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ARTICLES

BOOK REVIEW

Rael v. Taylor and the Colorado Constitution: How Human Rights Law Ensures Constitutional Protection in the Private Sphere

TODD HOWLAND*

I. INTRODUCTION

Many Practitioners and scholars in the United States have adopted the position that the ratification of human rights treaties adds little or nothing to the protection of rights in America.[1] This is due to a perceived advanced state of constitutional rights protection.[2] However, most international human rights advocates have lamented the apparent lack of impact that the ratification of the International Covenant on Civil and Political Rights [ICCPR] has had on U.S. jurisprudence. They blame this on the many reservations, understandings, and declarations attached during its ratification by the Senate.[3]

The impact of the ratification has yet to be fully understood as an extremely important interpretive device for federal and state constitutions.[4] One such area is the vertical and horizontal character of human

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1. One practitioner raises the following question: "why should I apply international human rights law, which I can't even shepardize and which I have trouble finding, in a lawsuit between Californians raising issues of California law?" He goes on, however, to discuss how human rights can be useful in promoting rights in state courts. Paul Hoffman, *The Application of International Human Rights Law in State Courts: A View from California,* 18 INT'L LAW. 61, 62 (1984). One scholar indicates there are difficulties in using human rights law for "international law is a mystery to most judges." Curtis A. Bradely & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815, 815 (1997).

2. For example, the State Department claims that "because the basic rights and fundamental freedoms guaranteed by the Covenant on Civil and Political Rights . . . have long been protected as a matter of federal constitutional and statutory law, it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law." Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant of Civil and Political Rights, at 29 (July 1994). For an opposing view, see, Dorothy Q. Thomas, *Essay: Advancing Rights Protection in the United States: An International Advocacy Strategy,* 9 HARV. HUM. RTS. J. 15 (1996).

3. *See, e.g.*, Cherif Bassiouni, *Reflections on Ratification of the International Covenant on Civil and Political Rights by the United States Senate,* 42 DEPAUL L. REV. 1169 (1993).

4. Some scholars have predicted and suggested that advocates can use the Covenant "as an interpretive aid, and it is likely with U.S. ratification of the treaty, this role . . . will

rights, which means human rights law will have an important evolutionary impact on the application of constitutional rights, not only in the public, but also in the private sphere.[5]

This article will show the vital role the ICCPR should play in resolving a case pending in the Colorado courts since 1981, involving the descendants of the original Mexican settlers to Southern Colorado and their struggle to regain land rights with a 150 year history. The ratification of the ICCPR should profoundly alter the traditional "state action" limitation in cases seeking to vindicate constitutionally protected rights. The ICCPR should form the constitutional arguments made in the case of *Rael et al. v. Taylor*.[6]

The ICCPR was originally drafted as a blueprint for a society where human rights are respected by all. The effect on traditional constitutional analysis is the creation of a transparent method for the examination of all rights involved and the value judgments underlying them. This is true even when the alleged violator has traditionally been considered a private actor and therefore free from scrutiny.[7]

This article will provide a short history of *Rael v. Taylor*; outline the constitutional analysis of the case prior to the ICCPR; discuss the ratification of the ICCPR and its meaning; and conclude with a consti-

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expand." Jordan J. Paust, *Avoiding Fraudulent Executive Policy: Analysis of the Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1277 (1993).

5. For a thorough overview of the practical and theoretical development of horizontal human rights, see ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993). The terms "horizontal" and "private" sphere are used as descriptive categories which reflect a particular legal history. These distinctions or terms are not capable of describing reality.

6. In 1981 a group of citizens representing the heirs and successors in the interest of the original settlers of the *Sangre de Cristo* grant filed a civil action in Costilla County District Court to quiet title to the "Mountain Tract" or *la sierra* and alternatively, for damages. Rael v. Taylor, Civil Action No. 81CV5 (Dist. Ct. Costilla Cty. Colo., 1981). The District Court granted defendant Taylor's motion for summary judgement holding that the action was barred by the principle of res judicata and certain statutes of limitation. The court cited two related actions. The first is a Torrens action filed by Taylor in U.S. District Court in 1960. In this action, title to the Mountain Tract or *la sierra* was confirmed and registered in Taylor's name. Taylor v. Jaquez, Civil Action No. 6904 (D. Colo. Oct. 5, 1965). The 10th Circuit affirmed the lower court's holding, reasoning that the U.S. Congressional confirmatory Act of 1860 extinguished any usufructuary rights derived from Mexican law. Sanchez v. Taylor, 377 F.2d 733, 737 (10th Cir. 1967). The second is a quiet title action filed in 1960 by Taylor's predecessor in interest regarding the Salazar tract. Salazar v. Allis, Civil Action No. 1483 (Dist. Ct. Costilla Cty., Colorado July 8, 1960). The 1981 District Court ruling was appealed. The decision was affirmed by the Colorado Court of Appeals. Rael v. Taylor, 832 P.2d 1011 (Colo. Ct. App. 1991). The Court of Appeals ruling was appealed. The Colorado Supreme Court affirmed in part and reversed in part, the lower court's ruling. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994). Specifically, the Colorado Supreme Court held that the due process rights of the heirs may have been violated during the 1960 Torrens action and for that reason the application of res judicata would be inappropriate, and remanded the case for further action. *Id.* at 1229.

7. *See generally*, Duncan Kennedy, *The Status and Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

tutional analysis of the *Rael* case in light of the ICCPR's ratification.

II. THE HISTORY OF RAEL V. TAYLOR

In 1844, what is now Costilla County, Colorado, was Mexican territory including the land presently in contention in the *Rael v. Taylor* case.[8] That year the Mexican government issued to Narcisco Beaubien and Stephen Luis Lee the *Sangre de Cristo* land grant on the condition they encourage settlement in that area.[9] As was the custom at that time, Mexican law granted the businessmen a portion of the land with the remainder to be divided among the successful homesteaders and common areas.[10] These common areas would be used as pastures and a mountain tract for hunting, fishing, wood gathering and as a water supply. The land used for these common areas was held by the community with usufructuary rights to all settlers, however, title to the land reserved for common use was most often held by the local government or community but it could be held by the federal government or by an individual.[11]

In the early 1800's, Mexico and the United States were competing to expand into what is now the Southwestern part of the United States.[12] The Mexican government used attractive incentives to persuade settlers into this area. [13] It allowed title to be recognized without being formalized until after the land had already been settled. Even without formalized title, the general pattern of settlement was well known and systematically followed.[14] This made custom an extremely important part of Mexican land law during this period of rapid expansion.[15]

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8. *See, e.g.*, Calvin Trillin, *U.S. Journal: Costilla County, Colorado A Little Cloud on the Title*, NEW YORKER, Apr. 26, 1976, at 122.

9. For a complete study of the land grant and its sociological and anthropological impact on the region, see Marianne L. Stoller, The History of the *Sangre de Cristo* Land Grant and the Claims of the People of the Culebra River Villages on the Lands (unpublished manuscript 1980). Attached as an exhibit to plaintiff's brief in opposition to Motion for Summary Judgement in 1981 civil action.

10. Typically 30% was awarded to the grantee (businessman). The remainder was to be held individually and in common by the settlers. FREDERIC HALL, THE LAWS OF MEXICO: A COMPILATION AND TREATISE 103-06 (1885).

11. GEORGE MCCUTCHEN MCBRIDE, THE LAND SYSTEMS OF MEXICO 107-111 (1923).

12. *See* Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039, 1065 (1985).

13. The terms did not improve only for the settlers, but for the grantee as well. In that larger tracts of land than typically granted were being distributed by the Mexican government to facilitate settlement of its northern border. *Id.* at 1066.

14. MCBRIDE, *supra* note 11, at 1, 57, 85.

15. At this point, custom and usage became even more important:

> The supreme authorities of the remote province of New Spain, afterwards the Republic of Mexico, exercised from time immemorial certain prerogatives and powers, which, although not positively sanctioned by congressional enactments, were universally conceded by the Spanish and Mexican governments; and there being no evidence that these prerogatives and powers were revoked or repealed by the supreme authorities, it is to be presumed that the exercise of the them was lawful.

Tameling v. U.S. Freehold and Emigration Co., 93 U.S. 644, 658 (1876)(quoting William

The original grantees, Narcisco Beaubien and Stephen Luis Lee, were killed in 1847 during the Taos Rebellion.[16] Narcisco's father, Carlos Beaubien, inherited his son's undivided one-half interest in the property and purchased the remaining interest from Lee's estate.[17] By 1848, when the governance of that area was transferred from Mexico to the United States, the necessary steps to fulfill the terms of the land grant had been well underway.[18] Following a change of sovereignty, the underlying property claims remain unchanged.[19] Settlement in *Sangre de Cristo* continued in accord with the terms of original Mexican grant.[20]

In accordance with the terms of the original *Sangre de Cristo* grant, a tract of mountain land was set aside as common area (*la sierra*). *La sierra* compromised a portion of what is now the *Sangre de Cristo* mountain range. In 1863, Beaubien memorialized the original Mexican settler's rights to this communal tract of land in a document referencing two types of common areas; pasture lands (*la vega*) and mountain lands (*la sierra*). This document states:

> Town of San Luis of Culebra, May 11, 1863 Book 1, Page 256.
>
> It has been decided that the Rito Seco lands shall remain uncultivated for the use of the residents of San Luis, San Pablo, and the Vallejos, and other inhabitants of said towns, for pastures and community

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Pelham, Surveyor General in relation to the *Sangre de Cristo* land grant, Dec.30, 1856).

16. *Id.*

17. Rael, 876 P.2d at 1210, 1213 .

18. Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Feb. 2 1848, U.S. - Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

19. The concept of conquest in international law called for the new sovereign to recognize and respect the property rights of the previous inhabitants of the territory it had just acquired. This concept was clearly established in U.S. courts. United States v. Percheman, 32 U.S. 51, 88 (1833). Fisher v. Allen, 3 Miss. (2 Howard) 611 (1837) (holding that a change in citizenship cannot interfere with the rights to property previously acquired). In fact, the U.S. Supreme Court reiterated this same principle in a case delineating the boundaries of the *Sangre de Cristo* land grant. "We have repeatedly held that individual rights of property, in the territory acquired by the United States from Mexico, were not affected by the change sovereignty and jurisdiction." Tameling, 93 U.S. at 661.

The Treaty of Guadalupe Hidalgo recognized this concept in its text:

> Mexicans now established in territories previously belonging to Mexico . . . shall be free to continue to reside, or remove at any time to the Mexican republic, retaining the property which they possess in the said territories . . . . In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. Mexicans who, in the territories aforesaid . . . shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

Treaty of Guadalupe Hidalgo, *supra* note 18, Arts. VIII, IX.

20. Stoller, *supra* note 9, at 26-30.

> grounds, etc. And that Rito Seco waters are hereby distributed among the said inhabitants of the town of San Luis, and those on the other side of the *vega*, whose lands lie in the vicinity and cannot be irrigated by the water of the Rio Culebra .
>
> All the inhabitants shall have the use of pasture, wood, water, and timber and the mills that have been erected shall remain where they are, not interfering with the rights of others. No stock shall be allowed in said lands, except for household purposes. All those who come as settlers shall agree to abide by the rules and regulations and shall help, as good citizens and be provided with the necessary weapons for the defense of the settlement.[21]

This statement is entirely typical of Mexican land grants from that time.[22]

The Mexican land grant's common area provisions are reminiscent of the practice brought by early settlers from England to United States.[23] *La vega* is one of the few common pasture areas recognized by United States courts West of the Mississippi River.[24]

While the original Mexican homesteaders continued to settle the area, the United States government recognized the entire *Sangre de Cristo* grant.[25] During this period plots were provided to the settlers for cultivation and they were also given usufructuary rights to *la vega* and *la sierra*. In 1864, when Beaubien transferred the underlying fee in *la sierra* he reaffirmed the traditional usufructuary rights of the original

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21. Rael, 876 P.2d at 1231 (quoting a document executed by Carlos Beaubien on May 11, 1863 translated from the Spanish original).

22. The Spanish colonies in the new world normally held pasture lands, mountains, and water in common for the use of the residents of the settlement. "We have ordained that pastures, mountains, and water, shall be common in the Indies." JOHN SAYLES AND HENRY SAYLES, EARLY LAWS OF TEXAS 3, Vol. 26 (2d ed. 1891) (discussing the Law and Decrees of Spain relating to land in Mexico). This practice of colonial Spain filtered into Mexican law. *See* MCBRIDE, *supra* note 11, at 1, 57, 85.

23. Such a property arrangement characterized feudal agrarian society. *See, e.g.*, MARC BLOCH, FEUDAL SOCIETY (L.A. Manyon trans., 2d ed. 1962) (1961). For a more extensive overview of the legal history relevant to the case, see Richard D. Garcia & Todd Howland, *Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre De Cristo/Rael Case*, 16 CHICANO-LATINO L. REV. 39 (1995).

24. Costilla State Development Company v. Delphino Salazar, Civil Action No. 118 (Dist. Ct. Costilla Cty., Colo., Jan. 21, 1916).

25. In accord with the Treaty of Guadalupe Hidalgo, the U.S. Surveyor General made findings and recommendations regarding property which had become part of U.S. territory. The U.S. Congress confirmed that the legal owner under Mexican law of the *Sangre de Cristo* grant was Carlos Beaubien. This as well as a number of other land grants were confirmed by U.S. Congress through, An Act to Confirm Certain Private Land-Claims in the Territory of New Mexico, June 21, 1860, ch. 167, 12 Stat. 71-72 (1860). This confirmation eventually provided Beaubien with a quitclaim deed to the property related to the grant, the relevant section of which reads: "this patent shall only be construed as a quitclaim deed or relinquishment on the part of the United States, and shall not affect the adverse right of any other person or persons whomever." Following a lengthy debate over the exact size of the grant, in 1880 a Congressional patent was issued based upon the 1860 confirmation. Tameling, 93 U.S. 644. *See also* Stoller, *supra* note 9, at 33-35.

Mexican settlers.[26]

Geographic isolation, combined with the rather unusual property arrangement for that period of American legal history nurtured a unique, self-sufficient culture. The land provided all the of the settler's needs, from subsistence agriculture on their individual tracts, to hunting, fishing, and wood gathering on *la sierra*. In fact, without access to *la sierra* it would have been impossible for the settlers and their descendants to have survived. For one hundred and fifty years, the villages established by these settlers have continued to function in the same manner, preserving a unique American heritage found nowhere else. The language, religion, and customs practiced by the descendants of the original settlers can be traced back to historic Spanish-Indio culture.[27]

In 1960, major changes began to unfold in Costilla County. John (Jack) T. Taylor, a North Carolina lumberman, purchased the underlying fee of approximately 77,000 acres of *la sierra*. His purchase included the Culebra Mountain, the only privately owned 14,000 foot mountain peak in the state of Colorado.[28] Taylor's deed contains language similar to the 1863 County Record, indicating he was fully aware that the descendants of the original settlers of the *Sangre de Cristo* grant had usufructuary rights to the property he was purchasing.[29] *La sierra* was adjacent to the individual tracts of property used by the original settlers for agricultural purposes and as common pasture lands [*la vega?*]. Taylor fenced in areas of *la sierra*, infringing the traditional usufructuary rights. This generated a steadily increasing tension which continues to divide the region.[30]

In 1961, Taylor filed a Torrens action in Denver (250 miles from Costilla County) attempting to register his recently acquired property without recognizing the original settlers' descendants' usufructuary rights mentioned in his deed. Taylor named in his Torrens action only

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26. The instrument of conveyance from the estate of Carlos Beaubien to William Gilpin reads:

> [C]ertain settlement rights before then conceded by said Charles Beaubien to residents of the settlements of Costilla, Culebra and Trinchera, within said Tract included, shall be confirmed by said William Gilpin as made by him, the said Charles Beaubien during his [sic] occupancy of said Tract and as understood and agreed by and between him and said settlers.

Rael, 876 P.2d at 1213-14.

27. *See generally* Stoller, *supra* note 9, for a more extensive discussion of this aspect of development of the community which grew out of the original grant.

28. *Id.*

29. In Rael, the Court stated:

> [a]ll of the land hereby conveyed being subject to rights of way of record and all rights of way heretofore located and now maintained and used on, through, over and across the same; and also subject to claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlements [sic] rights in, to and upon said land, but not subject to rights granted by the party of the first part or its predecessors from and after January 1, 1900; and also subject to taxes for the year 1960 and subsequent years, and existing leases, if any.

Rael, 876 P.2d at 1214.

30. Trillin, *supra* note 8.

about 15% of the readily ascertainable landowners that would be affected.[31] The U.S. District Court granted Taylor's request to extinguish the usufructuary rights of the original settlers and their descendants even though they had been using that land in question in an uninterrupted fashion for more then one hundred and fifty years. The court did not require Taylor to give notice to almost 85% of the landowners who were affected by its decision.[32] This decision was affirmed by the U.S. Circuit Court.[33]

With the court supported and enforced fencing of *la sierra*, tensions remained high and the residents of Costilla County suffered a major economic downturn, due to the dislocation from their traditional way of life. Descendants of the original settlers were arrested for attempting to exercise their traditional rights.[34] By 1978, Costilla County had the highest percentage in Colorado of residents receiving public assistance - about one half of all adult residents.[35] Residents were disaffected with a system that did not recognize their rights, and for the most part did not even give them a day in court before their rights were stripped away. The descendants of the original settlers suffered both material loss in well-being and a loss of dignity stemming from the loss of their traditional way of life and self-sufficiency.[36]

In 1981, some of the descendants of the original settlers of the *Sangre de Cristo* land grant and residents of Costilla County banded together to file a claim against Taylor. Their claim alleged that Taylor had violated their traditional rights without ever having their day in court. This challenge failed in the district,[37] and appellate courts.[38] The

31. Costilla County property records listed almost all those who would have been affected by the decision.

32. Taylor v. Jaquez, No. 96-1426, 1997 WL 627025, at *1 (D. Colo. 1997).

33. Sanchez v. Taylor, 377 F.2d 733, 737 (10th Cir. 1967).

34. Trillin, *supra* note 8.

35. Stoller, *supra* note 9, at 91.

36. The most recent complaint (District Court of Colorado 1997) of the heirs of the original settlers lists a number of causes of action, which include: Plaintiffs' properties received and became affixed with easements by grant or dedication to use the Historical (usufructuary) Rights on the Mountain Tract. Plaintiffs are, third party beneficiaries to the existence of the covenants and servitudes, which covenants and servitudes served to impress and burden the Mountain Tract, and to benefit the Plaintiffs' properties. Plaintiffs' properties, acquired easements which are implied both by pre-existing use and by necessity to use the Historical Rights on the Mountain Tract. Plaintiffs' properties, through open, continuous, notorious, hostile and adverse use, acquired easements by prescription to use the Historical Rights on the Mountain Tract. Beaubien and his successors-in-interest granted licenses, which have ripened into easements. Circumstances surrounding the creation of the Historical Rights warrants imposition of an equitable trust against the Mountain Tract. Heirs and successors of the original settlers are entitled to continued communal use of the Historic Rights in the Mountain Tract in accordance with Mexican law and custom that established these rights. The application of these rights is protected by the Constitution of the State of Colorado as informed by binding human rights law, by international treaties, including the Treaty of Guadalupe-Hidalgo, as well as international legal principles recognized in U.S. courts, including the law of conquest. Plaintiff's Complaint, Rael v. Taylor, Civil Action No. 81CV5 (Dist. Ct. Costilla Cty., Colo., 1981).

37. Rael v. Taylor, Civil Action No. 81CV5 (Dist. Ct. Costilla Cty., Colo., 1981).

38. Rael v. Taylor, 832 P.2d 1011 (Colo. Ct. App. 1991).

Colorado Supreme Court, however, held in favor of the residents stating that the defendant Taylor did not provide adequate notice to those his original Torrens action would divest, given the ease of identifying all potentially injured parties.[39] The case has now been remanded to the district court to allow the settler's descendants to argue their rights were violated when Taylor stripped them of their usufructuary rights to *la sierra*.[40]

The descendants of the original settlers challenge Taylor's action of cutting access to *la sierra*, and thereby depriving them of their traditional rights to hunt, fish, and gather wood.[41] The descendants also claim that Taylor's actions have destroyed their livelihood, their way of life, and their community. These effects indicate that some cluster of rights has been violated, however, the difficulty presented is in determining whether any of those rights create a cause of action which is recognizable in a U.S. court. Should an action exist, the Taylor's rights to enjoy the use of his land, and the usufructuary rights of the settler's descendants are in conflict and will need to be resolved.

III. CONSTITUTIONAL DEVELOPMENT AND *RAEL V. TAYLOR* PRE-ICCPR

Traditionally, scholars have viewed the 1791 Bill of Rights to the U.S. Constitution as an attempt to curtail the central government's infringement of rights of individuals.[42] Early court cases restricted the Federal governments powers, it was not until the 13th [1865] and 14th [1868] Amendments to the Constitution were passed that focus shifted to any infringement of an individual's rights.[43]

Although most scholars have views the language of the Bill of Rights as limitations placed on the Federal government, there is some ambiguity as to their application on state governments. The 14th Amendment clearly eliminates that ambiguity placing a firm restriction on state governments.[44] Additionally, the 13th Amendment creates a constitutional right for individuals against other individuals.[45]

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39. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

40. Two of the three kinds of property derived from the original land grant have always been recognized as valid. The individual plots for cultivation and the common land for pasturing. Costilla State Development Company v. Delphino Salazar, et. al., Civil Action No. 118 (Dist. Ct. Costilla Cty., Colo., Jan. 21, 1916). But the usufructuary rights to the Mountain Tract or *la sierra* were interrupted in 1961 and with active state intervention have not been exercised since.

41. The popular press is already following the issue closely as it involves a number of issues, like sustainable living and respect for the environment, that are widely valued in Colorado. *See, e.g.*, Jillian Lloyd, *150-Year-Old Land dispute Intensifies in Colorado,* CHRISTIAN SCI. MONITOR, Mar. 3, 1997, at 4.

42. *See, e.g.*, Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 78 (1996).

43. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

44. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV, §1.

45. "Neither slavery nor involuntary servitude, except, as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, §1.

U.S. jurisprudence has moved slowly to reflect these changes:

> It took from 1868 to 1925 for the Supreme Court to rule that the Fourteenth Amendment protection of life, liberty, and property against state attacks including attacks on the rights set forth in the First Amendment. The first time a statute was over turned for violating the First Amendments was 1931. And it was 1953 before the Supreme Court upheld the conviction of a large Washington, D.C. department store for discriminating against Negro customers in violation of the acts of 1872 and 1873 passed by the Legislative Assembly of the District of Columbia. It was 1968 before the Supreme Court upheld a challenge to the practice of refusing to sell a home to a Negro under the law passed in 1866.[46]

It has taken time to accept the idea that States must respect the rights contained in the Bill of Rights. The idea that individuals must respect the rights contained in the Bill of Rights has been a much more convoluted process.

After the Civil War, the Supreme Court did not embrace the idea that it should protect individuals from violation committed by another individual. The Court developed the "state action" distinction, whereby a deprivation of a constitutional right is remediable only when a state actor is responsible.[47] In the Civil Rights cases of 1883, the Court attempted to create a distinction between public and private deprivations of an individual's rights. Discrimination in the private sphere was a protected constitutional right, while in the public sphere, it was a blight that was to be stuck down.[48] A whole tapestry of cases has followed trying to draw a clear distinction between these spheres.[49] Many judicial resources have been expended trying to avoid looking seriously at the rights of both parties and determining how and why one person's rights should prevail.

