The Changing Faces of Human Rights

University of Michigan Law School

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the changing faces of human rights

In preparation for this century's last issue of Law Quadrangle Notes, several faculty members were asked to reflect on their professional interests through the prism of human rights. The results will illuminate "the question of human rights from a variety of viewpoints as varied and diverse as the people who write the essays that make up the section," they were told. And their essays do just that. Parallel introductions by Catharine A. MacKinnon, the Elizabeth A. Long Professor of Law, and Eric Stein, the Hessel E. Yntema Professor Emeritus of Law, set the tone for these discussions of human rights by drawing sharp focus from very different starting points. Other writers follow their lead. The result is a rich weave of many threads.
Human rights are a response to atrocity denied. Before they are recognized, the acts are considered, by people not subjected to them, as either too extraordinary to be conceivable or too ordinary to be atrocious. If the events are socially marked as unusual, the fact they happened is denied; if they are regarded as usual, the fact they are violating is denied. The basic psychology seems to be, if it's happening, it's not so bad, and if it's really bad, it isn't happening. In this way, acts that are common to human experience, like rape in war and rape in peace, are beneath notice because they are so familiar, while acts that are uncommon to human experience, like the Nazis’ industrial murder and the Serbs’ industrial rape, are beyond belief.

When and where the denial stops, rights are recognized against the extreme and the normal, defining the victims as human. Inaugurating modern human rights as we know them in 1948, this process produced the Universal Declaration of Human Rights and the Genocide Convention when denial that the Holocaust occurred was supplanted by acknowledgment and determination that it not recur. Since then, escalating in the past decade, the same process has given rise to increasing recognition of women's human rights, giving back to the “other” half of the world's people the humanity that violence against them — which has been both normal and extreme, sometimes at the same time — takes away. The recognition that rape in genocide in life is genocidal rape under international law provides a paradigm instance of this development.

In the past decade, women's resistance to their status as unfit for a human being has provided the cutting edge of change in international human rights. Atrocities to women were denied. Women's refusal to accept that denial is shifting both the form and the content of the human rights paradigm. Since states have not represented women, women's assertion of their human rights for themselves has required that human beings move to the center of the process, supplementing the state's traditional role as human rights law's prime actor. And since states are often not the most immediate violators of women's humanity, less-than-state actors have increasingly been recognized as perpetrators, supplanting the traditional primacy of the state as the recognized defendant.

As ever, jurisdiction — who can claim what against whom where — has remained the primary legal battleground. The emerging women's model is to go far away from home to claim a women's human right to be free from violation by men at home. Sovereignty has given way to accountability, challenging impunity where dominion is greatest and most entrenched, whether some men recognize their own nationbuilding in other men's rape and genocide or not. As women have come to recognize that their human rights violations, to paraphrase Eleanor Roosevelt, begin close to home, national courts, offering enforcement powers that international forums do not yet have, have been increasingly employed by domestic and foreign nationals alike, asserting international legal principles that national courts, on their own, may not have recognized. In the face of authorities who continue often unresponsive, women take the law into their own hands through civil rather than criminal claims. As these movements continue into the next century, and the wall of denial that now surrounds many atrocities that survivors expose — such as pornography and child sexual torture — crumbles, survivors will be given back a real measure of the humanity that the violations and their denial takes away.
Professor Stein, a member of the international group that advised Czech and Slovak authorities on revision of the Czechoslovak and Czech constitutions, has served in the U.S. State Department, and was an adviser to the U.S. Delegation to the UN General Assembly. He has taught and lectured at American, European, and Asian universities and at the Hague Academy of International Law. Honorary vice president of the American Society for International Law, he also has served on the board of editors of the American Journal of International Law, the Common Market Law Review, Legal Issues of European Integration (Amsterdam), and Rivista di diritto europeo (Rome). He is co-author of European Community Law and Institutions in Perspective and author of Czechoslovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup. A collection of his essays, Thoughts From the Bridge: A Retrospective of Writings on New Europe and American Federalism, is being published this fall by the University of Michigan Press.

I begin this introduction with a question, which will puzzle most of our readers: Whatever happened to Article 2, Paragraph 7 of the UN Charter? This is the text embodying the foundational principle of classic international law — the prohibition of “intervention” in “matters essentially within the domestic jurisdiction of any State.”

Few of us have lived long enough to recall the great debates of the 1950s on whether the UN General Assembly had the authority to include in its agenda the item on the treatment of people of Indian origin in the Union of South Africa, and whether such action would amount to the prohibited intervention in the domestic jurisdiction of the “sovereign” Union. Later on, an even more emotional debate turned on the power of the assembly to discuss the issue of the general “apartheid” policy in that country, raised by India and Pakistan. The United States supported the assembly authority only to discuss the complaint; but year after year, it abstained on the assembly’s resolutions — until Henry Cabot Lodge, the American ambassador to the UN, a quintessential old-line Bostonian, persuaded President Eisenhower to overrule what he termed “the faceless bureaucrats” of the State Department “dominated by Western European diplomats.” Eventually, the United States joined a majority of the assembly in adopting a text, drafted with the connivance of the American delegation staff, that called for an “integrated society,” an idea invoked for the first time at the international level in the context of the South African problem. It took some courage to publicly support this resolution in the face of the powerful alliance of Southern Democrats and conservative Republicans in the U.S. Congress. And does anyone still remember the East-West confrontation over the assembly’s authority to deal with the state of human rights in Soviet-controlled Eastern Europe where the Soviet Union relied on the same Charter article in opposing the inclusion of the issue in the assembly agenda?

Yet today the charges of violation of human rights are routinely discussed in the UN and other international fora. The last third of the century has witnessed an increasing number of interventions in support of basic human rights values culminating in the NATO-led action in Kosovo. President Vaclav Havel termed it “the first war that has not been waged in the name of national interest, but rather in the name of principles and values.” (Address to the Canadian Senate, April 29, 1999, The New York Review of Books, June 10, 1999, 4 at 6.)

Forcible intervention, however, may be appropriate in extreme exigencies only and under international safeguards. The proliferation of international tribunals to deal with massive violations of human rights is a related, novel phenomenon.

In the late 1940s, to return once more to the beginning of things, concurrently with the debate on the limits of Article 2, Paragraph 7, another set of activities began to unfold in still another UN forum, destined to have a deep impact on the most intimate aspect of “domestic jurisdiction,” the treatment by the “sovereign” state of its own citizens. Based on the UN Charter mandate to promote respect of basic individual rights, the UN embarked on a program stimulated by the United States aimed at defining the fundamental rights and freedoms and translating them into international instruments open for acceptance by the member states. I still hear Mrs. Roosevelt expounding in her high-pitched voice on the progress of the program in meetings I attended as advisor to the U.S. delegation to the UN General Assembly.

Today, the UN program, and parallel developments at the regional levels, particularly in Europe and Latin America, have brought about an existential change not only in the concept of “domestic jurisdiction” but in the international legal order at large. The individual was elevated to the position of a subject of international law, no longer exclusively dependent for protection of her basic rights on the constitution of her nation-
state. Practically all states, members of the international community, have accepted — albeit to a greatly different extent — international obligations in this field, including international and regional supervision in one form or another.

Clearly, an individual still relies first and foremost on the judicial and other avenues of protection in his own state under national standards. Direct access of an individual to international mechanisms for relief against his own state is still limited, except in Europe, where it has flourished for almost half a century. However, there are ways to induce the political actors, through non-governmental organizations or interest groups, to raise a serious violation of basic rights in the appropriate international forum.

National legislatures, including the U.S. Senate, often compromise the ability of an individual to press his rights under an international instrument before the national judiciary of his own state by declaring a human rights treaty non-self-executing (not directly applicable) in the national legal order. This barrier to judicial relief has costs which appear to me increasingly incommensurate with the presumed benefits. Similarly, attaching unreasonable and often unnecessary reservations to the acceptance of human rights treaties is another way of diluting their effect.

