States Products Liability Cases: Are the European Community and Japan Likely to Develop Similar Cause-in-Fact Approaches to Defendant Identification?*, 15 LOY. L.A. INT'L & COMP. L. J. 29, 42 (April 1993), citing, Younghee Jin Ottley & Bruce L. Ottley, *Product Liability in Japan: An Introduction to a Developing Area of Law*, 14 GA. J. INT'L & COMP. L. 29, 42 (1984).

206. Scheinwold, *supra* note 201, at 279.

207. *Id.*

208. Ponte, *supra* note 205, citing, Younghee Jin Ottley & Bruce Ottley, *Product Liability in Japan: An Introduction to a Developing Area of Law*, 14 GA. J. INT'L & COMP. L. 29,42 (1984).

209. Green, *supra* note 199, at 581.

210. Scheinwold, *supra* note 201, at 279.

211. *See supra* note 205.

212. *Id.*

213. Green, *supra* note 199, at 581.

214. *Id.*

215. Scheinwold, *supra* note 201, at 279.

216. *Id.* at 280.



they are less efficient based on the unequal bargaining power of large corporation and the powerless plaintiff.<sup>217</sup>

### *B. Benefits of Adopting Alternative Methods of Dispute Resolution in Latin American Countries*

Through the adoption of these alternative methods of dispute resolutions, Latin American countries would also be able to promote settlements between tortfeasors and plaintiffs without saturating the courts. Claims involving products liability would be more efficiently resolved with less time and money expounded by both parties. The corporation will be absolved of liability quickly with little damage to their reputation and the plaintiff will receive their settlement in less time if these alternatives were implemented.<sup>218</sup> Adoption of these methods would certainly be a benefit to all the parties involved from the plaintiff and defendant to the court system.

## XI. CONCLUSION

Claims brought on behalf of American plaintiffs require compliance of many conditions. Laws and statutes such as the Foreign Sovereign Immunities Act and the Helms-Burton Act place many provisions upon both American parties as well as foreign defendants. In order to maintain a harmonious foreign relationship between the United States and foreign countries, issues concerning the constitutionality and fairness of these Acts must be considered. The United States often finds itself torn between seeking to protect its citizens from foreign tortfeasors and maintaining a stable relationship with international corporations.

Consequently with the desire of promoting international harmony comes the determination of which choice of law is best applied to the situation. Choosing the best forum in which to bring the lawsuit will aid in protecting the relations between the United States and the foreign country that is brought on the products liability charge. The primary goal of preventing forum shopping is a consideration that must be deterred by the judicial system through legislation. By balancing the interests of both countries a proper forum can be attained.

Products liability law is an area of law that is constantly changing. With change comes knowledge and the need to attain a fair and equitable means for plaintiffs to achieve just resolution while maintaining a defendant's opportunity to receive a fair trial. As lawyers, judges, and

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217. *Id.*

218. *Id.*

students of law, it is up to these individuals to learn and apply knowledge that will meet the best interests of everyone involved.

# THE RIGHT TO PRIVACY IN GREAT BRITAIN: WILL RENEWED ANTI-MEDIA SENTIMENT COMPEL GREAT BRITAIN TO CREATE A RIGHT TO BE LET ALONE?

*Laura Lee Mall\**

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## I. INTRODUCTION

The concept of privacy and the legal rights it implicates have historically proved difficult to define. In 1888, an English judge named Cooley coined one of the broadest yet most commonly used phrases to describe the right to privacy. He called it “the right to be let alone.”<sup>1</sup>

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY (Ferdinand D. Schoeman ed. 1984).

France has adopted a similarly broad definition by which privacy is the "antithesis of everything that is public: hence everything concerning an individual's home, family, religion, health, sexuality, personal legal, and personal financial affairs" is private.<sup>2</sup> In the United States, the United States Supreme Court found a right to privacy to exist in a *penumbra* which *emanated* from the First, Fourth, Fifth, and Ninth Amendments.<sup>3</sup> The right to make intimate decisions regarding contraceptives<sup>4</sup> and the right choose whether to have an abortion<sup>5</sup> have both been held to be aspects of the right to privacy. Though seemingly quite diverse, each of these elements does have something in common. They protect autonomy, liberty and human dignity. Justice Douglas captured this idea when he stated that one aspect of privacy is "the autonomous control over the development and expression of one's intellect, interests, tastes and personality."<sup>6</sup>

This article will concentrate on the aspect of the right to privacy Alan Westin defined as "the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."<sup>7</sup> The press often usurps that authority when, for example, it publishes personal information about public figures. Specifically, I will address the question whether there is or should be privacy protection from the kind of personally invasive publications commonly found in tabloids, and from the often invasive newsgathering techniques employed to gain access to the information published. In particular, I will examine the absence of this kind of privacy protection in England and explore whether International Human Rights law offers any protection which English law does not.

Because England has no privacy law, it is helpful to look first at American privacy law. I do this primarily for convenience, so that I may borrow American terminology to label the kinds of privacy protections England lacks. Beyond that, this paper is not intended as a comparison of English and American privacy law. Next, I will demonstrate the need for a right to privacy, especially in light of modern technology. In Section IV, I will provide an overview of Parliament's refusal to legislatively create a

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2. REPORT OF THE COMM. ON PRIVACY AND RELATED MATTERS (Chairman: David Calcutt QC 1990).

3. *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965).

4. *Id.*

5. *Roe v. Wade*, 410 U.S. 113 (1973).

6. *Doe v. Bolton*, 410 U.S. 179, 211 (1979) (Douglas, J., concurring).

7. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

right of privacy. This will include a discussion about the Press Complaints Commission, the private organization whom Parliament has chosen to defer claims of invasions of privacy by the press. In the two following sections, I will examine the treatment of the right to privacy by the English judiciary and by the European Court of Human Rights, and the competing interest of freedom of the press.<sup>8</sup> Section VII will be dedicated exclusively to the historic Human Rights Bill now pending in Parliament.<sup>9</sup> The Human Rights Bill, if passed, would incorporate the European Convention on Human Rights into domestic law and thereby preempt the inaction of both Parliament and the English judiciary in the area of privacy. So, before turning to a more in-depth discussion of the right to privacy in England, I begin now with a brief overview of the origins and subsequent development of the right to privacy in the United States.

## II. HISTORICAL BACKGROUND OF THE RIGHT TO PRIVACY

The right to privacy has not enjoyed a long tradition in the United States. It was not until 1890, when Samuel Warren and Louis Brandeis wrote their famous Harvard Law Review article, that the "right to be let alone"<sup>10</sup> was recognized at all. Seventy years after the Warren and Brandeis article, William Prosser divided the right to be let alone into four distinct torts: 1) intrusion into an individual's seclusion or into his private affairs; 2) public disclosure of embarrassing private facts; 3) publicity which causes an individual to be seen in a false light; and 4) appropriation of an individual's name or likeness for the defendant's advantage.<sup>11</sup>

Most states now follow a similar scheme. As first noted by Dean Prosser,<sup>12</sup> there are two primary differences between these torts. Whereas the first requires no actual publication or intent to publish for an invasion of privacy to be actionable,<sup>13</sup> the others do. This article is concerned with

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8. While freedom of speech is an important concern and might better be considered earlier, I have chosen to delay the discussion until the issue of Article 10 under the European Convention arises because England, having no written constitution, does not possess the equivalent of a First Amendment. Free speech rights in England derive from the common law.

9. The Human Rights Bill was introduced in the House of Lords on Oct. 23, 1997. The text of the Bill, as yet unavailable through Her Majesty's Stationery Shop, is available at Parliament's web-site on the Internet at (visited Nov. 20, 1997) <<http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldbills/038/97038-a.htm>>.

10. Brandeis, *supra* note 1.

11. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

12. William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1979), reprinted in PHILOSOPHICAL DIMENSIONS IN PRIVACY: AN ANTHOLOGY 104 (Ferdinand D. Schoeman ed. 1984).

13. Intrusion into seclusion consists of an intentional interference with an individual's interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of

the right of privacy as encompassed by intrusion into seclusion (as when the press stalks public figures from place to place) and public disclosure of private facts (as when, for example, personal information about the lives of public figures is published in the tabloids).

Since the Warren and Brandeis article, much has been written in an attempt to further define the right now embodied in the United States by various state statutes and a confusing body of case law. Despite one hundred years of development, there is still uncertainty regarding the scope of the right in the United States today.<sup>14</sup>

England's development of the right to privacy has fared far worse. Although Warren and Brandeis based many of their privacy ideas on English cases,<sup>15</sup> England does not explicitly provide a right to privacy at all.<sup>16</sup> That two western nations, both of which are thought to be highly developed in the area of human rights law, could differ so radically regarding the notion of privacy makes one wonder whether the right to privacy is really all that important. If England has no explicit right of privacy, what form of regulation, if any, is there on intrusion into seclusion, a privacy right recognized and protected as a civil tort in the United States? Is there a similar right encompassed in international human rights law under Article 8 of the European Convention on Human Rights? Is the right to be let alone one of those fundamental human rights that both deserves and is afforded protection under customary international law? If so, how broad or narrow is the international understanding of the right?

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a kind that would be highly offensive to a reasonable man. RESTATEMENT, *supra* note 11, at § 652B cmt.a.

14. For example, the Supreme Court, in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), held that a newspaper who printed the name of a rape victim was not liable under a statute which forbade the publication. Some suggest that this case has effectively precluded any future tort actions involving the publication of true information, regardless of how private the information or outrageous or embarrassing its dissemination. See Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C.L. REV. 989, 1076-78 (1995); see also Mary Ellen Hockwalt, *Bad News: Privacy Ruling to Increase Press Litigation*. The *Florida Star v. B.J.F.*, 23 AKRON L. REV. 561 (1990). However, it is my contention that because the name of the victim was a matter of public record, and therefore in the public domain, these authors are wrong. An action could still lie for publication of similar information not already in the public domain.

15. One such English *privacy* case involved an injunction awarded to Prince Albert against the publication of pictures he had drawn of himself and Queen Victoria. Though decided on grounds of breach of confidence, Warren and Brandeis interpreted it as an early right to privacy case. Brandeis, *supra* note 1, at 83. See also Eric Barendt, *End this Intrusion Now, Eric Barendt Says It's Closing Time at the Last Chance Saloon, and the Press Needs to be Curbed with a Law which will Punish Unwarranted Intrusion*, THE GUARDIAN (London), Sept. 24, 1997, available in 1997 WL 2403252.

16. Ronald J. Krotoszynski, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398, 1403 (1991).

Will the death of Diana have any real impact on privacy protection in England? It is these questions that this paper will address.

### III. PRIVACY AS ESSENTIAL TO HUMAN DIGNITY

It has been argued by some that Warren and Brandeis gave birth to a trivial tort.<sup>17</sup> However, their description of the societal ills symptomatic of a breach of the right to be let alone, astoundingly contemporary and even prophetic for the time, belies its triviality:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy the prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasion on his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.<sup>18</sup>

Today, the right to privacy is more essential to the preservation of human dignity than ever before. Technological advances far beyond the imaginations of Warren and Brandeis have emerged which make finding Browning's "obscure nook" virtually impossible.<sup>19</sup> The video camera and

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17. See Harry Kalven, Jr., *Privacy In Tort Law - Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966). See also Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?*, in INDIVIDUAL AND GROUP PRIVACY 47 (1976).

18. Brandeis, *supra* note 1.

19. Referring to Robert Browning, *Paracelsus*, in 1 THE POEMS 118, 127 (J. Pettigrew ed. 1981) which reads:

I give the fight up: let there be an end,  
A privacy, an obscure nook for me.  
I want to be forgotten even by God.

telephoto lens, for example, have intruded upon our everyday lives in vast numbers of ways. Granted, there are many privacy invasions utilizing these technologies which are in fact quite innocent, even laudable. Video surveillance, for example, is most often concerned with the community's need to know about the conduct of others in order to protect society. Banks, for example, are videotaping transactions at automated teller machines; employers are videotaping employees in the workplace; department stores are videotaping dressing rooms and bathrooms; parents are video-taping nannies while they care for their children. But there are an equal number of invasions that could be characterized as nefarious which, without an action for invasion of privacy, will go without redress.

Since there is no law in England specifically directed at protecting rights of privacy, plaintiffs must resort to other areas of the law for protection. Unfortunately, the protections afforded privacy via these *alternative* actions often prove inadequate. A good example is the infamous case where a man, for his personal amusement, bugged the bedroom of a neighbor.<sup>20</sup> The defendant was found liable for civil trespass and fined a mere fifty-two pounds. The size of the award demonstrates the inability of alternative causes of action to adequately protect privacy interests. Civil trespass is intended to protect the enjoyment of the occupation of land.<sup>21</sup> As to *this* interest, the intrusion was minimal — only a small unobtrusive device was placed in the neighbor's bedroom. But the intrusion on the neighbor's right to privacy was much greater. Had it been the aim of the action to consider the neighbor's privacy interest, the amount of damages awarded would have been proportionately higher, as would the effectiveness of the deterrent.