While a number of scholars have attempted to clarify the distinction between public and private deprivations, one gets the feeling that the distinctions being made are a bit slippery.[50] In some cases it has been argued that "[r]ights created by the first section of the 14th

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46. Ann Fagan Ginger, *The Energizing Effect of Enforcing a Human Rights Treaty*, 42 DEPAUL L. REV. 1341, 1352-53 (1993) (construing Gitlow v. New York, 268 U.S. 652, 666 (1925); Stromberg v. California, 283 U.S. 359 (1931); District of Columbia v. John R. Thompson, Co., 346 U.S. 100 (1953); and Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)). Note also that it was not until 1962 that the Eighth Amendment was applied to the States.

47. David Pickle, Comment, *State Court Approaches to the State Action Requirement: Private Rights, Public Values, and Constitutional Choices*, 39 U. KAN. L. REV. 495 (1990-1991).

48. Civil Rights Cases, 109 U.S. 3 (1883).

49. Coppage v. Kansas, 236 U.S. 1 (1915) (allowing employers to discriminate against union members in employment decisions); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage by reading liberty to protect against attacks on welfare by individual, even though the defendant claimed his right to liberty protected his freedom to contract); Marsh v. Alabama, 326 U.S. 501 (1946) (Court reviewed and overturned state preference for the property right of a mall owner, over the rights of freedom of expression of others).

50. *See, e.g.*, LAWRENCE TRIBE, CONSTITUTIONAL CHOICES 259-60 (1985).

Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[51] While in other cases it has been argued that "[n]othing in the Due Process Clause itself requires the State to protect life, liberty, property of its citizens against an invasion by private actors."[52] The reasoning of this line of cases presupposes that the world is divided between public and private spheres, that assumption is difficult to fit into today's world.[53]

The lines between state and non-state actors are blurring, if there ever was a clear distinction. Today, for example private organizations are running prisons and schools, increasing the number of institutions that perform traditional "state functions." There are symbiotic relationships requiring state compulsion to be valid. For example, private property is nothing without government intervention and protection.[54]

The present state of the law normally calls for legislative action before constitutional rights can be applied against governments [horizontally] or between individuals [vertically]. Other than favoring the status quo, some scholars believe that the distinction between public and private is not legally justifiable, nor desirable, in that it helps sustain the racist and male dominated aspects of society.[55] Implicit in a no state action holding is a declaration that a claim has no constitutional merit. As scholars have noted, it would be intellectually more honest and beneficial for society to openly discuss the rights in conflict in a transparent fashion, strike a balance, or if necessary, confirm that one side's right is more important then the others.[56]

The distinction between public and private law is considered by sociologist to be inappropriate.[57] Durkheim has said: "All law is private in the sense that it is always about individuals who are presented and acting; but more importantly, all law is public, in the sense that it is a social function and that all individuals are, whatever their various titles, functionaries of society."[58]

IV. RATIFICATION ON THE ICCPR AND ITS MEANING

President Carter signed the ICCPR and transmitted it to the Senate for its advice and consent in 1977.[59] Fifteen years later it was rati-

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51. Shelley v. Kraemer, 334 U.S. 1 (1948).

52. DeShaney v. Winnebage Cty. Soc. Serv., 489 U.S. 189 (1989).

53. For a criticism of the underlying assumption and the values attached to it, see Duncan Kennedy, *The Status and Decline of the Public/Private Distinction,* 130 U. PA. L. REV. 1349 (1982).

54. For a more detailed discussion of this area, see Pickle, *supra* note 47.

55. *E.g.,* Kennedy, *supra* note 53.

56. Pickle, *supra* note 47, at 499, 505, 516.

57. CLAPHAM, *supra* note 5, at 131.

58. EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 68 (1964).

59. *International Covenant on Civil and Political Rights,* G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* Mar. 23, 1976 [hereinafter ICCPR]. The ICCPR has 27 substantive articles touching on most aspects of what are generally classified as political and civil rights.

fied by the Senate.[60]

The ICCPR is considered to be one of the foundation documents of human rights law. It is solidly grounded in the Universal Declaration of Human Rights.[61] The ICCPR is often refereed to as part of the International Bill of Rights.[62] It took the world community 19 years to negotiate and draft the ICCPR treaty, with the participation and consent of one hundred and three nations as well as indirect input from non-governmental organizations.[63] The United States delegation was one of the more active groups during the drafting process.[64]

Despite the extensive United States participation in the ICCPR's drafting, the Senate's ratification was remarkable in the number of limitations and clarifications it attempted to attach to the treaty. The Senate following extensive deliberations attached five reservations, five understandings, and four declarations to the ratification of the ICCPR.[65] While both under international law[66] and in domestic courts, the status of these attachments is questionable,[67] this article will focus

60. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). The U.S. deposited its instruments of ratification on June 8, 1992, *reprinted in 31* I.L.M. 645 (1992). It was not until September 8, 1992 that the ICCPR entered into force in the United States. U.S. Department of State Dispatch, Monday, May 16, 1994.

61. G.A. Res. 217A (III), U.N. Doc. A/810, at 72 (1948).

62. The other half of the International Bill of Rights is the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), *entered into force* Jan. 3, 1976. *See, e.g.*, LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS (1987).

63. *See* HENKIN, *supra* note 62; *see also*, MARC J. BOSSUYT, GUIDE TO THE *TRAVAUX PREPARATOIRES* OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS XIX, XX (1987).

64. The U.S. even sat on the original eight-member drafting committee in June of 1947. *Id.* at XIX. A noted political scientist in the area has divided U.S. interest in human rights into four phases: 1945-1953, U.S. Limited Support; 1954-1974, U.S. Neglect; 1974-1981, U.S. Renewed Interest; and 1981-19?, Era of Subservience to Cold War Politics. David Forsythe, *The United States, the United Nations, and Human Rights, in* THE UNITED STATES AND MULTILATERAL INSTITUTIONS, 261 (Margaret P. Karns & Karen A. Mingst, eds. 1990).

65. For a detailed discussion, see David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

66. Many countries registered complaints regarding the manner in which the U.S. attempted to limit its treaty obligation. Countries such as Finland and Sweden referred to article 19(c) of the Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, 8 I.L.M. 679 (1969), stating that regardless of what a country calls it, a reservation, understanding, or declaration, any attempt to opt out of what is the essence of the treaty is incompatible with its object and purpose. The countries reminded the U.S. that a party to the treaty may not invoke provisions of its internal law as justification for failure to respect provisions of the treaty. *See* UN Treaty Database (visited April 2, 1997) <http://www.un.org/cgi-bin/treaty2.pl>. Given this principle of treaty construction, it is questionable whether U.S. attempts to limit its obligations under the ICCPR through a series of reservations, understandings, and declarations could withstand a challenge in the International Court of Justice.

67. The non-self-execution provision found in the first declaration has been widely criticized. Scholars have pointed out that self-execution is a judicial doctrine regarding whether the obligations and wording in the treaty are sufficiently clear to ground a private right of action. Some believe it is for the courts, not for the Senate to decide, especially given the fact that non-self-execution is at odds with the language of the treaty

on what the Senate did not attempt to limit, thereby leaving no impediment in the way of using those aspects of the treaty.

Article 2 of the ICCPR states: "Each State Party to the present Convention undertakes to respect and ensure that all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind. . ."[68] If the Senate intended to exclude any possible application of the ICCPR in the United States and in state courts, it would have entered a reservation to article 2, it did not.[69]

The Senate, through one of its understandings, declared the ICCPR's "non-self executing" in nature, and thereby attempted to avoid litigation based directly upon the ICCPR. Instead, the Senate indicated that the fundamental rights and freedoms protected by the ICCPR are also guaranteed as a matter of U.S. law, both constitutional and statutory, and can be effectively asserted by individuals in the judicial system.[70] This incorporationist position attempts to minimize the impact of the ICCPR without denying it significance. In other words, the Senate looks to the interpretation of current law to reflect any modification required by the ICCPR. This incorporationist position is seen in the fifth understanding to the Senate's ratification of the ICCPR which states "[the ICCPR] shall be implemented by the Federal Government to the extent it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments."[71]

The Senate's attempts to limit the application of the ICCPR fall mainly into three categories: the first relates to free speech, the second relates to criminal procedural protections and punishment, and the third relates to discrimination.[72] The free speech limitation highlights a different conception of this right than that found in the Covenant, in that U.S. practice is civil libertarian based, while the ICCPR limits speech that is offensive to human rights. In the second area, the Senate

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which obligates a State Party to the ICCPR to provide an effective remedy when there is a violation of a right contained in the Covenant. *See, e.g.*, Paust, *supra* note 4, at 1265. Other scholars have been more blunt with their criticism of the Senate. They posit that a declaration regarding self-execution does not change the treaty obligation and does not bind courts. Stefan R. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI-KENT L. REV. 293, 296-97 (1991). The D.C. Circuit has held that statements other than reservations made by the Senate have no force of law. Power Authority v. Federal. Power Comm'n, 247 F.2d 538, 546 (D.C. Cir. 1957).

68. ICCPR, *supra* note 59, at Part II, art. 2.

69. John Quigely, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993).

70. Stewart, *supra* note 65, at 1203; *see also*, United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, Jan. 30, 1992, 31 I.L.M. 645, 658-59.

71. Senate Committee on Foreign Relations, Covenant on Civil and Political Rights, U.S. Senate Exec. Rep. 102-23, (102 Cong. 2d Sess.) *reprinted in* 31 I.L.M. 657.

72. *Id.*

has no fundamental difference in conception regarding the rights in question, but prefers a much more limited interpretation of what those rights mean. For those rights, the Senate does not want the ICCPR to expand or change the present U.S. interpretation. The last area, discrimination, the Senate wanted to maintain the U.S. interpretation which allows discrimination in the private sphere and where it is tied to a rational government objective.

The Senate accepted many aspects of the ICCPR, indicating approval of the law and how that law had been interpreted by the UN and other nations. Where the Senate differed in conception differed, the Senate choose to placed a reservation, understanding or declaration on its ratification of the ICCPR. The lengthy deliberations and number of limitations made to the ICCPR indicate a rigorous attempt by the Senate to eliminate aspects which, from its perspective, were undesirable.

The wording of the ICCPR, its *Traveaux Preparatoires* [legislative history], and the official interpretations of by the UN Human Rights Committee indicate that the rights contained in the ICCPR are both vertical and horizontal in nature. This allows them to be applied in both the public and the private spheres. The Senate made no specific limitation on this point, indicating its acceptance of this concept.

While the language of the ICCPR clearly sets out a duty on the State Party to the treaty, it does not directly preclude application against individuals.[73] Most of the articles are written in an open style, not specifying who has a duty. For example, article 7 states: "no one shall be subjected to torture."[74] Also, article 8 states: "no one shall be held in slavery."[75] Both of these articles are difficult to construe as only applying against state action. Their plain meaning is that torture and slavery are prohibited no matter who does it. This language is used throughout the ICCPR. Perhaps the most compelling support of this interpretations is in the preamble to the ICCPR itself, "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights in the present Convention."[76]

The ICCPR does specify that those who are bound by its terms are not just states, but organizations and individuals.

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.[77]

An examination of the *Traveaux Preparatiores* of the ICCPR indicates that the treaty was designed to reach individual action. "Al-

73. ICCPR, *supra* note 59 art. 2.
74. *Id.* art. 7.
75. *Id.* art 8.
76. *Id.*
77. *Id.*, art. 5.

though a suggestion was made that freedom of assembly should be protected only against 'governmental' interference, it was generally understood that the individual should be protected against all kinds of interference in the exercise of this right."[78]

The only exception to the general application of rights in the private sphere was made in regard to article 26 on the prohibition of discrimination. Here, the treaty's history supports limiting the application of the article to state action.[79] Interestingly enough, it was probably the debate on the applicability of this provision to all actions, and to its rejection by the drafters, which led to the creation of the International Convention on Elimination of All Forms of Racial Discrimination.[80] It has also been considered the primary reason for the creation of the Convention on the Elimination of All forms of Discrimination Against Women.[81]

Many countries, upon adopting the ICCPR, and the UN, began to see article 26 as relevant to both state and private actions.[82] The Senate observed this trend in interpretation, and decided to reinforce its position that article 26's antidiscrimination language would not apply in the private sphere. An understanding to that effect was attached to the Senate's ratification of the ICCPR.

In regard to the rest of the ICCPR, the official UN body in charge of compliance, the UN Human Rights Committee has stated, "[t]he Covenant by its substance was capable of extending rights to all persons . . . It should be considered to have a third party applicability."[83] The language of the ICCPR, its history, and its authoritative interpretation all provide support for the applicability of rights to state and non-state actors. This conception is reflected in the modern trend in jurisprudence.

The traditional view of international law is that it regulates the relations between nations.[84] However, international human rights law regulates conduct of individuals.[85] Many scholars have attempted to limit the application of human rights law to only state actors.[86] There

78. U.N. Doc. E/CN.4/SR.121, p.3 (F); A/2929 ch. VI sec. 139 (22 June 1973).

79. CLAPHAM, *supra* note 5, at 98-102.

80. *Opened for signature* Mar. 7, 1966, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195.

81. *Convention on the Elimination of all Forms of Discrimination Against Women*, U.N. GAOR 3rd Comm., 34th Sess., Agenda Item 75, U.N. Doc A/Res/34/180 (1980).

82. The UN Human Rights Committee has stated it is concerned about private discrimination. U.N. Doc. CCPR/C/Rev. 1/Add. I p. 3 (21 Nov. 1989)

83. In other words, horizontal application. U.N. Doc. CCPR/C/SR 321 para. 34 (Opsahl); U.N. Doc. CCPR/C/SR 321 para. 46 (Graefrath); GAOR 36th Sess. Supp. No. 40(A/37/40), annex v. 93. For further elaboration of this idea, see discussion *infra* note 87 (22 Sept. 1982). For further elaboration of this idea, see discussion *infra* note 87

84. *See, e.g.*, JAMES LESLIE BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 1 (6th ed. 1963).

85. 1 INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 147-49 (E. Lauterpacht ed. 1970); T.O. Elias, *New Perspectives and Conceptions in Contemporary Public International Law*, 10 DEN. J. INT'L L. & POL'Y 409, 411 (1981).

86. W.N. Nelson, *Human Rights and Human Obligation, in* HUMAN RIGHTS 275-291 (J.R. Pennock & J.W. Chapman, eds. 1981). LOUIS HENKIN, THE RIGHTS OF MAN TODAY 2 (1979), *but see* Henkin, *supra* note 62, at 10 for a position that has shifted from his origi-

is another trend toward outlawing certain conduct or situations which violate individual and collective rights regardless of the perpetrator.[87]

Public international law, especially in the area of human rights, has been an evolving and contextual approach in its interpretation.[88] Moving rights toward application in the private sphere has been a part of human rights jurisprudence since their birth in modern form following World War II. It is not surprising that one of the first national systems to adopt the vertical and horizontal application of rights was Germany through its post-war constitution.[89] Many other states have followed either completely or partially adopting the application of human rights to both public and private activity. For example, the Netherlands,[90] the UK,[91] Canada,[92] South Africa, [93] Belgium, Austria, and

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nal position toward the modern trend. THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VII, introductory note, at 144-45 (1987) does not fully commit to any position, but states: "how a state treats individual human beings . . . is a matter of international concern and a proper subject for regulation by international law."

87. *See, e.g.*, CLAPHAM, *supra* note 5. It is clear that contemporary human rights law places obligations on individuals. This can be seen in the creation of the International Criminal Tribunals for Former Yugoslavia and Rwanda, *e.g.*, U.N. Doc. S/1994/1125 (October 4, 1994); decisions by the Inter-American Court on Human Rights, *e.g.*, Velasquez Rodriguez v. Honduras, Judgement 29 July 1988, *reprinted in*, 28 I.L.M. 291 (1989) (placing an obligation on the State to investigate and punish those individuals responsible for disappearances); and can even be seen in U.S. courts in Filartiga and its progeny, Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

88. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Not Withstanding Security Council Resolution 276 (Namibia), 1971 I.C.J. 16, 31(June 21); *see, e.g.*, Ireland v. U.K., 25 EUR.CT.R. (ser.A) at 65 (1978).

89. Drittwirkung der Grundrechte or third-party effect of fundamental rights is well established in German jurisprudence. Kenneth M. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in 'West Germany,'* 17 INT'L & COMP. L. Q. 571 (1968).

90. The preamble to the Dutch Bill of Rights reads:

> No more consideration should be given to the thought that all fundamental rights in general do not have any effect whatsoever or, on the contrary, that all fundamental rights have the same effect to the same extent on horizontal relations. The question concerning the horizontal effectiveness need not be answered in a similar fashion for every fundamental right. The answers may differ from article to article, or from one part of an article to another, perhaps only in respect to various particular categories found in a single article. This approach has the advantage of liberating the problem of horizontal effectiveness from its dogmatic nature and of bringing it back to normal proportions of constitutional interpretation.

Explanatory Preamble to the Bill on Fundamental Rights which was to become part of the Dutch Constitution, *cited in* D. Simmons, *Bestand und Bedeutung der Grundrechte im den Niederlanden*, 1978 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 450, at 454.

91. "If there is to be no interference by public authority, all the more so there should be no interference by private individuals." Associated Newspaper Group v. Wade, (1979) 1 W.L.R. 697 at 709.

92. The Canadian Charter of Rights and Freedoms, prevents discrimination on the grounds of sexual orientation. Veysey v. Canadian Correctional Service [1989] 44 CRR 364, [1990] 1 F.C. 321, 29 F.T.R. 74 (T.D.). The Quebec Charter of Human Rights and Freedoms protects those infected with AIDS against discrimination, for example in rent-

Switzerland.[94]

The European Court of Human Rights has adopted the modern trend. The European Convention on Human Rights "creates an obligation for states which involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[95] Additionally, the Convention "sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if needed."[96] One of the leading authorities in this area has concluded, "states may not argue that international human rights treaties have no relevance for activities of private actors."[97]

V. CONSTITUTIONAL ANALYSIS OF THE *RAEL* CASE, POST RATIFICATION OF THE ICCPR

"State action" is a concept that does not limit the application of human rights.[98] For this reason the ICCPR affects the way rights are viewed in courts. The U.S. Constitution places treaty law in the hierarchy of laws:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.[99]

Thus, treaties supercede previous inconsistent federal statutes.[100] Additionally, through the preemption doctrine, treaties can supercede state laws.[101] The Supreme Court has held that the Constitution is superior to inconsistent treaties.[102] The Court has also held that treaties are subject to the rights found in the Bill of Rights.[103]

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ing an apartment or obtaining insurance. Bulletin de la Commission des Droits de la Personne du Quebec at 1-2 (4 June 1988).

93. The plurality position of the new South African Constitutional Court is that fundamental rights may apply directly in litigation between private parties. Almost every Justice wrote a separate opinion in a case, where no clear majority position developed. For interesting discussion of the horizontal application of rights and its importance to the respect of human rights. *See* In the Matter of D. Du Plessis v. DeKlerk, G.F.J., Case No.CCT8/95 (visited April 8, 1997), htp.www.wits.ac.za/judgments/duplessis.html>.

94. CLAPHAM, *supra* note 5, at 179-181.

95. X. and Y. v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) at 23 (1985).

96. Plattform Artze fur das Leben v. Austria, 139 Eur. Ct. H.R. (ser. A) at 32 (1988).

97. CLAPHAM, *supra* note 5, at 111.

98. Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUMAN RTS. J. 51, 53 (1992).

99. U.S. CONST. art. VI.

100. Penhallow v. Doane's Adm'r, 3 U.S. (3 Dall.) 54, 85-93 (1795).

101. Missouri v. Holland, 252 U.S. 416 (1920).

102. Reid v. Covert, 354 U.S. 1 (1957).

103. Boos v. Barry, 485 U.S. 312, 324 (1988).

There is an axiom in both treaty interoperation and constitutional law that instructs courts, if possible to fashion an interpretation so that both laws are met.[104] Courts have frequently used the ICCPR and other human rights instruments to inform their developing understanding of constitutional or fundamental rights. Some courts, like those in the U.K., have stated they feel "obliged" to look at human rights treaty law when interpreting rights.[105] Australia and Canadian courts have found this approach to be useful as well.[106]

Both textual comparison and a review of the evidence before the Special Joint Committee of the Senate and House of Commons on the Constitution, 1981-82, confirm that the International Covenant on Civil and Political Rights was an important source of the terms chosen since Canada ratified the Covenant in 1976, with unanimous consent of the federal and provincial governments, the Covenant constitutes an obligation upon Canada under international law, by article two thereof, to implement its provisions within this country. Although our Constitutional tradition is not that a ratified treaty is self-executing within our territory. . . . Nevertheless, unless the domestic law is clear to the contrary, it should be interpreted to conform with our international obligations.[107]

This is also true generally in U.S. jurisprudence. It is traditionally thought that the words of the amendments to the Constitution are not precise, and that their scope is not static. The Constitution must draw its meaning from evolving standards of a maturing society.[108] Today, human rights law provides the mark of those evolving standards. Given that the ICCPR has had a relatively short life as a ratified treaty in the U.S., no case has yet to apply it as a treaty to inform constitutional standards. Previously, courts have applied, ignored, and misinterpreted human rights law.[109]

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104. *See, e.g.*, "An Act of Congress ought never to be construed to violate the laws of nations, if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). "[This Court] must read the statutes to give effect to each if we can do so while preserving their sense of purpose." Watt v. Alaska, 451 U.S. 259, 267 (1981); U.S. v. Lee Yen Tai, 185 U.S. 213, 221 (1962). Another related axiom is that courts should construe treaties "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Asakura v. City of Seattle, 265 U.S. 332, 342 (1924).

105. Derbyshire County Council v. Times Newspapers Ltd., (1992) 1 Q.B. 770, 894; (1992) 3 All E.R. 65, 93.

106. Mabo v. Queensland, 107 A.L.R. 1 (1992).

107. The Queen v. Videoflicks, 14 D.L.R. (4th) 10, 35-36 (Ont. C.A. 1984). *See also*, the Queen v. Keegstra [1990] 1 S.C.R. 697, 749-58 (stating "I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.").

108. Trop v. Dulles, 356 U.S. 86 (1958).

109. There are many cases in the U.S. of indirect application of human rights law. For an overview, see Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Court: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 72-80 (1992). An example of where U.S. courts applied human rights law would be Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980); Thompson v. Oklahoma, 487 U.S. 815, 831 n.34 (1987) is an example of where the plurality of the court made reference to international norms.

Richard Lillich, a leading American scholar of international law, believes that the proper way for human rights to be applied in U.S. courts is as a mechanism to inform or contribute to the development of U.S. constitutional and statutory interpretation.[110] Other noted scholars have demonstrated how the human rights provisions in the UN charter were a factor in resolving constitutional issues.[111] It has also been posited that U.S. courts frequently use human rights law, whether that be treaty, custom, or standards, but do not cite to item, because U.S. jurists have a difficult time accepting the fact that the Constitution is not always superior in terms of rights protection compared with human rights law.[112]

Even if that may be the case, courts have recognized the importance of human rights law to constitutional interpretation:

> International custom and treaties . . . limiting attacks on civilians are not derogatory to our Constitution. Rather they expand and give substance to a developing enriched concept of right of the individual that harmonizes with our Constitutional developments.[113]

In *Rael v. Taylor*, the first hurdle the plaintiff will have to cross will be that of convincing the court that the "state action" doctrine is irrelevant. Some courts may accept a *Shelley v. Kraemer* type argument that the prolonged court ordered state intervention in this case constitutes sufficient state action to entertain a private right of action based on the Constitution.[114] Especially considering that the exercise of the descendants of the original settlers' rights have been interrupted with state assistance for well over three decades. Nonetheless, the use of this type of analysis, while not improper given the slippery nature of the "state action" doctrine, it would be contrary to the current trend in

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The following year in a case with almost the same facts the plurality ignored human rights law, but the dissent felt the U.S. was obligated to read constitutional standards in light of the human rights law, Stanford v. Kentucky, 492 U.S. 361 (1988) (this case was decided well before the ICCPR's ratification by the Senate). *See* Ved P. 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). Linder v. Calero Portocarrero, 747 F. Supp. 1452, 1462 (S.D. Fla. 1990) is an example of a case where the court based its decision on an antiquated and simply incorrect notion of human rights, stating "torture by a non-state actor is not a violation of international law."