The world scene offers today a disconcerting array of rhetoric and actions promoting, interpreting, and applying the many-splendored concepts of individual human rights — political and civil, economic and social, procedural and substantive — by national, regional, and international courts and agencies, operating in vastly divergent social and cultural contexts. This complex, still inchoate development parallels the much-noted economic-technological globalization. Some national actors, political and judicial, either are not aware of this perspective or find it irrelevant for their work. Thus, Justice Stephen Breyer of the U.S. Supreme Court urged his brethren to take notice of foreign experience in interpreting the U.S. Constitution, but Justice Antonin Scalia demurred, albeit discreetly, in a footnote appended to the opinion he wrote for the majority in Printz v. U.S., 117 S. Ct. 2365 (1997), at 2377, n. 11.

The editor of Law Quadrangle Notes asked several faculty members with expertise ranging across the Law School curriculum to meditate briefly on the implications, if any, of evolving human rights for their work. Their responses follow.
Living with the death penalty

By SAMUEL R. GROSS

The debate over the death penalty in the United States — such as it is — is framed in terms of criminal justice policy. The issues are the same ones we consider when the question is the length of prison sentence for a drug crime: Does the defendant deserve the penalty? Is it cost effective by comparison to other available sanctions? Will it deter others from committing the crimes for which he was convicted? Can we impose this punishment fairly? Can we make sure that innocent people are not condemned?

The answers to these questions are well known, and depressing. The death penalty is a very expensive punishment; although the act of killing a single person is cheap, maintaining the elaborate system of trial and review that makes these occasional killings possible is extremely costly and diverts resources from other parts of the criminal justice system. Despite its advocates’ fondest hopes, the death penalty does not deter homicide any better than life imprisonment. We do not and probably cannot impose the death penalty predictably and fairly, and we have not been able to prevent an extraordinary number of convictions and death sentences for innocent defendants. And yet a great majority of Americans favor the death penalty — most strongly so — in part because they hope — despite the evidence to the contrary — that it will reduce crime, but mostly because they believe that many criminals who commit murder deserve to be killed.

In Europe, and in much of the rest of the world, the death penalty is viewed primarily as an issue of human rights. From this point of view, the question is not whether a killer like John Wayne Gracey deserves to die; of course he does. Surely for what Gracey did — kidnapping, humiliating, abusing, torturing, and finally killing dozens of boys and young men — he deserves far worse than a quick death. In Tudor England the punishment for treason was that the condemned man be hung by the neck, that he be cut down and disemboweled while still alive, that his entrails be burnt before him, that he be drawn and quartered (that is, torn apart), and only then, that he be beheaded and his head stuck to rot on a pike. Wouldn’t that be closer to the mark? As Americans, we have no doubt that it would be wrong — that it would be a violation of human rights — to torture Gracey as punishment for his acts of torture. For European judges and lawyers it is equally clear that it would be a violation of human rights to kill him for his acts of killing.

Drawing and quartering was not abolished out of sympathy for traitors, but as a fundamental limit on the exercise of government power. We believe that a civilized state does not torture, not even for the vilest crimes, not even if torture would deter future criminals. The abolition of capital punishment extends this logic from torture to death. It signifies that a civilized state does not deliberately and methodically kill the people it governs.

It is the policy of the United States to monitor human rights violations around the globe, and to try to stop human rights abuses by other governments. By the same token, it is the official policy of several European countries to work to abolish the death penalty worldwide, including in the United States, because it is a violation of human rights. In Europe itself, this has been accomplished primarily through the Council of Europe, which now requires abolition of capital punishment as a condition of membership. All of the European republics of the former Soviet Union — as well as the former Soviet bloc countries — are applying for or have recently been admitted to the Council of Europe. As a result, those former socialist countries that did not abolish the death penalty soon after 1989 have done so recently, or are in the process of doing so.

Abolition in the United States is a totally different matter. We are not much interested in what the world thinks of our system of criminal justice, and we have the power to ignore world opinion. And we do. To choose one example among many: In May of this year, the United Nations Human Rights Commission voted for a worldwide moratorium on executions. Only 11 countries voted in opposition, including China, Pakistan, Rwanda, Sudan — and the United States.

Some aspects of the administration of the death penalty in the United States raise separate and troublesome human rights questions. The International Covenant on Civil and Political Rights prohibits the imposition of the death penalty on defendants who were under 18 years old at the time of their crimes. Virtually every country in the world has signed this treaty, most recently China. The United States is the only nation to have done so with a reservation that excludes the article forbidding the execution of juvenile offenders. For the same reason, the United States has not ratified the UN Convention on the Rights of the Child, or the American Convention on Human Rights, both of which would outlaw that practice. This has enabled the United States to retain its status as the modern world leader in executing teenage criminals.

The United States has also executed over 30 mentally retarded defendants since 1976, a practice that is considered unacceptable elsewhere. Racial discrimination in the use of capital punishment is a national disgrace. The extraordinary delays in handling death penalty appeals in America — a death row inmate in California is likely to wait four years or more after judgment before a lawyer is appointed to handle his case — are considered a separate human rights violation by European countries. And the absolutely inadequate legal representation that many capital defendants receive is a human rights scandal by any measure. But the essential problem, seen from the outside, is more basic: The United States is a civilized and democratic nation, with a respected legal system, that nonetheless continues to kill people as a mode of punishment long after most similar states have abandoned that practice as inhumane, brutal, and barbaric.
I had not traveled far from Ann Arbor, less than 200 miles, but the purpose of my journey seemed to take me worlds away. From the killing fields of Cambodia to the central plains of Ohio, I was called by the defense in a capital murder trial, where one Cambodian man had been killed at the hands of another, to testify as an expert on the Khmer Rouge genocide.

The body was found face down on the bathroom floor — a single gunshot wound to the back of the head. To believe the prosecution is to see it as a straightforward case of aggravated murder in the course of a robbery. To believe the defense is to see it as a case of retribution, a revenge killing of a former Khmer Rouge member by one of his victims. One need not resolve the conflicting stories to understand either scenario as yet another in a long list of Cambodian tragedies.

American justice moves at its own pace, and on this summer afternoon it moved slowly. I had been waiting over two hours to testify, sitting on the long wooden benches and walking the halls. We take the physical assets of justice for granted. The courtroom was on the eighth floor of a large modern building, one of four courtrooms complete with separate chambers. In Cambodia we struggle to provide filing cabinets to the clerk's office for court records, or a table for the defenders to have a place to sit during trial. We take the human capital devoted to justice for granted as well — a sophisticated independent judge, two professional prosecutors, and two experienced defense lawyers. At the end of the Khmer Rouge reign of terror, there were fewer than a dozen trained legal professionals left in the country, and it will take a generation or more to reconstruct a workable judicial system.

Ironically, despite the fact that I have labored for over six years to help establish and professionalize similar legal institutions in Cambodia, I harbored substantial doubts about the ability of this proceeding to find truth or dispense justice. The prosecutors, as all advocates are prone to do, were ignoring or marginalizing facts inconsistent with their simple theory of the case. Whatever transpired between the victim and the defendant was likely to have been far more complicated than either side was willing to acknowledge. While pacing the hall outside the courtroom, I could look through the narrow window in the door and catch glimpses of the judge, the defendant, and the jury. The thought that kept running through my mind was that the defendant was entitled to a "jury of his peers." What did this mean? Who were his peers? There were certainly no Cambodians on the jury. It was unlikely that any of the jurors were

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Cambodia's long road back from the devastation of the Khmer Rouge regime has been a continuing subject of study and involvement for Assistant Professor Hammer. He has been deeply involved in establishing a public defender program in Cambodia and is a past president and an active member of the advisory council of Legal Aid of Cambodia. At the Law School, he oversees the Program for Cambodian Law and Development. His interests also embrace issues of healthcare markets, and he and a co-researcher have received an Investigator Award in Health Policy Research from the Robert Wood Johnson Foundation to study how competition policy can affect healthcare quality.
themselves refugees. What would a jury of his peers look like? Twelve Rwandan Tutsis? A group of Kosovar Albanians? Surviving children of the Nazi Holocaust?

What did Ohio and Cambodia have in common? This was not the first time that Cambodian politics had collided with the lives of ordinary Ohioans. The killing of four students by the Ohio State National Guard at Kent State University was in response to protests over Nixon's invasion of Cambodia. But while the slogan “four dead in Ohio” and the image of 14-year-old Mary Ann Vecchio holding the slain body of one of the fallen became immediate icons for a new American tragedy, what emotional connection would the jury have with this defendant or with his story? I felt wholly inadequate to my task of explaining the magnitude of the horror of the Khmer Rouge, the complete unraveling of the life of an entire nation, and its impact on a single 9-year-old boy.