To further demonstrate the ineffectiveness of alternative causes of action to protect privacy, let us consider a hypothetical provided in a recent law review article. "A takes his video camcorder to the beach. He records B who is sunbathing. A's purpose if filming B is to use the videotape for sexual gratification, which he later does."<sup>22</sup> Under alternative English

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The reference is made all the more appropriate here because this work was cited both by the Calcutt Committee in REPORT OF THE COMMITTEE, *supra* note 2, at ii, and also by Krotoszynski, *supra* note 16.

20. Alasdair Palmer, *Someone Is Always Watching You. Britain May Soon Acquire a Law Protecting Privacy, But Will it Help Any But the Rich and Famous - and Will it Really Stop the Snoopers?*, SUNDAY TELEGRAPH (London), Aug. 17, 1997, available in 1997 WL 2331908.

21. REPORT OF THE COMMITTEE, *supra* note 2, para. 6.13.

22. McClurg posed this hypothetical to demonstrate that motive should be a factor when considering whether an invasion of privacy which occurs in a public place should be actionable in the United States. McClurg, *supra* note 14, at 1076-78. I offer it here for an entirely different purpose.



criminal and tort remedies, *B* will be left unprotected all together. Briefly, here is how the various alternative actions fail. First, there is no action for trespass since this incident occurs at a *public* beach.<sup>23</sup> Nor is there an action for breach of confidence because, under these circumstances, it can't be said that *A* owed *B* a duty of confidentiality.<sup>24</sup> Finally, there is no action for criminal harassment<sup>25</sup> or nuisance<sup>26</sup> if *A* merely videotaped *B* without incident.

Now, let's change the above scenario somewhat. Suppose *A* is actually a member of the press and *B* is a public figure sunbathing topless on a private beach. *A*'s motive is to broadcast the images on the Nightly Mirror Tabloid Television Show. The above shortcomings in the law apply here as well, but there are a few others worth mentioning. Now that *B* is on *private* property, trespass would seem to be implicated. However, since trespass is directed at protecting an individual's enjoyment and occupation of land,<sup>27</sup> not at protecting privacy, there will be no action for trespass unless *B*'s enjoyment of her occupation of the land had been directly interfered with. If in this instance, as is true in most, *B* took the video from an adjacent property using a telephoto lens, *B* may not have been aware of *A*'s activity at all. Therefore, no interference could possibly have occurred. Now, suppose *B* is a member of Parliament and the images "tend to lower [her] in the estimation of right-thinking members of society generally."<sup>28</sup> Though, by that definition, the images may be defamatory, no action for defamation or libel exists because the event depicted was *true*.<sup>29</sup> Again, England's method of protecting privacy by bootstrapping it onto other already existing causes of action is ineffective.<sup>30</sup>

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23. REPORT OF THE COMMITTEE, *supra* note 2, para. 6.12.

24. *Id.* para. 8.1.

25. Sections 4 and 5 of the Public Order Act make it an offense to use "threatening, abusive or insulting words or behaviour" with intent to cause fear of or provoke immediate violence or to use such words "within the hearing or sight of a person likely to be caused harassment or harm." The offense may be committed on public or private property. *Id.* para. 6.3.

26. *Id.* para. 6.12.

27. *Id.*

28. *Id.* para. 7.3.

29. REPORT OF THE COMMITTEE, *supra* note 2, para. 7.3, 7.9.

30. There has been much scholarly discussion regarding England's hit and miss approach to the protection of privacy rights. See WALTER F. PRATT, *PRIVACY IN BRITAIN* 38-59 (1979). See also RAYMOND WACKS, *PERSONAL INFORMATION: PRIVACY AND THE LAW* 42-134 (1989). For a convenient overview of the various civil and criminal remedies available, see REPORT OF THE COMMITTEE, *supra* note 2, para. 6.1-12.37. For a detailed and comprehensive argument about similar failings in Ireland, many of which are analogous to England, see Eoin O'Dell,

Without a law specifically directed at maintaining privacy, we will continue to see scenarios like these played out over and over again in the press: Princess Diana kissing Dodi Al Fayed on his private yacht<sup>31</sup> or exercising in her Isleworth gym;<sup>32</sup> the Duchess of York sunbathing topless in the company of man not her husband;<sup>33</sup> Hugh Grant arguing with Elizabeth Hurley in the garden of her West Country home.<sup>34</sup> Should there be no action for any of these intrusions? For many, the answer has been no. One reason is that privacy intrusions often involve public figures who are said to have given up all claims to privacy when they entered public life. But this logic is faulty. First, it is far too broad an assumption. While public figures indeed have a lesser expectation of privacy regarding *some* matters, they are nonetheless entitled to retain a privacy interest in matters outside the legitimate public concern. Surely, the sexual conduct of an actor is of no legitimate concern to the public. Personal information in that regard merely serves to satisfy public curiosity.<sup>35</sup> Second, this logic fails to recognize that privacy is a fundamental right that, without more, should not be held inapplicable to some people. Justice Brandeis rightfully pointed out that privacy is integral to the pursuit of happiness:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling, and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be let alone – the most

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*When Two Tribes Go to War*, reprinted in LAW AND THE MEDIA 181, 184-237 (Marie McGonagle ed. 1997).

31. Andrew Culf, *Diana: Tormentors Pay Their Respects But Counsel Against Assigning Blame*, THE GUARDIAN (London), Sept. 2, 1997, available in 1997 WL 2399179.

32. Roy Greenslade, *Checking the Code. Would the Proposed New Editors' Code have Prevented Some of the Most Infamous Cases of Intrusion in Recent Years?*, THE GUARDIAN (London), Sept. 29, 1997, available in 1997 WL 2402984.

33. Frances Gibb, *If MPs Do Not Create Privacy Law, Judges Will*, TIMES (London), Sept. 1, 1997, available in 1997 WL 9226436.

34. Culf, *supra* note 31.

35. I concede that in some cases the public interest in a public figure may outweigh the right to privacy. Especially in matters implicating a public official's fitness for office, society's right to know can trump a public official's right to privacy. However, in the examples under consideration here, no such interest is implicated.

comprehensive of rights and the right most valued by civilized men.<sup>36</sup>

Because privacy is so fundamental and so highly valued, an implied contract that would completely disavow a person's right to it is unconscionable.

Another reason privacy rights are too quickly denied is that the seriousness of the intrusion is often mistakenly based on the value of the information revealed. Even though, practically speaking, the issue revolves around a photograph of someone kissing, exercising, sunbathing or arguing, this is the *revelation*, not the *intrusion*. The *intrusion* is upon a person's ability to control what kind and how much information about him is revealed to others. Controlling the information known about us is the way we as individuals define ourselves. It is also the way that each of us remains able to redefine ourselves, free from the indefinite stigma associated with permanent records which can, and often do, reappear to haunt and undermine all our future endeavors. The intrusion, then, is upon a person's dignity. It should not be minimized because, at first glance, what *seems* to be at issue is merely a true record (photograph, videotape, audio tape, etc.) about oneself made public.

Finally, because of present technology, these kinds of privacy intrusions have spread so far as to include *everyone*, not just movie actors whose interests tend to be minimized by courts, or public officials whose otherwise private activities may implicate a genuine public interest. It is no longer true that only limited numbers of people, namely the press, control what information is disseminated to the public. Now, via the Internet, virtually everyone has access to the media. It has been said that the video camera is the *great equalizer* which has *democratiz[ed] technology*<sup>37</sup> — that because of the new video vigilantism, the general public is able to expose violations and effect changes in society more efficiently than it ever has before.

I suggest that it is the Internet, not the video camera, which more properly deserves to be called the great equalizer. Just like photographs before the advent of the video camera, and sketches before the advent of the camera, images captured through surreptitious video taping were only made public when an editor decided they had commercial value. But now, the Internet has provided the masses with unlimited free access to a medium capable of instantaneously broadcasting private images to a global

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36. EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 40 (1978) *citing* *Olmstead v. United States*, 277 U.S. 438 (1928).

37. McClurg, *supra* note 14, at 1022.

audience. The Internet has replaced the editor, who sometimes, though all too infrequently, refused to publish information in poor taste or that was violative of privacy rights. A prime example is the set of photographs that were taken of Diana as she lay dying in that Paris tunnel. Editors all over the world announced that they would not publish the photographs.<sup>38</sup> In spite of the self-restraint of editors, the photographs appeared on the Internet.<sup>39</sup>

There are numerous other paparazzi Internet sites available where photographs of various celebrities can be viewed free of charge.<sup>40</sup> Surely pay-per-view Internet sites, such as those now widely available for viewing other types of prurient material,<sup>41</sup> are on the horizon. One particular incident comes to mind. Many years ago, a photographer snapped a photograph of the Queen just as a gust of wind blew her dress over her head.<sup>42</sup> The photograph was never published, owing to a greater self-restraint by the press than exists today.<sup>43</sup> The Internet provides a marketplace for photographs like this despite editors' efforts to minimize intrusions. There is no question that a photograph of the Queen in her skivvies on a pay-per-view Internet site would be enormously profitable. Because England fails to recognize a specific right to privacy, publication by the press or a member of the public on the Internet would not be actionable.<sup>44</sup>

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38. See Karen Lowe, *Hollywood Joins Outcry Over Paparazzi Following Diana Death*, AGENCE FRANCE-PRESSE, Sept. 1, 1997 available in 1997 WL 13386914.

39. Joan Smith, *They'd Gawped For Years. Why Would They Stop Now?*, THE INDEPENDENT (London), Sept. 21, 1997, available in 1997 WL 12347916.

40. See, for example <<http://www.dkiproductions.com/madonna1.html>> where paparazzo Dave Kotinsky has posted exclusive photos of Madonna "caught leaving her Manhattan apartment for a night on the town," among others.

41. One such pay per view site offers nude photographs for \$29.95 for 30-day unlimited access or \$39.95 for ninety days, payable by credit card. See <<http://www.netnudes.com>> Another site, (visited Nov. 20, 1997) <<http://www.barely18live.com>> charges \$9.90 to view especially young-looking models for ten minutes.

42. A member of the press, in an interview for Frontline, *Princess and the Press*, PBS, broadcast on Nov. 18, 1997, told of how he photographed the incident as Queen Elizabeth was boarding a plane. He delivered the photo to the Windsors for their disposal and they were never published. A transcript of the interview is temporarily available on the internet at (visited Nov. 20, 1997) <<http://www.pbs.org/wgbh/pages/frontline/shows/royals/interviews>> .

43. *Id.*

44. In the United States, a similar photograph was held to be an invasion of the right to privacy. See *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964), where a woman's dress blew over her head while in a carnival *Fun House*. A photographer was there and snapped the photo as part of a public scene at the carnival. It was subsequently published on the front page of his newspaper. The case has been cited as one of those rare instances where a United States court recognized a right to privacy in a public place. See McClurg, *supra* note 14, at 1022.

Such Internet sites needn't be limited to the exploitation of celebrity photographs. Private figures are also at risk. As evidenced by programs like America's Funniest Home Videos, the public also has an appetite for viewing *private* figures in a variety of embarrassing private situations. The Internet provides another as yet unexploited market for similar programs. The public could, for example, submit intrusive videos to a public-made Internet video show modeled after "America's Funniest Home Videos." Such submissions might include a male youth with a spontaneous erection, a woman temporarily deprived of her swimsuit after a dive into the ocean, or a couple making love in their back yard swimming pool. As was the case with *B*, the sunbather discussed earlier, these invasions would likewise go unprotected under England's current system.

The Warren and Brandeis right to be let alone is far from trivial, especially in light of modern technology. Without legally enforceable privacy rights, the Internet has the potential to become "the greatest leveler of human privacy ever known."<sup>45</sup> It implicates a human right necessary to every person's dignity and pursuit of happiness. Unless England recognizes a general and independent right of privacy, public and private figures alike will be faced with the untenable choice of remaining prisoners in their homes or sacrificing an important human right.

#### IV. PARLIAMENT'S REJECTION OF THE RIGHT TO PRIVACY

Parliament has considered creating a statutory right of privacy on numerous occasions over the past fifty years.<sup>46</sup> Unfortunately, all attempts to statutorily create a right to privacy have failed. In 1969, a general right to privacy bill was introduced in Parliament which not only addressed intrusions by publication, but also addressed intrusions into seclusion through "spying, prying, watching or besetting" and "unauthorized overhearing or recording" of both spoken words and visual images.<sup>47</sup> The Bill was withdrawn on the grounds that the right was not well enough defined. It was feared that without a clearer definition, court discretion

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45. McClurg, *supra* note 14, at 1022, quoting *United States v. White*, 401 U.S. 745, 756 (1971) (Justice Douglas, dissenting).

46. One of the early calls for Parliament to create a right of privacy occurred in 1938, in a letter to the editor by a member of Parliament. See PRATT, *supra* note 30, at 82. For information regarding a right to privacy bill introduced in the House of Lords in 1961, see WACKS, *supra* note 30, at 40 n.38.