110. This usage would avoid the problem of an "independent rule of decision." Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 CINN. L. REV. 367, 410 (1985).

111. Oscar Schachter, *The Charter and the Constitution: the Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 644, 658 (1951). Professor Schachter cites Oyama v. California, 185 U.S. 579, 604 (1948) (Murphy, J. and Rutledge. J., concurring) and Namba v. McCourt, 185 Or. 579, 604 (1949) to support his position.

112. Bernhard Schuluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CALIF. L. REV. 100, 157 (1973).

113. In the Matter of the Petition of Mahmoud El Abed Ahmad v. Wigen, 726 F. Supp. 389, 411 (E.D. N.Y. 1989).

114. Shelley v. Kraemer, 334 U.S. 1 (1947).

human rights law. On the other hand, the court could interpret human rights law as found in the ICCPR [now the law in Colorado] to eliminate the "state action" hurdle found in previous applications of the Constitution. This would conform to a trend in comparative jurisprudence, international jurisprudence, and even in the U.S..

There has been a little linear movement from the time of the thirteenth amendment to date as to the horizontal application of constitutional rights. Recently, that movement has increased with the horizontal application of human rights . A logical extension of this movement would be its application to constitutional rights.

Perhaps even predating the thirteenth amendment, the common law applied rights in a horizontal fashion. The notion of *sic utere tuo at a lienum non laedas* [one cannot use their property to harm the property of another] can be found in both U.S. and international law.[115] While this concept may typically have been seen as a limit on the individual right of the property owner, for example through a nuisance action, the concept really is about overlapping property rights. This situation can be almost directly analogous to horizontal application of constitutional rights.

Two modern examples in U.S. courts demonstrate this idea. In environmental law, which limits property rights to protect complex ecosystems and related values.[116] Also in cases where the traditional usufructory rights of Native Americans cause a collision between hard title to property and treaty commitments and tradition-based practices.[117] This cases have a common recognition of a constitutional right to property on both sides and an attempt by the courts to balance these interests.

In the human rights field, the U.S. has quite effortlessly used the horizontal application of human rights in foreign countries. For example, economic sanctions could be applied by the U.S. government based on the violation of an employee's human rights by an employer.[118] Recently, President Clinton placed investment sanctions on Burma citing the violation of the human rights of the political opposition, workers,

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115. *See, e.g.*, Grundgesetz [Constitution][GG], art. 14, sec. 2 (F.R.G) (holding that property imposes duties in that it should also serve the public weal).

116. At present the U.S. Supreme Court is considering a case which highlights the limits that can be placed on private property or perhaps better stated the conflicting uses of private property. *See, e.g.*, Robert Marquand, *Court Weighs Widow's Right to a Lake Tahoe View*, CHRISTIAN SCI. MONITOR, Feb. 27, 1997, at 1.

117. Recognition of usufructuary rights in Anglo-American jurisprudence traces back to the Statutes of Merton (1235) and Westminster (1285). U.S. case law has sustained traditional usufructuary rights of Native Americans protected by a treaty, except where explicitly eliminated by an act of Congress. *See* United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981); People v. LeBlanc, 248 N.W.2d 199 (1976); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341 (7th Cir. 1983).

118. The entire Generalized System of Preference system and the related Caribbean Basin Initiative is based on this notion. *See generally*, Philip Alston, *Labor Rights Provisions in United States Trade Law: "Aggressive Unilateralism?"*, 15 HUM. RTS. Q. 1 (1993). The GSP provisions can be found in Sec. 502 of the Trade Act of 1974, 19 U.S.C.A. § 2462 (1988).

and students as his reasoning.[119] Further, a recent U.S. District Court decision held that UNOCAL, an American company doing business in Burma, could be held liable for violating the human rights of Burmese victims.[120] On April 14, 1997, the White House announced an agreement between clothing manufactures, labor organizations, and human rights groups designed to protect the human rights of workers around the world from violations committed by their employers.[121]

From the above examples it can be concluded that the U.S. has a history of horizontal application of rights, even if not termed as such. Given the recent ratification of the ICCPR, calling for the application of rights in the private sphere, and the U.S. history of applying rights in such a manner, it is not only appropriate but an obligation for the court to read Colorado Constitution in light of the ICCPR.

The roots of the horizontal application of human rights in the Colorado Constitution can be found generally in the areas of property and the prohibition of discrimination. Also, the Colorado Constitution contains a number of provisions that directly apply to the private sphere. It contains a prohibition on slavery similar to the federal law.[122] There is also a takings clause that prohibits the taking of private property from one individual by another without compensation.[123] Also in property law, there is a provision that "private property shall not be taken for private use unless by the consent of the owner."[124]

Generally, the Colorado Supreme Court has held that rights "should be protected from infringement or diminution by any person as well as any department of the government."[125] The Court, however, has determined created a limiting principal by stating that one person's rights cannot detrimentally affect or harm another persons rights.[126] In the area of discrimination, the Colorado Supreme court has held: "[A]n inherent human right will be upheld by this court against action by any person or department of the government which would destroy such a right or result in discrimination in the manner in which enjoyment thereof is to be permitted as between persons of different races, creeds, or color[s]."[127]

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119. Public Papers of the Presidents: Statements of Investment Sanction Against Burma, Apr. 22, 1997, *available in* LEXIS, Executive Library, Presidential Documents File.

120. Benson v. UNOCAL, Case No. 96-6959 (C.D. CA 1997)(UNOCAL's motion to dismiss was denied).; *see also*, Yindee Lertcharoenchok, *UNOCAL PLEA*, Nation (April 3, 1997).

121. Christina Nifong, *'No Sweat' pact to Cut Garment Worker Abuse,* CHRISTIAN SCI. MONITOR, Apr. 14, 1997 at 3.

122. COLO. CONST. art. II, § 26. (1876).

123. *Id.* art. II, § 15.

124. *Id.* art. II, § 14.

125. Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 245, 380 P.2d 34, 40 (1962). There also appears to be the acceptance of the horizontal application to the right to privacy. Wells v. Premier Indus., 691 P.2d 765, 768 (Colo. Ct. App. 1984).

126. Nebbia v. New York, 291 U.S. 502 (1934), *cited in* Colorado Anti-Discrimination Comm'n, 151 Colo. at 245, 380 P.2d at 41.

127. Colorado Anti-Discrimination Comm'n, 151 Colo. at 245, 380 P.2d at 41.

The following looks at some of the possible constitutional arguments presented in *Rael v. Taylor*, given the self-executing nature of the Bill of Rights of the Colorado Constitution. Article II, section 3 of the Constitution of the state of Colorado provides: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring possessing and protecting property; and of seeking and obtaining their safety and happiness."[128]

VI. PROPERTY[129]

The ratification of the ICCPR ensures that the court must look at the property rights of the plaintiff and defendants. The court should balance these rights. If possible, the court should strike a balance which recognizes the overlapping nature of the property rights in contention. For example, this could be achieved via time, place, and manner restrictions of the exercise of the plaintiffs' usufructory rights and of the defendant's underlying fee.

The ICCPR may also be helpful at defining the desirable values underlying the respect for property rights. In human rights, the concept of property goes beyond mere title. It recognizes the complex social relation between an individual and other individuals and the land itself.[130] From this perspective, the UN Human Rights Committee in adversarial cases has found that individuals are entitled to a continuing relationship with lands and natural resources according to traditional patterns of use or occupancy, notwithstanding lack of hard title to the land.[131] Without respect for these type of property rights, a whole range of human rights violations could be produced.[132]

In *Rael v. Taylor*, the law of the "commons" in both Mexican law and U.S. law supports the descendants of the original settlers' traditional usurfructory rights to *la sierra*. These usufructory rights are also supported by the legal principles of custom, easement, and equitable

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128. Medina v. People, 154 Colo. 4, 387 P.2d 733 (1963).

129. COLO. CONST. art. II, §§ 14, 15 (adding a protection that property cannot be taken for private use without consent or compensation).

130. For an interesting discussion of how U.S. property law should reflect this complex social relation, see Jack. M. Beerman and Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 946-956 (1989).

131. *See, e.g.*, Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 267/1984, Report of the Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. 2, at 1, U.N. Doc. A/45/40, Annex 9 (A) (1990) (*views adopted* March 26, 1990); Lovelace v. Canada, Communication No. R.6/24, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40, Annex 18 (1977) (*views adopted* Dec. 29, 1997); U.N. Subcommission on Prevention and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7, Add.4, at 39 (1986) ("It must be understood that, for indigenous populations, land does not represent simply a possession or means of production . . . . It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.").

132. *Id.*

trust. The usufructory rights exist, but it is for the court to determine whether it should be respected/ To do so, the court should openly discuss and weigh the competing rights, taking into account the complex and culturally unique relationship between the settlers' descendants and the land.

VII. LIFE AND LIBERTY

The Colorado Supreme Court has interpreted the rights of life and liberty to mean that one has a right to practice a learned profession.[133] It has also determined that one has the right to pursue a legitimate trade or business.[134] This idea finds historical support in the interpretation of rights by the U.S. Supreme Court, which has held that life means something more than a mere basal existence.[135] It is interesting to note that this idea has not received much attention recently in U.S. courts, even though this theory has been expanded and followed in some states.[136]

The concept of a right to life and liberty has had such a pervasive influence that other countries have started to follow it. In India, for example, a right to life and liberty provision similar to that in the Colorado Constitution has been incorporated in its own.[137] The Supreme Court of India has interpreted that clause to mean:

> An equally important facet of that right [to life] is the right to a livelihood because, no person can live without the means of living, that is the means of living a livelihood. If the right to a livelihood is not treated as a part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means to a livelihood to the point of abrogation. Such deprivation would not only denude life of its effective content and meaningfulness but it would make life impossible to live. There is thus a close nexus between life and the means to a livelihood and as such that, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life.[138]

This case demonstrates the manner in which one country has applied a right to life and liberty in a manner consistent with the ICCPR. The ICCPR has been interpreted to encompass a cluster of rights related to the right to life and liberty. It language is very clear, "in no

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133. Prouty v. Heron, 127 Colo. 168, 255 P.2d 755 (1953).

134. Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956).

135. Munn v. Illinois, 94 U.S. 113 (1877).

136. *E.g.*, "The right to work I have assumed was the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live, to be free and to own property. To work means to eat and it also means to live." Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

137. "No person shall be deprived of his life or personal liberty except according to procedure established by law." INDIA CONST. article 21. "No person shall be deprived of life, liberty or property, without due process of law." COLO. CONST. art. II, § 25.

138. Olga Tellis and Others v. Bombay Municipal Corporation and Others, 3 SCC [Supreme Court of India] 545 (1985).

case a people may be deprived of its own means of subsistence."[139]

This concept of the right to life and liberty is very important in *Rael v. Taylor*, for the descendants of the original settlers were using the land to allow them to farm, and live in a self-sufficient fashion. Now, Taylor is using the land exclusively for profit-making endeavors at the expense of the descendants who are being displaced from their previous self-sufficient existence to one of poverty and dependence on the state for assistance.[140]

VIII. RIGHT TO CULTURE AND COMMUNITY

"The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people."[141] While not specifically protected in the Colorado Constitution, the right to one's culture or community is protected by the ICCPR:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[142]

While U.S. courts have never specifically recognized culture or community as a right, various articles of the Constitution have been interpreted to support what could be construed as a right to culture or community.[143] For example, the right to exercise religion freely may implicate lifestyle choices, such as subsistence farming, which deserve protection.[144] The right to associate may protect the nonexclusive use of public parks by racist groups.[145] Regarding education, there is the right to teach the language of choice.[146] There is also the right for parents to direct the upbringing and education of their children.[147] Parents have a right to have a child's cultural heritage considered in curriculum development.[148] Finally, regarding family, there is a recognition of the extenuated family relationship.[149] There is also a right to marry within a chosen community.[150]

A court interpreting the meaning of article II, section 28 of the

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139. ICCPR, *supra* note 59, art. 1, para. 2.

140. Stoller, *supra* note 9.

141. COLO. CONST. art. II, § 28.

142. ICCPR, *supra* note 59, art. 27.

143. The line of cases cited stand for the idea that religious and culture differences of subgroups must be respected, when those subgroups' goals are shared with the larger community. In the *Rael v. Taylor* case, the common values are self-sufficiency and the sustainable family existence. *See* Martha Minow, *Pluralisms*, 21 CONN. L. REV. 965 (1989).

144. Wisconsin v. Yoder, 406 U.S. 205 (1972).

145. Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

146. Meyer v. Nebraska, 262 U.S. 556 (1974).

147. Pierce v. Society of Sisters, 268 U.S. 510 (1924).

148. Lau v. Nichols, 414 U.S. 563 (1974).

149. Moore v. East Cleveland, 431 U.S. 494 (1977).

150. Loving v. Virginia, 388 U.S. 1 (1966).

Colorado Constitution would be well advised to consider the ICCPR's protection of individual rights.[151] First there is a direct statement in the ICCPR regarding the protection of culture and community. Second, the detrimental impact the actions of Taylor have had on the unique community and culture of the descendants of the original settlers of the *Sangre de Cristo* land grant has been well documented.[152] What had developed in Southern Colorado was a unique community and culture. In the time since *la sierra* has been fenced and the usufructory rights denied tot he descendants of the original settlers, there has been a visible, but hopefully not irreversible, loss of community and culture.

IX. POTENTIAL ARGUMENTS AGAINST THE HORIZONTAL APPLICATION OF CONSTITUTIONAL PRINCIPLES

Human rights are important considerations in any society, whether it be a local, national, or global society. Many people would differ on the exact content of these rights, nor would most people know from where human rights are derived, or how they are directly relevant to their lives. This shows that legislatures, courts, lawyers and the public will continue to content with the content and significance of human rights for many years to come.

Some may argue that the application of constitutional principles in the private sphere will result in an unwanted intrusion of government into every facet of life. They worry an undesirable "Big Brother" moral police would need to be created to apply rights in the private sphere. This is not what the application of constitutional rights in the private sphere would entail. Private life, which truly does not impact the lives of others, remains untouched Court review is required only when one perceives ones rights have been violated by another person. If such a conflict arises, the ICCPR indicates that reinforcing the existing power relations such as male domination and racism would not be valued. Nonetheless, it would be for the court to weigh the competing values in an open fashion to make a determination as to which right should be upheld.[153]

Others may argue that the recognition of a horizontal application of rights will lead to increased litigation and clog the courts with frivolous claims. This complaint is similar to almost any legal change in a litigious society. Mechanisms already exist to reduce and eliminate frivolous claims. Presently, the courts deal with many cases which are eventually dismissed as frivolous claims. In these cases, after prolonged debate, many of the plaintiffs eventually have their day in court based on the common law or a statute. Recognition of a private sphere of constitutionally applied rights would not in fact generate a significant in-

151. Courts should be cautious in dismissing a case where the pleadings show that an alleged violation of a constitutional right is at issue, since fundamental rights and public policy questions are necessarily involved. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

152. Stoller, *supra* note 9.

153. *See generally*, Pickle *supra* note 47.

crease in court work loads. The courts would have a much easier analysis in these cases, having to weigh only the individual party's rights against the other, without governmental concerns. The courts seem quite capable of weighing, creating methods, and discussing competing interests and rights, and thus it would be no major change for the courts to apply constitutional rights in the private sphere.[154]

Another possible problem would be the perceived interference with the democratic process.[155] The difficulty in this case is how democracy is defined. While some would define it as a society where human rights are respected, others would choose a forma; definition linked to a specific form of representative government.[156] For people thus defining democracy, the ICCPR may constitute "imported" values that are somehow delegitimized because they did not follow the traditional law making process.[157] This form of government and legislating is not necessarily more democratic or reflective of the will of the people then the process used to create the ICCPR.

Another possible criticism is a revival of substantive due process, leading to open-ended modes of constitutional adjudication and to the adoption of "rights" not traceable to the Constitution's text, structure, or history.[158] In this instance, the law being used is directly tied to constitutionally provided process. The rights included in the ICCPR are clearly defined by its text, history, and legal interpretations. The process of adjudicating these rights is transparent.

X. CONCLUSION

Adapting to a changing world is not easy, especially when these changes do not respect traditional geopolitical boundaries. Human rights law is one of the first sets of laws to seriously deal with this hurdle. Such a global approach may better reflect today's reality, than one tied to a specific idea of law making and democracy grounded in a geopolitical entity.[159] It is worth noting that the U.S. can effectively accommodate this type of law via the established constitutional mechanism for treaty adoption.

What has happened to the descendants of the original settlers of

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154. *See generally*, CLAPHAM *supra* note 5, at 90, 298.

155. *See* Bradley, *supra* note 1 (discussing of how certain applications of customary international law in U.S. courts may undermine constitutional integrity).

156. Some scholars have seen a tension between majoritarian politics that is more directly electorally accountable and the process used to create human rights law. Bayefsky & Fitzpatrick, *supra* note 109, at 87. While this criticism, from a formal point of view, may resonate some in relation to customary international law, it is difficult to see how human rights treaties in the U.S. context are disconnected from the electoral process and its accountability.

157. U.S. CONST. art. I, § 7.

158. This approach has been controversial. *See, e.g.*, GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 103 (5th ed. 1992).

159. Most disciplines are struggling with today's interdependent world. For example, traditional normative political theory tied to fixed borders may be seen as outmoded. *See, e.g.*, Daniel Warner, *An Ethics of Human Rights: Two Interrelated Misunderstandings*, 24 DENV. J. INT'L L. & POL'Y 395, 396 (1996).

the *Sangre de Cristo* land grant is best understood as a violation of their human rights. The disruption of their fundamental rights like those to property, livelihood, and culture, have resulted in a loss of dignity which occurs when anyone has had their means to self-sufficiency and their mechanism to contribute to their community and society stripped from them. The relevance of the Colorado Constitution to this problem has been highlighted by ratification of the ICCPR.[160]

The ICCPR shifts constitutional review of alleged violations of rights from the state/non state action dichotomy to a more productive one which forces the court to balance the competing rights involved. Such an analysis will no doubt uncover a number of values underlying the competing rights.

It is unfortunate that this analysis was not available from the beginning of the controversy, for with its application it would have been possible to avoid a great deal of suffering by fashioning a remedy that respects the overlapping nature of the rights involved. Such a decision is long overdue and with the ratification of the ICCPR, not only does a vehicle exist to reach this conclusion, its use is mandated.

160. There is no problem of *ex post facto* application, because it is the Colorado Constitution that is being applied. The ICCPR is simply informing its involving interpretation. It should be kept in mind, that as the legal and social context changes, applying the old rule or interpretation means something different. *See, e.g.* Karl Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989 (1988).

Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period

OMAR M. DAJANI*

What god shall resurrect us
in his flesh?
After all, the iron cage is shrinking.
The hangman will not wait
though we wail from birth
in the name of these happy ruins.
What narrow yesterdays,
what stale and shriveled years . .
Even storms come begging
when the sky matches the gray
of the sand,
leaving us stalled between seasons
barricaded by what we see.†

Palestine first appeared on the United Nations' agenda as a question.[1] To a great extent, it remains one. The Palestinian people have sought for much of this century to achieve national independence, striving for international recognition of their right to determine freely their political status in the territory they claim as their own. In the 1960s, the Palestine Liberation Organization (PLO) emerged as the international representative of the Palestinian people and, since then, has played a central role in defining and pursuing their national aspirations. In 1993, the PLO and the government of Israel agreed to a Dec-

* Law clerk to Judge Dorothy W. Nelson, United States Court of Appeals for the Ninth Circuit. J.D., Yale Law School, February 1997; B.A. Northwestern University, 1991. The author would like to thank Professor Michael Reisman for his thoughtful comments on earlier drafts of this paper. The author also appreciates the support of the Schell Center for International Human Rights and the Coca-Cola World Fund, which funded my preliminary research at the United Nations Centre for Human Rights. Finally, I gratefully acknowledge the limitless patience and support of M.T. and Ninon Dajani.

† Ali Ahmed Said (Adonis), *Elegy for the Time at Hand, in* THE BLOOD OF ADONIS: SELECTED POEMS (Samuel Hazo trans.,1971).

1. One of the United Nations General Assembly's first items of business was to create a Special Committee to examine "the question of Palestine." *See* G.A. Res. 104 (S-1), U.N. Doc. A/310, at 6-7 (1947). For a thoughtful analysis of the origins and implications of the phrase, see EDWARD SAID, THE QUESTION OF PALESTINE 3-9 (1979).

laration of Principles on Interim Self-Governing Arrangements (DOP)[2] that established a framework for limited Palestinian self-government during an interim period, pending resolution of the permanent status of the territory occupied by Israel since 1967. Pursuant to the DOP, they have concluded a series of agreements elaborating upon and implementing transitional arrangements. The parties, however, have yet to agree on either from what or to what they are making a transition. Upon taking power, the Likud Government of Israeli Prime Minister Benjamin Netanyahu issued guidelines declaring that it "would oppose the establishment of a Palestinian state or any foreign sovereignty west of the Jordan River."[3] In contrast, a member of the Palestinian leadership has asserted that "[t]here will be neither peace nor security without an independent Palestinian state . . . ."[4]

This disagreement regarding what Palestine will be prompts consideration of what Palestine is. In one of its few references to the future, the DOP states that elections for the Palestinian Council established to administer portions of the Occupied Palestinian Territories (OPT) during the interim period are to constitute ". . . a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements."[5] This declaration raises a number of important questions; foremost, what is the nature of "the legitimate rights of the Palestinian people"? Is the right to self-determination among them? If so, to what extent are the interim arrangements a "significant . . . preparatory step" toward their realization? And how do the interim arrangements — particularly the establishment of the Palestinian Interim Self-Governing Authority (PA) — affect the status of existing Palestinian public bodies in the international system?

In this essay, I undertake to answer these questions. I begin in Part One by reviewing the Palestinian claim to self-determination, outlining international legal treatment of the principle, and evaluating its applicability to the people and territory of Palestine. Next, in Part Two, I examine the Palestinian public bodies established in pursuit of Palestinian national rights by analyzing the structure and legal status of the PLO, the "State" of Palestine established by the Palestine National Council in 1988, and the PA created by the DOP and subsequent agreements. Finally, in Part Three, I try to define the legal status of Palestine as it is presently constituted, and to evaluate the extent to

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2. Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, 32 I.L.M. 1528 (1993) [hereinafter Declaration of Principles].

3. *The New Government's Guidelines*, JERUSALEM POST, June 18, 1996, at 3.

4. Adviser to Yasser Arafat rejects Puerto Rico-like Palestine, AGENCE FRANCE-PRESSE, Nov. 9, 1996, available in 1996 WL 12177831.

5. Declaration of Principles, *supra* note 2, art. 3, para. 3. The same language appears in the Interim Agreement concluded by the parties in 1995. *See also* The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, art. 2, para. 2, (September 28, 1995) <http://www.israel-mfa.gov.il/peace/interim.html> [hereinafter Interim Agreement].

which it fulfills the legal requirements for the exercise of self-determination.

I. THE PALESTINIAN CLAIM TO SELF-DETERMINATION

The principle of self-determination is the legal foundation on which the Palestinian people's struggle for national independence is based. In international practice, however, the principle of self-determination becomes a right only when invoked under certain circumstances, with the status of both the population and the territory concerned determining the viability of the exercise of self-determination. As will be seen, the Palestinians have attained broad international recognition of their right to self-determination in the OPT. Moreover, as I argue below, the territory they claim constitutes a viable self-determination unit.