What if the victim had been a former Khmer Rouge member? What would be the appropriate response? I started my work in Cambodia naive in my notions about forgiveness, believing in its simple, cleansing power. I had never confronted first hand an evil too large to be imagined, too deep to be forgotten, or too raw to be forgiven. I have heard numerous stories of revenge killings in the immediate wake of the 1979 Vietnamese liberation. Many of the incidents involved gruesome beatings and mutilations collectively inflicted by groups of former victims against their now vulnerable oppressors. I know of many more Cambodians who never participated in such acts, but who privately harbored detailed fantasies about the revenge they would exact on the Khmer Rouge.

Forgiveness — Revenge — Reconciliation — Retribution — Justice — Genocide — are all powerful words. In a different context, I have struggled with the question of what obligation a legal aid society in Cambodia would have if asked to represent former leading Khmer Rouge officials in war crimes trials. These are not easy issues. There is no Cambodian equivalent of the ACLU to absorb the political backlash associated with taking ideologically appropriate, but publicly unpopular stances. The success or failure of the entire institution of a meaningful role for public defenders in Cambodia often rides on the decisions that the few legal aid societies make in politically charged cases. In addition, and perhaps more importantly, the marching orders of any institutional decision to represent the Khmer Rouge would have to be carried out by Cambodian lawyers, every one of whom would be a surviving victim of the oppressive and inhumane organization or “Angkar” they would be asked to represent and viciously defend.

On the drive home, I reviewed the testimony in my mind. I covered all of the topics I had planned, explaining who the Khmer Rouge were and describing their revolutionary agenda to eliminate all vestiges of the past when they declared 1975 to be “Year Zero.” I described the chaotic evacuation of Phnom Penh and the story of the second mass deportation that took the defendant from the southeastern area of Prey Veng to the northwest province of Batambar. I described the progression of Khmer Rouge policies leading to the systematic destruction of the family: breaking extended families into nuclear units, removing children over age six from their parents, separating children by age and then by gender into mobile work groups, the imposition of forced communal dining, and the conscious attempt to change language and align previous familial relations into new allegiances to Angkar. Finally, I described the Vietnamese invasion and “liberation” in 1979.

I ended by discussing the fate of the Khmer Rouge. The Khmer Rouge did not simply disappear. They are with us today, as present as the destructive legacy of their oppressive reign. Everywhere you find large groups of Cambodians you can find former Khmer Rouge members. The Prime Minister of Cambodia, Hun Sen, is a former Khmer Rouge member, and there are many others working in the Cambodian government. There are former Khmer Rouge members selling noodles at the Central Market in Phnom Penh. There are former Khmer Rouge members in the United States, among the tens of thousands of Cambodian immigrants, and yes, it is conceivable that there are former Khmer Rouge members in Ohio. At the end of my testimony, I was thanked and politely excused. The prosecution had no questions. As a matter of litigation strategy, this was tactically correct. From their perspective, the story of the Khmer Rouge was another Cambodian “sideshow,” a distraction.

The wheels of American justice move methodically, with their own internal logic and their own momentum. This is not a bad thing. The rule of law as a regulator of individual conduct and as a check on the abuse of state power is an essential component of a civilized society. The rule of law in Cambodia was one of the first and most long-lasting victims of the Khmer Rouge revolution, with repercussions felt to this day. A body had been found in Ohio, a proper police investigation had been conducted, the defendant was apprehended, and his rights respected. Now, he was on trial. This is exactly what we aspire to achieve.

Still, juxtaposing the defendant’s fate in Ohio with the fate of the leaders of the Khmer Rouge who perpetuated the genocide in Cambodia is unsettling. While Pol Pot, Brother Number One, is dead, four other leading members of the Khmer Rouge are still very much alive — Ieng Sary, Khieu Samphan, Nuon Chea, and Ta Mok. Ieng Sary, the “official” Brother Number Two, defected in 1996 and was granted amnesty by the King, expunging a 1979 death sentence handed down against him and Pol Pot when they were tried in absentia for their crimes. Now, Ieng Sary is not only a free man, but is the de facto leader of the gem-and-log-rich Pailin area he administered when it was a guerrilla territory. Khieu Samphan, the long-time public face of the Khmer Rouge, and Nuon Chea, Pol Pot’s behind-the-scenes real Brother Number Two, defected in December 1998 and spent Christmas weekend in the resort city of Kampong Som. The deal they struck with Prime Minister Hun Sen makes it unlikely that they will ever face trial. Ta Mok, “the Butcher” and last hard-liner, was apprehended in March 1999. He remains in custody, his fate still to be determined. His only real crime in the eyes of the government was his failure to surrender voluntarily and strike his own deal. If tried, the maximum penalty Ta Mok could face would be life in prison. Article 32 of the Cambodian constitution outlaws capital punishment. Section 2929.02(a) of the Ohio Revised Code, in contrast, provides for the death penalty in cases of “aggravated murder.”

How could one compare even a “life” sentence for the 72-year-old Ta Mok with a “life” sentence for the 33-year-old Cambodian defendant in Ohio? There is no universal metric of justice to make such comparisons and there are no easy answers. Nor are there easy ways to address the psychic wounds suffered by individual victims or by an entire nation. The only certain truth is that there are victims everywhere. The body was found face down on the bathroom floor — a single gunshot wound to the back of the head. In April 1975, a small nine-year-old boy was forced to leave Phnom Penh, never to return again to the capital city or to the life that he had known. Twenty-four years and many miles later, he sits alone in an Ohio state prison on trial for his life. Cambodia is filled with ghosts, living and dead, still haunted by the specter of the Khmer Rouge. Some of these manifestations are actual, others imagined, all are real.
It has often struck me that the prominence of the Restatement of the Foreign Relations Law of the United States epitomizes the plight of international law in this country. The title of this standard reference on international law does not even refer to international law, but instead to foreign relations law. That is, it is meant to set out the standards by which we may legitimately judge the conduct of others. The clear, if unintended, message is that the Restatement is not really a codification of laws that bind us. And indeed, it is explicitly not just a codification, but a re-statement. It is, in other words, not a simple summation of those rules that are binding under international standards of lawmaking, but a specifically American take on the rules that (ought to?) define the global order.

This detachment from an understanding of international law as a collectively defined system that binds all states is most clearly evident in our troubled relationship with international human rights law. While the United States has been involved in the drafting of every major human rights treaty, is represented at virtually every session of every human rights monitoring body, and annually publishes its assessment of the human rights performance of every country in the world, we simply do not accept that international human rights law is about us. We cannot bring ourselves as a nation to adopt international human rights standards as domestically binding norms, and we certainly will not tolerate other states or international bodies scrutinizing the ways in which human rights are (or are not) implemented in the United States.

My own field of refugee law is rife with examples of American refusal to be part of the international human rights project. The courts routinely insist that relevant domestic law implements our obligations under international refugee law. But they seem simultaneously determined to interpret our treaty obligations in ways that diverge from the goals of the Refugee Protocol, and which bear little resemblance to interpretations of the same obligations rendered by courts in our partner states. The United States stands alone in its insistence that refugees are to be denied protection unless somehow able to prove the state of mind of the person or entity that would persecute them; specifically, we require evidence that the actions of the agent of persecution are inspired by racial, political, or other animosity. No other country
demands such feats of clairvoyance. Similarly, while most developed countries have formally committed themselves to judge the existence of a risk of persecution by whether or not basic international human rights are respected in the asylum seeker's home country, American judges only rarely show any awareness of these standards. Instead, our courts are typically content subjectively to decide whether the harm threatened is "regarded as offensive." And even when an individual somehow meets the peculiarly American standard of international refugee status, this is no guarantee of protection. Instead, we assert that asylum is a matter of discretion, rather than entitlement, and, unique among Western states, we explicitly reserve the right forcibly to interdict any refugees approaching our borders, even if this means taking action in international waters beyond our legal authority.

Even with all these concerns, our record on respect for international refugee law is actually one of the relative success stories in America's relationship to international human rights law. At least with refugee law we have signed the relevant treaty, and acknowledge that our asylum law is (more or less) based on international standards. Until quite recently, we refused to be bound by any of the other major human rights treaties. And even now, we will not sign on without a reservation to guarantee that international norms cannot override the U.S. Constitution (logically raising the question of just why we accede to human rights treaties at all).