47. WACKS, *supra* note 30, at 40.

would be too broad, and that citizens, who might interpret the right too broadly, would flood the courts with unwarranted litigation.<sup>48</sup>

In 1970, Parliament appointed a Committee on Privacy, chaired by Kenneth Younger, to determine whether a right of privacy enforceable against individuals and organizations was needed.<sup>49</sup> The Younger Committee conceded that privacy is "a basic need, essential to the development and maintenance of a free society and of a mature and stable individual personality."<sup>50</sup> However, it was reluctant to endorse the creation of a general right to privacy, echoing Parliament's concerns that the scope of a general right would be too uncertain.<sup>51</sup> The Committee nevertheless recommended the statutory creation of both a new crime and a new tort of unlawful surveillance.<sup>52</sup> Though Parliament agreed with the Committee regarding the importance of the right of privacy, it still refused to provide even narrow protection against unwarranted surveillance.

In 1987, another right of privacy bill was before Parliament. That Bill defined the right of privacy as:

[t]he right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs, including intrusion by: 1) spying, prying, watching or besetting; 2) the unauthorized overhearing or recording of spoken words; 3) the unauthorized making of visual images . . . .<sup>53</sup>

Like its 1969 predecessor, the 1987 bill would have created a general right of privacy. Practically speaking, it would have made actionable invasions of privacy which do not contain the incident of publication. Though the bill was given a second reading and completed its Committee stages in the House of Commons, it was not passed.

In the 1988-89 Parliamentary session, Parliament again rejected an opportunity to create a right of privacy.<sup>54</sup> This time, a bill was introduced which would create a tort action and a right of reply against members of

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48. *Id.* at 41.

49. *Id.*

50. *Id.*, citing REPORT OF THE COMMITTEE ON PRIVACY (chairman: Kenneth Younger) Cmnd. 5012, para. 113 (1972).

51. *Id.*

52. *Id.* para. 560-65.

53. Right of Privacy Bill 1987, reprinted as Appendix J in the REPORT OF THE COMMITTEE, *supra* note 2, at 107.

54. Krotoszynski, *supra* note 16, at 1406.

the press, but only for "public use or public disclosure of private information."<sup>55</sup> The 1989 bill was narrower than its predecessors because it required publication or the intent to publish. The bill failed to address invasions of privacy by physical intrusion. Despite this apparent narrowing, competing concerns regarding press freedoms ultimately caused the Bill to be defeated.<sup>56</sup>

In response to the introduction of the 1987 and 1989 bills and surrounding public concern about invasions of privacy by the press, Parliament formed yet another committee. The Committee on Privacy and Related Matters, chaired by Sir David Calcutt (Calcutt Committee), was given the task of "consider[ing] what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen, . . . and to make recommendations."<sup>57</sup> The Calcutt Committee concluded that there was no need for a privacy tort.<sup>58</sup> As an alternative to legislative protections, the Calcutt Committee recommended that complaints regarding invasions of the press handle privacy themselves through a self-regulatory agency created for that purpose.<sup>59</sup> Should this self-regulatory agency fail, the Calcutt Committee recommended Parliament create "a statutory system for handling complaints."<sup>60</sup>

Self-regulation was no stranger to the press and had already been deemed a failure when Calcutt's new self-regulating agency was formed.<sup>61</sup> In 1953, the self-regulatory agency known as the Press Council had been created to promote ethical journalistic practices.<sup>62</sup> Almost forty years later, in response to the Calcutt Committee's recommendations, the Press Complaints Commission (PCC) replaced the failed Press Council. Unlike its predecessor, the majority of the PCC's sixteen members have no connection with the press. But this is not to suggest that the fox is no

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55. Protection of Privacy Bill 1989, *reprinted as Appendix K in the REPORT OF THE COMMITTEE*, *supra* note 2, at 108. *See also id.*

56. Krotoszynski, *supra* note 16, at 1406.

57. Taken from a statement published by the Press Complaints Commission, *Origins of the Commission*, (visited Nov. 3, 1997) <<http://www.pcc.org.uk/about/origins.htm>>.

58. REPORT OF THE COMMITTEE, *supra* note 2, at x, 46. *See also* Krotoszynski, *supra* note 16, at 1406.

59. REPORT OF THE COMMITTEE, *supra* note 2, at 65.

60. *Id.* at xi, 73. *See also* Press Complaints Commission, *Scrutiny of Press Self-Regulation*, (visited Nov. 3, 1997) <<http://www.pcc.org.uk/about/scrutiny.htm>>.

61. *See* Press Complaints Commission, *Origins of the Commission*, (visited Nov. 3, 1997) <<http://www.pcc.org.uk/about/default.htm>>.

62. *Id.*

longer watching the hen house. Currently, seven of the PCC's sixteen members are highly esteemed officials of the publishing industry.<sup>63</sup> There is also a great deal of political power among its members. The Right Honorable Lord Wakeham is Chairman.<sup>64</sup> Other Public Members include Lord Tordoff, who served in the House of Lords from 1988-94, and the Right Reverend John Waine, Bishop of Chelmsford from 1986-96.<sup>65</sup> The requirement that the majority of the PCC members be selected from outside the publishing industry and the addition of politically persuasive Public Members has not made a difference in the PCC's effectiveness. Parliament, by having delegated its responsibility to a private agency, seems to be more concerned with creating an organization that appears to be powerful and unbiased than with effectively protecting privacy rights.

In 1993, Sir David Calcutt, in his second report on press self-regulation, recommended abolition of the PCC.<sup>66</sup> Calcutt concluded, as had his predecessors, that the PCC was "flawed in its procedures and not sufficiently independent of the press."<sup>67</sup> Calcutt also recommended that the government proceed with the introduction of new criminal offenses on physical intrusion and that it create a statutory tort for infringement of privacy.<sup>68</sup> The government's response was disappointing. While it accepted Calcutt's findings regarding the ineffectiveness of the PCC, the government nevertheless urged, for the third time, a strengthening of the procedures for self-regulation.<sup>69</sup> Again postponing its duty to provide a right of privacy, Parliament merely "reaffirmed its commitment to consider introducing new criminal offenses on physical intrusion and said

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63. The seven members of the press currently on the Commission are Iris Burton, *Editor in Chief, Women's Realm and Woman's Weekly*; Jim Cassidy, *Editor, The Sporting Life*; Tom Clarke, *Editor, The Sporting Life*; Graham Collier, *Editor, Surrey Advertiser*; Sir David English, *Chairman and Editor in Chief, Associated Newspapers*; John Griffith, *Editor, Liverpool Echo*; John Witherow, *Editor, The Sunday Times*. The full list of Commission members is available at <<http://www.pcc.org.uk/about/members.htm>>.

64. Lord Wakeham has enjoyed a distinguished political career, having served as Lord Privy Seal and Leader of the House of Lords from 1992-94; Secretary of State for Energy from 1989-92; Lord President of the Council and Leader of the House of Commons 1988-89; Lord Privy Seal and Leader of the House of Commons from 1987-88 and Government Chief Whip from 1983-87. *Id.*

65. *Id.*

66. Taken from a statement by the Press Complaints Commission, *Scrutiny of Press Self-Regulation*, (visited Nov. 3, 1997) <<http://www.pcc.org.uk/about/scrutiny.htm>>.

67. *Id.*

68. *Id.*

69. *Id.*



that it would give consideration to the merits of a new civil tort of privacy."<sup>70</sup>

Two months after Sir David Calcutt's call for statutory protections, the National Heritage Select Committee on Privacy and Media Intrusion also urged the Government to protect privacy rights.<sup>71</sup> In their March 1993 report, the Committee recommended the creation of a yet another new self-regulatory agency that would be overseen by a statutorily created Press Ombudsman.<sup>72</sup> Under their proposal, the Press Ombudsman would be empowered by statute to impose large fines.<sup>73</sup> This proposal is interesting because it maintained the *idea* of self-regulation but, because it gave government authority to an overseer, the agency's decisions would have had the force of law. The Heritage Select Committee also recommended a criminal offense for physical intrusion and a civil tort for infringement of privacy be established.<sup>74</sup> Parliament responded much as it had before, by giving a lip service promise to consider the merits of the Committee's recommendations.<sup>75</sup>

In light of the utter failure of the PCC and its predecessor to protect privacy through self-regulation, it is inconceivable that Parliament could continue to delegate its duty to provide citizens effective remedies for invasions of privacy to this ineffective private body. But that is exactly what it did. Then came the tragedy of September 1997, when Princess Diana was killed during a paparazzi motorcycle chase. Though Diana's death occurred in Paris,<sup>76</sup> and was further complicated by the intoxication of her driver, the appalling newsgathering tactics which attended the tragedy again brought the issue of invasions of privacy by the press to the forefront. Earl Spencer, Diana's brother, who publicly proclaimed that every newspaper editor who had ever published intrusive photographs of

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70. *Id.*

71. Press Complaints Commission, (visited Nov. 3, 1997)

<<http://www.pcc.org.uk/about/scrutiny.Htm>> .

72. *Id.*

73. Andrew Culf, *The Death of Diana: Press Chances in on Privacy Media Watchdog's Intervention Highlights Problems in Halting Harassment and Hounding*, THE GUARDIAN (London), Sept. 2, 1997, available in 1997 WL 2399175.

74. Press Complaints Commission, *supra* note 66.

75. *Id.*

76. Members of the press who are against the creation of a privacy law in England have argued that since stringent French privacy laws failed to save Diana, privacy laws simply do not work. See Anthony Bevins, *Diana 1961-1997: The Tributes - Blood on Their Hands, Says Brother*, THE INDEPENDENT (London), Sept. 1, 1997, available in 1997 WL 12343550.

Diana had her blood on his hands,<sup>77</sup> appealed to Parliament for the creation of a privacy law. But his appeal fell on deaf ears. Tony Blair, England's Prime Minister, stated that he's "never been convinced about privacy laws"<sup>78</sup>, and his position that questions of privacy are best left to self-regulation by the newspaper industry remains unshaken.<sup>79</sup> Astonishingly, even in the wake of the Diana tragedy and the public support of privacy laws which attended it, Parliament steadfastly maintained that privacy issues were best resolved by the PCC.<sup>80</sup>

Unless Parliament creates a right of privacy, either by specific legislation recognizing the right or by incorporation of the European Convention on Human Rights,<sup>81</sup> the PCC will continue to be the sole arbiter of invasions of privacy by the press. In light of that prospect, Lord Wakeham has called for strong reform of the Commission's Code of Practice. The current Code has very little to say about intrusion.<sup>82</sup> While a broad interpretation of the Code would prohibit a great many of the

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77. *Id.*

78. Phillip Johnston, *Earl Asks Blair for Privacy Law*, THE DAILY TELEGRAPH (London), Sept. 11, 1997, available in 1997 WL 2337288.

79. Bevins, *supra* note 76.

80. Earl Spencer had received 27,000 letters in support of his criticism of press newsgathering tactics by the time he spoke with the Prime Minister urging privacy law reform. See Johnston, *supra* note 78.

81. The European Convention on Human Rights and the Human Rights Bill are discussed herein at sections V and VI, respectively.

82. There are two articles from the Code which pertain to the right to be let alone and intrusion into seclusion:

Article 4. Privacy. i) Intrusions and enquiries into an individual's private life without his or her consent, including the use of long-lens photography to take pictures of people on private property without their consent, are only acceptable when it can be shown that these are, or are reasonably believed to be, in the public interest. ii) Publication of material obtained under i) above is only justified when the facts show that the public interest is served. Note – Private property is defined as i) any private residence, together with its garden and outbuildings, but excluding any adjacent fields or parkland and the surrounding parts of the property within the unaided view of passers-by, ii) hotel bedrooms (but no other areas in a hotel) and iii) those parts of a hospital or nursing home where patients are treated or accommodated. . . . Article 8. Harassment. i) Journalists should neither obtain nor seek to obtain information or pictures through intimidation or harassment. i) Unless their enquiries are in the public interest, journalists should not photograph individuals on private property (as defined in the note to Clause 4) without their consent; should not persist in telephoning or questioning individuals after having been asked to desist; should not remain on their property after having been asked to leave and should not follow them. iii) It is the responsibility of editors to ensure that these requirements are carried out."

Press Complaints Commission, *Code of Practice*, (visited Nov. 3, 1997) <<http://www.pcc.org.uk/complain/code.htm>.>

unsavory activities of the press, it appears to have been applied quite narrowly. The PCC adjudicates very few violations involving public figures and only one in eight complaints involves privacy.<sup>83</sup> When asked why so few complaints of this nature were brought to the PCC, a spokesman conceded that the difficulty in proving a breach of the Code was a contributing factor.<sup>84</sup> Several of Lord Wakeham's proposed reforms address some of the problems. For instance, Wakeham proposes to deal with harassment by prohibiting the publication of photos obtained through *persistent pursuit*, including those obtained by photographers "[w]ho stalk their prey."<sup>85</sup>

Despite these reforms, the biggest problem with the resolution of privacy violations through the PCC still remains. The PCC is a private body with no authority to impose sanctions other than those agreed to by its members. At present, the only available sanction is that the offending publication print the Commission's findings "in full and with due prominence."<sup>86</sup> The PCC has been aptly described as a fraud because it can impose no real sanctions and cannot compensate victims.<sup>87</sup> Even if victim compensation were made available, some members of the press would likely perceive fines of that sort as a necessary cost of doing business. Fines would have to be quite sizeable to be an effective deterrent, and it is unlikely that the PCC would agree to them if they were.<sup>88</sup> However, it must be conceded that even if effective economic sanctions did exist, the PCC reaches only those editors willing to submit. To date, not all members of the press submit to the PCC, and if legitimate sanctions were to become a part of the ante, they likely never would.