A. The Principle of Self-Determination

Self-determination has come to elicit broad recognition as an international human right.[6] The United Nations Charter states explicitly that "respect for the principle of equal rights and self-determination" should form the basis for relations among nations in the world system[7] and provides implicitly for its vindication in its provisions regarding the disposition of trusteeships and non-self-governing territories.[8] The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (hereinafter Declaration on Friendly Relations), moreover, characterizes the principle as a right, proclaiming that "by virtue of the principle of... self-determination of peoples all peoples have the right freely to determine, without external interference, their political status."[9] Similarly, both

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6. For a thorough analysis of the historical development of the principle of self-determination, *See* Goyora Binder, *The Kaplan Lecture on Human Rights: The Case for Self-Determination*, 29 STAN. J. INT'L L. 223, 223-48 (1993); John Collins, Note, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 138-143 (1980); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

7. U.N. CHARTER art. 1, para. 2; *See also* art. 55.

8. *See* M.C. Baussiouni, *"Self-Determination" and the Palestinians*, 65 AM. SOC'Y INT'L L. PROC. 31, 32 (1971) (arguing that Chapters XI, XII, and XIII of the U.N. Charter embody the principle of self-determination "in spirit"); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 356 (1979) (stating that Chapter XI of the U.N. Charter is an attempt to apply "somewhat similar ideas to those embodied in Article 22 of the [League of Nations] Covenant to a far broader category of territory.").

9. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970). The Resolution was passed unanimously by the General Assembly and "is generally viewed as an authoritative interpretation of the U.N. Charter." Binder, *supra* note 6, at 236. Binder argues:

The Declaration was the culmination of a lengthy effort to legitimate the U.N. Charter for its newer signatories in the developing world who took no part in its drafting. The Declaration was drafted by a committee appointed to develop an official interpretation on which the new as well as the old members could agree.

The internal evidence of the Declaration's authoritative character includes:

> (a) the resolution's self-description as a 'Declaration' in its title; (b) the resolution's 'declaration' that 'the principles of the Charter which are embodied

the International Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights affirm that "all peoples" have a right to self-determination, and that "[b]y virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."[10] By the express terms of these international instruments, self-determination has been elevated to the status of a right.

The scope and legal force of the right, however, have varied in application. As Professor Cherif Bassiouni has suggested:

> 'Self-determination' is a catch-all concept which exists as a principle, develops into a right under certain circumstances, unfolds as a process and results in a remedy. As an abstract principle it can be enunciated without reference to a specific context; as a right it is operative only in a relative context, and as a remedy, its equitable application is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate.[11]

Central among the equitable concerns to which Professor Bassiouni alludes has been regard for the sovereignty of states. Because "peoples" can be defined broadly or narrowly, the right of self-determination can be construed to bestow national rights upon almost any minority group, with potentially destructive consequences for the internal stability and territorial integrity of States. Perhaps unsurprisingly then, States generally have proven hesitant to interpret the right to self-determination

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> in this Declaration constitute basic principles of international law[;] (c) the reference in the resolution's title to U.N. Charter article 1 ('Friendly Relations') and in its first paragraph to the 'Principles' of the United Nations listed in U.N. Charter article 2; (d) the observation in the Declaration's pmbl. that 'progressive development and codification' of those principles would 'promote the realization of the purposes of the United Nations[;]' and (e) the implicit reference to U.N. Charter article 13, conferring on the General Assembly authority to 'encourage the progressive development of international law and its codification.'
>
> The external evidence for the authority of the Declaration would include the Declaration's adoption by consensus, combined with two customary canons of construction. The first is that in treaty interpretation, 'There shall be taken into account, together with the context any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,' and 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.' The second is the custom of reading constitutional texts as necessarily conferring on the institutions they establish authority to 'interpret their own constitutional powers and the specific provisions of the text so constituting them.

Id. at 236 n.52 (citations omitted).

10. International Covenant on Economic, Social, and Cultural Rights, *came into force on* January 3, 1976, part I, art.1, para. 1, 993 U.N.T.S. 3, 5; International Covenant on Civil and Political Rights, *came into force on* March 23, 1976, part I, art. 1, para. 1, 999 U.N.T.S. 171, 173.

11. Baussiouni, *supra* note 8, at 33.

as conveying the right to secession from a sovereign State.[12] Accordingly, the Declaration on Friendly Relations makes clear that it does not "authoriz[e] or encourag[e] any action which would dismember or impair the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of self-determination of peoples."[13] Self-determination, therefore, has not been accepted to be the unqualified right of all peoples.

Indeed, notwithstanding Judge's Dillard's assertion in the *Western Sahara Case* that "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people,"[14] the status of a territory has proven significant in determining whether and how a given people will exercise self-determination. As noted above, States generally have been unwilling to recognize that a right of self-determination extends to peoples residing within the borders of an existing State if the exercise of that right would compromise the sovereignty or territorial integrity of that State. In these situations, State practice has been to regard self-determination as a principle, rather than as a right. As Crawford concludes, "[Self-determination] is not a right applicable directly to any group of people desiring political independence or self-government. Like sovereignty, it is a legal principle. It applies as a matter of right only after the unit of self-determination has been determined by the application of appropriate rules."[15] The question, then, is how to determine what constitutes a "self-determination unit."

The archetypal self-determination units are former mandated territories and colonies. The U.N. Charter places dependent territories into two categories: trusteeships and non-self-governing territories.[16] The principle of self-determination was a basic premise of the Charter's provisions regarding the disposition of trusteeships,[17] and it was gradually accepted to be relevant to the administration and disposition of other non-self-governing territories as well. In its 1971 *Namibia Opinion*, the International Court of Justice (I.C.J.) determined that State practice, as

12. CRAWFORD, *supra* note 8, at 265 (describing broad non-recognition of Biafra after secession from Nigeria); Emerson, *supra* note 6, at 464-65 (citing the United Nations unwillingness to support Katanga's secession from the Congo). *See also* G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 67, U.N. Doc. A/4684 (1960) ("Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.").

13. Declaration on Friendly Relations, *supra* note 9.

14. Advisory Opinion on Western Sahara, 1975 I.C.J. 12, 122 (Oct. 16, 1975) (separate opinion of J. Dillard).

15. CRAWFORD, *supra* note 8, at 101.

16. *See* U.N. CHARTER, chs. 11-13.

17. Article 76 of the Charter states that one of the purposes of the trusteeship system is the "progressive development [of the inhabitants of trust territories] towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned ..." U.N CHARTER, art. 76; *see also* CRAWFORD, *supra* note 8, at 92 (referring to mandated and trust territories as "the primary type of self-determination territory).

reflected in the General Assembly's adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and in "the political history of mandated territories in general," indicated that international law had come to require application of the principle of self-determination to all non-self-governing territories that had been under colonial regimes.[18] This view was affirmed by the I.C.J. in the *Western Sahara Case*.[19]

The history of decolonization consequently provides some basis for identifying non-self-governing territories whose peoples are entitled to self-determination. Chapter XI of the U.N. Charter offers only vague guidance for determining which territories and or peoples qualify, referring simply to "territories whose peoples have not yet attained a full measure of self-government."[20] As Crawford states, "[t]he meaning of these terms is not self-evident and has not been entirely settled by subsequent practice."[21] He notes that Article 74 of the Charter makes a distinction between non-self-governing territories and the "metropolitan areas" of existing States, suggesting that "the problem of minorities not inhabiting a clearly defined territory but scattered throughout a State" therefore falls outside of the scope of Chapter XI.[22] The result is that one must consequently determine how to distinguish between non-self-governing territories within and outside a metropolitan State.

In 1959, the General Assembly established a committee to examine the obligations imposed by Chapter XI upon administering States.[23] On the basis of its report, the Assembly passed Resolution 1541 (XV), which sets out "principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter."[24] Principle IV of the Resolution states, "*[p]rima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."[25] Once this *prima facie* case is established, other factors could then inform the evaluation of whether a territory is non-self-governing under Chapter XI of the Charter; the central issue being whether those factors "affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination."[26] A territory therefore falls under the ambit of the Charter's provisions regarding non-self-governing territories if it is separate from, distinct from, and subordinate to a metropolitan State.

In sum, the principle of self-determination becomes a legal right

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18. 1971 I.C.J. 6, 31.
19. 1975 I.C.J. 12, 31-3.
20. U.N. Charter, art. 73.
21. CRAWFORD, *supra* note 8, at 359.
22. *Id.* (discussing the U.N. CHARTER art. 74).
23. *See* GOODRICH, HAMBRO, & SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 461-62 (1969).
24. G.A. Res. 1541, *supra* note 12.
25. *Id.* Annex, Principle 4.
26. *Id.* Annex, Principle 5.

only when it is invoked by a group recognized to constitute a people and with regard to a territory that can serve as a self-determination unit. As I will show, Palestine meets both of these criteria.

B. The Palestinian People

Juridical recognition of the Palestinian people by the international community has expanded in accordance with the development of more inclusive conceptions of participation in the international process and with the Palestinians' evolving conception of national identity. The Palestinians, initially, were defined by what they were not: in 1922, a nascent League of Nations identified them simply as the "existing non-Jewish communities in Palestine." By the end of the 1960s, however, the United Nations General Assembly recognized the Palestinians to be a people and attributed to them the attendant rights to self-determination and sovereignty. This section traces international recognition of the Palestinian people as it has developed over the course of this century.

1. 1919-1947: The Arab Inhabitants of Palestine

The states that structured the international order at the conclusion of the first World War provisionally recognized Palestine to be an independent nation. The League of Nations Covenant [hereinafter Covenant], signed in 1919 in conjunction with the Treaty of Versailles,[27] marked an initial, though perhaps reluctant, departure from the state-focused vision of the international community that prevailed during the nineteenth century. [28] Reflecting the Great Powers' acquiescence to President Woodrow Wilson's advocacy in favor of the principle of self-determination,[29] the Covenant acknowledged the existence of "peoples not yet able to stand by themselves under the strenuous conditions of the modern world" and declared that their "well-being and develop-

27. One historian has suggested that "neither the Europeans nor the Americans could have the peace treaty without the League or the League without the peace treaty; both would stand or fall together. . . ." F.S. NORTHEDGE, THE LEAGUE OF NATIONS: ITS LIFE AND TIMES, 1920-1946, at 39 (1986).

28. During the nineteenth century, the European Concert maintained a state-focused vision of international participation, recognizing the legal status only of nations that had been incorporated into recognized states. The "society of nations," as then defined, might more accurately have been characterized as a society of states. Binder, *supra* note 6, at 227.

29. Binder, *supra* note 6, at 228, Scholars disagree about the extent to which the Covenant implies or incorporates the principle of self-determination. *Cf.* L.C. Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, 65 AM. SOC'Y INT'L L. PROC. 40, 42, 56 (1971) (arguing that Article 22 of the League of Nations is not a recognition of the right to self determination); John A. Collins, Note, *Self-Deter-mination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 158 (1981) (arguing that the Covenant implicitly recognizes the right to self-determination); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 463 (1971) (making no reference to the Covenant, but stating that the right of self-determination advocated by Wilson applied to peoples of the Middle East).

ment" formed "a sacred trust of civilization."[30] In accordance with this vision, the Covenant delegated responsibility for carrying out this trust to certain "advanced nations" under whose tutelage the designated Mandates presumably could progress.[31] Palestine, along with the other communities formerly under the sovereignty of the Turkish (Ottoman) Empire, was categorized as developed enough to warrant "provisional" recognition, "subject to the rendering of administrative advice and assistance by a Mandatory until such time as [it was] able to stand alone."[32] The Covenant, therefore, bestowed a level of international recognition upon the "nation" of Palestine with the expectation that it shortly would achieve statehood.

Article 22 of the Covenant, which established the framework for the mandates system, appears to define this "nation" in primarily communal terms. Its provision regarding the "A" Mandates, as Palestine and the other former Turkish provinces would later be known, states that "[c]ertain *communities* . . . have reached a stage of development where their existence as independent nations can be provisionally recognized . . . ."[33] The Covenant committed, moreover, to giving prime consideration to the wishes of these "communities" in the selection of the Mandatory.[34] These provisions seem to reflect an acknowledgment that the peoples in this category were more than simply the inhabitants of defined territories, that they were coherent communities that were politically organized enough to articulate preferences regarding their national development. The communal focus of the "A" Mandates provision becomes even more apparent when contrasted with the more territorial definitions of the "B" and "C" Mandates. The "B" Mandates provision makes reference to "peoples," rather than "communities," and makes "the administration of the territory" — not the rendering of administrative advice — the Mandatory's prime responsibility.[35] Moreover, while the "A" Mandates provision makes no reference at all to territory, the Covenant defines the "C" Mandates in entirely territorial terms, making only incidental reference to their "population."[36] The Covenant appears, therefore, to do more than recognize Palestine as a territory; it recognizes the Palestinians as a nation.[37]

The terms of the Mandate for Palestine, which was approved by the League of Nations Council on July 24, 1922, departed in a number of respects from Article 22(4) of the Covenant, shifting significantly away from recognition of a Palestinian national community. As an initial matter, the League of Nations Council ignored the Covenant's requirement that the wishes of the indigenous community be a prime criterion

30. LEAGUE OF NATIONS COVENANT, art. 22, para. 1.
31. *Id.* art. 22, para. 2.
32. *Id.* art. 22, para. 4 (emphasis added).
33. *Id.*
34. *Id.*
35. *Id.* art. 22, para. 5.
36. *Id.* art. 22, para. 6.
37. *See* W. THOMAS MALLISON & SALLY V. MALLISON, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER (1986) 189-90.

in the selection of the Mandatory, assigning the Mandate to Great Britain without the consent of Palestine's population.[38] The Mandate, moreover, entrusted to Great Britain "the administration of the territory of Palestine,"[39] words more reminiscent of the role assigned to "B" Mandatories than of the "A" Mandatories. Most significantly, in contrast to its numerous explicit commitments to the establishment of a "Jewish national home" in Palestine,[40] the Mandate referred to the indigenous Arab population of the country, which in 1922 represented almost 90% of Palestine's total population,[41] primarily in contradistinction to the Jewish population.[42] The Mandate, therefore, transformed the "independent nation" provisionally recognized by the Covenant into an assortment of "non-Jewish communities" that happened to reside within the borders of the territory of Palestine.

Some have argued that this conception of the Palestinians simply conforms to the historical record — that the Arabs in Palestine in 1917 were an undifferentiated segment of the larger Arab nation that stretched from Syria to Morocco and that they possessed no independent communal identity that could form the basis for nationhood.[43] According to this view, the national aspirations of Arabs in Palestine were given adequate means of fulfillment by the allocation to "the Arabs" of the vast tracts of land that presently comprise the Arab states.[44] Moreover, it has been suggested that the kingdom of Transjordan, which in 1922 was established as an independent principality, was, itself, a "Palestinian Arab State" and consequently fulfilled whatever interests in self-determination Palestinians legitimately could claim.[45]

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38. NORTHEDGE, *supra* note 26, at 205.

39. Mandate for Palestine, Pmbl., *in* 44 Stat. 2184 (1924).

40. *Id.* (incorporating Balfour Declaration, expressing support for ". . .establishment in Palestine of a national home for the Jewish people,. . ."; recognizing Jewish grounds for "reconstituting their national home in" Palestine); *Id.* at art.2, 2185 ("The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home . . . ."); *Id.* at art.4 (setting terms for creation of Jewish agency ". . .to assist and take part in the development of the country" and recognizing the Zionist organization in that capacity); *Id.* at art.6 (committing to facilitation of Jewish immigration to Palestine); *Id.* at art.7, 2186 (committing to acquisition of Palestinian citizenship by Jews).

41. *See* WALID KHALIDI, BEFORE THEIR DIASPORA 86 (1984).

42. Mandate for Palestine, *supra* note 38, at 2184, (committing not to take steps that "might prejudice the civil and religious rights of existing non-Jewish communities. . . ."); *Id.* at art.2 ("The Mandatory shall be responsible for . . . [helping to establish the Jewish national home] . . . and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."); *Id.* art. 3 (qualifying commitment to Jewish immigration to ensure "that the rights and position of other sections of the population are not prejudiced"); *Id.* at art.9 (guaranteeing "[r]espect for the personal status of the various peoples and communities and for their religious interests . . .").

43. *See, e.g.*, JULIUS STONE, ISRAEL AND PALESTINE 10-15 (1981).

44. *Id.* at 15-16.

45. *Id.* at 22-25. Stone's position rests on the following premises: (1) that the designation "Palestine" referred historically to the territory on both sides of the Jordan River, *id.* at 22; (2) that the division of the territory into the mandates of Palestine and Transjordan represented "a last-minute encroachment on the already small allocation to

While it seems clear that Palestinian national identity at the beginning of the century was intertwined to a significant extent with a more general Arab identity,[46] it does not follow that the establishment of other Arab states negates the Palestinians' right to self-determination in Palestine. Had a different chain of events placed the entire territory of Palestine under, for instance, the rule of Jordan's King Abdallah, Palestinians may have had some difficulty establishing that the principle of self-determination mandated their independence from Jordan, since the Palestinians and Jordanians, as Arab peoples, have long been connected by history and culture and were not always clearly separated by national borders. The notion that the self-determination rights of the people of Jaffa or Ramallah or Jerusalem were amply satisfied by the establishment of an independent state fifty or one hundred miles away and that their cities and land consequently could be "allocated" to a largely foreign[47] population is, however, difficult to square with authoritative interpretations of the principle of self-determination.[48]

Moreover, as indifferent to the political rights of the indigenous Palestinians as the Mandate for Palestine appears to have been, it was

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the Jewish nation in the self-determination distribution. . . ." *id.* at 23; (3) that the population of Jordan is, at present, comprised largely of Palestinians, most of whom possess Jordanian citizenship; and (4) that Jordanians and Palestinians share a historical and cultural "affinity," *id.* at 24.

The historical accuracy of Stone's assertions is worthy of some skepticism. *See, e.g.* ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 318 (1991) (referring to Transjordan as land east of Palestine and noting that Britain acknowledged no Jewish claim to it); KHALDI, *supra* note 42, at 27-29 (reviewing historical references to Palestine as land west of the Jordan River); Ibrahim Abu-Lughod, *Palestinian Culture and Israel's Policy,* ARAB STUDIES Q., Spring/Summer 1985, at 95, 97-99 (discussing distinguishing characteristics of Palestinian culture).

46. To concede this point is not to suggest that the Arabs in Palestine were culturally indistinguishable from other Arab peoples at the beginning of the twentieth century. The urban and agricultural lifestyles and traditions of Palestinians made them very different from the predominantly Bedouin population of Transjordan. *See* ARTHUR GOLDSHMIDT, A CONCISE HISTORY OF THE MIDDLE EAST 272-73 (3d ed. 1988); *See generally* Abu-Lughod, *supra* note 66, at 95,97-99 (discussing distinguishing characteristics of Palestinian culture).

47. Ninety percent of the Jewish population of Palestine in 1946 had immigrated to the country in the previous four decades. *See* HENRY CATTAN, PALESTINE AND INTERNATIONAL LAW 88 (1977). Most Jewish immigrants came from Central Europe, Poland, and the Soviet Union. *Id.*

48. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, which is generally seen as an authoritative interpretation of the U.N. Charter's self-determination provisions, *see supra* note 10, and accompanying text, states that "by virtue of the principle of . . . self-determination of peoples . . . all peoples have the right freely to determine, without external interference, their political status," Declaration on Friendly Relations, *supra* note 9, at 123. Even if one assumes, *arguendo*, that the people of Palestine were merely a part of the larger "Arab people" in 1922, it is difficult not to see the "allocation" of their territory by foreign powers to a foreign population as "external interference."

not designed to facilitate placing the indigenous Arab[49] population of Palestine under the sovereignty of a "Jewish State." The Mandate, like the Balfour Declaration from which its language is drawn, commits to the establishment only of a Jewish national home in Palestine.[50] The Balfour Declaration was adopted by the British War Cabinet only after it received Zionist assurances that they did not seek to establish a "Jewish Republic or other form of State in Palestine or any part of Palestine."[51] Moreover, Great Britain refused to interpret the language of the Balfour Declaration as contemplating the transformation of Palestine into a Jewish State.[52]

The framers of the Mandate seem to have envisioned the eventual establishment of a single state in Palestine. For instance, although the Mandate committed in several capacities to helping to secure the establishment of a Jewish national home, it provided for the enactment of a single nationality law for the country, stating that the law should include "provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine."[53] This provision acknowledged the concept of Palestinian nationality and framed it in non-communal (i.e. not Jewish or Arab) terms. Similarly, the Mandate stated that "[t]he Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country"[54] and expressed Britain's commitment to support "the development of self-governing institutions" in Palestine.[55] The broad non-exclusive language of these provisions suggests that the framers of the Mandate conceived of Palestine as a single country whose inhabitants would possess a single nationality and would govern themselves with a single administration. Although inter-communal strife prompted Britain to reconsider this approach, it seems clear that the eventual establishment of a single state of Palestine was Britain's original intention. [56]

Despite these apparent intentions, Britain's policies over the course of the Mandate contributed to the development of severe inter-communal tension in Palestine. The British Mandatory Government's commitment to the creation of a Jewish national home in Palestine, and its initially liberal Jewish immigration policies, aroused the resentment

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49. The term "Arab" is used loosely here to include the entire indigenous population of the country, including Muslims, Christians, and Jews.

50. Mandate for Palestine, *supra* note 39, at 2184; *See* John A. Collins, *Self-Determination in International Law; The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 157 (1980).

51. MALLISON & MALLISON, *supra* note 37, at 38.

52 CATTAN, *supra* note 47.

53. Mandate for Palestine, *supra* note 39, art. 7, at 2186 (emphasis added).

54. *Id.* art. 11, at 2186 (emphasis added).

55. *Id.* art. 2, at 2185.

56. This textual analysis is supported by the expressed statements of British officials at several points during the Mandate. *See* BERNARD WASSERSTEIN, THE BRITISH IN PALESTINE: THE MANDATORY GOVERNMENT AND THE ARAB-JEWISH CONFLICT, 1917-1929, at 109 (1978); NORTHEDGE, *supra* note 27, at 214. *See generally* W. THOMAS MALLISON, THE BALFOUR DECLARATION: AN APPRAISAL IN INTERNATIONAL LAW (1973).

of indigenous Palestinians who identified themselves as part of a broader Arab nation and feared being placed under the rule of European immigrants.[57] These tensions generated increasingly violent inter-communal strife in Palestine and led the British Peel Commission to conclude in 1937 that "[a]n irrepressible conflict has arisen between two national communities within the bounds of one small country."[58] Based on these observations, the Commission recommended the partition of Palestine into Jewish and Arab states, the latter to be incorporated into Transjordan. The proposal raised the ire of both the Zionists, who felt that the territory allocated to them was too small, and the Arab Palestinians, who challenged Britain's right to partition their territory at all.[59] Although Britain eventually abandoned this proposal declaring its goal to be "the establishment within ten years of an independent Palestine State,"[60] Arab-Jewish relations continued to deteriorate.

In February 1947, Great Britain formally acknowledged that it lacked the power to impose a settlement in Palestine and returned the Mandate to the United Nations, which assumed responsibility for League of Nations trusteeships. After accepting the return of the Mandate in May, the United Nations established a committee composed of delegates from eleven United Nations member states to evaluate the situation in Palestine and make recommendations regarding the future of the territory. In August, a majority of the Committee recommended a partition plan that divided Palestine into three territories — an Arab state, a Jewish state, and an internationally administered enclave around Jerusalem — in a contorted geographical arrangement that one British scholar has described as "two fighting serpents entwined in an inimical embrace."[61] The Partition Plan stated that "[i]ndependent Arab and Jewish States . . . shall come into existence in Palestine two

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57. Christians and Muslims in Palestine began to unite during the early part of the 1900's in opposition to Zionist national aspirations. For instance, after Zionists held a procession in Jerusalem in November 1918 to celebrate the first anniversary of the Balfour Declaration, a deputation of Christian and Muslim sects, headed by the mayor of Jerusalem, submitted a written protest to the British Military Governor of Palestine articulating its concern that the Zionists would be given sovereignty over them. Responding to Zionist assertions that Palestine had become their national home, the deputation stated:

> If it is meant that they should obtain national liberty in the country, why should this be confined to the Jews and not to others? . . . We Arabs, Muslim and Christian, have always sympathized profoundly with the persecuted Jews in their misfortunes in other countries. . . . We hoped for their deliverance and prosperity. But there is a wide difference between this sympathy and the acceptance of such a nation in our country, to be made by them a national home, ruling over us and disposing of our affairs.