Perhaps most tragically, the United States steadfastly refuses to allow its own citizens to hold it directly accountable through the United Nations complaint procedures established to address even such presumably uncontroversial rights as freedom from torture, racial discrimination, and the violation of basic civil and political rights. Among the industrialized countries that comprise the Organization for Economic Cooperation and Development, only the citizens of the United States, Japan, Korea, and Mexico are prevented from accessing the United Nations. Even Algeria, China, and Libya have agreed that their citizens will have the right to take human rights concerns directly to the UN. Our contempt for international accountability is clear too in the outrage expressed by some political leaders when the United Nations Special Rapporteur on Summary Executions not only decided to visit the United States last year, but dared to criticize our refusal to abolish laws that authorize the execution of children (only Thailand has taken a position comparable to that of the United States).

We can, of course, credibly argue that there is less need for international involvement in human rights enforcement in the United States than in many other, much more troubled, countries. And we can always fall back on the tired old chestnut of domestic constitutional supremacy to insist that it would not be legally responsible for the United States to be a full participant in the international human rights system. But these are lame excuses for keeping our distance from international human rights law. Many other countries with excellent human rights records are quite willing to embrace international accountability. And few of their constitutions are as clear in defining an authoritative role for international law as is our own Article VI, which expressly defines treaties to be part of "the supreme Law of the Land," which shall bind judges "... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

My own sense is that the real reason the United States rejects international human rights law is an intuitive belief that our own, domestically framed, human rights values are better than anything the world has to offer us. We just do not want to see our definitions of rights interfered with by non-Americans.

Yet the truth is that access to the international human rights machinery would not allow the United Nations to overrule American law. There is a solid tradition within UN treaty bodies of deference to reasonable national interpretations of human rights, and, in any event, no United Nations human rights body can issue enforceable judgments. The United States would, however, be required to defend the treatment of persons under its authority before expert bodies elected by the governments of the world (including the United States). We would be denied the right simply to assert the domestic legality of a particular practice, and would occasionally have to face up to the logic of reconsidering our traditional views.

Experience elsewhere suggests that the rejection of a cosmopolitan approach to human rights is a substantive loss for American society. Complaints to international human rights bodies have opened the eyes of Canada to flaws in its protection of aboriginal peoples, of the Netherlands to patterns of sex discrimination, and of Switzerland to official conduct that gave rise to the risk of torture. American national human rights law is similarly in need of a mechanism that tests our accepted beliefs against the views of the broader global community. Is there no room for doubt about the sufficiency of our strictly national approach to human rights when the Constitution is invoked to defend the right to inflame hatred through violent speech, to guarantee the right of every American to possess guns without demonstration of genuine need, and to treat foreign nationals routinely incarcerated at our borders as non-persons? Are we really confident that human rights are not infringed when we do little to combat the existence of a permanent economic underclass in the midst of the world's wealthiest nation?

There are also compelling political reasons to accept the need for a continuing dialogue of justification about the scope of human rights law. Whatever concerns we had about the risks of international accountability during the Cold War era are now clearly irrelevant. In an era where virtually all wars are civil wars, fought on the basis of irrational prejudice or discriminatory allocations of power and resources, there is no excuse for our standoffish attitude towards an international legal system that works to defuse precisely those risks. If we continue to insist on the primacy of our own parochial way of defining rights and entitlements, we should not be surprised when others also reject accountability with predictably tragic results of the kind witnessed most recently in Kosovo.

America must learn to lead by example.
**The three threats to *Miranda***

**By Yale Kamisar**

*Miranda v. Arizona* (1966) was the centerpiece of the Warren Court's "revolution" in American criminal procedure. Moreover, as Professor Stephen Schulhofer of the University of Chicago Law School has recently noted, a number of the *Miranda* safeguards "have now become entrenched in the interrogation procedures of many countries around the world." (See generally Craig Bradley, "The Emerging International Consensus as to Criminal Procedure Rules," 14 *Michigan Journal of International Law* 171 (1993).)

But *Miranda* is in serious trouble at home. A provision of the federal criminal code enacted in 1968, 18 U.S.C. § 3501, purports to "repeal" *Miranda* and reinstate the pre-*Miranda* standard for the admissibility of confessions — the due process-"totality of circumstances"-"voluntariness" test. Section 3501 has been avoided by every administration since its enactment more than 30 years ago. But this has not discouraged conservative legal foundations from urging the federal courts to inject § 3501 into their cases.

In 1999, these legal groups gained a stunning victory when a 2-1 majority of a panel of the U.S. Court of Appeals for the Fourth Circuit ruled — against the express wishes of the Department of Justice — that the pre-*Miranda* voluntariness test set forth in § 3501, rather than the famous *Miranda* case, governs the admissibility of confessions in the federal courts. According to the Fourth Circuit panel, the *Miranda* rules are not constitutionally required; they are only "prophylactic" rules designed to implement or reinforce the underlying constitutional right. Therefore, § 3501 is a valid exercise of congressional authority to override judicially created rules [that are] not part of the U.S. Constitution.

I strongly disagree. I share the view of a number of criminal procedure and constitutional law professors that the *Miranda* rules were an understandable (and long overdue) response to the inadequacies of the mushy, subjective, and unruly voluntariness test (under which every factor was relevant, but virtually nothing was decisive). I agree, too, that prophylactic rules are a necessary and proper feature of constitutional law — a means of interpreting constitutional provisions in light of institutional realities — a means of providing constitutional rights much-needed "breathing space." But if the present Court were to address this issue in the near future, I am afraid that at least four justices might uphold the statute purporting to abolish *Miranda* (the Chief Justice and Justices O'Connor, Scalia, and Thomas).

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Professor Kamisar, widely known for his pioneering teaching materials on criminal procedure and his many articles defending and explaining the Warren Court's "revolution" in American criminal procedure, is a specialist in constitutional law. He has studied the impact and aftermath of the U.S. Supreme Court decision that produced what we now call the Miranda Rule since the decision was handed down in *Miranda v. Arizona* in 1966. Here, he identifies three distinct threats to the protections the ruling provided for suspects and defendants.
Section 3501 is not the only danger facing
Miranda. A decade and a half ago, in Oregon v. Elstad
(1985), a case that upheld the admissibility of a
second confession made at the time the police
complied with Miranda, although earlier that day the
police had obtained a statement from the same
defendant — in violation of Miranda — the Supreme
Court indicated that the “fruit of the poisonous tree”
doctrine did not apply to Miranda at all. If so, all the
“fruits” of (or evidence derived from) a Miranda
violation would be admissible — not just a second
confession or a witness for the prosecution whose
identity the government learned from the
inadmissible confession, but physical evidence, e.g.,
the drugs, the proceeds from a bank robbery, or the
murder weapon.

The Court has never explicitly decided whether
physical or nontestimonial evidence derived from a
Miranda violation is admissible. However, I have to
say there is a good chance it will do so. In the
meantime, the state courts and the lower federal
courts have almost uniformly ruled that the
prosecution may use the nontestimonial fruits of a
Miranda violation.

Some 30 years ago, Judge Henry Friendly noted
that “what data there are” suggest that the obtaining
of leads with which to obtain real or demonstrative
evidence or prosecution witnesses is more important
than getting statements for use in court.” (Emphasis
added.) Therefore, a ruling that all types of evidence
derived from a Miranda violation are admissible
would strike the landmark case a grievous blow. How
could we possibly expect the police to comply with
Miranda if the courts barred only the use of
incriminating statements obtained in violation of that
doctrine, but none of the leads or clues or evidence
these statements brought to life?

Miranda faces still another danger — there is
good reason to think that in a substantial number of
police stations throughout the land police
interrogators are violating Miranda in a fundamental
way. They are getting suspects to waive their rights
— by persuading them it’s in their “best interest” to
tell the police “their side of the story” so the police
can help them — before they advise them of their
rights.

These interrogation techniques were first
described at length in David Simon’s book, Homicide:
A Year on the Killing Streets. The author, a Baltimore
Sun reporter, was granted unlimited access to the
city’s homicide unit for a full year. Recent articles
indicate that the interrogation tactics employed by
the Baltimore police are being utilized by detectives in
a number of other police departments as well.