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83. Culf, *supra* note 73. For a compilation of complaints and adjudications, see The Press Complaints Commission (visited Nov. 3, 1997) <<http://www.pcc.org.uk/ajud.htm>>.

84. E-mail from Tim Toulmin, Press Complaints Commission, to Laura Mall (Nov. 6, 1997) (on file with author).

85. Taken from a speech made by the Right Honorable Lord Wakeham at a press conference in Parliament Chamber, Crown Office Row, Temple on Sept. 25, 1997, (visited Nov. 3, 1997) <<http://www.pcc.org.uk/ajud/pr250997.htm>>.

86. Press Complaints Commission, Preamble to the Code of Practice, available at Press Complaints Commission (visited Nov. 3, 1997) <<http://www.pcc.org.uk/complain/code.htm>>.

87. Allison Daniels, *Guardian Debate: Press has Nothing to Fear from Privacy Law*, *QC Argues*, THE GUARDIAN (London), Oct. 28, 1997, available in 1997 WL 14737744.

88. Apparently, the profits involved in checkbook journalism are quite staggering. For example, THE MIRROR paid 250,000 pounds for the photograph of Diana and Dodi Al Fayed kissing in St. Tropez. Culf, *supra* note 31.

## V. JUDICIAL REJECTION OF A COMMON LAW RIGHT TO PRIVACY

The courts of England have done little for those in need of privacy protection. British judges believe that the creation of a new right rests with the legislature and, in light of Parliament's refusal to create one, have been hesitant to act. The judiciary's refusal to recognize a right of privacy where it does not legislatively exist was apparent in a case involving British-comedy star Gordon Kaye.<sup>89</sup>

In 1990, Mr. Kaye, star of the British comedy *Allo, Allo*, was in the hospital recuperating from brain surgery when a photographer from *Sunday Sport* violated the sanctity of his hospital room.<sup>90</sup> The journalist asked him questions and took photographs without his permission (medical evidence proved Mr. Kaye's condition was such that he was incapable of giving informed consent).<sup>91</sup> Precisely because there is no privacy right in England, nor any other effective alternative action, Mr. Kaye was unable to prevent the printing of the photographs.<sup>92</sup> Despite this complete lack for a remedy, the court refused to create a common law right to privacy. Court of Appeals judge Lord Justice Glidewell deferred to Parliament, concluding that "[t]he facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals."<sup>93</sup> In a concurring opinion, Lord Justice Leggett echoed that the right to privacy "has so long been disregarded here that it can be recognized now only by the Legislature."<sup>94</sup>

*Kaye* is not the only example of the judiciary's deference to Parliament regarding the right to privacy. *Malone v. Metropolitan Police Commissioner* also demonstrates the judiciary's reluctance to step on the toes of Parliament:

No new right in the law, fully-fledged with all appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right. . . . One of the factors that must be relevant in such a case is the degree of particularity in the right that is claimed. The

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89. *Kaye v. Andrew Robertson and Sport Newspapers Ltd.*, 1990, appended to REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, *supra* note 2, at 98.

90. *Id.*

91. *Id.* at 99.

92. Four alternative rights of action were pursued but failed. These were libel, malicious falsehood, trespass to the person, and passing off. *Id.* at 100.

93. *Id.*

94. *Id.* at 104.

wider and more indefinite the right claimed, the greater the undesirability of holding that such a right exists.<sup>95</sup>

*Malone* has been cited as having essentially foreclosed any future attempts at a judicial creation of a common law right to privacy.<sup>96</sup> But I disagree. While a *broad and general* right of privacy may not spring from the head of a judge, other language in the decision suggests that more limited equitable remedies for specific invasions of privacy may still be available under the common law. The Court limits its decision to the tapping of telephone lines in which the police have just cause or excuse, stating it “decide[s] nothing on tapping elected for other purposes, or by other persons, or by other means.”<sup>97</sup> The *Malone* case, then, has not necessarily foreclosed all common law creation of a right to privacy.

*Malone* is significant for another reason. The *Malone* judiciary rebuffed arguments that a right to privacy had been created in England by the European Convention on Human Rights. As regards the European Convention, the Court noted that:

The United Kingdom, as a High Contracting Party that ratified the Convention on March 8, 1951, has thus long been under an obligation to secure these rights and freedoms to everyone. That obligation, however, is an obligation under a treaty which is not justiciable in the courts of this country. Whether that obligation has been carried out is not for me to say . . . All that I do is to hold that the Convention does not, as a matter of English law, confer any direct rights on the plaintiff that he can enforce in English courts.<sup>98</sup>

The *Malone* Court correctly recognized that it was the obligation of the State, as a High Contracting Party, and not the province of the courts, to implement legislation which would give effect to the Convention. Since Parliament had neither created a statutory right to privacy, nor passed legislation giving effect to the European Convention on Human Rights, the Court ultimately concluded that it could “find nothing in the authorities or contentions . . . to support the plaintiff’s claim based on the right of

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95. Krotoszynski, *supra* note 16, at 1412, citing *Malone*, wherein the *Malone* case is cited as having foreclosed the creation of a common law right to privacy.

96. *Id.*

97. *Malone v. Metropolitan Police Comm’r*, 67 I.L.R. 345 (1979).

98. *Id.* at 339-40.

privacy.”<sup>99</sup> Malone appealed the decision directly to the European Commission of Human Rights.<sup>100</sup> It was Malone’s hope that a right to privacy would be found to exist under international law. If so, the United Kingdom, in violation of its treaty obligations under the European Convention on Human Rights, would be required to provide a remedy. I turn now to a discussion of privacy as addressed by the European Convention on Human Rights.

## VI. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 8 of the European Convention on Human Rights (the Convention), to which the United Kingdom has been a signatory since 1951, provides that “[E]veryone shall have the right to respect for his private and family life, his home and his correspondence.”<sup>101</sup> As this is written quite broadly (just as most human rights documents are), it is uncertain from its face whether the right would encompass invasions of privacy by the media. Though the European Court of Human Rights has considered over sixty cases in which Article 8 was at issue,<sup>102</sup> none has squarely put before it the question of an individual’s right to be let alone versus the media’s right to gather news. Notwithstanding the inherent difficulties in balancing of the right to privacy against freedom of the press, there are two additional obstacles that must be overcome if the European Convention is to provide the protection England lacks.

The first regards whether the Convention would apply to the press as a private actor at all. Traditionally, international law applies only to government action. The government has pledged that *it* will not violate, by its *own* actions, the rights named within the treaty. But the Convention has

99. *Id.* at 336.

100. In order for a case to be accepted by the European Commission of Human Rights, and ultimately referred to the European Court of Human Rights, Article 26 of the Convention requires that an individual must first have exhausted all domestic remedies available. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR]. Without a cause of action in England for invasions of privacy, no further remedy was available, Malone was found to have exhausted all available remedies and his individual petition was accepted then referred to the Court. Ultimately, the Court found a violation of Article 8’s guarantee of a right to privacy, but it was only because the United Kingdom had failed to provide adequate safeguards against the abuse of wire-tapping by the police. There was no finding that the United Kingdom was in derogation because it lacks a privacy law. *Malone v. United Kingdom*, 82 Eur. Ct. H.R. (ser. A) at 36-37 (1984).

101. ECHR, *supra* note 100.

102. For a convenient listing of European Court of Human Rights cases, see the Department of International Law at the University of Salzburg where Christian Campbell maintains a list of cases according to Convention article available in (visited Nov. 10, 1997) <<http://www.sbg.ac.at/var/docs/egmr/echrhome.htm>>. <http://www.sbg.ac.at/>

imposed upon States the *positive* obligation to uphold the rights embodied in the Convention.<sup>103</sup> This means that a State can violate the terms of the treaty for doing nothing. By failing to provide redress to its citizens for rights violations by private actors, for example, a State fails to uphold its positive obligations under the treaty. The European Court of Human Rights has specifically held that a State is under a positive obligation under Article 8 to *respect* family life.<sup>104</sup> While it seems likely, it is nevertheless uncertain whether the Court in Strasbourg would extend positive obligations on a State to curb privacy intrusions by the media.

The second obstacle is whether the right to privacy as framed in Article 8 can be understood to include a general right to be let alone, one that is broad enough to encompass intrusion into seclusion, and the publication of private facts. If the application of Article 8 turns solely on the original intent of the Convention's framers and on the definition of the right as historically interpreted by the members of the European Union, protection against intrusion and publication of private facts is likely to be found lacking. It must be remembered that the original purpose of the Convention was to combat totalitarian governments in the wake of World War II. Article 8 was framed in response to the invasions of homes by Nazi troops, not intrusions into private affairs by the news media.<sup>105</sup> Furthermore, European union member states have not traditionally granted a broad right of privacy. As we have already seen, Parliament has consistently refused to create any general right to be let alone. France, often cited as the European nation with the most stringent privacy laws, did not develop a common law right to privacy until the 1960's, and they did not codify the right until 1970.<sup>106</sup> The most substantial protections for this aspect of privacy, then, did not exist in Europe until more than twenty-five years *after* the Convention was put into effect. While other privacy rights unrelated to Article 8's original purpose have fallen within its scope, a common understanding among the High Contracting Parties is still often

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103. Article 13 states that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Krotoszynski, *supra* note 56. See also *Campbell & Cosons v. UK*, 48 Eur. Ct. H.R. (ser. B) 17 (1982), where the Court defines the word *respect* used in Article 2 of the Convention to imply that a State is under a positive obligation to act. Article 8 uses the word *respect* when defining State obligations regarding the right to privacy. ECHR, *supra* note 100, art. 8.

104. See *Gaskin*, 160 Eur. Hum. Rts. Rep. (ser. A.) at 15, 17-20 (1989) where the Court held that the Government violated its positive obligations under Article 8 by failing to provide a system whereby Gaskin could retrieve a Government file relating to his care when he was a ward of the State.

105. PRATT, *supra* note 30, at 86-87.

106. REPORT OF THE COMMITTEE, *supra* note 2, at 14.

necessary. For example, the Court held that a United Kingdom law criminalizing homosexual conduct to be a violation of a homosexual's right to respect for his privacy and family life in part because of the modern day acceptance for this kind of lifestyle among other Member States, even if not in Ireland.<sup>107</sup> If there is no common European understanding that the Article 8 right to privacy encompasses even a minimum of protection for the kinds of invasions at issue here, and I submit that there is none, any claim to the right under the Convention may fail.

Only when an applicant has overcome both the obstacles discussed above will the issue turn on a balancing of the interests between an individual's right to privacy and society's right to know. Of course, the right to know is part of the guarantee of freedom of expression as embodied in Article 10 of the European Convention. I turn now to a discussion of that competing interest.

#### *A. Freedom of Expression under the European Convention on Human Rights*

The right to privacy cannot be considered alone. It must be considered in tandem with the competing right of freedom of expression. Article 10 of the European Convention protects freedom of expression, including the right to receive and impart information without government interference.<sup>108</sup> There is no question that freedom of the press is necessary to a democratic society, and I can add nothing to the debate that has already clearly established its high value. But, freedom of speech and of the press has never been regarded as absolute. Freedom of the press should not, and need not, be maintained at the expense of other important rights. Article 10 recognizes the necessity for limits to be placed on freedom of expression and of the press:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>109</sup>

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107. *Dudgeon Case*, 45 Eur. Ct. H.R. (ser. A)(1981).

108. ECHR, *supra* note 100.

109. *Id.* art.10, § 2.



Thus, Article 10 expressly recognizes boundaries regarding the publication of information in breach of confidence and which are libelous. But the phrase that refers to the *rights of others* indicates that this list is not meant to be exhaustive.<sup>110</sup> While these rights might refer narrowly to the specific human rights as enumerated in Article I of the Convention, the preceding phrase, *as are prescribed by law* suggests an even broader reference. The *rights of others* is more likely meant to include domestically created rights as well as international human rights. Either way, the language of Article 10 leaves the door open for a privacy limitation on freedom of expression to be recognized.

The Strasbourg Court has yet to deal with any case that pits the rights of a free press against the privacy rights of an individual. However, the Court has dealt with privacy and free press issues separately. If anything may be gleaned from an overview of the two bodies of case law, it is that the right of a free press is broad and well defined, and the right to privacy is less so. This does not bode well for advocates of the right to privacy.