WASSERSTEIN, *supra* note 56, at 32. *See also* JAMAL R. NASSAR, THE PALESTINE LIBERATION ORGANIZATION: FROM ARMED STRUGGLE TO THE DECLARATION OF INDEPENDENCE 9 (1991) (quoting an editorial from the Jerusalem daily demanding "self-rule," "unity of territory" and "rejection of a Zionist immigration" in Palestine).

58. MARK TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT 241-42 (1994).

59. *Id.* at 242.

60. *Id.* at 245 (quoting a White Paper issued by Malcolm MacDonald in May 1939).

61. *Id.* at 259 (quoting George Kirk).

months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948."[62] It then set forth an outline for a multi-phased transition period during which each of the States was to develop provisional governmental institutions,[63] and conditioned international recognition of each State upon its establishment of effective independence and its declared commitment to guarantee the protection of religious sites and minority rights.[64]

The Plan, however, never came into effect. Although, after some initial hesitation, the Zionists declared their willingness to accept the recommendations, the Palestinian Arabs rejected them out of hand, arguing that the United Nations had no right to allocate the majority of their territory to the Zionists (who, in March 1947, claimed possession of less than seven percent of the land in Palestine and ownership of only 5.66%[65] and represented less than a third of the territory's population).[66] The United Nations General Assembly nevertheless endorsed the partition resolution on November 29, 1947 by a vote of thirty-three to thirteen, with ten abstentions.[67] Almost immediately thereafter, full-scale war broke out between the Arabs and the Zionists. On May 14, 1948, after establishing control over all of the territory allocated to the Jewish state (and over some allocated to the Arab state),[68] a provisional Zionist national council announced the establishment of the State of Israel on the portion of Palestine allocated by the Partition Plan to form the Jewish State. Israel captured more territory allocated to the Arab state in fighting after its independence. By the time armistice agreements were concluded in 1949, its official boundaries encompassed almost 80% of the territory of Palestine.[69]

In light of these circumstances, the effect of United Nations Resolution 181 (which recommended implementation of the Partition Plan) on the international legal status of Palestine's indigenous inhabitants remains unclear.[70] Although the Partition Plan required each of the proposed States to make a declaration that included a commitment to guarantee the political[71] and religious[72] rights of all Palestinians (Arab

62. *Plan of Participation with Economic Union*, G.A. Res. 181 (II), part 1, sec. A, para. 3, U.N. Doc. A/519, at 133 (1947).

63. *Id.* part 1, sec. B., at 133.

64. *Id.* part 1, sec. F., at 142.

65. CATTAN, *supra* note 47, at 88 (citing United Nations statistics); KHALIDI, *supra* note 41, at 236.

66. *See* ABU LUGHOD, THE DEMOGRAPHIC TRANSFORMATION OF PALESTINE 155 (1973).

67. TESSLER , *supra* note 58, at 261.

68. *Id.* at 263.

69. CATTAN, *supra* note 47, at 24.

70. A discussion of the legitimacy of the United Nations' decision to endorse the Partition Plan falls beyond the scope of this essay. For a critical evaluation of the legal dimensions of this issue, *see* CATTAN, *supra* note 47, at 75-89.

71. G.A. Res. 181 (II), *supra* note 62, part 1, sec. C, ch. 3, para. 1 ("Palestinian citizens shall, upon the recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights.").

72. *Id.* at part 1, sec. C, ch. 2 (defining religious and minority rights).

and Jewish), it defined the two states in clearly communal terms. For instance, it provided for voluntary population transfers between the two states and prohibited Arabs and Jews residing within the proposed territory of their own respective states from seeking citizenship in the other state.[73] These provisions show that the United Nations acknowledged the existence of two national communities in Palestine, each on the verge of achieving the status of statehood. Accordingly, they reflect a tacit recognition by the United Nations of the Palestinian Arab nation.

Over the course of the Mandate, therefore, the indigenous inhabitants of Palestine received implicit international recognition as a people entitled to statehood. This recognition is apparent from the terms of the League of Nations Covenant, which granted provisional recognition of the independent nationhood of the communities designated as "A" Mandates. While the terms of the Mandate for Palestine departed significantly from this conception of the Palestinian Arabs, defining Palestine in primarily territorial terms, U.N. Resolution 181 and the Partition Plan affirmed that the Palestinian Arabs were entitled to a State of their own.

2. 1948-1969: From Inhabitants to Refugees

Following the establishment of the State of Israel, the international community began to regard Palestinians in individual rather than communal terms.[74] Although the Partition Plan had provided for voluntary population transfers between the proposed Jewish and Arab states,[75] United Nations resolutions following the creation of the State of Israel maintained a territorial focus. The U.N. sought to restore the former inhabitants of Palestine to their homes, whether they were located within the newly-created State of Israel or in what remained of the lands allocated by the Partition Plan to the Arab state.[76] The Palestine Arabs, therefore, were viewed simply as individual refugees, the former inhabitants of the territory of Palestine.[77] This approach continued beyond the June 1967 War.[78]

This shift away from international recognition of Palestinian Arab nationhood likely resulted, at least in part, from changes in the conception of self-determination. One writer has suggested recently that the West's reaction against nationalism after World War II — driven both

73. *Id.* at part 1, sec. C, ch. 3, para. 1.

74. MALLISON & MALLISON, *supra* note 37, at 189-90.

75. G.A. Res. 181 (II), *supra* note 62, part 1, sec. C, ch. 3, para. 1.

76. G.A. Res. 194 (III), para. 11, U.N. Doc. A/810, at 21, 24 (1948). Similarly, the U.N. created in 1948 a relief agency—UNRWA—to provide assistance to "Palestine Refugees," not Palestinian refugees, reflecting a view of them as the inhabitants of the territory of Palestine rather than as an independent people.

77. S.C. Res. 89, U.N. SCOR, 5th Sess., at 9, U.N. Doc. S/1907 (1950).

78. Security Council Resolution 259 refers to "the inhabitants of the Arab territories under military occupation by Israel." U.N. SCOR, 23d Sess., at 11, U.N. Doc. S/INF/23/Rev.1 (1968).

by horror at Nazi atrocities and by increasing economic and political internationalization — translated into a renunciation by Western nations of the Wilsonian concept of self-determination and a reaffirmation of the principle of state sovereignty.[79] Although the United Nations Charter commits the United Nations to the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,"[80] to the postwar framers of the United Nations Charter, "[s]elf-determination was [still] . . . only . . . a means of furthering the development of friendly relations among states and . . . strengthen[ing] universal peace . . . with the obvious consequence that it might and indeed should be set aside when its fulfillment would give rise to tension and conflict among states."[81] Support for Palestinian nationhood was not easily reconciled with this new vision of self-determination. The Palestinian Arabs, as individuals, were entitled either to repatriation or to compensation for their lost possessions. They could seek vindication of their individual rights within existing state structures. Their claims to nationhood and to the right to establish an independent state, however, were subordinated to the maintenance of the political order established in the Middle East following the Arab-Israeli War.[82]

3. 1969-Present: Peoplehood, Participation, & Self-Determination

In the late 1960s, however, a culmination of factors[83] brought the United Nations General Assembly to reaffirm the recognition of Palestinian nationhood articulated in the League of Nations Covenant and the 1947 Partition Plan. Beginning in 1969, the General Assembly passed a series of resolutions recognizing: (1) the Palestinians' status as a people; (2) the centrality of their participation to the achievement of a just resolution of the Palestine question; and (3) their right to self-determination. This recognition, however, was not extended by all Member States. Until 1993, Israel and the United States refused to recognize the Palestinians' peoplehood or their right to participation in the Middle East peace process, and both countries continue to refrain from expressly acknowledging the Palestinians' right to self-

79. Binder, *supra* note 6, at 230-31.

80. UNITED NATIONS CHARTER, art. 1, para. 2.

81. Binder, *supra* note 6, at 230-31 (quoting Antonio Cassese, *The Helsinki Declaration and Self-Determination*, *in* HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD 83, 94 (Thomas Buergenthal ed., 1977)); *Cf.* GOODRICH, ET. AL, *supra* note 23, at 30-31 (discussing U.N. Charter framers' varying interpretations of right to self-determination).

82. *See* TESSLER, *supra* note 58, at 275-279 (discussing subordination of Palestinian national aspirations to Israeli, Jordanian, and Egyptian political concerns); William J. O'Brien, *The PLO in International Law*, 2 B.U. INT'L L.J. 349, 352 (1984) (identifying the Arab States' failure to take Palestinians seriously as a factor motivating the establishment of the PLO in 1964).

83. Among these factors were the recent independence and participation of former colonial territories in the General Assembly; Israel's occupation of the remaining territory of Palestine following the June 1967 War; and the wresting of control over the PLO from the Arab States by Palestinian *fedayeen*.

determination. As discussed below, however, the actions of Israel and the United States, in this regard, have been at odds with the broad recognition of Palestinian national aspirations by other members of the international community.

The General Assembly departed from its previous focus on the individual rights to repatriation and compensation of refugees from Palestine in 1969, recognizing the Palestinians' status as a people. In resolution 2535, the General Assembly reaffirmed "the inalienable rights of the people of Palestine,"[84] stating that the Palestinian refugee problem had arisen from a denial of the Palestine Arabs' rights under the United Nations Charter and the Universal Declaration of Human Rights.[85] It, thereby, acknowledged that the Palestinians were more than stateless individuals and that their statelessness had resulted from a denial of their right to constitute themselves as a national community. This recognition of Palestinian peoplehood has been reaffirmed by all subsequent General Assembly resolutions dealing with the subject.[86] Accordingly, during its 1970 session, the General Assembly began to use the designation "the Palestinians,"[87] instead of referring to them as the Palestine Arabs, the Palestine refugees, or the (former) inhabitants of Palestine.

In addition to extending international recognition to the Palestinian people, the General Assembly began, during this period, to regard them as primary participants in the settlement of the Palestine question. Previously, U.N. resolutions acknowledged no role at all for the Palestinians. Security Council Resolution 242, for instance, made no specific reference to the Palestinians except insofar as it affirmed the necessity of "achieving a just settlement of the refugee problem."[88] While Resolution 242 emphasized "the need to work for a just and lasting peace," it defined this peace as being one in which "every State in the area can live in security."[89] Maintaining the focus on the inviolability of state sovereignty apparent in the U.N. resolutions following the 1947 Arab-Israeli War, it made no reference to a Palestinian role in the peace process or to Palestinian national rights. In contrast, General Assembly Resolution 2628 (XXV), passed during the 1970 session, recognized the vindication of Palestinian rights to be "an indispensable

84. G.A. Res. 2535 (XXIV), U.N. GAOR, 24th Sess., Supp. No. 30, at 25, U.N. Doc. A/7630 (1969).

85. *Id.* sec. B, pmbl..

86. MALLISON & MALLISON, *supra* note 37, at 190.

87. G.A. Res. 2628 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 5, U.N. Doc. A/8028 (1970).

88. S.C. Res. 242 U.N. SCOR, 22d Sess., at 8, U.N. Doc. S/INF/22/Rev. 2 (1967). U.N. Resolution 242 deals with the Palestinians in two ways: (1) it states that the U.N. Charter requires "the establishment of a just and lasting peace" based in part on "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict"; and (2) it affirms the necessity of "achieving a just settlement of the refugee problem." *Id.* In light of resolutions throughout the 1960s, the phrase "just settlement of the refugee problem" likely alludes to General Assembly Resolution 194(III), U.N. Doc. A/810, at 24 (1948), which demanded the repatriation or compensation of refugees.

89. S.C. Res. 242, *supra* note 88.

element for the establishment of a just and lasting peace in the Middle East."[90] Building upon that premise, the General Assembly resolved in 1974 that "the Palestinian people is a principal party to the question of Palestine" and invited the Palestine Liberation Organization to participate in plenary meetings of the General Assembly concerning Palestine.[91] In a subsequent resolution, moreover, the General Assembly requested that the Secretary General "establish contacts with the Palestine Liberation Organization on all matters concerning the question of Palestine."[92] The General Assembly, therefore, affirmed that the vindication of the rights of the Palestinian people was a central component of any just resolution of the Palestine question and that, accordingly, the Palestinian people had a right to participate in the settlement of that question.

In a series of resolutions during the same period, the General Assembly made explicit that this right to participation emerged from the Palestinians' right to self-determination. General Assembly Resolution 2649 — entitled Universal Realization of the Right of Peoples to Self-determination and Speedy Granting of Independence to Colonial Countries and Peoples — condemned "those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine."[93] Through this and subsequent resolutions,[94] the General Assembly recognized the legitimacy of the Palestinian national liberation movement and analogized it to other efforts to eradicate the vestiges of colonialism.

This recognition, however, has not been unanimous. While the existence of a Palestinian people and their right to participate in the resolution of the Palestine question appear no longer to be in contention, their right to self-determination has not been fully recognized by the two States, Israel and the United States, that are most able to prevent its realization. In September 1993, in anticipation of the signing of the DOP, Israel Prime Minister Yitzhak Rabin wrote to PLO Chairman

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90. G.A. Res. 2628 (XXV), *supra* note 87.

91. G.A. Res. 3210 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 3, U.N. Doc. A/9631 (1974).

92. G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974) (emphasis added). The international role and status of the Palestine Liberation Organization is discussed in greater depth below. *See infra* Section II(A).

93. G.A. Res. 2649 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 73-74, U.N. Doc. A/8028 (1970).

94. *See* G.A. Res. 2672 (XXV), U.N. GAOR, 25th Sess., at 35-36, U.N. Doc. A/8028 (1970) (recognizing "that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations"); G.A. Res. 2787 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 82, U.N. Doc. 8429 (1971) (entitled "Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights;" "Reaffirming the inalienable rights of all peoples, and in particular those of the Palestinian people, to freedom, equality, and self-determination, and the legitimacy of their struggles to restore those rights."); G.A. Res. 2949 (XXVII) (8 Dec. 1972), U.N. GAOR, 26th Sess., Supp. No. 29, at 82, U.N. Doc. 8429 (1971).

Yasser Arafat stating that, in light of the PLO's acceptance of U.N. resolutions 242 and 338, its recognition of Israel's right to exist, and its commitment to renounce terrorism, Israel recognized the PLO "as the representative of the Palestinian people."[95] Further, in the DOP itself, the Government of Israel and the PLO, as representative of the Palestinian people, agreed to "recognize their mutual, legitimate and political rights,"[96] words the two parties reaffirm in their subsequent agreements.[97] Although these commitments by Israel fall short of the PLO's recognition of Israel's right "to exist in peace and security,"[98] they represent formal recognition that the Palestinians possess "legitimate and political rights" as a people. The scope of the rights recognized by Israel is, however, difficult to assess.

The agreements concluded between the PLO and Israel pursuant to the DOP are silent with regard to Palestinian self-determination. The U.N. Security Council resolutions to which the agreements refer make no direct reference to the issue of self-determination or even name the Palestinian people, Resolution 242 affirming only the need for "a just settlement of the refugee problem."[99] The U.N. General Assembly recently has made some effort to link Palestinian self-determination to Resolution 242. Following the conclusion of the DOP, the Assembly passed a resolution reaffirming that final status negotiations between Israel and the PLO should be based, *inter alia*, upon:

> (a) [t]he realization of the legitimate national rights of the Palestinian people, *primarily the right to self-determination*, (b) [t]he withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and from the other occupied Arab territories, [and] (c) guaranteeing arrangements for peace and security for all States in the region, *including those named in resolution 181(II) of 29 November 1947, within secure and internationally recognized boundaries.*[100]

The resolution, therefore, not only expresses the Assembly's sense that Palestinian self-determination should be a basis of permanent status negotiations, but also incorporates the principle into Resolution 242 by including the states named by Resolution 181 (and therefore, the Arab State envisaged by the 1947 Partition Plan) among the States whose borders should be respected. Israel and the United States both voted against the resolution, however, with Israel asserting that it predetermined the outcome of permanent status negotiations and the United States seeking to avoid focusing on "divisive and polarizing

95. Letter from Yitzkah Rabin to Yasser Arafat, THE PALESTINIAN-ISRAELI PEACE AGREEMENT: A DOCUMENTARY RECORD 128-29 (Inst. For Palestinian Studies, ed. 1993) [hereinafter THE PALESTINIAN ISRAELI PEACE AGREEMENT].

96. Declaration of Principles, *supra* note 2, at 1527.

97. *See* Interim Agreement, *supra* note 5, pmbl.; Gaza-Jericho Agreement, pmbl.

98. THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 128.

99. *See* S.C. Res. 242, *supra* note 87; S.C. Res. 338, U.N. SCOR, 28th Sess., at 10, U.N. Doc. S/INF/29 (1973); Bassiouni, *supra* note 8, at 35.

100. G.A. Res. 48/158D, U.N. GAOR, 48th Sess. (1993) (emphasis added).

statements."[101]

It is, therefore, uncertain whether the governments of Israel and the United States recognize the Palestinian right to self-determination. In view of Israel's acknowledgment that the Palestinians are a people and possess the "legitimate rights" attendant to that status, Israel's unwillingness to support the General Assembly Resolution may arise from the view that, even if the Palestinians do possess a right to self-determination, as the vast majority of the international community has recognized, the ultimate status of the territory that they claim is not theirs alone to decide. That is, that the OPT do not constitute a viable self-determination unit. As discussed below, however, that position is difficult to reconcile with international practice regarding the disposition of non-self-governing territories.

C. The Territory of Palestine

A people's right to exercise self-determination is constrained by the status of the territory to which they lay claim. As Professor Bassiouni suggests, "[i]n the abstract, people determine their goals regardless of geographic limitations; however, realistically, [self-determination] is exercisable only when it can be actuated within a given territory susceptible of acquiring the characteristics of sovereignty . . . ."[102] Thus, while authoritative international instruments recognize self-determination to be a right of all peoples, the full exercise of that right, in practice, has been restricted to the populations of certain classes of territory. Owing perhaps, to the fact that the law of self-determination has developed largely within the context of decolonization, the territories most universally recognized to be "self-determination units" have been mandate territories and the former colonial holdings of metropolitan States.

In order to assess the scope of the Palestinian right to self-determination, it is necessary to evaluate the extent to which the OPT themselves comprise a self-determination unit. The provisional recognition of Palestine's independence in the League of Nations Covenant and in U.N. Resolution 181(II) arguably confers this status upon Palestine.[103] As argued below, however, this status can also be seen to emerge from the U.N. Charter's provisions regarding the disposition of non-self-governing territories. While the OPT may not be a former colonial territory *per se*, and Israel's role in the OPT has been one of a belligerent occupant rather than an administering authority, the OPT otherwise conform to the Charter's definition of a non-self-governing

101. 1993 U.N.Y.B. 530, U.N. Sales No. E.94.I.1.

102. Bassiouni, *supra* note 8, at 34.

103. With the exception of the U.S. administered Pacific Islands, all "A" , "B" and "C" Mandates have achieved independence. *See* CRAWFORD, *supra* note 8, at 426-28. *See also* Allen Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, 24-27 (1973) (arguing that sovereignty in mandated territories resides ultimately in their populations, who have the right eventually to exercise that sovereignty through independence).

territory. Since international law has evolved to recognize the right of the populations of all non-self-governing territories to self-determination, so too must Israel recognize the Palestinians' right to self-determination on their territory.

Based on the framework established by the U.N. Charter for the definition and disposition of non-self-governing territories, the OPT constitute a self-determination unit. Although the U.N. General Assembly has interpreted Chapter XI of the Charter primarily to apply to territories that were colonies in 1945,[104] the Charter, itself, requires U.N. Members "which have *or assume* responsibilities for the administration"[105] of non-self-governing territories to abide by its provisions.[106] This suggests that it is applicable to territories acquired by metropolitan States after 1945.[107] The General Assembly's subsequent resolutions analogizing the Palestinian liberation movement to other anti-colonial movements imply, moreover, that the OPT possess characteristics similar to the colonial territories to which Chapter XI has been recognized to apply. Further, as discussed below, the OPT conform to Chapter XI's definition of non-self-governing territories in that they are separate from, distinct from, and subordinate to Israel, the State presently administering them.

Under U.N. General Assembly Resolution 1541, there is a *prima facie* obligation to transmit information "in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."[108] The OPT meet all three criteria. The OPT's geographic separateness from Israel is apparent from a number of factors. First, the international community — including both the U.N. Security Council and the General Assembly — consistently has regarded Israel's presence in the OPT as an occupation of foreign territory and has demanded the withdrawal of Israeli forces. [109] Second, while members of the Israeli polity have laid claims to the OPT on the basis of religious, political, security, and other interests, the Government of Israel has not annexed the OPT.[110] Accordingly, Israel has

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104. *See* G.A. Res. 1541 (XV), *supra* note 24, at Annex, Principle 1.

105. U.N. CHARTER, art. 73 (emphasis added).

106. *See* CRAWFORD, *supra* note 8, at 359-60.

107. *Id.*

108. G.A. Res. 1541 (XV), *supra* note 24, at Annex, Principle IV.

109. *See, e.g.*, G.A. Res. 49/62D, U.N. GAOR, 49th Sess. (1994); G.A. Res. 2443(XXIII), U.N. GAOR, 23d Sess. (1968). The fact that the U.N. Security Council and the General Assembly have demanded that Israel recognize the *de jure* applicability of the Fourth Geneva Convention to the OPT confirms its view that the OPT are not seen as part of the State of Israel. *See The Situation in the Arab Territories Occupied by Israel*, S.C. Res. 446, U.N. SCOR, 34th Sess., at 4, U.N. Doc. S/INF/35 (1979); G.A. Res. 48/41 B, U.N. GAOR, 48th Sess., Supp. No. 49, at 114, U.N. Doc. A/48/49 (1993) (demanding that Israel accept *de jure* applicability of Fourth Geneva Convention to OPT).

110. Although the Knesset extended Israeli law over East Jerusalem shortly after its occupation in 1967 and made "unified Jerusalem" the capital of Israel in 1980, its Annexation has been condemned by the U.N. General Assembly and Security Council. G.A. Res. 49/87A, U.N. GAOR, 49th Sess. (1994) (citing past resolutions); S.C. Res. 252, U.N. SCOR, 23d Sess., at 9, U.N. Doc. S/INF/23/Rev.1 (1968).

imposed a separate legal regime upon the OPT than that prevailing in Israel, and Palestinian residents of the territories have been granted no right to citizenship in Israel. Finally, the express terms of the Interim Agreement concluded between Israel and the PLO affirm that both parties see the West Bank and the Gaza Strip "as a single territorial unit, the integrity and status of which will be preserved during the interim period."[111] While the Interim Agreement does not indicate precisely what "status" will be preserved, it does affirm that the OPT constitute a distinct, coherent territorial unit.

The population of the OPT, moreover, is to a great extent ethnically and culturally distinct from the population of Israel. [112] The distinctions between the two populations were explicitly recognized in the United Nations 1947 Partition Plan and are the implicit basis for the international community's recognition of Palestinian peoplehood. The differences in the predominant languages and religions of the two populations also attest to this distinction. While almost two hundred thousand Israeli citizens presently reside in the OPT, their presence in the Territories has repeatedly been condemned by the international community as an illegal contravention of humanitarian law.[113] They constitute, moreover, only a small percentage of the Territories' total population. The OPT, therefore, are geographically, ethnically, and culturally distinct from the State of Israel. On that basis, there exists a presumption under Principle IV that the OPT is a non-self-governing territory under Chapter XI of the U.N. Charter.