If the admissibility of a statement obtained as a
result of these methods were challenged by a defense
lawyer, a prosecutor would be in a strong position, for
she would be armed with a signed waiver of rights
form (and a signed explanation of rights form as
well). But she would be in a strong position only if —
as would hardly be surprising — the detective
involved in the case conveniently failed to remember
how the suspect was induced to sign the waiver of
rights form. However, if all the details were known —
if the entire transaction had been tape recorded —
no court would be able to admit the statement unless
it was prepared to overrule Miranda itself.

(Unfortunately neither the Warren Court nor any
other Supreme Court has ever required law
enforcement officers to tape record, when feasible,
how the warnings of rights are delivered, how the
waiver takes place, and what the police do thereafter.
And the overwhelming majority of state courts have
held that the testimony of a police officer that he
gave complete Miranda warnings and obtained a
voluntary and intelligent waiver of rights need not be
corroborated.)

Miranda emphasizes that “any evidence” that a
custodial suspect was “threatened, tricked, or cajoled
into a waiver will, of course, show that the defendant
did not voluntarily waive his privilege.” But in a
substantial number of station houses, the police are
threatening the suspect; they are telling him that
unless he talks to them about the homicide, they will
write it up as first degree murder and turn him over to
a merciless assistant prosecutor. The police are also
tricking the suspect: they are leading him to believe
that it is in his best interest to tell them his side of the
story. Indeed, the police are pretending that talking to
the police instead of asking for a lawyer is the
suspect’s only chance to get the homicide charge
reduced (or perhaps even dismissed).

The police are not supposed to subject a custodial
suspect to questioning unless and until they obtain a
waiver of his rights. Unfortunately, what they are
really doing in too many places is subjecting
individuals to “interrogation” before they waive their
rights — indeed, before they even advise them of
their rights.

Once the police have taken a suspect into custody,
there is no such thing (at least there is no lawful basis
for any such thing) as a “pre-interview” or “pre-
waiver” interrogation. The waiver of rights transaction
is supposed to take place as soon as the curtain goes
up — not be postponed until the second act.

Reports about how modern police interrogators
have “adapted” to Miranda underscore the need to
record on video- or audiotape the entire proceeding in
the police station — any preliminary conversation,
the reading of rights, the waiver transactions, and
any subsequent interrogation. There is nothing new or
startling about tape recording police questioning.
Virtually all of the nation’s criminal procedure
professors — critics and defenders of Miranda alike
favor the idea. Moreover, there is widespread
satisfaction with a mandatory recording requirement
in Great Britain. Why then is tape recording, where
feasible, not the general practice in American police
stations today?

The only startling thing about this issue is that,
after all these years, American law enforcement
officials are still able to prevent objective recording of
all the facts of police “interviews” or “conversations”
with a suspect and, of course, how the warnings are
delivered and how the waiver of rights is obtained.
But if you were a member of the Baltimore homicide
unit (or a member of other police departments
employing the same interrogation methods), would
you favor tape recording (and making available for
public inspection) what really happens in the
interrogation room?
I have two thoughts to contribute to this dialogue—one concerning the atrocities in Bosnia and Kosovo, the other based on a recent visit to South Africa as part of the Law School's student externship program there.

1. International law now recognizes that the use of rape as a tool of war is a war crime. But the examples of Bosnia and Kosovo make clear that rape is an unusual war crime, because it is so often exacerbated by the conduct of the victim's own countrymen. Men in these societies are taught to experience the "violation" of "their" women as a violation of their own proprietary rights. Men, feeling violated, act out the social ritual of repairing the injury to themselves by abandoning, rejecting, blaming, and ostracizing their raped women. The women are thus violated twice: once by the enemy at war, once by their one-time loved ones at home. The rapists likely know (or even share) their enemy-neighbor's norms on the social consequences of rape, and thus commit their rapes with the hope and expectation that their male enemies will do part of their work for them.

I have been outraged by the fate of many rape victims in these societies. These countries' leaders excel at manipulating the rhetoric of patriotism and nationhood. Why haven't they issued a post-war declaration that discriminating against victims of wartime rape is a crime against the nation? Are the norms of patriarchy that much stronger than the norms of patriotism?

That question presents an opportunity to think about the relationship between domestic and international law. Might it be possible for international authorities to require protective changes in domestic law as a precondition to pursuing war crimes prosecutions? If that suggestion is too naive as a matter of international law, perhaps something less sweeping might work. For example, an
international war crimes tribunal might insist, as a tool for protecting its own jurisdiction, that those who retaliate against women for discussing their status as rape victims or coming forward in aid of prosecutorial investigations or court proceedings be punished in some way. It is difficult to know whether such coercive action could work a genuine change in the domestic culture of rape. But at least the international community would be acting to protect wartime rape victims from the full force of the domestic culture.

2. South Africa presents a different question about the relationship between domestic and international law.

The new South African constitution is heavily influenced by the human rights norms of the international community, and it requires its courts to consult international law sources in interpreting the constitution. For this reason — as well as for domestic reasons easy both to understand and decry — the new constitution feels quite foreign to jurists whose tenure predates the end of apartheid. Many claim not to understand it, and are hesitant to apply it. This frustrates the public-interest lawyers and academics who helped to shape the document and who have developed the still-esoteric expertise to employ its provisions in litigation. They worked hard to embody international human rights norms in the constitution, and they understandably want to see them applied in individual cases.

In conversations with lawyers, academics, and justices of the South African Constitutional Court, I learned of a scenario that has started to play itself out in the courts of pre-apartheid judges. The new constitution requires that South African law — including still-applicable apartheid-era law — be interpreted in light of the letter and spirit of the constitution. For this reason — as well as for domestic reasons easy both to understand and decry — the new constitution feels quite foreign to jurists whose tenure predates the end of apartheid. Many claim not to understand it, and are hesitant to apply it. This frustrates the public-interest lawyers and academics who helped to shape the document and who have developed the still-esoteric expertise to employ its provisions in litigation. They worked hard to embody international human rights norms in the constitution, and they understandably want to see them applied in individual cases.

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One can certainly understand their position. But there is a contrary view — one I found myself expressing in heated conversations. By convincing themselves that the norms of the new constitution can be read as harmonious with prior law, these judges might well be domesticating a seemingly foreign constitution — both for themselves and for the conservative white constituencies from which they hail. So long as the justices of the Constitutional Court are willing to review decisions of this sort to make sure they do not misapply constitutional norms, there may be more gained than lost through this process of domestication. My last official act in South Africa was a day as the guest of Justice Richard Goldstone at the Constitutional Court. [Goldstone delivered the William W. Bishop Lectures in International Law at the Law School in 1998 in conjunction with the official opening of the Law School's Center for International and Comparative Law.] I was surprised and gratified to find one of his colleagues in agreement with me on this issue.

It is one thing to import international human rights law into domestic legal practice. It is another thing to create an organic relationship between the international and the domestic. What seems like cheating the constitution to members of an internationally sophisticated legal elite might well really be helping to make the constitution seem acceptable to those most hostile to it and to the peaceful revolution that brought it about.
The tension between economic liberalization and the protection of human rights is set to become an issue of increasing concern as we enter the next century. Of course, achieving a modus vivendi between deregulating the economy and the achievement of other non-economic values is a problem that has been with us nationally for some years. Indeed, it has proven one of the most difficult issues of this decade in many industrialized countries. Whether it is the tension between economic efficiency and environmental protection, or labor-market flexibility and fair labor standards, or deregulation and distributive justice, a resolution of the problem seems some way away.

The tension between these different values at a national level within a particular country is only one part of the story. Often, complicating the discussion is another problem that involves a dispute about the appropriate level of government (international, regional, national, or local) at which these conflicts of values should be resolved. This issue has various dimensions. How far should national economic liberalization be a subject of international regulation? Does this lead to undermining national sovereignty to an unacceptable extent? How far should sub-national communities, such as municipalities, be able to influence or determine the outcome of these issues? Is such local control merely a way of ensuring that protectionist impulses will win through? Where there is a conflict between the goal of global economic liberalization and the local pursuit of domestic social policy goals, should the local give way to the international? The impact of "globalization" on local communities has therefore also attracted considerable attention recently.