Though the Strasbourg Court has not yet dealt with any case concerning the intrusion of the media into the privacy of an individual, such as was the issue in *Kaye*,<sup>111</sup> the Court has dealt with cases that are somewhat analogous. One such case involved the libelous publication of five articles about the private lives of certain Antwerp Magistrates.<sup>112</sup> The articles severely criticized the Magistrates for having granted child custody to a father accused of sexually abusing the children, and concluded that the Magistrates based their decision on bias, cronyism and in misplaced right-wing politics. The judgement of the domestic courts against the newspaper were based on violations of domestic law which prohibits publication of "ill-considered accusations without sufficient evidence;" that "employs gratuitously offensive terms or exaggerated expression;" or that "fails to respect private life or the individual's privacy."<sup>113</sup> According to the Brussels tribunal, the journalists were liable for defamation for having "besmirched the honor of the magistrates without being in possession of all

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110. *Id.*

111. Ben Emmerson, *Newspapers Fear that Incorporating the European Convention on Human Rights into UK Law will Restrict Investigative Reporting*, THE GUARDIAN (London), Nov. 4, 1997, available in 1997 WL 14739002.

112. *Haes & Gijssels v. Belgium*, (7/1996/626/809) Eur. Ct. H.R. (1997) publication pending, but currently available at the European Court of Human Rights (visited Nov. 5, 1997) <<http://www.dhcour.coe.fr/eng/DEHAES.html>>.

113. *Id.* para. 26.

the necessary information.”<sup>114</sup> The courts also held that in doing so, the newspaper had invaded the privacy of the Magistrates:

In the instant case the appellants dared to go one step further by maintaining, without a shred of evidence, that they were entitled to infer the alleged bias from the very personalities of the judges and the Advocate-General and thus interfere with private life, which is without any doubt unlawful.<sup>115</sup>

The European Court disagreed. It held that the government had not violated Article 8.<sup>116</sup> First, the Court noted that the applicants had not “cast doubt on the information published regarding the fate of the X children.”<sup>117</sup> That being the case, the inferences which the newspaper drew from their correct knowledge of the record of the case were *value judgments*, which the Court held distinguishable from *facts*.<sup>118</sup> Also important to the Court’s judgment was the idea that the issue at hand, regarding the impartiality of the judiciary, was of such significant public interest that the government was unjustified in its interference with freedom of expression.<sup>119</sup>

There was one notable exception. The Court found that the journalists had invaded the privacy of the Magistrates for making reference to the activities of the family of one of the magistrates:

One of the allusions to the alleged political sympathies was inadmissible – the one concerning the past history of the father of one of the judges criticized . . . It is unacceptable that someone should be exposed to opprobrium because of matters concerning a member of his family. A penalty was justifiable on account of that allusion by itself.

It was, however, only one of the elements in this case. The applicants were convicted for the totality of the

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114. *Id.* para. 27.

115. *Id.* para. 41.

116. *Id.* para. 49.

117. Haes & Gijssels v. Belgium, (7/1996/626/809) Eur. Ct. H.R. para. 40 (1997).

118. *Id.* para. 42.

119. *Id.* para. 37.

accusations of bias they made against the three judges and the Advocate-General in question.<sup>120</sup>

It is interesting that the Court found conclusions drawn from true facts regarding a public official's family violated Article 8 when similar conclusions drawn from other true facts did not. Was it the publication of private information about the family, or the "allusion" that the apple had not fallen far from the tree that the Court held objectionable? The distinction is critical. Action for the first is an invasion of privacy for publication of true embarrassing facts, while the other is for defamation. Each implicates Article 10's right to free speech, but only the former would implicate Article 8. It appears, by the use of the word "allusions" and "opprobrium" that what the Court found actionable was defamation, not invasion of privacy. Regretfully, the Court failed to make the distinction clear.

Notwithstanding that one small concession, the Court appears to be highly deferential to Article 10. Most notably, the Court virtually disregarded two arguments put forth by the government: first, that the Magistrates are different from most public officials, because owing to ethical constraints which prevent them from commenting about cases, they cannot respond to criticism about their decisions; and second, that the government's interest in preserving the public confidence in its judiciary justifies its protection against unfounded attacks.<sup>121</sup> This second justification appears to be specifically allowed under Article 10 to maintain "the authority and impartiality of the judiciary."<sup>122</sup> While the Court is often generous in providing a wide margin of appreciation to the government for its determination of what is "necessary in a democratic society . . . for the prevention of disorder or crime . . . or for the protection of the rights and freedoms of others,"<sup>123</sup> it is apparently less willing to do so when freedom of expression is implicated.

Another case involved a libel action over a book published about the private life of the applicant.<sup>124</sup> The United Kingdom provided a remedy for information published that was false, but offered no remedy where the

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120. *Id.* para. 45. The newspaper had made reference to the fact that the father of one of the judges was "a big-wig in the gendarmerie who was convicted in 1948 of collaboration: he had, in close collaboration with the 'Feldgendarmerie', restructured the Belgian gendarmerie along Nazi lines. [YB] is no less controversial as a *magistrat*." *Id.* para. 19.

121. *Id.* para. 14.

122. ECHR, *supra* note 100.

123. *Id.*

124. *Emmerson*, *supra* note 111.

information published was true.<sup>125</sup> The applicant claimed that true information published about his private life was an invasion of his privacy.<sup>126</sup> The European Commission on Human Rights held that the remedies provided by the United Kingdom under defamation and breach of confidence were sufficient, and so the United Kingdom was not held to have violated Article 8.<sup>127</sup> This suggests that the Commission is unwilling to find a State in violation of its positive obligations when it offers some, even if insufficient, remedy. From this we might infer that where the State offers no remedy at all, as was illustrated in *Kaye*, the Commission would hold a State in violation. This precise question, whether other remedies such as trespass, defamation, and breach of confidence, or even those offered by the quasi-public PCC, are sufficient in their incidental protection of privacy, is precisely the one that Parliament has been faced with for quite some time. Parliament's response has been that those remedies *do* adequately protect privacy rights, even though cases like *Kaye* clearly belie that proposition. The Strasbourg Court may offer a wide margin of appreciation to the United Kingdom for their view that incidental protections to the right of privacy are enough. If they do, future holdings of the Strasbourg Court may closely resemble the deferential treatment English judges have paid to Parliament.

### *B. Potential Effect of a Violation of the European Convention*

Article 1 of the Convention confers upon its signatories the obligation to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I."<sup>128</sup> Further, Article 53 obligates contracting parties to "abide by the decision of the Court in any case to which they are parties."<sup>129</sup> Should a violation be found, the Court would issue a judgment so stating, and award a specific remedy, such as damages and costs, to the injured party.<sup>130</sup> While the judgment of the Court does require that the State come into compliance with its Convention obligations, the Court is not empowered to dictate exactly *how* it should do so. The Court has confirmed that "the Contracting States remain free to choose the measures which they consider appropriate."<sup>131</sup>

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125. *Id.*

126. *Id.*

127. *Id.*

128. ECHR, *supra* note 100.

129. *Id.*

130. Damages are permitted under Article 50. *Id.*

131. The Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) at 38 (1979).

In any case involving a State's *positive* obligations, there are difficulties regarding compliance that do not necessarily occur in negative obligation cases. In the latter, a State is directed to discontinue a specific practice. Assuming full compliance, the practical result for citizens is that the practice will no longer occur. In the former, there is the potential that a State will enact measures that only partially or otherwise unsatisfactorily protect the citizen against future violations. This is especially likely, as here, when the State has demonstrated reluctance to provide the protections. Furthermore, the Court has indicated that exceptions to freedom of expression must be narrowly interpreted. In the *Thalidomide Case*, the United Kingdom had issued an injunction against the publication of an article regarding the negligence of a company that manufactured and marketed a drug to pregnant women that subsequently caused severe birth defects.<sup>132</sup> Civil cases against the company were at various stages of action and the government's injunction was intended to prevent trial by newspaper.<sup>133</sup> An Article 10 violation was found despite the express provision allowing exceptions for "maintaining . . . impartiality of the judiciary." The injunction was held to be an unnecessary infringement on freedom of expression under the specific facts of the case.<sup>134</sup> The *Thalidomide Case*, then, demonstrates how the Court might be inclined to apply narrowly any restrictions placed on freedom of expression.

So, given a State's freedom to prescribe for itself how it chooses to comply with a violation of the European Convention, Parliament's potential reluctance to implement broad privacy measures, and the Court's instruction that restrictions on freedom of expression should be narrowly applied, a violation of Article 8 may do little to impact privacy rights in England. Despite this pessimism, incorporation of the European Convention on Human Rights into domestic law may still provide for a general right of privacy.

## VII. THE HUMAN RIGHTS BILL

Although the United Kingdom played a major part in drafting the Convention and was the first to ratify it in 1951, it has never incorporated the Convention into domestic law.<sup>135</sup> As we have already seen, the result is that British citizens cannot enforce Article 8's privacy right's in British courts. Instead, they must appeal to the European Commission of Human

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132. *Id.*

133. *Id.*

134. *Id.* at 42.

135. Rachael Donnelly, *Labour Unveils Bill to Improve Protection of Basic Human Rights*, THE IRISH TIMES, Oct. 25, 1997, available in 1997 WL 12032014.

Rights who may, if the case meets certain criteria, refer the case to the European Court of Human Rights.<sup>136</sup> On average, the process takes approximately five years to complete and will cost the petitioner approximately thirty thousand pounds.<sup>137</sup> Practically speaking, such a costly and time-consuming process does not afford an effective remedy to the majority of British citizens. The better solution would be for the United Kingdom to finally incorporate the European Convention on Human Rights into domestic law. And this is exactly what is being considered.

On October 24, 1997, the British Government published a White Paper announcing the Government's intention to bring UK law in line with the European Convention on Human Rights.<sup>138</sup> If passed, the Human Rights Bill now pending before Parliament would incorporate the European Convention on Human Rights into domestic law. This would enable British citizens to enforce a right of privacy in domestic courts, making it unnecessary for Parliament to create a general right of privacy or enact specific privacy tort legislation.

While this seems like an ideal solution, whether any meaningful right to privacy will emerge will ultimately depend on how it is balanced against the rights of a free press. Lord Bingham, Britain's highest-ranking judge, pointed out that "what is going to have to be confronted is the demarcation of the boundary between privacy and free speech. I think this is difficult and debatable territory. In deciding whether publication would infringe the right of privacy, the obvious criterion for judges to use would be 'public interest'."<sup>139</sup> The problem with using a public interest criterion is that the term is subject to differing interpretations. The press, on the one hand, would argue for the narrowest possible definition. To them, anything that sells newspapers might be considered to be in the public interest. In the words of Sir John Donaldson, the press is "peculiarly vulnerable to the error of confusing public interest with their own

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136. The Commission acts as a screening body to individuals, who may not directly appeal to the European Court of Human Rights. The Commission determines whether a case should go before the European Court of Human Rights. ECHR, *supra* note 100, art. 25-27.

137. Alan Travis, *Judges Win Power in Historic Bill - Courts to Rule on Privacy*, THE GUARDIAN (London), Oct. 25, 1997 available in 1997 WL 14737335. See also Donald McIntyre, *Can We Trust the Judges to Make Our Laws?*, THE INDEPENDENT (London), Sept. 19, 1997, available in 1997 WL 12347212.

138. The Human Rights Bill was introduced in the House of Lords on Oct. 23, 1997. The text of the Bill, as yet unavailable through Her Majesty's Stationery Shop, is available at Parliament's Internet web-site (visited Nov. 20, 1997) <<http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldbills/038/97038—a.htm>>.

139. Clare Dyer, *Courts May Rule on Privacy Rights - Judge Says New Law Unnecessary*, THE GUARDIAN (London), Oct. 9, 1997, available in 1997 WL 14734021.

interest."<sup>140</sup> It is unlikely, however, that the term is susceptible to a definition that would include information that merely serves to satisfy public curiosity. The distinction between what satisfies prurient curiosity and what is in the public interest most often arises in the context of a public official. Those in favor of a broad interpretation would argue that the morals of a public official, as evidenced by his sex life and other private activity, directly relates to his fitness for public office. Those in favor of a narrower interpretation, however, would argue that only when there is a more direct interference with an official's ability to properly carry out his duties is private information in the public interest. Eric Barendt, Goodman Professor of Media Law at University College in London, put it this way:

Even public figures are entitled to privacy. There is no public interest justification for publishing details of a politician's sex life, unless that interferes with the discharge of his duties. The argument that the public has a right to know the truth about every aspect of his private life is particularly shabby. Taken seriously, this claim would empty the privacy right of all content.<sup>141</sup>

While it remains to be seen how the courts will answer the question of what is in the public interest, any definition narrower than that which has been employed by the press will be a great victory for advocates of privacy.

### VIII. CONCLUSION

The video camera, the telephoto lens and the Internet are just a few of the advances that necessitate a broader reading of the right of privacy in England and the international human rights community. Lord Wakeham recognized that there is little one country can do to solve the problems created by paparazzi operating in a global market.<sup>142</sup> But while Lord Wakeham may be congratulated for making a heroic attempt to make a difference within the narrow scope of his authority, Parliament cannot. By deferring protection of the right of privacy to the PCC, Parliament failed to provide its citizenry effective redress for privacy violations by the press. Even if the PCC, under its revised Code, is successful in blocking the sale of ill-gotten paparazzo photographs, the day is gone when the press are the

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140. REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, *supra* note 2, at para. 3.20.