Once the *prima facie* case described in Principle IV has been met, Principle V provides for scrutiny of other elements of the relationship between the concerned territory and the metropolitan State in order to assess the extent to which the territory has been placed "in a position or status of subordination."[114] As discussed in Part II(C), below, the OPT remain almost entirely under Israeli authority and control, even though portions of the Territories have been administered by the PA since June 1994.

The OPT, therefore, possess the attributes, though not the formal

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111. Interim Agreement, *supra* note 5, at ch. 2, art. 11, para. 1.

112. I must admit that I speak of ethnic and cultural distinctions with some hesitation. Ethnicity and culture are dynamic, largely imagined concepts that, like the communities they are used to describe, resist rigid delineation. It is, after all, only an accident of history that we do not now speak of "Jewish Palestinians" with lack of irony with which we speak of "Christian Palestinians." Many writers have reflected thoughtfully on these issues. *See, e.g.*, BENEDICT R. O'G. ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983); JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART (1988); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS (1973); FRANTZ FANON, THE WRETCHED OF THE EARTH (Constance Farrington trans., 1968); FRANCOISE LIONNET, AUTOBIOGRAPHICAL VOICES: RACE, GENDER, SELF-PORTRAITURE (1989); EDWARD W. SAID, ORIENTALISM (1978).

113. *See* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 85-86 & nn. 152-53 (1990) (citing U.N. General Assembly and Security Council Resolutions condemning Israeli settlement activity).

114. G.A. Res. 1541 (XV), *supra* note 24, Annex, Principle V.

status, of a non-self-governing territory under the terms of Chapter XI of the U.N. Charter. It would be naive, if not cynical, however, to characterize Israel's occupation of the West Bank and Gaza as a form of trusteeship, although at least one writer has suggested that Israel assume the role of "trustee-occupant."[115] Since Israel is an occupying power with significant economic and political interests in the OPT and a relationship of extreme enmity with its population, it is unlikely that its acceptance of "the obligation to promote to the utmost . . . the well-being of the inhabitants" [116] of the West Bank and Gaza would be received with great confidence by the Palestinian population. The point of demonstrating the OPT's functional status as a non-self-governing territory is not, therefore, in order to recommend a shift in Israel's status from occupant to trustee but, rather, to show that the OPT possess the requisite characteristics for the exercise of self-determination. The OPT are a coherent and distinct territorial unit that is separate, both legally and practically, from Israel. In light of the fact that the populations of other non-self-governing territories that meet these criteria have been seen to possess the right to self-determination, the OPT should be recognized to constitute a legitimate self-determination unit.

II. PALESTINIAN PUBLIC BODIES

The international community, therefore, has recognized the Palestinians' status as a people, the centrality of their participation to equitable resolution of the Palestine question, and, by and large, their inalienable right under the United Nations Charter and other international instruments to self-determination. This recognition of Palestinian peoplehood — and the international participation it has facilitated — has resulted, to a great extent, from the establishment of Palestinian public bodies, which have served both as constitutive expressions of Palestinian nationhood and as vehicles for the pursuit of self-determination. The Palestine Liberation Organization (PLO) has, for many years, represented — in the myriad senses of the word — the Palestinian people. Through the PLO, the Palestinians have established a symbolic State and a very real administrative authority. This section examines the functions and international status of each of these bodies.

A. The Palestine Liberation Organization

Over the last thirty years, the PLO has emerged as the international representative of the Palestinian people and has played an instrumental role in defining and pursuing Palestinian national aspirations. This section analyzes the PLO's legitimacy as representative of the Palestinian people and its international status, as it has developed since its establishment in 1964.

115. Gerson, *supra* note 103, at 45-47.
116. U.N. CHARTER, art. 73.

1. Representation of the Palestinian People

In January 1964, Egyptian president Gamal abd-el-Nasser convened the first Arab Summit Conference in an attempt to formulate responses to Israel's plan to divert the waters of the Jordan River for its own use. Although the Conference proved unable to develop a viable strategy to counteract Israel's plans, it did recommend the establishment of "a sound basis for organizing the Palestinian people in order to enable them to assume their duties in liberating their homeland and determining their destiny."[117] Accordingly, a council selected by committees composed of Palestinians in various Arab countries met that spring and on June 1, 1964 established the PLO and adopted the Palestine National Covenant. Although the Covenant is occasionally referred to as the "PLO Covenant," it is more than an organizational charter. By its own terms, at least, it represents a constitutive expression of Palestinian nationhood; defining the Palestinian people and articulating their national character and aspirations, as well as establishing the PLO to act as their international representative and to work toward vindication of their national rights.

The Covenant defines the Palestinian people in ethnic, temporal, and territorial terms. Perhaps reflecting the emphasis at the time of its enactment on the principle of Arab unity, the Covenant's first article proclaims, "Palestine is the homeland of the Palestinian people. It is an inseparable part of the bigger Arab nation, and its people are an integral part of the Arab people."[118] The Covenant, therefore, situates both the territory of Palestine and the Palestinian people within the Arab nation. Although this provision arguably is designed more to emphasize the incongruity of the "Zionist-imperialist"[119] presence in the region than to define an ethnic or cultural criterion for Palestinian nationality. More substantively, the Covenant defines the Palestinian people in temporal and territorial terms. Article Five states, "[t]he Palestinians are those Arab citizens who under normal conditions used to live in Palestine[120] until 1947; they include those who remained there as well as those who were evicted. The offsprings [sic] of an Arab Palestinian parent, since that date, whether born in Palestine or outside, are regarded as Palestinians."[121] The Covenant also states that "Jews who

117. NASSAR, *supra* note 57, at 20. President Nasser initially proposed creating a "Palestinian entity." *Id.* at 19. During discussion of the issue, the leaders of the Arab states represented at the conference, suggested a variety of forms, ranging from the creation of a Palestinian state in the West Bank and Gaza Strip (which at the time were occupied by Jordan and Egypt, respectively) to the formation of a national liberation front. *See* LEILA KADI, ARAB SUMMIT CONFERENCES AND THE PALESTINE PROBLEM 99 (1966).

118. Palestine National Covenant, art. 1, *reprinted in* NASSAR, *supra* note 57, app. 2 at 219.

119. Palestine National Covenant, art. 15, *reprinted in* NASSAR, *supra* note 57, app. 2 at 220.

120. *See generally* Palestine National Covenant, art. 2, *reprinted in* NASSAR, *supra* note 57, app. 2 at 219 (defining Palestine in terms of "the borders that existed during the British Mandate").

121. Palestine National Covenant, art. 5, *reprinted in* NASSAR, *supra* note 57, app. 2 at

used to live under normal conditions in Palestine until the Zionist invasion of the country are to be considered Palestinians."[122] The Covenant, therefore, defines the Palestinians as the people who resided in the territory of Palestine, as delimited by the British Mandate, before 1947 (or, for Jewish Palestinians, before 1923) and their descendants.

Having thus defined the Palestinian people, the Covenant assigns to the PLO the role of facilitating the liberation of their homeland. This role is apparent not only from its name — the Palestine *Liberation* Organization — but also from article 26 of the Covenant:

The Palestine Liberation Organization, which represents all the forces of the Palestinian revolution, is responsible for the activities of the Arab Palestinian people *in their struggle to liberate their land and return to it to practice their right to self-determination.* This applies to all military, political, and financial matters, as well as anything related to the Palestinian problem on the Arab and international levels.[123]

The Covenant makes clear that, whatever functions the PLO might assume in relation to the Palestinian people and the international community, its overriding goal is securing for the Palestinian people the opportunity to return to their homeland under circumstances that will enable them to exercise self-determination. Since its creation, the PLO has developed an elaborate bureaucratic structure and administers a variety of social services to Palestinians in diaspora. Nevertheless, its focus has not been the amelioration of conditions in exile, but rather the termination of the condition of exile. While it has on occasion played a significant role in the national politics of other countries in the region (despite the Covenant's commitment to the contrary),[124] it has not sought to represent the interests of Palestinians as members of the national communities of the States in which they reside. Rather, its political activities have focused on those States' policies regarding Israel and the question of Palestine. It is in this capacity that the PLO characterizes itself as the sole legitimate representative of the Palestinian people.[125]

The internal legitimacy of this claim among the Palestinian people

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122. Palestine National Covenant, art. 6, *reprinted in* NASSAR, *supra* note 57, app. 2 at 219. The PLO selected 1923 as the year when the "Zionist invasion" began. As Cherif Bassiouni has pointed out, however, "That cut-off date is debatable since Palestinian Arab representatives agreed in the ensuing years to an immigration quota which allowed for the lawful entry of many European Jews." Baussiouni, *supra* note 8, at 38.

123. Palestine National Covenant, art. 26, *reprinted in* NASSAR, *supra* note 57, app. 2 at 222 (emphasis added).

124. *See* Palestine National Covenant, art. 27, *reprinted in* NASSAR, *supra* note 57, app. 2 at 222 ("The Palestine Liberation Organization cooperates with all Arab States, each according to its potentials, and it adheres to a neutral policy in its relations with these States in the light of the requirements of the liberation battle. On the basis of this, it does not interfere in the internal affairs of any Arab State").

125. As discussed in the next section, the international community roundly accepts the PLO's claim to represent the Palestinian people.

has been consistently affirmed. As a liberation organization representing the sometimes disparate interests of a dispersed population, the PLO has not functioned democratically at all times.[126] Nevertheless, Palestinians continually have identified the PLO as their international representative since its founding in 1964. Palestinian labor unions and women's and students' groups pledged their support for the organization promptly after it was created, and they have continued to regard it as the sole legitimate representative of the Palestinian people.[127] Other Palestinian institutions, including newspapers, political parties, and guerrilla groups, also have acknowledged the legitimacy of the PLO's representative status.[128] Perhaps most indicative of the internal legitimacy of the PLO, however, has been the consistent failure of other States to circumvent it in their dealings with the Palestinians. Israel, for instance, was unable to establish an alternative Palestinian leadership structure in the Occupied Territories in the 1970s, when the elected mayors in the West Bank agreed to confine their dealings with the Israelis to municipal matters on the grounds that the PLO was the "political representative" of all of the Palestinian people.[129] Similarly, even though the PLO did not participate directly in the 1991 Madrid Conference, the Palestinian delegation affirmed in its response to the invitation to participate that "[t]he fact that the PLO has agreed not to be directly or overtly involved in the process at present, does not in any way prejudice its role as the sole legitimate representative of the Palestinian people everywhere, and the only body empowered to negotiate or conclude agreements on behalf of the Palestinian people."[130] The PLO, therefore, has firmly established its status among Palestinians as their sole international representative.

A brief review of the organization's institutions of internal governance reveals some of the contours of this representation. Although the PLO has not sought recognition as a government in exile,[131] its institutions are modeled after governmental structures and provide Palestinians worldwide with an array of social services. [132] The PLO has two primary policymaking organs: the Palestine National Council (PNC), a 300 to 400 member body that functions as the PLO's legislative branch; and the Executive Committee, a fifteen member council apparently based in form on the British cabinet system.[133] The PNC, alone, is empowered to make or change basic PLO policy positions.[134] Its members,

126. *See* NASSAR, *supra* note 57, at 74-76 (discussing democratic and autocratic strains apparent in PLO politics).

127. *Id.* at 30-31.

128. *Id.* at 31-36.

129. *Id.* at 35. *See generally* 7 J. PALESTINE STUD. 132-36 (1978) (presenting Israeli press coverage regarding Palestinian municipal elections and PLO).

130. Palestinian Response to Madrid Invitation, Oct. 22, 1991. THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 14.

131. *See* notes 140-41, *infra* and accompanying text.

132. *See* NASSAR, *supra* note 37, at 68-73.

133. *Id.* at 50.

134. William V. O'Brien, *The PLO in International Law*, 2 B.U. INT'L L. J. 349, 355 (1984).

who serve three-year terms, assemble annually to consider the report of the Executive Committee, the Organization's budget, proposals by various committees, and other policy matters.[135] PNC members originally were elected based upon a geographic scheme, under which members of the PLO assembled quarterly on the local level to elect representatives.[136] Following the 1967 War, however, the PLO adopted an occupational electoral scheme, in order to make mobilization possible under Israeli occupation, since Israel permitted the organization of professional and labor unions.[137] Presently, the various Palestinian resistance organizations (e.g. *Fatah* and the Popular Front for the Liberation of Palestine) and mass unions and syndicates (e.g. the General Union of Palestinian Women and the General Union of Palestinian Students) hold seats on the Council in much the same way as would political parties in a national legislature.[138]

The PLO Executive Committee has the mandate of establishing and supervising the organization's bureaucratic institutions and of ensuring that PNC policies are implemented.[139] Originally, the Chairman of the Committee, who is appointed by the National Council, selected the members of the Executive Committee, but the system was altered later to require their election by the Council.[140] Yasser Arafat has been Chairman of the Executive Committee since his election to the position at the fifth session of the PNC in February 1969.[141]

The PLO's institutional structure to a great extent reflects its mandate. It was conceived as and remains a liberation organization. It has never characterized itself as a government-in-exile. According to Anis Kassim, "authoritative officials of the PLO" have taken the position that the establishment of a government-in-exile would "create problems of dual loyalty for Palestinians living in different countries" and possibly "invite conflicts with host governments."[142] Kassim suggests that, while the PLO might seek to establish such a government at some point in the future, the Palestinians remain — or remained (Kassim wrote in 1980) — too "far way from realizing their objectives" to make it a prudent enterprise.[143] Moreover, it is unclear whether the PLO has the power to

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135. NASSAR, *supra* note 57, at 50.

136. *Id.* at 73.

137. *Id.* at 73-74.

138. *See generally id.* at 60-61. Fateh has been the largest movement in the PLO since 1969. *See generally id.* at 80-86. It should be noted that the various unions with representatives in the PLO are not occupational in the traditional sense — they do not represent the interests of workers as workers, for instance. As Nassar explains, "[t]hese unions are formed around political and social issues rather than work-related questions. These unions do not concern themselves with worker-management matters, but function mainly to mobilize their members behind the Palestinian cause." *Id.* at 74.

139. *Id.* at 51.

140. *Id.*

141. *Id.* at 60-61.

142. Anis Kassim, *The Palestinian Liberation Organization's Claim to Status: A Juridicial Analysis Under International Law*, 9 DENV. J. INT'L L. & POL'Y 1, 31-32 (1980).

143. *Id.* Although there was some expectation that the PLO might move to establish itself as a government body following the issuance of the Palestinian Declaration of Inde-

reconstitute itself in that way. As noted above, the Palestine National Covenant assigns the PLO the role of facilitating circumstances through which Palestinians can exercise their right to self-determination on their territory. The PLO's role ends, therefore, when the exercise of self-determination begins. [144] Under the Covenant, the PLO does not have the power to determine, itself, how to constitute the Palestinian nation; whether, for example, it should take the form of an independent State or should enter into an association with another State. Since the PLO's international legitimacy emerges from its role as representative of the Palestinian people, the power ultimately to ratify or decline agreements regarding the final status of Palestine remains with the Palestinian people.

2. International Status

a. Recognition

The Palestine Liberation Organization's legitimacy as the international representative of the Palestinian people has been affirmed consistently by the United Nations General Assembly, Security Council, and other constituent organs, as well as by most States in the international system, including, since 1993, Israel and the United States. However, few States or organizations outside of the Arab World have recognized the PLO as a government.

United Nations

The United Nations General Assembly has extended recognition to the PLO as the international representative of the Palestinian people and, accordingly, has facilitated its participation in United Nations activities. As discussed above, the General Assembly recognized, in the early 1970s, the rights of the Palestinian people to participate in the settlement of the Palestine question and, more broadly, to self-determination. Pursuant to this recognition, in October 1974, it invited the PLO, which one month earlier had been affirmed by the Arab League to be "the sole legitimate representative of the Palestinian people," [145] to participate during plenary sessions in its deliberations re-

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pendence, it has not taken steps formally to alter its status. NASSER, *supra* note 57, at 43.

144. Testimony introduced on behalf of the PLO in litigation related to the *Achille Lauro* incident conforms to this conception of the PLO's role: "The PLO describes itself as 'the internationally recognized representative of a sovereign people *who are seeking* to exercise their rights to self-determination, national independence, and territorial integrity. The PLO is the internationally recognized embodiment of the nationhood and sovereignty of the Palestinian people *while they await the restoration of their rights through the establishment of a coomprehensive [sic], just and lasting peace in the Middle East.*'" Klinghoffer v. Achille Lauro, 739 F. Supp. 854, 857 (S.D.N.Y. 1990) (quoting Ramsey Clark Aff., Apr. 27, 1987) (emphasis added).

145. THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 210-11. The Rabat Summit marked Jordan's acquiescence to the PLO's claim to represent the Palestin-

garding the question of Palestine.[146] Shortly thereafter, the General Assembly approved even broader participation by the Palestinian people in United Nations activities, requesting the Secretary General "to establish contacts with the Palestine Liberation Organization on *all matters* concerning the question of Palestine."[147] Finally, during the same session, the General Assembly granted the PLO the status of observer, inviting it to participate in the work of the General Assembly and of all international conferences convened either by the General Assembly or under the auspices of other United Nations organs.[148] Accordingly, a number of United Nations organs and independent agencies have extended observer status to the PLO or have cooperated with it to provide services to the Palestinian people.[149]

The observer status granted to the PLO gives it broader access to General Assembly activities than that granted to any other non-state entity. For instance, while the PLO has access to both the plenary and Main Committees of the General Assembly,[150] the other national liberation movements (excepting the South West Africa People's Organization (SWAPO)) have been accorded access only to the Main Committees,[151] and their participation in General Assembly activities has been limited to deliberations regarding the territories that they claim to represent.[152] The other liberation movements, moreover, have been invited to participate only in United Nations conferences, meetings, and other seminars that concern their countries, while the PLO and SWAPO — before Namibia's independence — have been invited to participate in the sessions and work of all such conferences.[153] Non-governmental organizations, similarly, are entitled to attend only public meetings of the General Assembly and committee meetings on items relevant to their work.[154] Even intergovernmental organizations generally have access

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ian people after having previously claimed that role for itself. Kassim, *supra* note 141, at 18 n.99.

146. G.A. Res. 3210 (XXIX), *supra* note 91, at 3.

147. U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. doc. A/9631 (1974). The vote on this resolution was 89 in favor, 8 against, and 37 abstentions. Israel and the United States were among the states voting against the resolution. Patrick J. Travers, *The Legal Effect of United Nations Action In Support of the Palestinian Liberation Organization and the National Liberation Movements if Africa*, 17 HARV. INT'L L. J. 561, 570-71 (1976). In its 1975 session, the General Assembly emphasized that Palestinian participation in U.N. deliberations regarding the Middle East would be on "equal footing" with all other parties. U.N. GAOR, 30th Sess., Supp. No 34, at 3, U.N. Doc. A/10034 (1975).

148. G.A. Res. 3237 (XXIV), U.N. GAOR, 30th Sess., Supp. No. 31, at 5, U.N. Doc. A/9631 (1974). This resolution reflected the General Assembly's broader objective of shifting the role of observers from simple observation to active participation. *See* Erik Suy, *The Status of Observers in International Organizations*, 160 ACADEMIE DE DROIT INTERNATIONALE 75,130-31 (1978).

149. Travers, *supra* note 147, at 569-75.

150. Suy, *supra* note 148, at 107 (citing G.A. Res. 3237 (XXIX) (1974)).

151. *Id.*

152. Travers, *supra* note 147, at 570.

153. Suy, *supra* note 148, at 111-12.

154. *Id.* at 106.

only to international conferences that deal with matters of direct interest to them.[155] Erik Suy, the former Legal Counsel to the United Nations, suggests that the breadth of access afforded the PLO emerges from the assumption that it is "strongly connected with [the] future state[] of the people [it] represents" and therefore has "a much wider interest in the works undertaken by the United Nations than regional intergovernmental organizations, the work and interest of which are expected to be more limited."[156] The General Assembly, therefore, has established a unique status for the PLO; while it has not been granted the full access to U.N. activities accorded Member States, its recognized connection to the land and people of Palestine has facilitated broader participation than other non-State entities.

The Security Council has proven less sympathetic to Palestinian participation than the General Assembly, due in large part to the United States' traditional rejection of attempts to establish direct links with the PLO.[157] The Security Council has, however, acknowledged the PLO's representative status. In 1975, and again in 1976 and 1978, it invited the PLO to take part in the debate over a resolution that would have condemned Israel for its repeated air attacks on Lebanon. What is notable about the invitation is that it extended to the PLO "the same rights conferred upon a member State invited to participate under rule 37,"[158] rather than relying upon rule 39, under which the African movements appeared before the Council. [159] Although the legal validity and implications of the invitation have been hotly disputed,[160] it appears beyond contention that the Council's decision to structure PLO participation in this way was calculated to reaffirm the PLO's status as representative of a people with recognized national rights. Since then, however, the Security Council has done little to facilitate the expansion of the PLO's international participation. Other International Organizations

The PLO has also been recognized by and permitted to participate in the activities of other international organizations, but this recognition largely has been limited to organizations with members sympathetic to the Palestinian cause. Arab regional organizations and Islamic organizations have granted the PLO the broadest recognition and participation, giving it the status and privileges of a State member.

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155. *Id.* at 112.

156. *Id.*

157. *See* Travers, *supra* note 147, at 573.

158. U.N. Monthly Chronicle, No. 1, at 14-15 (1976). "Rule 37 applies to '[a]ny Member of the United Nations which is not a member of the Security Council;' rule 39 applies to 'persons.'" Kassim, *supra* note 142, at 20.

159. Travers, *supra* note 147, at 573.

160. *See, eg.*, Kassim, *supra* note 142, at 20-21, 31 (suggesting that invitation and implicit recognition of the PLO by the Security Council constituted authoritative legal precedent); Evyatar Levine, *A Landmark on the Road to Legal Chaos: Recognition of the PLO as a Menace to World Public Order*, 10 DENV. J. INT'L L. & POL'Y 259, 259-61 (1981); Leo Gross, *Voting in the Security Council and the PLO*, 70 AM. J. INT'L L. 470, 476-91 (1976).

Among these organizations are the League of Arab States and its specialized agencies (e.g. the Arab Fund for Economic and Social Development), the Organization of the Islamic Conference, the Arab Monetary Fund, the Council of Arab Economic Unity, and the Islamic Development Bank.[161] The nonaligned nations conference also has invited the participation of the PLO as a full member.[162] States

The governments of more than one hundred states have extended recognition to the PLO, generally in its capacity as the representative of the Palestinian people.[163] Among these States are most of the countries in the developing world and former Soviet bloc, as well as China, Japan and a number of European countries, including France, Belgium, Italy, Sweden, and Austria.[164] In 1993, moreover, Israeli Prime Minister Yitzhak Rabin wrote a letter to PLO Chairman Yasser Arafat stating that "the Government of Israel has decided to recognize the PLO as representative of the Palestinian people."[165] More than half of these countries have accorded the PLO full diplomatic status and have authorized the establishment of PLO embassies within their borders. A number of others have permitted the PLO to establish offices under the auspices of the Arab League.[166] With a few exceptions, however, the embassies have played more of a symbolic role than a practical one.[167]

b. International Status

The international status of the PLO has been a point of some contention among legal scholars. One commentator, Anis Kassim, characterized the PLO as a "territorial public body," which he defined to include "territorial units the elites of which are in the process of consolidating their respective nation state units."[168] He argued that, by virtue of its broad recognition as the international representative of the Palestinian people, [169] its exercise of typical governmental functions,[170] and its role as successor to the Arab Higher Committee, which, Kassim suggested, had elicited *de facto* recognition as a public body by Great Britain and Arab governments,[171] the PLO was legally entitled to participate in the international process as representative of the Palestinian people.[172]

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161. *See generally* YEARBOOK OF INTERNATIONAL ORGANIZATIONS (33d ed. 1996).