Christopher McCrudden, a member of the Law School’s Affiliated Overseas Faculty, was named Professor of Human Rights at Oxford this year. He has been a Fellow and Tutor in Law at Lincoln College since 1980 and a Reader in Law at the University of Oxford since 1996. In addition to his publications in a wide variety of journals and books, his academic work has included service on the editorial boards of the Oxford Journal of Legal Studies, the Review of Employment Topics, and the International Journal of Discrimination and the Law. He currently serves on the editorial board of the Journal of International Economic Law. He is the United Kingdom’s representative in the European Commission’s group of lawyers advising it on women’s equality issues, and is a specialist advisor to the House of Commons’ Northern Ireland Affairs Committee. His research interests lie in the areas of human rights, comparative law, and globalization.
As if these issues were not complicated enough, there is a further dimension to these problems that has become evident in recent years. The pursuit of one set of international goals may, unsurprisingly, conflict with the pursuit of another set of international goals. For example, the pursuit of trade liberalization, a goal reflected in the World Trade Organization (WTO) system, may conflict with the international protection of human rights, a goal reflected in the plethora of human rights treaties and the growth of non-international entities (such as states in a federation) to seek to pursue this international human rights agenda via international trade.

In a recent essay, I discussed a cause célèbre that is currently attracting attention because it neatly illustrates several dimensions of these issues. It is a dispute, on the one hand, about the relative importance of international human rights values as against trade liberalization. It is also, on the other hand, a dispute about the appropriate method of expression of concern by a local community about human rights abuses abroad, as against national and international control of the trade agenda. The issue that has managed to combine these questions is that of selective purchasing by state and local governments in the United States, in particular the legality under the WTO Government Procurement Agreement of the Massachusetts law relating to Myanmar (formerly Burma). The issue of how far state governments should be able to use their purchasing power to require those they purchase from to follow human rights practices acceptable to them has both U.S. constitutional dimensions, which are being adjudicated in federal court, as well as important international law dimensions. It is the latter in which I am particularly interested.

One of the difficulties of resolving such issues is the existence of largely separate spheres that those concerned with international trade, on the one hand, and human rights, on the other, seem to inhabit. Few are experts in both, and there is often considerable difficulty in developing a common language for discussion between them.

That is only one part of the problem. It would be naïve to think that there is not considerable opposition to any linkage between international trade and other non-economic issues such as human rights. Some of that opposition appears to be based on the assumption that it is possible to avoid such linkages. The WTO, it is said, should be used as a sword to enforce human rights.

The WTO cannot avoid dealing with such linkages entirely, however. In particular, the WTO dispute settlement institutions are likely to be called on to interpret the multilateral and plurilateral agreements in contexts where the appropriateness of linkages made by national governments will have to be scrutinized. In that case, the issue will be the appropriate amount of legal space that states will be given to pursue such non-economic goals, and the WTO may not be able to avoid giving an answer. When it does so, trade law should not be used as a sword to attack human rights policies, provided they are not protectionist.

This essay is adapted from “International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of ‘Selective Purchasing’ Laws Under the WTO Government Procurement Agreement,” 2 Journal of International Economic Law 3-48 (1999). Professor McCrudden has been exploring these issues in a seminar he is teaching at the Law School during the fall term.
On one of my first trips to Juvenile Court with two student lawyers, we represented a 10-year-old girl whom I will call Mary. Tall for her age, very thin and fragile, she had pale white skin, stringy blond hair, and glasses too large for her face. Her most prominent features, on the afternoon we met her, were dark, ugly bruises on her cheek and forehead. Mary was a sweet girl, who laughed and joked with the students as they tried desperately to develop rapport with her without surfacing their own horror as they stared at her conspicuous bruises.

She eventually told us her story in a matter-of-fact way. Mary lived with her mother and her mother’s boyfriend. He believed in daily exercise and required Mary to perform mandatory sit-ups, push-ups, etc. On the night before we met her, Mary did not do her exercises and the boyfriend physically disciplined her. The muscular, grown man left her badly bruised and the punishment frightened her mother sufficiently to motivate an emergency call to child protective services. Noteworthy was Mary’s apparent belief that she deserved the beating. In Mary’s case, this use of corporal punishment by a person acting in a parental role crossed the line to child abuse and she was given some protection through the juvenile court system. Of course, her mother’s boyfriend had used corporal punishment to discipline Mary before, but it had never been this bad (or it had never before frightened her mother this badly).

In the United States, it is legal for parents to use corporal punishment as a form of discipline. In fact, more than 90 percent of American parents report using some form of corporal punishment on young children. Parents must draw the line between reasonable corporal punishment and child abuse. Most corporal punishment is legal (e.g. hitting, slapping, smacking) regardless of how much the parent outsizes the child or whether the assault is justified. Realistically, children will only receive protection from adults who hit them if someone notifies child protective services AND the punishment involves the use of an object or leaves bruises. If a parent hits her child in private and is careful not to leave noticeable marks, the child is on his own. Is it wise to leave the distinction between acceptable corporal punishment and abuse up to parents?
As an alternative, we could recognize that a child like Mary has the right to physical integrity — to be free from all physical assault — requiring parents to use alternatives to physical punishment. There is an international movement to ban corporal punishment. The legislatures of Sweden, Finland, Denmark, Norway, Austria, and Cyprus have passed anti-corporal punishment statutes. And, in 1996, Italy’s highest court banned corporal punishment of children. Last year, the European Court of Human Rights interpreted the European Convention for the Protection of Human Rights and Fundamental Freedoms to protect a boy who had been repeatedly struck by his stepfather. The United Nations Convention on the Rights of the Child is interpreted by its monitoring committee to require a ban on corporal punishment and the committee has “stated repeatedly...that banning corporal punishment of children in families is essential in order for reporting countries to achieve treaty compliance.” The United States has not joined the 191 nations that have become parties to the UN Convention since 1989. (For a detailed description of international developments in this area, see Susan Bitensky, “Spare the Rod, Embrace Our Children,” 31 Michigan Journal of Law Reform 353 (1998)).

In my law practice, I see an endless stream of children treated very badly by their parents. When I look up from the endless stream to seek big-picture solutions, I see international efforts to stop all physical violence against children. I wonder whether we would see fewer cases of child abuse and less violence among American children two or three generations from now, if we adopt, for example, a law like Finland’s:

“A child shall be brought up with understanding, security, and gentleness. He shall not be subdued, corporally punished, or otherwise humiliated. The growth of a child towards independence, responsibility, and adulthood shall be supported and encouraged.”

The impact of a law recognizing the child’s right to be treated with dignity and to physical integrity would not be noticed for a few generations. Most of us were spanked as children, leaving us hesitant to condemn our parents’ techniques and often leaving us without instincts for how to discipline without hitting. Any ban on corporal punishment must be accompanied by a strong public education campaign, as suggested by “Guidance for Effective Discipline,” a 1998 report of the American Academy of Pediatrics:

“Because of the negative consequences of spanking and because it has been demonstrated to be no more effective than other approaches for managing undesired behavior in children, the . . . Academy . . . recommends that parents be encouraged and assisted in developing methods other than spanking . . .”

If we recognize a child’s right to be treated with dignity and without violence, we are necessarily intruding on parents’ right to privacy in raising children. This conflict should be easily resolved in favor of the child to the extent that the parent’s right to use physical punishment is based on ancient and legally abandoned views of children as the property of their parents. More difficult to reconcile is the more modern justification for parental privacy: that parents, not the state, are better positioned to make appropriate parenting decisions, including the proper method of discipline. This leads back to Mary’s story. In our system of laissez-faire parenting, Mary’s mother could turn her 10-year-old daughter over to a grown man for administration of his idea of proper physical punishment. Daily, the appropriate level of physical punishment of children is left to the subjective judgment of their parents and of the other adults who act as or on behalf of their parents. Some would say that a child’s right to dignity and physical integrity should outweigh the privacy rights of her parents, because no one should be subject to physical violence of any kind. Others might say that a child’s right to dignity and physical integrity should outweigh the privacy rights of her parents because the assumption that parents and other adults will handle this judgment wisely is not borne out in our society. As we wring our hands over increasing reports of severe child abuse and how violent many of our children have become, it might be time to reassess policies that give parents and others the license to use even the most mild forms of violence against our children.