141. Barendt, *supra* note 15.

142. Speech by the Rt. Hon. Lord Wakeham, *supra* note 85.

singular masters of mass media. Any boycott the PCC calls regarding photographs of a particular incident will only serve to stimulate market demand. Because this may in fact prove to be even more profitable for the paparazzi and individual violators, it could have the adverse effect of increasing privacy violations.

It will be up to the judiciary to create a right to privacy in England. Last year, Lord Bingham, the British equivalent to the United States Supreme Court's Chief Justice, was said to have forewarned Parliament that if it failed to protect personal privacy, "the judges would."<sup>143</sup> It appears that Lord Bingham will soon have the opportunity to realize his threat. The seemingly inevitable incorporation of the European Convention of Human Rights into UK law<sup>144</sup> will place the future of the right to privacy, not in the hands of the European Court of Human Rights, but in the hands of the English judiciary. Because Article 8's right to privacy as it relates to intrusions by the press has not been well defined by the Court in Strasbourg, it will remain necessary for British judges to determine its scope. The title and content of the White Paper itself makes this suggestion. "Rights Brought Home points out [that] British judges will have more, not less, impact on European Human Rights jurisprudence."<sup>145</sup>

Lord Bingham's remark also suggests that British judges, after years of frustration over the lack of authority to provide just remedies, are quite eager to protect privacy rights. It also appears likely that public sentiment since the death of Diana has provided yet another impetus to act. Continued denial of the right now, perhaps more than ever before, may serve to seriously undermine public confidence in the judiciary. So, despite their prior track record, British judges may well create a broader right than would have been defined by the European Court of Human Rights in the full course of time -- given the Court's limitation to define the right according to a common understanding within the European Community.

Prior to the drafting of the Human Rights Bill, it was the hope of privacy rights advocates that the Strasbourg Court would provide English citizens the privacy protection they lacked. Ironically, it now appears that

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143. Robert Rice, *Top Judge Says Privacy Law Will Not be Needed*, FINANCIAL TIMES (London), Oct. 9, 1997, available in 1997 WL 14785012.

144. Most commentators note little opposition to the Human Rights Bill. I have found only one reference in the U.K. press which suggests that the Tories may be unhappy with the Bill. Michael Streeter, *Human Rights: Bill Leaves Unanswered Questions*, THE INDEPENDENT (London), Oct. 25, 1997, available in 1997 WL 15213387.

145. *A Milestone for Human Rights - But Keep Judges from Privacy*, THE GUARDIAN (London), Oct. 25, 1997, available in 1997 WL 14737350.



England, heretofore one of the few countries in the European Union with no right of privacy at all, may assist the Court in Strasbourg to define the right more broadly. Long overdue, the right to privacy is finally ripe for broad recognition in England and in Europe.

**THE RIGHT TO DIE WITH DIGNITY WITH THE  
ASSISTANCE OF A PHYSICIAN: AN ANGLO,  
AMERICAN AND AUSTRALIAN INTERNATIONAL  
PERSPECTIVE**

*By Elizabeth Woods\**

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“No decent human being would allow an animal to suffer without putting it out of its misery. It is only to human beings that human beings are so

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cruel as to allow them to live in pain, in hopelessness, in living death, without moving a muscle to help them."<sup>1</sup>

## I. INTRODUCTION

Individuals should have the right to end their life with dignity at the time of their own choosing, but this right must be carefully balanced with the idea of a right to life. Thus, seeking a balance between the two *rights* is the crux of the problem and the corresponding solution. Modern medicine has the ability to prolong life far beyond what was once conceived. The question now becomes one of an individual's right to self-determination versus society's interest in prolonging life. In ancient China, family members would take elderly, senile people into the woods with a basket of food. After saying their farewells, the elderly people would be left behind, in order for nature to take its course and allow them to die in peace.<sup>2</sup> Today's society might find this behavior cruel, but where should the line be drawn?

The first part of this Note will discuss recent developments in the law of the United States and the impact on physician assisted suicide controversy. The second part will explain important case and statutory law in the British Isles and Australia. Next, this work will discuss international law as it relates to the law of the aforementioned countries and to the overall issue of death with dignity and the right to life. Finally, the Note will conclude that the global community must take an active role in promoting individual sovereignty and criminal immunity by allowing a terminally ill individual a right to a dignified death, with the help of a physician.

## II. BASIC FRAMEWORK

### A. Definitions

There are many terms to describe the current controversy over assisted suicide. Often the term euthanasia is used as a synonym. Euthanasia is the intentional act of causing another's death.<sup>3</sup> There are a

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1. DONALD W. COX, *HEMLOCK'S CUP* 92 (Prometheus Books 1993) (quoting Isaac Asimov).

2. *Id.* at 19.

3. Alison C. Hall, *To Die with Dignity: Comparing Physician Assisted Suicide in the United States, Japan and the Netherlands*, 74 WASH. U. L.Q. 803, 803 n.3 (1996). Webster's New Collegiate Dictionary defines euthanasia as "the act or practice of killing individuals . . . that are hopelessly sick or injured for reasons of mercy." WEBSTER'S NEW COLLEGIATE DICTIONARY 287 (7th ed. 1967).

few sub-categories: passive and active, voluntary and involuntary. Active, which is also referred to as positive or direct, euthanasia is where death is produced deliberately and actively by positive means.<sup>4</sup> Passive, also referred to as negative or indirect, euthanasia is where death is deliberately produced by withholding or withdrawing ordinary means of nutrition or treatment.<sup>5</sup> In the case of voluntary euthanasia, a terminally ill patient, of competent mind, can request an administered death.<sup>6</sup> In involuntary euthanasia, a physician ends the life of a terminally ill patient, without the express request from the patient.<sup>7</sup> Physician assisted suicide occurs where a patient is given medication or other assistance to end the patient's life.<sup>8</sup>

The right to die does not refer to a constitutionally imposed fundamental right, but rather the right of the patient to request help from a doctor to assist in a dignified death, without the possibility of criminal penalties applying to the physician's actions. Thus, the idea that people have a right to end their lives is often confused with the idea that man is free to end his life when he so chooses, but that does not translate to an inherent right. What terminally ill people should have is a choice to have a physician help them to die in a dignified manner, and not to have the doctor criminally liable for such action.

### *B. Slippery Slope Argument*

The opponents to any reform in the current assisted suicide battle, often point to disastrous results that will occur if the law is relaxed and criminal sanctions for assisting physicians are eliminated. This is referred to as the "slippery slope." According to this theory, once the door is opened to some medically assisted suicide patients, there will be an increase in "killing" that will extend to other groups in a compulsory, coercive manner. The experience of Nazi Germany is often cited as proof of this argument's validity. The basis of the argument is that the total annihilation of groups of people started with the idea that it was acceptable to allow chronically sick people to die. The idea gradually moved to include the socially unproductive and ended with the destruction of all

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4. Dr. John Wilkinson, *The Ethics of Euthanasia*, 6 J.L. SOC'Y SCOT. 243 (1990).

5. *Id.*

6. Hall, *supra* note 3, at 803.

7. J. K. MASON & R. A. MCCALL SMITH, *LAW AND MEDICAL ETHICS* 231 (Butterworths 1987).

8. *Id.*

9. GERALD A. LARUE, *PLAYING GOD* 21 (Moyer Bell 1996).

Jews, homosexuals, and non-Germans.<sup>10</sup> However, this argument falls short, because the concept of voluntary euthanasia or assisted suicide was never implemented in Nazi Germany. Additionally, the proposed changes in the current law that include eliminating the criminal penalties for doctors to help a patient to die, are presented in the confines of a democracy, not a dictatorship. Further, the existence of the legislature, as well as the courts, provide checks on the potential for abuse. Any human endeavor or system has the potential for misuse or abuse, but that is not a powerful reason to deny human autonomy and the need for terminally ill people to be able to eliminate their own suffering.

### III. THE LAW IN THE UNITED STATES

#### A. 1997 Supreme Court Decisions

On June 26, 1997, the Supreme Court, in an unanimous decision, held that terminally ill people do not have a constitutional right to physician assisted death. In *Washington v. Glucksberg*, Chief Justice Rehnquist delivered the opinion, which held that the right to physician assisted suicide was not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.<sup>11</sup> The Court further held that the state of Washington's ban on physician assisted suicide was rationally related to the government interests of preservation of life, maintaining integrity in the medical profession, and protecting terminally ill people who might be pressured into rash decisions about ending their life.<sup>12</sup> Despite this ruling, the court did not preclude any rulings by states to legalize such assisted suicide. Chief Justice Rehnquist, writing the majority opinion, conceded that an "earnest and profound debate" should ensue on the issue of physician assisted suicide.<sup>13</sup>

Similarly, the Supreme Court also held that there is no fundamental right to die in a case challenging New York's law prohibiting physician assisted suicide.<sup>14</sup> The *Vacco* case was based on the Equal Protection Clause of the Fourteenth Amendment. The petitioners said that the equal protection argument applied because the law discriminates against those terminally ill patients who were not on life support. The patients on

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10. *Id.* at 25 (citing Dr. Leo Alexander, *Medical Science Under Dictatorship*, 39 *NEW ENG. J. MED.* 46 (1949)).

11. *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

12. *Id.*

13. *Id.* at 2275.

14. *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

life support were able to hasten their deaths, while those not hooked up to any life sustaining machines were not given the same opportunity. The Equal Protection argument failed because the Court said that if the facial value of either the assisted suicide ban or the law permitting patients to refuse medical treatment is considered, neither treats anyone differently. Everyone is entitled, if competent, to refuse medical life-sustaining treatment. Additionally, no one is permitted to assist in a requested suicide.

The recent Supreme Court rulings found that the group of mentally competent, terminally ill patients was not a suspect class,<sup>15</sup> so the scrutiny level could not be increased. As in the *Glucksberg* case, the rational basis test applied, and the Court found that the state interests of preserving life and prohibiting intentional killing, were legitimate interests.

The *Vacco* Court did clarify and strengthen the right to refuse medical treatment. In addition, the Court took the cause farther when it said that a doctor may provide palliative, or pain easing care, even if this case might hasten the patient's death.<sup>16</sup> The Court looked to the intent of the physician. As long as the doctor's intent was not specifically to kill the patient, the aggressive attack to decrease pain was acceptable.

The "pain easing" argument rests on a tenuous base at best. If a physician's purpose is to ease a patient's pain, then aggressive palliative care may be given. Thus, the physician can escape the box by merely restating the intention as one of relief and not death. Under such rationale, a physician may administer several prescriptions or injections that would not individually cause death, but in the aggregate will make death certain. As long as the physician says the medication is intended to alleviate suffering, the lethal dosage is permitted.

It was only seven years ago, that the Court permitted the patient's right to refuse life-sustaining treatment.<sup>17</sup> Justice O'Connor, in a concurring opinion, recognized that allowing a patient to endure unwanted medical assistance was an intrusion of personal liberty and dignity.<sup>18</sup> However, in the recent Supreme Court cases, the Court found a substantial difference between "letting a patient die and making a patient die."<sup>19</sup> The

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15. *Id.* at 2297.

16. *Id.* at 2298.

17. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). The United States Supreme Court recognized that the right to refuse unwanted medical care is a *liberty* interest, and is subject to Constitutional protection. *Id.*

18. *Id.* at 288.

19. *All Things Considered* (NPR radio broadcast, June 26, 1997) (transcript #97062611-212).

Court relied on the principals of causation and intent. Thus, when medical treatment is withdrawn, the patient dies from the underlying condition. Whereas with physician assisted suicide, the patient is actually "killed" by the medication.

Lawrence Tribe, a Harvard Law Professor, who represents patients wishing to utilize physicians' assistance to end their life, feels the recent decisions amount to a victory. Although, the recent decisions do not preclude a federal Constitutional claim, the issue is now left primarily to the states. Tribe feels that a dying patient might have a better chance of relief in the lower courts.<sup>20</sup>

### B. Other Federal Court Rulings

Previous rulings in the federal appeals courts, in both the Second and Ninth Circuits have presented favorable outcomes for proponents of physician assisted dying. In *Compassion in Dying v. Washington*,<sup>21</sup> the Court held that physician assisted suicide is an intimate personal decision that is protected by the 14th Amendment's Due Process Clause. The Court recognized a liberty interest in choosing the time and manner of one's own death. Judge Reinhardt stated that it was a personal choice and those people who chose not to implement the choice were free to do so, but they were "not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society."<sup>22</sup>

Similarly, the Second Circuit struck down New York's law banning assisted suicide, but this time an equal protection argument was used.<sup>23</sup> Thus, there was no rational basis for distinguishing between unwanted medical treatment and assisted suicide.

The United States was founded on the idea that individual liberty and autonomy are integral to the strength of the nation. Justice William Brennan said, "Our Constitution is a charter of human rights, dignity and self-determination."<sup>24</sup> In 1976, the courts took the right of self-determination into the privacy spectrum.<sup>25</sup> In this case the New Jersey Supreme Court held that when an individual has a terminal illness that is

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20. *Id.*

21. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996).

22. *Id.* at 839.