162. Kassim, *supra* note 142, at 3 n.3.

163. O'Brien, *supra* note 134, at 379.

164. NASSAR, *supra* note 57, 163.

165. Letter from Yasser Arafat to Yitzkah Rabin (Sept. 9, 1993), THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 129.

166. O'Brien, *supra* note 134, at 379.

167. *Id.* at 380.

168. Kassim, *supra* note 142, at 9.

169. *Id.* at 19-22.

170. *Id.* at 22-26, 32.

171. *Id.* at 18.

172. *Id.* at 33. In support of his position, Kassim cited numerous precedents acknowledging that governments in exile, anti-colonial movements, and fledgling revolutionary governments are subjects of international law and extending to them recognition com-

In a critique of Kassim's analysis, Israeli Military Judge Evyatar Levine suggested that the PLO, as a non-state entity, could claim no right to international recognition as representative of a people[173] and that the PLO's lack of control over any portion of the territory it claimed differentiated it from other revolutionary movements that had received international recognition.[174] Another critic, Professor William O'Brien, argued in 1984 that internal divisions prevented the PLO from effectively representing the Palestinian people at the international level: "[i]n its present disarray, the PLO can apparently not perform the most essential of all functions of an organization purporting to represent a people, namely, negotiating diplomatically on their behalf."[175] O'Brien suggested, moreover, that the PLO's broad recognition by international organizations and States had little functional significance since the PLO had not (in 1984) been recognized by Israel or the United States, the two States most capable of effecting or stifling Palestinian national aspirations.[176]

Much has changed since these commentators debated the PLO's status in the early 1980s. The PLO has renounced terrorism and has established diplomatic connections with Israel and the United States, both of whom recognize it as the legitimate representative of the Palestinian people and as a "partner" in the ongoing Middle East peace negotiations. Also, the PLO is substantially connected to the Palestinian administration governing sections of the OPT under the DOP and its progeny. In view of these developments, the objections cited above to Kassim's characterization of the PLO as a "territorial public body," and, more broadly, to the PLO's participation in the international process lack currency. While, as discussed below, neither the establishment of the "State of Palestine" in 1988 or the PA in 1994 has altered the PLO's international role and status, both have helped to facilitate universal recognition of the PLO as international representative of the Palestinian people.

B. The "State" of Palestine

1. The Palestinian Declaration of Independence

During its nineteenth session, in November 1988, the PNC voted to adopt the Palestinian Declaration of Independence, proclaiming "the establishment of the State of Palestine on our Palestinian territory with its capital Holy Jerusalem."[177] The Declaration clearly was conceived,

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mensurate with that granted to nascent states. *Id.* at 9-13.

173. Levine, *supra* note 160, at 247-48.

174. *Id.* at 248-49.

175. O'Brien, *supra* note 134, at 392.

176. *Id.* at 392-95.

177. *Palestinian Declaration of Independence*, 19th Sess., para. 10, U.N. Doc. A/43/827 (1988) [hereinafter Declaration of Independence].

in part, as a symbolic gesture in support of the Palestinian *intifada*, which at that time had been in progress for eleven months.[178] The terms of the Declaration, however, suggest that the PNC intended for the Declaration to have broader consequences. Following its expulsion from Lebanon in 1982, the PLO leadership began to focus more resolutely on achieving a negotiated settlement with Israel within an internationally-mediated framework. To that end, it heightened its efforts to fortify its international legitimacy, pursuing the establishment of diplomatic relations with the United States and engaging in an informal dialogue with leaders of the Israeli peace movement. The Declaration of Independence appears designed to legitimate the PLO's political agenda by reconciling it with the already-existing legal framework established by the United Nations for resolution of the Palestine question.

The Declaration of Independence bases its proclamation of Palestine's independence on two specific international commitments to the Palestinian people and, more generally, on the principles enshrined in the United Nations Charter. First, it makes reference to the League of Nations' recognition of Palestine as a provisionally independent nation in Article 22 of the League of Nations Covenant and in the Treaty of Lausanne,[179] arguing that those authorities confirm the falsehood of the notion that Palestine was ever a "land without a people." Secondly, it characterizes the 1947 partition plan endorsed in U.N. General Assembly Resolution 181 as bestowing "international legitimacy" upon the Palestinian Arab people's claim to self-determination and sovereignty.[180] Since the PNC voted, after its adoption of the Declaration, to declare the territorial boundaries of the state of Palestine to be the West Bank (including East Jerusalem) and the Gaza Strip, the Declaration's evocation of Resolution 181 appears to represent a retroactive acceptance of the principle of dividing Palestine into two states, the idea being that nothing has occurred since 1947 that would nullify the Palestinian right to sovereignty recognized in Resolution 181.

Finally, the Declaration states that the occupation of Palestinian land has subverted the Charter and subsequent resolutions of the United Nations, which guarantee "the right of Return, the right of independence, [and] the right to sovereignty over territory and homeland."[181] Although it does not make reference to a specific provision of the U.N. Charter, several clauses of the Charter could be construed as bestowing these rights on the Palestinians. The Charter states, for instance, that one of the purposes of the United Nations is the development of "friendly relations among nations based on respect for the prin-

178. *Id.* para. 9 (speaking of the *intifada* as having been the decisive change prompting Palestinian independence). *See also* Youssef M. Ibrahim, *P.L.O. Proclaims Palestine to be an Independent State; Hints at Recognizing Israel*, N.Y. TIMES, Nov. 15, 1988, at A1 ("The announcement by the Palestinian council had been expected for months. Leaders of the Palestinian uprising in the West Bank and Gaza have demanded the gesture in recognition of their 11-month-long insurrection . . .").

179. Declaration of Independence, *supra* note 177, para. 4.

180. *Id.* para. 5.

181. *Id.* para. 6.

ciple of equal rights and *self-determination of peoples* . . . ."[182] Article 55 of the Charter uses a similar formula to express the United Nations' goals in the fields of social and economic development and human rights. Further, Article 73 compels U.N. members assuming responsibility for non-self-governing territories "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement."[183] Finally, the U.N. General Assembly has interpreted the Charter's requirement that States refrain from the use of force in international relations as a prohibition of action that "deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status and pursue their economic, social, and cultural development."[184] These provisions of the Charter can all be seen to legitimize the Palestinians' claims to self-determination and the pursuit of sovereignty.

Beyond demonstrating the legitimacy of Palestinian national aspirations within the established international legal framework, however, it is unclear precisely what purpose the Declaration is intended to serve. Despite its retroactive acceptance of Resolution 181 and, shortly thereafter, its acceptance of U.N. Resolutions 242 and 338, the PNC made no effort following the Declaration to reconstitute itself as a government-in-exile and, thereby, to formalize Palestine's status as a State under occupation. Similarly, the PNC Central Council's election of Yasser Arafat to the position of President of the State appears to have been little more than honorific, there having been no apparent distinction between his responsibilities as President and as Chairman of the PLO. As suggested by the Declaration's call to other Arab peoples "to consolidate and enhance the emergence *in reality* of our state,"[185] the PNC's decision to proclaim the independence of Palestine appears to have been a largely symbolic gesture, an attempt to affirm the reasonableness and international legal legitimacy of the Palestinian cause.

2. International Recognition

To the extent that the Declaration was conceived as an effort to bolster the international legitimacy of the Palestinian national liberation movement, it met with considerable success. Perhaps unsurprisingly, Israel's Likud-dominated coalition government refused to recognize the legitimacy of any unilateral action taken by the PLO, which it continued to regard as a terrorist organization.[186] A number of other

182. U.N. CHARTER, art. 1 ¶ 2 (emphasis added).

183. *Id.* art. 73(b).

184. G.A. Res. 2160 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 4, U.N. Doc. A/6316 (1966) (apparently basing prohibition of denial of self-determination on Charter art. 2(4)); *see also* CRAWFORD, *supra* note 8, at 89-90.

185. Declaration of Independence, *supra* note 177, para. 12 (emphasis added).

186. 1988 U.N.Y.B. 208, U.N. Sales No. E.93.I.100.

nations welcomed the move, however, at least thirteen of them immediately recognizing the newly-declared state.[187] By April 1989, 114 nations had extended some form of recognition to the Palestinian state,[188] but the majority of these countries appear to have recognized the State to be a legitimate aspiration, not an existing reality.[189]

The U.N. General Assembly took a similar approach. In Resolution 43/177, the General Assembly voted to replace the designation "Palestine Liberation Organization" with "Palestine" within the United Nations system, but it did so "without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system."[190] Thus, while the General Assembly (on a vote of 104-2-36, the United States and Israel voting against the resolution) explicitly affirmed the Palestinians' right to exercise their sovereignty over the West Bank and Gaza, it stopped short of altering the status of the PLO. Significantly, however, the General Assembly ratified the Declaration's interpretation of Resolution 181 as legitimating the establishment in the Occupied Territories of a Palestinian state.[191] In subsequent resolutions, moreover, the General Assembly began to interpret U.N. Security Council Resolution 242 to require that the territorial integrity of the States created by Resolution 181 be respected, appearing, thereby, to recognize the PNC's retroactive acceptance of the 1947 Partition Plan and affirming that the terms of the Plan continue to legitimate the Palestinians' claim to self-determination.

C. The Palestinian Interim Self-Government Authority (PA)

Over the course of several months in 1993, while formal peace negotiations within the framework established by the 1991 Madrid Peace Conference proceeded separately (and largely without progress), representatives of the Israeli government and the PLO engaged in at least fourteen rounds of secret meetings in Oslo, the process mediated by the late Johann Jorgen Holst, former foreign minister of Norway. This process led to formal mutual recognition between the State of Israel and the PLO, as the representative of the Palestinian people, and to the formulation of the DOP, which was signed on September 13, 1993 by Is-

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187. *13 Countries Back Palestinian Move*, N.Y. TIMES, Nov. 16, 1988, at A10.

188. Arafat is Elected President of State He Hopes to Form, N.Y. TIMES, Apr. 3, 1989, at A3.

189. The U.S.S.R., for instance, recognized "the proclamation of the Palestinian state," but noted that its "practical" creation would result from a "comprehensive settlement" in the region. Phillip Taubman, *Moscow Lauds P.L.O. State But Is Vague on Recognition*, N.Y. TIMES, Nov. 19, 1988, § 1, at 4. Similarly, Egypt, Norway, and Spain expressed support for the PNC move, although they did not bestow formal recognition on the State of Palestine. *13 Countries Back Palestinian Move*, *supra* note 185.

190. G.A. Res. 43/177, U.N. GAOR, 43rd Sess., Supp. No. 49, at 62, U.N. Doc. A/43/49 (1988).

191. The General Assembly acknowledged its awareness "of the proclamation of the State of Palestine by the Palestine National Council *in line with General Assembly resolution 181 (II)* and in exercise of the inalienable rights of the Palestinian people." *Id.* (emphasis added).

raeli Foreign Minister Shimon Peres and Mahmoud 'Abbas, head of the PLO's Political Department. The DOP created a framework for long-term negotiations regarding the final status of the OPT and the establishment in the interim period of a Palestinian self-governing authority. Subsequent agreements concluded between the Government of Israel and the PLO further defined the functions and jurisdiction of this PA, which began to administer portions of the OPT in May 1994.

This section analyzes the PA's jurisdiction and claim to legitimacy with a view toward evaluating its legal status in relation to Israel, the PLO, the Palestinian people, and the international community.

1. Jurisdiction

The powers, structure, and jurisdiction of the PA are defined by the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (IA), which was concluded in Washington, D.C. on September 28, 1995, pursuant to Article VII of the DOP.[192] The Interim Agreement, as its name suggests, is a self-consciously temporary arrangement. While it governs the administration of portions of the OPT during "the transitional period," the Agreement is purposefully vague about both to what and from what the parties are making a transition.[193] It makes no fundamental changes to the legal status of the OPT[194] and, indeed, explicitly limits its effect to the interim period.[195] The OPT, therefore, remain under Israeli occupation, even if Palestinians are now afforded a broader role in their administration. Accordingly, the authority of the Palestinian governing institutions established by the DOP is entirely local in character.

The central components of the Palestinian Interim Self-Government Authority (PA) are a Council with limited legislative authority, a President, and an executive authority. The Interim Agreement fixes the size of the Council at eighty-two members[196] and provides for the democratic election of its members by registered Palestinian voters residing in the OPT, including (parts of) Jerusalem.[197]

192. Because the IA supersedes earlier agreements between the PLO and Israel, such as the Agreement on the Gaza Strip and Jericho Area, Interim Agreement, pmbl., cl. 10, this essay does not address the terms of the other agreements. Interim Agreement, 36 I.L.M. 551, 558.

193. The only constraint on final status negotiations acknowledged by the Interim Agreement is that the permanent settlement must be "based on Security Council Resolutions 242 and 338." *Id.* pmbl., at 558.

194. Article 31 of the Interim Agreement states, "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations." *Id.* ch. 5, art. 31, cl. 7, at 567.

195. Article 31 of the Interim Agreement states, "Nothing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims, or positions." *Id.* art. 31, cl. 6, at 567.

196. *Id.* ch. 1, art. 4, at 559.

197. *See generally id.* Annex 3. The IA disqualifies from election candidates who are

The President of the PA is also democratically-elected.[198] Both the President and the Council members are to serve throughout the transitional period, which is to have ended by May 4, 1999.[199] While the Council technically possesses both legislative and executive authority, the IA provides for the delegation of its executive authority to a committee comprised of the President of the PA and other persons appointed by the President and approved by the Council.[200]

The IA strictly enumerates the powers of all three components of the PA, limiting their authority and jurisdiction to Palestinian affairs at the local level. Article One of the IA, which sets the basic terms for the transfer of authority, states that "Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred."[201] The terms of this provision make three things clear: first, that the limited authority transferred to the PA flows from the Israeli military government, not from the Palestinian people; second, that Israel possesses all residual authority over the OPT; and, third, that the transfer of authority is defined by agreement of both sides, not unilaterally by Israel. The first two points are reflected throughout the IA's provisions regarding the PA's territorial, functional, and personal jurisdiction, each of which is reviewed in turn below. The apparent implications of the third point, particularly with regard to the PA's legitimacy, are discussed later in this essay.

a. Territorial Jurisdiction

The IA provides for a phased transfer of territorial jurisdiction[202] from the Israeli Civil Administration and Military Government to the PA. Although the Agreement affirms that both sides regard the West Bank and Gaza Strip as "a single territorial unit, the integrity and status of which will be preserved during the interim period,"[203] it divides that "unit" into a patchwork of smaller districts, each classified into one of three categories: Area "A," Area "B," and Area "C."[204] The IA

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members of groups that advocate "racism" or pursue their aims "by unlawful or non-democratic means." *Id.* Annex 2, art. 3, para. 2.

198. *Id.* ch. 1, art. 3, para. 3, at 559.

199. *Id.* ch. 1, art. 3, para. 4, at 559.

200. *Id.* ch. 1, art. 5, para. 4. At least 80% of the members of the Executive Authority must be elected members of the Council. *Id.* at ch. 1, art. 5, para. 4, cl. (c), at 559.

201. *Id.* ch. 1, art. 1, para. 1, at 558

202. Territorial jurisdiction is defined in the Interim Agreement as including "land, subsoil, and territorial waters, in accordance with the provisions of this Agreement." *Id.* ch. 3, art. 17, para. 2(a), at 564. As discussed below in the functional jurisdiction section, the Interim Agreement places significant restraints on the exercise of Palestinian territorial jurisdiction in all spheres of authority.

203. *Id.* ch. 2, art.11, para. 1, at 561.

204. The Gaza Strip is not subject to the same territorial classifications. Gaza effectively is divided into two territories, one under Palestinian authority (as in Areas A and B

assigns the PA varying degrees of territorial jurisdiction over the areas in each of these categories.

Area "A" includes portions of major Palestinian population centers in the OPT and represents, in total, three percent of the West Bank.[205] Pursuant to the IA, the Israeli military redeployed its forces away from these areas prior to the elections for the Council, which took place on January 20, 1996. The PA's functional and personal jurisdiction, as defined by the IA, have full force in Area A. The PA also has authority over "internal security and public order in Area A."[206]

Area "B", which represents twenty-seven percent of the West Bank,[207] consists of other Palestinian-populated regions of the OPT, including a number of small towns, villages, and hamlets. Area B, like Area A, falls entirely within the PA's functional and personal jurisdiction. The "B" areas differ from the "A" areas, however, in two significant respects: first, Israeli redeployment out of these areas is to take place over a more extended period of time; and, second, while the Council is to assume "responsibility for public order for Palestinians," Israel maintains "overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism."[208]

Area "C" covers all remaining territory in the West Bank and Gaza Strip. Included in this category are all Jewish settlements, areas that Israel considers to be of strategic importance, and unpopulated areas. Area C encompasses the vast majority of the OPT: thirty-five to forty percent of the Gaza Strip and approximately seventy percent of the West Bank. The PA is to assume limited functional and personal jurisdiction (over Palestinians only) in Area C during the first phases of Israeli redeployment.[209] During these initial phases, Israel will retain complete territorial jurisdiction over Area C, [210] but it is to transfer gradually "powers and responsibilities relating to territory" to the PA over an eighteen month period.[211] Settlements and Israeli military installations, however, will remain entirely under Israeli control since they are considered to be among the "issues that will be negotiated in

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of the West Bank) and one under Israeli authority, the latter comprised of the Israeli military installations and settlements in Gaza. *Id.* ch. 2, art.11, para. 1, at 561.

205. Al Haq, Draft Analysis of Basic Law sec. 1.2.1.

206. Interim Agreement, ch. 2, art. 13, para. 1, 36 I.L.M. 551, 561. During the 1996 session of the Commission on Human Rights, the representative of the Permanent Observer from Palestine criticized Israel for violating this provision of the IA, citing the Israeli assassination in Gaza of Hamas operative Yehia Ayyash.

207. Haq, *supra* note 205.

208. Interim Agreement, ch. 2, art. 13, para. 2, 36 I.L.M. 551, 562.

209. As of late November 1996, even this limited jurisdiction has not yet been transferred. *Id.* ch. 2, art. 17, para. 2 (c) (d), at 564.

210. "In Area C, during the first phase of redeployment Israel will transfer to the Council civil powers and responsibilities not relating to territory . . . ." *Id.* ch. 2, art. 11, para. 2(c), at 561.

211. *Id.* ch. 2, art. 11, para. 2(e), at 562.

the permanent status negotiations."[212] Israel, moreover, will retain "authority to exercise its powers and responsibilities with regard to internal security and public order."[213] The Israeli deployment of combat forces throughout Area C and into Areas A and B in response to mass demonstrations by Palestinians following the opening of a tunnel beneath the Dome of the Rock in Jerusalem suggests that Israel is likely to continue to interpret this provision as broad authority for pursuing whatever security measures it deems prudent.

Two additional facets of the Interim Agreement's (IA) territorial jurisdiction provisions bear mention. First, although East Jerusalem legally remains part of the Occupied West Bank, and despite its illegal annexation by Israel, the IA does not give the PA any form of jurisdiction over the city and its residents, although a small number of Palestinian residents of Jerusalem (5,000) were permitted to register to vote in Palestinian Council elections. Secondly, although the West Bank city of al-Khalil (Hebron) has 120,000 Palestinian residents, the IA applies special arrangements to it for the interim period as a result of the continued presence of 120 Israeli settlers. As Al-Haq summarizes:

The Oslo B Agreement divides al-Khalil into two areas of administration, designated as H-1 and H-2. The Council will assume all civilian powers and responsibilities throughout al-Khalil in relation to Palestinian residents, as in other West Bank cities. In Area H-2 the IDF will not redeploy and will retain all powers and responsibilities for internal security and public order.[214]

Thus, under the IA, al-Khalil/Hebron is to be split into two sectors: one treated essentially as an Area-B territory, with partial PA jurisdiction; the other treated as an Israeli settlement, over which the PA can exercise no jurisdiction at all. Israel's new Likud administration led by Prime Minister Benjamin Netanyahu has expressed dissatisfaction with this arrangement, however, and negotiations to revise the provision have continued for several months without final resolution.[215]

During the interim period, therefore, the PA will assume limited authority over a limited portion of the OPT. The division of the OPT into these categories and the maintenance of Israeli control over Israeli settlements, which, particularly in the West Bank, are scattered between Palestinian population centers, ensure that the different areas under the territorial jurisdiction of the PA are largely non-contiguous. Palestinians residing within them consequently remain subject to Israeli controls on movement between towns and cities in the West Bank, as well as between the West Bank and Gaza Strip. In these respects, the IA appears to define the PA's authority in largely popular — as opposed to territorial — terms. This emphasis is also apparent in the IA's

212. *Id.*

213. *Id.* Annex 3, art. 4, para. 4.

214. Haq, *supra* note 205.

215. *See* Christopher Walker, *West Bank Disputes Delay Plan for Summit*, THE TIMES OF LONDON, Dec. 7, 1996.

provisions concerning the PA's functional and personal jurisdiction.

b. Functional Jurisdiction

The Interim Agreement defines the PA's functional jurisdiction in specific terms and makes clear that all powers beyond the scope of that sphere reside with Israel.[216] Accordingly, the IA requires the Palestinian Council to confine its legislative and executive acts to the areas within its jurisdiction. Legislation that exceeds the scope of the Palestinian Council's authority "or that is otherwise inconsistent with the provisions of the DOP, [the Interim] Agreement, or of any other agreement that may be reached between the two sides during the interim period" is to be considered *void ab initio*.[217] In order to facilitate the evaluation of disputed legislation, the IA establishes a Legal Committee comprised of an equal number of Israelis and Palestinians and requires the "communication" of all Palestinian legislation to the Israeli side of the Committee.

Substantively, the functional jurisdiction assigned to the PA is confined to the internal affairs of the Palestinian population in the OPT. The IA appears to place governmental functions into three primary categories: (1) functions to be transferred entirely to the Council; (2) functions to be coordinated between the Council and the Israeli authorities in the OPT; and (3) functions remaining entirely under Israeli authority. Governmental functions that fall primarily within the province of Palestinian internal affairs — e.g. health, education, culture, etc. — are placed into the first category; functions that implicate Israeli concerns in the Territories — primarily infrastructure issues — fall into the second; and functions related to external affairs, including external security, fall into the third. In this respect, the Council's functional jurisdiction closely parallels — and, to a great extent, works in tandem with — its multi-tiered territorial jurisdiction.

The first tier of functional jurisdiction — generally designated "transfer of authority" by the IA — is characterized by transfer to the PA of primary authority over issues that concern the Palestinian population exclusively and by required cooperation in any related areas that conceivably implicate Israeli concerns. For most issues falling into this category, the IA assigns the PA full authority in Areas A and B and

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216. Article 17 of the Interim Agreement states, *inter alia:*

> (3) The Council has, within its authority, legislative, executive, and judicial powers and responsibilities as provided for in this Agreement.
>
> (4) (a) Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis.
>
> (b) To this end, the Israeli military government shall retain the necessary legislative, judicial, and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis in personam.

Interim Agreement, ch. 3, art. 17, paras. 3-4, 36 I.L.M 551, 564.