LAW QUADRANGLE NOTES FALL/WINTER 1999 19
My observations will focus on the international law on human rights developed by the United Nations because it is there that both my academic interest in the matter and my practical experience lie.

In the course of 50 years of United Nations activities, international concern for human rights has occupied an increasingly prominent place. May we, then, list the protection of human rights among the great achievements of the UN? If we only look at legal texts and institutions, and as long as the term "protection" is not given its literal meaning, this question is certainly to be answered in the positive. However, if we asked whether and to what degree these texts, rhetoric, and procedures have had an impact on the exercise of political power by member states in actual practice — and by "practice" I mean what states actually do and not (only) what they say they are doing — our assessment will have to be much more cautious. Human rights in the United Nations are not only a success story of legal activism, a growth industry, and the favorite language in which to couch your claim of the day, but also a hotbed of hypocrisy, double standards, and doublespeak — here we have probably the field of UN activity in which the discrepancy between words and deeds is most notorious. When everything is said and done in the UN (and it is an awful lot indeed), the world community turns out to be still miles away from a truly effective system of actual protection of human rights. It is true that "human rights lawyers are notoriously wishful thinkers" (J. Humphrey). While this quality may have its merits and to a certain degree be indispensable for pushing the enterprise of international human rights further ahead, it can also be infuriating for a more detached observer to see with what remarkable readiness words seem to be taken for reality in the world of international human rights.

In staking out the potential of international efforts to protect human rights, one always has to keep in mind how revolutionary such efforts must appear contrasted with the pre-1945 structures and processes of international law. While until a few decades ago the way in which a foreign government exercised its power vis-à-vis its "own" nationals constituted the very core of so-called domestic jurisdiction, in which no other state was allowed to meddle, today the exercise of state authority, and
even the ways by which such authority constitutes itself, are the subject of international concern ranging from discussion of human rights matters in various UN organs and conferences to public censure and condemnation. Consequently, the prohibition of intervention by the UN in matters which are "essentially within the domestic jurisdiction of any state" (Article 2 (7) of the UN Charter) has been exposed to a process of constant erosion with regard to human rights concerns, and its invocation by states that have become targets of respective UN activities is now the exception rather than the rule.

Thus, international human rights law is turning the states inside out in the almost literal sense. It exposes to foreign scrutiny, criticism, and even more tangible reaction a realm that was traditionally shielded against such influences like no other aspect of sovereignty. In light of this reversal, it is simply out of the question that the development of the present UN system of protection of human rights could have taken place without encountering heavy resistance at every stage. Fifty years of UN concern with human rights have not yet, at least not entirely, succeeded in eradicating the traditional reflexes. Only too often steps forward have to be paid for, or are countered, by retrogressive moves.

Of course, the intensity of such almost "natural" resistance against the exposure of public authority to international law and procedures will correlate inversely to the degree in which a political system accommodates or even pursues human rights postulates at the level of its own domestic law and constitution. Thus, in the case of liberal democracies, at first glance, resistance seems sometimes to give way to a sort of cautious welcome to human rights treaties or procedures. Frequently, such harmony seems to be motivated by the conviction that the respective state's own domestic system has little or nothing to learn, or fear, from international human rights norms whose essential raison d'etre is rather seen as dragging other states along towards levels of accomplishment similar to one's own. Further, governments of all ideological affiliations have always tried to keep international concern with human rights as unintimidating, and as reassuring, as possible. One natural way of inevitably defusing almost any "explosive" idea consists in entrusting it to lawyers and bureaucrats.

The tracing of symptoms of such infection of human rights by bureaucratization and politics is as fascinating to the detached scholar as it is depressing and infuriating to the human rights activist. I have had the opportunity to experience such fascination and depression in a variety of contexts.

First, between 1987 and 1996 I served as an expert member of the UN Committee on Economic, Social, and Cultural Rights — a so-called "treaty body" mandated to monitor compliance by more than 140 states that are parties to the International Covenant on Economic, Social, and Cultural Rights, one of the two main pillars of UN human rights law.

The inclusion of economic, social, and cultural rights in the UN human rights agenda was not due to some sinister machinations of the (then) communist camp, but was effected upon the insistence of the United States, whose president had proclaimed "freedom from want" as one of the Four Freedoms for which the Allied Powers fought in World War II. However, after the outbreak of the cold war, the distinction between civil and political rights and economic, social, and cultural rights was infected by East-West antagonism, the latter category being used by the socialist bloc as an argument and propaganda weapon in its counterattacks against human rights offensives of the West. Similarly, newly independent states argued in favor of the priority of creating more tolerable economic and social conditions over the realization of civil and political freedom in the process of nation building, not infrequently as a pretext for political suppression. Thus, in the history of UN involvement with human rights, economic, social, and cultural rights got off to an extremely bad start from which they have not yet recovered. Despite many rhetorical confirmations of the unity and equality of the two categories of human rights, in the actual practice both of the UN itself and its member states, these lofty statements have hitherto been more than lip-service accompanied less by energetic efforts to grant the pursuit of economic, social, and cultural rights a more prominent place than by a continuation of institutional neglect and the worn-out doctrinal dialogue des sourds on the nature of these rights. Economic, social, and cultural rights are, to put it somewhat graphically, still considered to be the ultimate toothless tiger by some and a Trojan horse by others, and consequently pretty much set aside by both. As is well known, the United States has never been a leader with regard to participation in international human rights treaties. Even though this picture has changed somewhat during recent years, it is telling that the United States is not seriously considering becoming a party to the Economic Social Covenant. The reasons given for this abstention seem to me to be paradigmatic of the ideological and political bias towards economic, social, and cultural rights, and of the unwillingness to learn what modern human rights doctrine has to say about the nature of the obligations under the covenant. To this doctrine the activities of the respective committee, of which I was privileged to be a member during its first 10 years of existence, have made a decisive contribution, particularly through so-called "general comments" by which the committee interpreted the covenant.

In 1996 the UN General Assembly elected me to the International Law Commission (ILC). This expert body, mandated with the codification and progressive development of international law (Article 13 (1) (a) of the UN Charter) has considered human rights issues, if defined sufficiently widely, on more occasions than one would think. Whenever it did so since I joined the commission, I have had an interesting experience: While on the Committee on Economic, Social, and Cultural Rights, I often felt like an international "black letter" lawyer defending the integrity and solidness of international law against the criticism and the idiosyncrasies of the human rights community; in the ILC, I sometimes find myself in the role of a human rights advocate trying to keep the achievements of the human rights movement free from the revenge of politics that I described earlier. My most interesting experience in this regard has been the discussion on the issue of reservations to human rights treaties at the ILC's 1997 session. Nowhere in international treaty law are reservations more popular and numerous than with regard to multilateral human rights treaties concluded under UN auspices. Even though many of these reservations,
among them also reservations formulated by western states, must be considered inadmissible under the standards of the established law of treaties, objections to them by other states’ parties are neither as regular nor as forceful as would be desirable. Perusing the list of parties to major human rights treaties, any alert observer must wonder how many of these states have decided to join this great enterprise more for symbolic reasons than from a desire to conform their domestic laws and practices to internationally agreed upon standards and to subject themselves to international scrutiny. Unfortunately, the United States must again be mentioned in this context. As to the question of how to counter unacceptable reservations to human rights treaties, the differences of opinion and divergences of practice are great. In my view, this epitomizes the current interim stage of the world of international law between a society marked by bilateralism and a true international community. Undeniable community interests like that in the protection of human rights find themselves consecrated in international treaties but are then, with regard to realization and enforcement, left to old bilateralist mechanisms. The only exception to this can be found at the regional level, particularly in the system of the European Convention on Human Rights. But aside from Strasbourg, the growth in numbers and scope of reservations to universal human rights conventions urgently calls for a centralized, objective system of determining their admissibility. Hence, de lege ferenda, the UN human rights treaty bodies need — and deserve — to be made competent to render legally binding decisions on the admissibility and severability of such reservations. In 1997, the International Law Commission expressed itself in favor of a cautious development in this direction. But this came anything but easily.

To sum up my impressions: human rights seem to have developed into a kind of secular religion for our times. This new religion is (almost) universally professed but the degree to which it is taken seriously varies. With this one can live. What I consider more dangerous than inevitable hypocrisy is complacency.