23. *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

24. William J. Brennan, Jr., *What the Constitution Requires*, N.Y. TIMES, Apr. 28, 1996, § 4, at 13.

25. *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

medically impossible to reverse, that person has a right to die.<sup>26</sup> Additionally, the New Jersey Court held that criminal law could not punish the doctor for the free exercise of the right to privacy.<sup>27</sup>

The irony of criminal sanctions for physicians assisting in a patient's death, is that often there is very little probability that doctors will actually be prosecuted. In 1990, Dr. Jack Kevorkian assisted his first patient, Janet Adkins in allowing her to self administer a lethal dose of drugs. Dr. Kevorkian was subsequently charged with first-degree murder. However, the charges were dropped because Michigan did not have a law prohibiting assisted suicide.<sup>28</sup> Despite many subsequent lawsuits, no court to date, has been able to successfully prosecute Dr. Kevorkian.

### C. Legislative Decisions

The courts are not the only branch of government prone to apparent contradiction. President Clinton recently signed into law a federal ban on money for physician assisted suicide.<sup>29</sup> In April, 1996, the White House issued a statement where the President expressed his opposition to assisted suicide.<sup>30</sup> Additionally, in 1992, President Clinton spoke out against doctor-assisted suicide. At a town meeting he said, "I don't support it. I just don't agree with it."<sup>31</sup> However, President and Mrs. Clinton have each signed living wills.

The language of the *Cruzan* case in the United States, which stated that "although a patient had a Constitutional right to refuse medical care, a state could require clear and convincing evidence"<sup>32</sup> that the patient wished to terminate their life. A living will would satisfy that prong of the requirement. By mid-1992, forty-nine states passed some kind of Living Will legislation. Currently, all fifty states now have provisions for advance medical directives or living wills.<sup>33</sup>

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26. *Id.* The Supreme Court of New Jersey developed a widespread definition of a permanent vegetative state: "if there is no reasonable possibility of [a person] ever emerging from [a] comatose condition, to a cognitive, sapient state, life-preserving systems may be withdrawn." *Id.* at 671.

27. *Id.*

28. Hall, *supra* note 3, at 818 n.85.

29. Assisted Suicide Funding Restriction Act, Pub. L. No. 105-12, 111 Stat. 23 (1997) (codified and amended at 42 U.S.C. § 14401 (1997)).

30. *Morning Addition* (NPR Radio Broadcast, Oct. 30, 1996) ( Transcript # 1988-9).

31. *Id.*

32. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990).

33. COX, *supra* note 1, at 141.



Federal law has recently expanded the power of a living will. The Patient's Self-Determination Act (PSDA) passed the United States legislature in November 1990.<sup>34</sup> The act requires that all federally funded health care institutions inform patients of their right to prepare a Living Will, and compels the hospitals to respect the patient's wishes. The passage of the PSDA, means that there is a federal law allowing Living Wills to be considered as "evidence" in order to pass the *Cruzan* test.

In addition to the courts, various State legislatures have attempted to pass assisted suicide laws. The Oregon Death With Dignity Act was the first law of its kind in the United States.<sup>35</sup> On November 5, 1997, for the second time in three years, the citizens of Oregon voted in favor of doctor-assisted death.<sup>36</sup> The legislation requires that many steps be followed before allowing anyone to receive medical assistance to allow individuals to end their life. Among the controls are the requirements that a second physician's opinion would be required; a full psychiatric examination; and documentation showing the patient is not being coerced.<sup>37</sup>

#### IV. THE LAW IN THE BRITISH ISLES

##### A. ENGLAND

In the United Kingdom, voluntary assisted suicide is treated somewhat differently than in the United States. The Courts in England look to common law for precedent. In an early case, a doctor was acquitted of murder charges after he injected a massive dose of phenobarbitone into a patient with inoperable lung cancer.<sup>38</sup> The doctor wished to ease the patient's pain. Thus, the law looks to the intention of the physician, not his motive in terminating a patient's life. "If a doctor intends to kill, he is as liable to prosecution as is the layman."<sup>39</sup> The High Court, in an October 1997 hearing, held that Annie Linsell will be able to

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34. Patient Self-Determination Act Provision in the Omnibus Budget Reconciliation Act 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990) [hereinafter PSDA].

35. OR. REV. STAT. § 127.800 (1995) [hereinafter Measure 16]. In a case filed subsequent to Measure 16, the district court enjoined the statute from enforcement and declared it unconstitutional on equal protection grounds. *See Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995). But in February 1997, a three judge panel (3-0), in the Ninth Circuit, found that plaintiffs did not have standing to challenge the Act. The Court did not consider the Constitutional merits of the case. *Lee v. State of Oregon*, 107 F.3d 1382 (9th Cir. 1997).

36. Ellen Goodman, *Oregon Casts Ballots for Dispensing Death*, TAMPA TRIB., Nov. 8, 1997, at 14.

37. Measure 16, *supra* note 35.

38. *R v. Carr-Briant* [1943] 2 All E.R. 156.

39. SMITH, *supra* note 7, at 232.

receive diamorphine to achieve a pain-free death, once she reaches the point where she is unable to swallow. Even though the diamorphine would inevitably shorten her life, Annie's doctor will not be prosecuted for her death because the drug was mainly to relieve her pain.<sup>40</sup> The idea of looking to the intention of the physician is comparable to the recent United States Supreme Court rationale where palliative care could be withdrawn if it would ease the patient's suffering.

Public opinion seems to be moving towards the idea that assistance is oftentimes acceptable in the case of terminally ill patients. A 1986 survey of the British public reported that seventy-five percent of the public agreed that the law should allow adults to receive help towards an immediate and peaceful death, if they were terminally ill.<sup>41</sup> Even though the tide seems to be in favor of relaxed assisted suicide laws, the House of Lord Select Committee on Medical Ethics reported in 1994, that they opposed any change in the law.<sup>42</sup>

The first monumental right to die case in the United Kingdom was that of *Airedale Health Authority v. Bland*.<sup>43</sup> After a stadium disaster, Tony Bland was left in a "persistent vegetative state."<sup>44</sup> United States Supreme Court Chief Justice Rehnquist defined persistent vegetative state as a condition "in which a person exhibits motor reflexes but evinces no indications of significant cognitive function."<sup>45</sup> The *Bland* case set out a number of tests to be applied in right to die cases. First, the requirement that those who are seeking to have treatment terminated need to apply to the court for a declaration. Secondly, the applications must be preceded by a full investigation where independent medical opinions are sought and explored. "No one, including the court, is entitled to consent to, or refuse, medical treatment on behalf of mentally incompetent patients."<sup>46</sup> The courts then, act as a check because physicians must come to court before

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40. World News Bulletins, (Oct. 1 to 31, 1997) <[http://www.rights.org/~deathnet/Wnews\\_current.html](http://www.rights.org/~deathnet/Wnews_current.html)>.

41. SMITH, *supra* note 7, at 233.

42. Tim Helme & Nicola Padfield, *Lord Walton's Sandcastle*, 144 NEW L.J. 1521 (1994).

43. *Airedale NHS Trust v. Bland*, [1993] 1 All E. R. 821.

44. *Id.*

45. *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 226 (1990). In the 5-4 decision, the court, for the first time, endorsed the idea that the 14th Amendment guarantees the right to avoid unwanted medical treatment. The court applied this idea to all patients providing they had made their wishes known. The ruling was similar to Supreme Court decisions in the 1997 term, as it basically passed the decision to end life back to the States because the States could allow removal of life-sustaining mechanisms.

46. Julie Stone, *Withholding life-sustaining treatment: The Ultimate Decision*, 144 NEW L.J. 205 (1994).

initiating any death actions, in order to prevent doctors from making life ending decisions arbitrarily.

While the *Bland* case was not decided on the basis of a written constitution, there are still elements from common law that can be extracted that are similar to a right to self-determination and bodily integrity. The right to "self determination" was recognized by Lord Scarman in 1985.<sup>47</sup> The case involved a patient's right to be informed of inherent risks in recommended surgery. While English law did not recognize the doctrine of informed consent, the Court acknowledged the right of the patient to make her own mind based on relevant facts.<sup>48</sup>

The *Bland* case closely parallels the American case of Nancy Cruzan, a road accident victim. Nancy Cruzan was a thirty-two year old woman who was comatose for seven years after a car accident.<sup>49</sup> Cruzan's parents provided the United States Supreme Court with evidence that passed the "clear and convincing" test; showing that Nancy would not want to live by artificial means. The Supreme Court ruled that Nancy, who was in a permanent vegetative state, could be removed from all feeding and hydration pumps.

The first English case to interpret the holding in *Bland* was *Frenchay Healthcare NHS Trust v. S*.<sup>50</sup> The Court of Appeal held that it would be lawful for doctors to refuse to reinsert a feeding tube into a patient who had suffered acute brain damage. After the request of the patient's mother, the tube was not reinserted and S died shortly after the Court of Appeal Hearing of January 14, 1994.<sup>51</sup> The Court used the "best interests" test, to decide what treatment if any, was best for the patient. This case differs from *Bland* because it was presented as an emergency, and therefore, was not subject to the required court approved authorization to have life sustaining mechanisms removed.

## B. Scotland

Janet Johnstone, who entered a permanent vegetative state after an unsuccessful bid with suicide, became one of the most famous "right to die" cases in Scotland.<sup>52</sup> The Court set up a determinative balancing test to

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47. *Sidaway v. Bethlem Hospital Governors* [1985] 1 All E.R. 643 (Lord Scarman, dissenting).

48. *Id.*

49. *Cruzan*, 497 U.S. at 261.

50. *Frenchay Healthcare Nat'l Health Serv. Trust v. S*, [1994] 2 All E.R. 403.

51. Stone, *supra* note 46, at 205.

52. *Law Hospital NHS trust v. Lord Advocate* [1996] 2 L.R. 403 (Fam. 1996).

finalize a decision to discontinue medical treatment.<sup>53</sup> The test is to decide whether it is in the patient's best interests that any medical treatment be discontinued. The Court held that after weighing the physicians diagnoses and the fact that Ms. Johnstone had been in a vegetative state for over four years with no hope of recovery, it would not be unlawful to remove the feeding apparatus. The rationale the Court used was similar to the *Frenchay* case, as the *best interests* test was applied to determine the outcome.

### C. *The Republic of Ireland*

Often the argument against physician assisted right to die claims is that euthanasia is an easy way out of a bad situation. An Irish case portrays a different view of the issue. A mother who requested her daughter's right to die with dignity, while watching hopelessly as her daughter remained comatose for twenty three years, was certainly not looking for an easy way out. Thus, *In re Ward of Court*, the Irish Supreme Court looked at the right to die issue of the forty-five year old woman, whose condition remained unchanged for twenty three years.<sup>54</sup> The woman was kept alive by a naso-gastric feeding tube. The Irish Supreme Court upheld the cessation of treatment for the woman, after her parents petitioned the court. Although it was reported that the woman could track things with her eyes, her mother said, "In 23 years of constant and regular visiting, I got no response from her."<sup>55</sup> The Irish Court, in contrast to the English *Bland* decision, had to consider the requirements of the Irish Constitution, and not just common law.

The Irish Constitution sets out several provisions that are applicable to the right to die cases. Some of those, but not limited to, are

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53. *Id.*

54. *In re A Ward of Court* [1995] 2 I.L.R.M. 401.

55. After a long battle with both the hospitals and the courts, the woman's mother was allowed to bring her daughter home to die. "Once we had my daughter in my house it seemed as though a great calm descended on us. There was great sadness too but it was accompanied by peace we felt that, at last, we were in control." Her mother also stated that, "I can say, without fear of contradiction, that her eight days of dying were more peaceful than the previous 23 years of so called living." *The Mother of the Wom[er]n in the 'Right to Die' case Tells Her Story*, THE IRISH TIMES, Feb. 24, 1996, at 10. Similarly, the husband of a woman who remained in a permanent vegetative state for over four years in Scotland, battled for the right to allow his wife to die in peace. "It has been very hard for everyone over the past four years. It's better for me now to remember the past, not the present. I didn't want Janet to die, but her life ended more than four years ago." Stuart McCartney, *Family's Tears for Brave Gran Janet*, SCOT. SUNDAY MAIL, June 2, 1996, at 2.

the right to life, the right to bodily integrity and the right to equality.<sup>56</sup> In *Re a Ward of Court*, Chief Justice Hamilton says, "As the process of dying is part, and an ultimate consequence of life, the right to life necessarily implies the right to have nature take its course and to die a natural death."<sup>57</sup>

## V. THE LAW IN AUSTRALIA

Both in Australia and the United States, suicide itself is not a criminal act, yet physicians who assist a suicide can often be prosecuted and/or lose their licenses. In 1961, England decriminalized suicide and attempted suicide, but left assisted suicide a crime punishable by fourteen years in prison.<sup>58</sup>

The laws affecting physician assisted suicide differ from State to State in Australia. Similarly, criminal law is mainly administered by the States and Territories, rather than the Commonwealth. In 1995, Australia's Northern Territory became the first legislature in the post-war world to legalize a choice for terminally ill patients to have a physician assist them in their death. In 1995 the Legislative Assembly of the Northern Territory passed the Rights of the Terminally Ill Act 1995 (ROTTI).<sup>59</sup>

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56. BUNREACTH NA HEIREANN [Constitution] art. 40, § 3, cl. 2 (Ir.). "The State shall, in particular by its laws protect the best it may from unjust attack and, in the case of injustice done, vindicate the life...of every citizen." Additionally, the Constitution appears to guaranty a degree of personal bodily integrity. "The State guarantees in its law to respect, and, as far as practical, by its laws to defend and vindicate the personal rights of the citizen." *Id.* art. 40, § 3, cl. 1. Lastly, the Constitution sets forth a right to equality. "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to the differences of capacity, physical and moral, and of social function." *Id.* art. 40, § 1.