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The growing role of the European Convention on Human Rights

By A.W. BRIAN SIMPSON

Far and away the most effective international system of human rights protection, which has, so far, been invented, is the system established by the European Convention on Human Rights; the convention was signed in 1950, and remains the only major achievement of the Council of Europe. The council itself, which originally had 10 members, was an unhappy compromise between the European federalist movement, whose members conceived of the convention as the Bill of Rights of a future United States of Europe, and the opponents of federalism, led by Britain, who favored an organization that would make no inroads on state sovereignty, but who, nevertheless, supported the idea of a bill of rights that would serve as a statement of western values and a weapon in the ideological battles of the cold war. Both the federalists and their opponents conceived of the convention as a conservative document; its function was merely to reinforce the protection of human rights that already existed in western European democracies.

The convention came into force in 1953, but at first it had little impact. One reason was that allowing individuals to bring complaints, and accepting the jurisdiction of the Court of Human Rights at Strasbourg, were both originally optional. Another was that many European lawyers knew little about it. In addition, one major western state, France, long remained outside the system. In the 1970s, however, an initial trickle of complaints began to turn into a flood. The Strasbourg Court of Human Rights (and its subsidiary, the commission) began to evolve an elaborate and dynamic jurisprudence of human rights. The consequence was that the convention ceased merely to protest the status quo; it came to be used instead to enhance the level of the protection offered to individuals against misconduct by government officials. Appropriate legal doctrines were evolved in Strasbourg to legitimate this — for example, it came to be said that interpretation of the convention must be "evolutive." At the same time, doctrines were evolved to soften its intrusiveness — for example, it was established that member states had "a margin of appreciation" as to precisely [which] convention rights would be protected domestically. With some ups and downs and some grumbling, member states went along with this, though for a short period Greece, under the vicious rule of the colonels, withdrew from the council entirely rather than conform. In the case of Turkey, among the long established members, conformity remains a problem.

The role of the convention is now changing as part of a remarkable experiment. With the collapse of the Soviet bloc, admission to membership in the Council of Europe, and acceptance of its convention, now much modified by subsequent protocols, has come to be required of those states that hope, one day, to be admitted into the European Union. Willingness to conform to the convention serves as a certificate of political respectability, and its ratification and observance provides a ticket of entry to a very exclusive European club, albeit not an immediate ticket of entry. The convention is being used to serve a proselytizing or missionary function, a vehicle for the creation of a new political and legal ideology in central and eastern Europe. There are now 40 members of the Council of Europe; they even include Russia. Somewhere around 700 million people are, in theory at least, now protected; the convention applies from Gibraltar to Moscow. Within the countries to which the convention has not been extended, groups of liberal minded citizens are now engaged in establishing non governmental organizations committed to human rights, a vital element in any scheme of protection, as well as arranging educational courses for students, officials, and lawyers, and producing translations of relevant texts. Knowledge of the convention and expertise in using it are both being exported on an increasing scale. And some, at least, of the new member states are fully committed to making the convention work, whilst others are beginning this difficult process.

It took something like 20 years for the convention to have much practical effect in western Europe, and it will surely take as long in central and eastern Europe. There is no doubt but that the extension of the convention will impose severe strains on the Strasbourg machinery, which has recently been rejigged in an attempt to reduce the current severe backlog of cases. The pessimistic view is that the whole system will simply collapse under the load that has now been placed upon it. It is in reality far too early to judge. My own interest in the convention was, initially, purely historical — I am indeed working on a book about its genesis back in the 1940s and 1950s. From this historical work has developed a fascination with what is now becoming of it. It is particularly exciting that quite a number of Michigan students and graduates have come to be directly involved, through internships and other mechanisms, in this great experiment in the extension of the protection of human rights.
I have a bit of a streak going. I have found that if I attend enough social events, not a year goes by that someone does not remark to me that now must be an especially fascinating time to specialize in Japanese law. Those who make that remark are almost never wrong, as developments in Japanese law are often exciting, sometimes frustrating, and always at least interesting.

In 1999, many of the more fascinating issues have arisen from Japan's struggle with "modern," or perhaps "post-modern," human rights. As an economically developed democracy, Japan of course struggles with many of the same human rights questions that emerge in the United States. But recently Japan has been forced to grapple with a unique set of issues that fall loosely under the broad rubric of human rights and that result from conflicts between Japan's traditional history and the turn-of-the-millenium forces of information access, economic liberalization, and technological change.

Consider the following five measures, all of which reached Parliament in the first half of 1999—a period so busy that Parliament voted to extend its session by two months.

First, the Lower House passed a package of wiretapping bills that gives police the power to use wiretapping in cases involving drugs, guns, multiple murders, and mass smuggling of illegal immigrants. Japan is said to be the only leading industrial country that does not have laws allowing monitoring of private communications during crime investigations, and the legislation comes in response to the 1995 poison gas attack by the Aum Shinrikyo religious group and subsequent international pressure. An odd coalition of right-wing gangsters and three left-wing opposition parties have denounced the bill as an unconstitutional encroachment on the "fundamental human rights" of secrecy of communications and privacy. Playing on remaining wartime sentiments, popular Democratic Party of Japan leader Naoto Kan called the debate "a battle between citizens' rights and the power of the bureaucrats." A June poll found that 45 percent of respondents opposed the bill, 44 percent were in favor, and 11 percent were undecided.
Second, since 1955, fingerprinting has been required of foreigners living in Japan. Many non-Japanese residents, including many lifelong residents of Korean descent (more than 600,000 Koreans are in Japan), quite understandably found the procedure to be invasive and felt that they were treated as criminals. In 1992, the requirement was eliminated for foreigners with permanent resident status. In May, the Upper House passed a bill eliminating the requirement altogether. Although the bill is a victory for non-Japanese residents, one reason the requirement was relaxed may be the increasing existence and accessibility of information from sources other than fingerprints.

Third, a “citizen numbering plan” was adopted by the Lower House in June. In the past, individual records were kept in a registry system based on domicile and family. The system is often annoyingly complicated. (You really can’t fight City Hall. I have yet to convince a single Japanese civil servant that my way is more efficient than the double-stamped, copies-in-triplicate method supposedly mandated by some unseen, yet strictly applied, regulation.) The new law would simplify such procedures as passport renewal, voting registration, and national health insurance plan changes by providing each citizen with a 10-digit number and storing relevant linked information in a national computer database. Although the law prescribes punishments for administrative officials who use the information for commercial purposes, opponents argue that such measures may be insufficient to protect individual privacy and could result in human rights violations.

Fourth, in May, the Japanese Parliament enacted a law that aims to ban child prostitution and child pornography. Existing laws had been vague, and required a victim to file a complaint before the police could take action. Opponents of the new law argue that it restricts free speech and as such impinges on human rights, while supporters argue that the law is necessary to protect the rights of minors.

Finally, also in May, Parliament passed Japan’s first national Freedom of Information Act. Proponents argue that the law is a first step toward allowing ordinary citizens access to government documents, a liberty they label as a human right in a modern state. But some opponents note that the law does not go far enough, as it stipulates that government organizations are allowed to refuse to release information if it would identify individuals linked to the requested information, was given to the government voluntarily by corporations on the understanding that it would not be made public, would be detrimental to the interests of the nation and its relations with other countries, or would impede criminal investigations or threaten public security.

Besides these relatively modern concerns, Japan also faces a host of basic human rights issues related to race, treatment of criminal defendants, treatment of the mentally ill, religious freedom, and gender. (With respect to the latter, Japan in April revised its Equal Employment Opportunity Law to prohibit sexual discrimination. In June it became the last developed democracy to approve the Pill, a development caused by protests that ensued after approval for Viagra took less than six months, while the petition for the Pill lingered for nine years.)

One of the luxuries of studying Japanese law is that almost all of these issues, whether traditional or modern, have been subject to relatively little examination by scholars trained in U.S.-style legal analysis and law and economics. As a researcher, this means that much of the most fertile ground is just begging for analysis. As a teacher, it means that I have the opportunity to present these issues to bright students who have never confronted the issues before, but who have enough initial training in the law, as well as life experiences sufficiently different from my own, to create exciting class discussion.