57. *In re A Ward of Court*, 2 I.L.R.M. at 426.

58. COX, *supra* note 1 at 62.

59. Rights of the Terminally Ill Act (NT), No. 12 (1995) (Austl.) [hereinafter ROTTI]. The provisions of the Act relating to the assistance in terminating a person's life are: "[a] patient who, in the course of a terminal illness, is experiencing pain, suffering and /or distress to an extent unacceptable to the patient, may request the patient's medical practitioner to assist the patient to terminate the patient's life." *See id.* § 4. Further, terminal illness is defined as "an illness which, in reasonable medical judgment will, in the normal course, without the application of extraordinary measures or of treatment unacceptable to the patient, result in the death of the patient." *See id.* § 3. There are considerable standards that must be met before a physician can assist a patient. Some of the conditions include:

- (a) the patient has attained the age of 18 years;
- (b) the medical practitioner is satisfied, on reasonable grounds, that -
  - (i) the patient is suffering from an illness that will, in the normal course and without the application of extraordinary measures, result in the death of the patient;

The legality of the Act was challenged in *Wake and Gondarra v. The Northern Territory of Australia*.<sup>60</sup> The Supreme Court upheld the validity of the Act.<sup>61</sup> The plaintiffs challenged the Act arguing that the Northern Territory's legislative power is subject to a fundamental principle underlying the common law that there is an undeniable right to life, and thus, the "fundamental right" of a patient would be denied. No member of the Court wanted to state specifically that there was a principle of law in Australia that supported an inalienable right to life.<sup>62</sup> Justice Angel said he did not believe there was a 'right' to life. "It seems to me to speak of a 'right' to life is essentially meaningless if by that expression is meant a legal right."<sup>63</sup>

The Federal Government in Australia has the Constitutional power to override laws of Australian Territories, much as the system in the United States where the Supremacy Clause<sup>64</sup> of the United States Constitution grants the federal government authority to trump individual States' legislation. In an effort to repeal the ROTTI Act, Federal Liberal MP Kevin Andrews introduced A Private Member's Bill(PMB) into the

(ii) in reasonable medical judgment, there is no medical measure acceptable to the patient that can reasonably be undertaken in the hope of effecting a cure; and

(iii) any medical treatment reasonably available to the patient is confined to the relief of pain, suffering and/or distress with the object of allowing the patient to die a comfortable death;

(c) two other persons, neither of whom is a relative or employee of, or a member of the same medical practice as, the first medical practitioner or each other -

(i) one of whom is a medical practitioner who holds prescribed qualifications, or has

(ii) prescribed experience, in the treatment of the terminal illness from which the patient is suffering; and

(iii) the other who is a qualified psychiatrist, have examined the patient . . .

(iv) in the case of the qualified psychiatrist referred to in subpar (ii) - that the patient is not suffering from a treatable clinical depression in respect of the illness; . . .

(f) the medical practitioner is satisfied, on reasonable grounds, that the patient is of sound mind and that the patient's decision to end his or her life has been made freely, voluntarily and after due consideration.

60. *Wake and Gondarra v. N. Terr. of Austl.* (1996) No. 112 (N. Terr. Sup. Ct.).

61. *Id.*

62. Australasian Legal Information Institute, *Euthanasia* (visited Nov. 20, 1997) <[www.austlii.edu.au](http://www.austlii.edu.au)> .

63. *Wake*, No 112, slip op. at 62.

64. U.S. CONST. art. IV, § 1.

House of Representatives. The Bill passed both the House, by a vote of 88 to 35, and the Senate by a vote of 38 to 33.<sup>65</sup> The effect of this law is that the ROTTI Act is overruled.

As an illustration of how quickly the world is changing, books that explained options about euthanasia were banned in Australia just a few years ago. Derek Humphry, founder of the Hemlock Society, and author of *Final Exit*, had his book banned. However, by August 1992, the Euthanasia Society in Australia made a plea to the government and in less than a year, the ban was lifted.<sup>66</sup>

## VI. INTERNATIONAL LAW

Human rights and self-determination have been established as important goals in international law. These principles have been established by the Charter of the United Nations.<sup>67</sup> Additionally, international treaties and customary law acknowledge universal respect for life which is coupled with regard for individual autonomy.

### A. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) is an international treaty, that was adopted by the UN General Assembly in 1966.<sup>68</sup> Australia ratified the ICCPR on August 13, 1980. Both Great Britain and the United States are also parties to the treaty. The ICCPR is binding on all those countries that have been a party to it. The ICCPR requires State parties to adopt legislative or other measures to support the rights recognized in the treaty. The Australian Parliament has not enacted the ICCPR as part of Australian law. However, the ICCPR is attached as a schedule to the Human Rights and Equal Opportunity Commission Act 1986.<sup>69</sup>

Article 1 provides that "all peoples have the right of self-determination. By virtue of that right they freely determine their political

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65. Queensland Right to Life, *Overview of Law in Australian States and Territories* (visited Oct. 20, 1997) <[www.qrtl.org.au/news/index.htm](http://www.qrtl.org.au/news/index.htm)> .

66. *Id.* at 42.

67. "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...." U.N. CHARTER art. 55.

68. International Covenant on Civil and Political Rights, G.A. res.2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, *entered into force* March 23, 1976 [hereinafter ICCPR].

69. Human Rights and Equal Opportunity Commission Act, 1986, Austl. Act 125. The Act asserts the universality of human rights and "every person is free and equal in dignity and rights." *See id.* § ii.

status and freely pursue their economic, social and cultural development.”<sup>70</sup> It is not clear if the provision advocates a blanket right to self-determination in every area of life or if it is limited to political, economic and social arenas. Even if self-determination was so limited, certainly making provisions for one’s own death would fall into one, if not all, of the above categories. Additionally, the use of the term “self-determination” followed by a period to end the sentence, indicates a lack of restrictions on free choice in personal matters. Thus, the second sentence in Article 1 does not provide a finite list, but rather gives examples of ways in which individuals are free to make determinations for themselves.

The right to self-determination is often balanced with a right to life. Article 6 provides: “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>71</sup> Even if the right to life is an inherent right, it may be possible to waive this right. Thus, as with other rights, an individual may decide that there is an appropriate time not to assert the right, and to choose a peaceful death.

The final sentence of Article 6 limits the scope of the right. The use of the word “arbitrary” is crucial to the analysis of the scope as only deprivations that are “arbitrary” are in violation. The right to life is apparently not absolute. A number of delegates to the Human Rights Commission suggested that arbitrarily was equivalent to an Anglo-American phrase, such as “without due process of law.”<sup>72</sup> Due Process implies a right of the person affected to be heard and to be able to make an informed choice. At a minimum then, passive euthanasia would appear to be permissible under the treaty, because legal controls are currently recognized to allow refusal of medical treatment.

### *B. Universal Declaration of Human Rights*

The General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights on December 19, 1948.<sup>73</sup> The Universal Declaration is not absolutely binding on United Nation members, but its provisions have been accepted all over the world. Article 3 provides that “[e]veryone has a right to life, liberty and security

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70. ICCPR, *supra* note 68, art. 1.

71. *Id.* art. 6.

72. Australasian Legal Information Institute, *supra* note 62, at 8.

73. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3rd Sess., art. 26, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].



of person.”<sup>74</sup> The application of Article 3 of the Universal Declaration’s right to life protection is not clear in the realm of assisted suicide. As in other treaties, it is possible that a victim’s consent may negate any illegal implications of the Universal Declaration. Additionally, Article 5 protects persons from inhuman and degrading treatment,<sup>75</sup> and so one can make an argument that the quality of life is relevant. Thus, assisted suicide does not *per se* conflict with the Universal Declaration. The protection of life should be considered in light of the provisions protecting degrading actions. An individual who experiences a debilitating medical illness should not only be able to refuse additional medical treatment, but should also be granted permission to end their life when further treatment is both futile and debasing.

### C. Universal Ethical and Philosophical Principles

Perhaps the best way to synthesize principles in international law with the concepts in Anglo-American law is to consider universal ethics. The ethical principle of double effect is relevant to the discussion on physician assisted death. This principle was formulated in western thought in the 17th Century by Roman Catholic theologians.<sup>76</sup> Double effect set out a test in which the good effect must be greater than the bad effect, provided the intention behind the action was a good one. If a proposed action satisfied the test, then it was ethically permissible.<sup>77</sup> Both the British custom of looking to the intention of the physician, as well as United States Supreme court test where the physician’s intent is considered, support the concept of double effect.

In addition to the “double effect” principle, John Stuart Mill’s concept of individual sovereignty<sup>78</sup> points to the answer in the physician assisted dying debate. The idea that man is the supreme decision maker for himself supports an individual’s power to terminate their life, should they choose to do so. Thus, as long as man’s decision is made in an uncoerced manner, and the physician’s intent was to help the patient, then the greater good of the individual’s free choice, outweighs the bad effect of the death.

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74. *Id.* art. 3.

75. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Id.* art. 5.

76. Wilkinson, *supra* note 4, at 245.

77. *Id.*

78. “Over himself, over his own body and mind, the individual is sovereign.” JOHN STUART MILL, ON LIBERTY AND OTHER WRITING 13 (Cambridge Univ. Press 1989).

International societies express an interest in the sanctity of life. In Anglo-American law, murder is proscribed, and abortion is available with limited application. Ironically, the United States still imposes the death penalty as a criminal sanction. The death penalty in Great Britain is accepted, but only in extreme situations. Australia has formally abolished the death penalty. The sanctity of life; therefore, has an exception in many countries. If a state or government can make the decision to end a person's life, then an individual should also be granted control over the decision to end his own life in exigent circumstances.

## VII. CONCLUSION

Australia, Great Britain, Ireland and the United States recognize a common law right of individuals to refuse medical treatment. Additionally, the right to self-determination extends to members of each of these nations through national, as well as international law. If members of these societies that are physically well are to benefit from these concepts, it follows that the rights extend to those who are terminally ill or unable to speak for themselves.

Just as Australian Courts have found no fundamental right to life, American courts have held there is no fundamental right to die.<sup>79</sup> International law consistently recognizes a right to life balanced with an individual's sovereignty over personal decisions. Even though there is no right to die in the United States Constitution, the states or individual countries could create such a right, just as the Australian Northern Territory did. The international community should follow Australia's lead in formulating strict guidelines to accommodate an individual's choice to die with dignity.

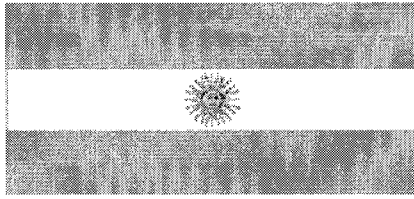
The advances in medical technology give the physician great opportunities to share in the decision making process to aid a terminally ill patient in a dignified death. However, without a legal framework and with fears that such a decision could result in criminal sanctions, these decisions are made behind closed doors, where neither the patient or the physician's rights are protected.

Legislation such as the Australian Act and laws upheld by American, Irish and English Courts, show that the world is ready for change. Although change ebbs and flows, it is nevertheless evident that society is on the brink of a major move toward respecting the autonomy of

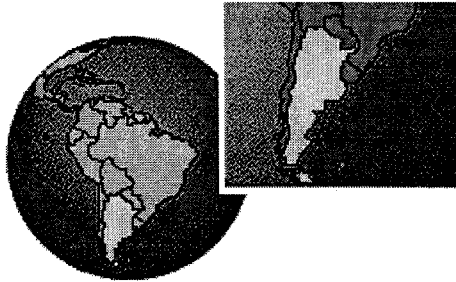
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79. In an address to Catholic University's School of Philosophy, Justice Scalia said it is "absolutely plain that there is no right to die. There were laws against suicide" in the states at the time the Constitution was enacted. *Scalia's Right to Die Remarks Criticized*, L.A. TIMES, Oct. 29, 1996, at 15.

the individual in matters of intimate concern. While the idea of a blanket approval of assisted suicide is not advocated, assisted suicide carried out within strict guidelines must become a right that every human being is granted.



Microsoft Illustration



## ARGENTINA

### **Judiciary**

Federal courts include the Supreme Court, 17 appellate courts, and district and territorial courts on the local levels. The provincial court systems are similarly organized, comprising supreme, appellate, and lower courts.

### **Magistratura**

Las cortes federales incluyen la Corte Suprema, 17 cortes de apelación, y cortes de distrito y territoriales en los niveles locales. Los sistemas judiciales provincianos son similarmente organizados, comprendiendo supremo, apelación, y las cortes más bajas.