217. *Id.*

provides for a gradual transition of authority in Area C (certain areas, such as Israeli settlements, remaining permanently outside of PA). For instance, while the IA provides for the transfer to the PA of "[p]owers and responsibilities in the sphere of archaeology" in Areas A and B, authority in area C is to be "transferred gradually;" additionally, the IA establishes a Joint Committee of experts "to deal with archaeological issues of common interest" and requires each side to inform the other of the discovery of any new sites in the sections of the OPT under its jurisdiction.[218] Similarly, while the IA transfers authority to the PA over social welfare services, it requires the Palestinians, upon request, to provide Israel with reports regarding juvenile offenders,[219] presumably to serve Israel's security interests. The IA establishes similar frameworks for the transfer of authority in the following areas: agriculture[220] and forests;[221] direct taxation;[222] education and culture;[223] gas, fuel, and petroleum facilities;[224] health;[225] insurance;[226] interior affairs;[227] labor;[228] land registration;[229] legal administration;[230] local government;[231] parks;[232] planning and zoning;[233] population registry and documentation;[234] postal services;[235] telecommunications;[236] tourism;

218. *Id.* Annex 3, app. 1, art. 2, para. 4, at 605.

219. *Id.* Annex 3, app. 1, art. 33, para. 3(b), at 619.

220. *Id.* Annex 3, app. 1, art. 1, at 604.

221. *Id.* Annex 3, app. 1, art. 14, at 609.

222. *Id.* Annex 3, app. 1, art. 8, at 606.

223. *Id.* Annex 3, app. 1, art. 9, at 607.

224. *Id.* Annex 3, app. 1, art. 15. The PA must inform Israel of any oil exploration or production that it undertakes. *Id.* para. 4(a), at 610.

225. *Id.* Annex 3, app. 1, art. 17, at 611.

226. *Id.* Annex 3, app. 1, art. 19, at 612.

227. *Id.* Annex 3, app. 1, art. 20. "Interior affairs" is defined by the IA as including, *inter alia*, "licensing of newspapers and publications and censorship of films and plays." *Id.* para. 1, at 613.

228. *Id.* Annex 3, app. 1, art. 21, at 613.

229. *Id.* Annex 3, app. 1, art. 22, at 613.

230. *Id.* Annex 3, app. 1, art. 23, at 614.

231. *Id.* Annex 3, app. 1, art. 24, at 615. In addition to giving the PA a wide degree of latitude in defining and managing local government institutions, the IA transfers to the Palestinian local governments the authority to issue building permits for various purposes. *Id.* at para. 5.

232. *Id.* Annex 3, app. 1, art. 26, at 615.

233. *Id.* Annex 3, app. 1, art. 27, at 616.

234. *Id.* Annex 3, app. 1, art. 28, at 616-17. Under the IA, the administrative dimensions — e.g. the issuance of identity cards, the maintenance of birth and death records, etc. — are to be handled by Palestinians, but Israel is to be informed of "Every change in its population registry, including, inter alia, any change in the place of residence of any resident." *Id.* para. 4.

235. *Id.* Annex 3, app. 1, art. 29, at 617. Emphasizing the local nature of the PA, as defined in the IA, Palestinian postage stamps are to contain only the terms "Palestinian Council" or "Palestinian Authority." *Id.* para. 2(a), at 618. The PLO is to arrange for sending and receiving postal items between the Palestinian side and foreign countries through commercial agreements with Postal Authorities of Jordan, Egypt, and Israel. *Id.* para. 6(a). The PLO's status at the Universal Postal Union, however, is not to change *Id.* para. 6(b).

236. *Id.* Annex 3, app. 1, art. 36, at 620. Under the IA, the PA may construct its own telecommunications network, although, in the interim, it will enter into a commercial

transportation;[237] public works and housing;[238] and holy sites.[239] The spheres of authority transferred to the PA, therefore, are primarily municipal functions. To the extent that they move beyond being local concerns — implicating regional resource allocation, infrastructure development, or international relations — the IA requires coordination with Israel.

Accordingly, the IA places into the second category of functional jurisdiction — partial authority — those spheres involving the OPT as a whole, as opposed to the local affairs of municipalities. For these functions, the IA requires cooperation between the PA and Israeli authorities in the OPT, establishing a Civil Affairs Coordination and Cooperation Committee (CAC) composed of an equal number of Palestinians and Israelis and charged with addressing "matters arising with regard to infrastructures, such as roads, water, and sewage systems, power lines and telecommunications infrastructure, which require coordination according to [the] Agreement."[240] Like the territorial jurisdiction provisions described above, the IA's assignment of partial functional jurisdiction to the PA in spheres related to general infrastructure prevents the Palestinians from establishing effective authority over the OPT as a whole, limiting their power to the affairs of individual municipalities in the Territories. Indeed, since any significant construction in Area C for any purpose can proceed only with Israeli approval, the Palestinians' capacity to construct an independent infrastructure is severely constrained by the IA.

The IA's provisions concerning electricity reflect these tensions well. The Agreement provides for the establishment of a Palestinian Energy Authority (PEA), to which it assigns the authority "to issue licenses and to set rules, tariffs, and regulations in order to develop electricity systems."[241] It also establishes a Joint Electricity Subcommittee to deal with "issues of mutual interest concerning electricity."[242] The Palestinians, therefore, have jurisdiction over the administrative dimensions of electricity provision and have a forum within which to coordinate broader functions with the Israelis. The remaining details regarding the assignment of powers and responsibilities over electricity, however, remain unresolved. Israeli and Palestinian negotiators have yet to agree on the scope of the Palestinian authority over electricity. Indeed, the two sides have precisely opposite positions: the Palestinians seek primary authority over the electrical grid in the entire West Bank and construction rights throughout that territory but would agree to Is-

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agreement with the Israeli telephone company (Bezeq). As in other spheres, however, the PA must seek Israeli approval for any construction in Area C. *Id.* para. a(2).

237. *Id.* Annex 3, app. 1, art. 37-38, at 622-23.

238. *Id.* Annex 3, app. 1, art. 30, at 618.

239. *Id.* Annex 3, app. 1, art. 32, at 619.

240. *Id.* Annex 3, art. 1, para. 1(c)(2), at 603.

241. *Id.* Annex 3, app. 1, art. 10, para. 2 (merged version), at 607.

242. *Id.* Annex 3, app. 1, art. 10, para. 8 (merged version), at 608.

raeli operation and maintenance of electricity supply systems within the Israeli settlements and military installations; the Israelis, conversely, seek to retain control over the OPT's electricity infrastructure but would cede local, administrative authority to the Palestinians.[243] In the absence of agreement, "the existing status quo in the sphere of electricity in the West Bank and Gaza Strip shall remain unchanged."[244] Since the status quo and the Israeli position are virtually indistinguishable, the prospects for expanded Palestinian authority in this sphere appear limited. Thus, the infrastructure issues that strike closest to defining the future of the OPT generally and Palestinian self-rule specifically remain largely unresolved, resulting in the perpetuation of the *status quo ante*, i.e. Israeli occupation and control.

The Interim Agreement, moreover, prohibits the PA from assuming any jurisdiction at all over functions that involve external relations. Article 17 of the IA states, "[i]n accordance with the DOP, the jurisdiction of the [Palestinian] Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for: (a) issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis."[245] Although the Agreement acknowledges the PLO's role as international representative of the Palestinian people and permits it to "conduct negotiations and sign agreements with states or international organizations for the benefit of the Council" in certain spheres, including economic, cultural, scientific, and educational agreements,[246] the Council itself is denied "powers and responsibilities in the sphere of foreign relations." [247] It cannot establish embassies, consulates or other types of foreign missions abroad or facilitate their establishment in the West Bank or Gaza Strip.[248] It also cannot contribute to the defense of the OPT's against "external threats."[249] Furthermore, under the IA, any involvement between the Council and representatives of foreign states and international organizations — even for the approved purpose of carrying out cultural, scientific, or educational agreements — is not to be considered "foreign relations."[250] Through these provisions, the IA expressly disallows the PA from participating in the international process in any way that could influence its international status.

The functional jurisdiction of the PA, therefore, is limited to an array of municipal powers and responsibilities. The IA explicitly prohibits the PA from engaging in external relations, except in relation to the provision of basic services to the local population and the economic de-

243. These positions are represented in the "merged version" of Annex 3, Appendix 1, Article 10 of the IA. *Id.* at 607-608.

244. *Id.* Annex 3, app. 1, art. 10 (merged version), at 608.

245. *Id.* ch. 3, art. 17, para. 1(a), at 564.

246. *Id.* ch. 1, art. 9, para. 5(b), at 561.

247. *Id.* para. 5(a).

248. *Id.*

249. *Id.* ch. 1, art. 12, para. 1, at 562.

250. *Id.* ch. 1, art. 9, para. 5(c), at 561.

velopment of the OPT. It also severely circumscribes the PA's role in the management of OPT-wide infrastructures, establishing a system of required coordination with the Israelis that leaves ultimate authority over these issues to Israel.[251] Thus, although the IA makes repeated reference to maintaining the territorial integrity of the OPT, the agreement ultimately has more to do with local governance of the Palestinian population than with the development of Palestinian territorial autonomy.

c. Personal Jurisdiction

The fact that the PA governs a population, rather than a territory, is also apparent from its limited personal jurisdiction. Article 17 of the IA states, "[t]he territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in this Agreement."[252] According to the Agreement, Israel maintains exclusive personal jurisdiction over Israelis in all criminal matters, even for offenses committed in areas under PA (i.e. Areas A and B).[253] Israelis, moreover, will only come under the jurisdiction of Palestinian judicial authorities in civil matters when they explicitly consent in writing to that jurisdiction, when they maintain ongoing businesses in territory under Palestinian authority, or when the subject matter of the action is real property located in Palestinian territory.[254] The PA's powers, therefore, extend only over the Palestinian population and other non-Israelis within Palestinian jurisdiction.

2. Legitimacy

The Interim Agreement provides for the transfer of authority over the Palestinian population in the West Bank and Gaza Strip from Israel to the PA. As noted above, the terms of this transfer were determined through a process of negotiation between Israel and the PLO. The DOP and the IA consequently are neither unilateral enactments by the State of Israel nor agreements between Israel and the Palestinian population currently residing in the OPT. Rather, they are international agreements between the Government of Israel and the PLO, acting on behalf of all Palestinian people. Thus, while the PA derives its authority in the OPT from Israel, it derives its legitimacy, at least during the interim period, from its relationship to the PLO in its capacity as international representative of the Palestinian people. The legal and func-

251. While the Interim Agreement (IA) provides a three-tier process for the settlement of disputes including, ultimately, their submission to arbitration, IA, ch. 3, art. 21, the IA's arbitration clause is arguably pathological. Id. at 566. There is no indication regarding the arbitral forum or the applicable law. Submission to arbitration is entirely voluntary. The uselessness of the clause is demonstrated by the recent unsuccessful attempt by Palestinian negotiators to have the dispute regarding the electricity infrastructure submitted to international arbitration.

252. *Id.* ch. 3, art. 17, para. 2(c), at 564.

253. *Id.* Annex 4, art. 1, para. 2, at 635.

254. *Id.* Annex 4, art. 3, para. 2, at 638.

tional relationship between the PLO and the PA consequently bears some review.

As discussed earlier in this essay, the international community unanimously recognizes the Palestinians' status as a people and their right to participate in the resolution of the question of Palestine. Most States also recognize the Palestinians' right to national self-determination. To give substance to this recognition the international community, including, since 1993, Israel and the United States, has consented to the PLO's participation in the international process as the representative of the Palestinian people. Because the PLO is recognized only as agent for the Palestinian people, its international legitimacy hinges upon international confidence that it represents the interests of the Palestinian people, in whom the rights to participation and self-determination reside. The PLO, consequently, is bound to act in accordance with the wishes of the Palestinian people, as a whole, not simply that portion that resides in the OPT.

The decisions of the Palestine National Council (PNC) and the Central Committee, its subsidiary, provide the best indication of the extent to which the agreements concluded between the PLO and the Government of Israel have elicited the approval of the Palestinian people. In 1974, the PNC "called for the establishment of an independent national authority over any part of Palestine that may be liberated."[255] The Arab League ratified this approach during its Summit Conference in Rabat in 1974, and that ratification was later cited as precedent supporting the establishment of the PA.[256] More recently, the Central Committee of the PNC voted on October 11, 1993 to ratify the DOP,[257] which was signed one month earlier by Yasser Arafat, acting on the authority of the Executive Committee of the PLO.[258] Since the DOP established the framework within which the ongoing PLO-Israel negotiations have proceeded, the PNC, by ratifying it, authorized the Executive Committee of the PLO to conclude further agreements consistent with its terms.[259] The PA, therefore, was established with the authorization of the PLO and, by extension, of the Palestinian people.

The establishment of the PA, however, does not alter the relationship between the PLO and the Palestinian people — either those living within the OPT or those residing in other States. Although the PLO Executive Committee played a significant role in governing the sections

255. NASSAR, *supra* note 57, at 63.

256. *Id.*

257. Israelis, Palestinians Laud PLO Ratification of Peace Accord, UPI, Oct. 12, 1993, available in LEXIS, Nexis Library, UPI file.

258. *See generally,* Executive Committee, Statement on the Declaration of Principles, Tunis, Sept. 12, 1993, THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 143.

259. One PLO official in the United States suggests that these measures constitute a delegation of authority to conduct negotiations from the PNC, where ultimate authority in the PLO resides, to the Executive Committee and Chairman Arafat. Interview with Khalis A. Foutah, Deputy Chief Representative, Palestine Liberation Organization, Palestine National Authority, Washington, D.C. (Feb. 9, 1996).

of the OPT under Palestinian administration during the transitional period before the election of the Palestinian Council in January 1996, it did so purely in a caretaker capacity until the Council was in a position to assume the functions assigned to it by the DOP and IA.[260] Otherwise, the PLO and the PA have very different functions vis-à-vis the Palestinian people. The PA, as discussed above, has largely municipal authority over the affairs of Palestinians in the OPT. It lacks the legal competence to make any broader decisions regarding the Palestinian people living outside the OPT or even regarding the ultimate status of Palestinians in the OPT. These functions remain the province of the PLO, which, as discussed in the next section, continues to serve as the representative of the Palestinian people in negotiations with Israel and in other international contexts.

Conversely, the PLO does not have legal authority over decisions of the PA that relate to local governance of the Palestinians in the OPT. The Interim Agreement, in its provisions regarding Palestinian Council elections, states, "[i]n order that the Palestinian people of the West Bank and the Gaza Strip may govern themselves according to democratic principles, direct, free, and general elections will be held for the Council and (the President) of the Executive Authority of the Council . . . ."[261] This provision emphasizes that the Council is to represent the interests of the "Palestinian people in the West Bank and Gaza Strip," who, through the Council, will "govern *themselves*." Thus, only their elected leaders in the OPT have the authority to make decisions included in the Council's functional jurisdiction.

This interpretation is supported by the Palestinian Election Law, which was issued by the PA in early December 1995. Article 12 of the Election Law requires members of the Palestine National Council (the PLO's legislative organ) who are seeking office in the PA Palestinian Council not only to reside within the OPT, but also to transfer their registration with any external constituencies to one of the interior constituencies in the OPT, thereby preventing any one person from serving both interior and exterior constituencies.[262] The Election Law thereby formalizes the distinction between the interests of Palestinians residing in the OPT and those who remain in diaspora and emphasizes the local

260. During the transitional period before the Council's election, the territories under Palestinian self-rule (the Gaza Strip, excluding Israeli settlements and military installations, and beginning with Jericho, several of the population centers in the West Bank) were governed by a Palestinian Council of National Authority, which was established pursuant to a Basic Law approved by the Central Committee of the PNC. Draft Basic Law for the National Authority During the Transitional Period, art. 58(1) (June 1994). The Council acted in a caretaker capacity during the transitional period and was "generally . . . responsible for the government and administration of the affairs of the country." *Id.* art. 59. The Basic Law made the Chairman of the Executive Committee of the PLO the "President" of the Council, *id.* art. 50, and provided for the appointment of other Council members by the PLO Executive Committee, *id.* art. 58(1). The Council's term ended upon the election of the Palestinian Council provided for by the Interim Agreement.

261. Interim Agreement, ch. 1, art. 2, para. 1, 36 I.L.M. 551, 559.

262. The Palestine National Authority, Palestinian Election Law, art. 12, para. 7 *in* Palestine Report, Special Supplement, Jan. 12, 1996.

character of representation in the Palestinian Council.

It is worth mentioning, however, that although the PLO and the PA are legally and functionally divided, they are intrinsically intertwined: the PLO negotiated the creation of the PA; the two bodies share a leader (President/Chairman Arafat) and are dominated by the same political party (*Fatah*);[263] and at least six of the elected members of the Palestinian Council also hold positions in the Palestine National Council.[264] A PLO official in the United States has suggested that this overlap helps to ensure consistency between PLO and PA positions and more fluid coordination of their activities.[265] This arrangement has, however, elicited severe criticism with many Palestinians arguing that the administration of Yasser Arafat has become unresponsive to the needs of Palestinians in diaspora.[266] Critics also have expressed concern that the establishment of the PA has marginalized the PLO's political bodies and has relegated the PLO to the role of international "wheeler-dealer" on behalf of the PA.[267]

In view of these concerns, it is important to emphasize that while the PA's authority over the affairs of Palestinians in the OPT is based upon the transfer of powers and responsibilities from the Government of Israel, its legitimacy emerges from the Palestinian people. Its external legitimacy derives from the role that the PLO, as international representative of the Palestinian people, played in negotiating and approving its establishment, and its internal legitimacy arises from the participation of the Palestinian population in the OPT in the election of the Palestinian Council.[268]

3. International Participation

The PA can participate in the international process only through the PLO. As discussed above, the Interim Agreement expressly prohibits the PA itself, from assuming powers and responsibilities in the

263. Candidates affiliated with *Fatah* won 76% of the votes in the January elections for the Palestinian Council. Ghada Karmi, *What Role for the Palestinian Diaspora After Oslo?*, *in* PALESTINIAN ELECTION AND THE FUTURE OF PALESTINE: A SPECIAL REPORT 98 (The Center for Policy Analysis in Palestine, ed. 1996).

264. The following Palestinian Council members are PNC members: Hakam Bal'awi (Tulkarem District); Dawood El-Zeir (Bethlehem District); Sharif Ali Hussein Mash'al'Abbas Zaki (Hebron District); Nabil ' Amr (Hebron District); Abdul Jawad Saleh (Ramallah District); Azmi El-Shuai'bi (Ramallah District).

265. Foutah Interview, *supra* note 259. Interestingly, Mr. Foutah's business card identifies him as the Chief Representative in the United States of both the PLO and PA, an arrangement that would seem to be precluded by the terms of the Interim Agreement.

266. *See* Karmi, *supra* note 263, at 11 (citing Arabic press report that eighty thousand Palestinian refugees signed petition denouncing Palestinian Council elections because Palestinians outside of OPT were excluded from voting).

267. *Id.* at 12-13.

268. The elections for Palestinian Council members yielded an extremely high overall turnout rate of 79% of registered voters, despite the attempted boycott of the elections by opposition parties. Salma A. Shawa, *The Palestinian Elections: A Strong Start Into an Uncertain Future*, WASH. RPT. ON MIDDLE EAST, Apr. 1996, at 23.

sphere of foreign relations. It does, however, permit the PLO to "conduct negotiations and sign agreements with states or international organizations for the benefit of the Council" in the spheres of economic, social, and technical development.[269] As discussed earlier in this essay, the PLO has established relationships with and participated in the proceedings of a variety of international organizations. Under the terms of the IA, the PLO may work with these organizations to address the specific problems and needs of the Palestinians in the OPT. In this respect, the PLO can participate more substantively in the international process than it could before its link to the Palestinian population in the OPT was formalized by the DOP.

The IA appears, however, to limit the extent to which the PLO may use this broadened participation as a basis for altering its international status during the interim period. This issue emerges in the IA's terms regarding the provision of postal services to the OPT's population. The Agreement states, "[w]ithout derogating from the generality of paragraph 5 of Article IX of this Agreement (Foreign Relations), the status of the Palestinian side to this Agreement in the Universal Postal Union (UPU) will remain as it is at present, and the Palestinian side will not be party to any action to alter or change its status."[270] In the context of the Agreement, the "Palestinian side" refers to the PLO, which is not a member of the UPU. The provision, therefore, precludes the PLO from seeking membership in the UPU as a "sovereign state,"[271] despite the UPU's traditionally liberal membership policy.[272] Although the Interim Agreement does not address this issue with regard to other organizations, it is indicative of the likely reaction from Israel to PLO attempts to alter its status in other international organizations. Since Israel will continue to control the admission of foreign visitors to the OPT throughout the Interim Period,[273] it will be in a position to stifle PLO efforts that it views as possibly prejudicing the outcome of final status negotiations.

4. Conclusion

The majority of the States in the international system have recognized that the Palestinian people form a nation and are entitled freely to determine their political status. In order to facilitate vindication of that right, the international community has consented to the participa-

269. Interim Agreement, ch. 1, art. 9, para. 5(b), 36 I.L.M. 551, 561.

270. *Id.* Annex 3, app. 1, art. 29, para. 6(b), at 618.

271. "Article 3(1) of the Constitution of the UPU prescribes that 'any sovereign state may apply for admission as a member.'" W. MICHAEL REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION 79 (1975).

272. According to Michael Reisman, the gates to membership in the UPU have been "opened wide," with little discussion of the be attributes of sovereignty. As he notes, "Membership in the UPU] includes the Netherland Antilles wazzu and Surinam, Portuguese provinces in West Africa, East Africa, Asia, and Oceania, Liechtenstein, Monaco, the Vatican, San Marino, and so on. With such a liberal membership policy, there has been no need for the development of associate status." *Id.*

273. Interim Agreement, Annex 1, 36 I.L.M. 551, 569.

tion of the Palestinian people in the international process through their international representative, the Palestine Liberation Organization. The PLO, however, does not govern the Palestinian people; rather, it exists to secure for them the opportunity to govern themselves, and its legitimacy and international status arise from that role. Neither the establishment of the symbolic State in 1988 nor the creation of the PA in 1994 legally altered the relationship between the PLO and the Palestinian people: the 1988 Declaration of Independence simply marked an official redefinition of Palestinian national aspirations — a retroactive acceptance of the two-state solution embodied in the 1947 U.N. Partition Plan; and the PA was established as a government of limited authority to serve the local needs of the Palestinians residing in the OPT during the interim period and to create a practical foundation for some broader form of self-government.

III. THE INTERNATIONAL LEGAL STATUS OF PALESTINE UNDER INTERIM SELF-GOVERNMENT ARRANGEMENTS

Thus, Palestine at present is a people, a territory, a liberation organization with a legal status as something more than a liberation organization, a State with a legal status as something less than a State, and an Interim Authority of rather limited authority. But is Palestine more than the sum of its parts? Can the public bodies established to represent and liberate the people and territory of Palestine be fused into an entity with a legal status of its own? In this section, I undertake to situate Palestinian public bodies within the normative framework governing the exercise of self-determination. Ultimately, I will argue that, while the legal and functional separation of the PLO and the PA has precluded Palestine from acquiring an international legal status independent of those bodies, that separation also has served to preserve the independence of the PLO as the international representative of the Palestinian people, which is a necessary precondition for its role in facilitating the legal exercise of Palestinian self-determination.

A. The Exercise of Self-Determination

Modern international law has developed relatively defined standards to govern the legal exercise of self-determination. As Crawford notes, "[i]t is a peculiarity of this area of practice that it is possible to be more certain about the 'consequences' of self-determination than about the criteria for the territories to which the principle is regarded as applying."[274] The goal articulated by the U.N. Charter for non-self-governing territories is the eventual attainment of "a full measure of self-government."[275] The General Assembly has interpreted the Charter to permit three alternatives:

> A Non-Self-Governing Territory can be said to have reached a full

274. CRAWFORD, *supra* note 8, at 91-92.
275. U.N. Charter, art. 73.

measure of self-government by[:]

(a) Emergence as a sovereign independent State;

(b) Free association with an independent State; or

(c) Integration with an independent State.[276]

Thus, although self-government most frequently has taken the form of full independence from the administering State,[277] "[m]any federations, real unions, personal unions and associations are treated with equanimity by the international decision process."[278] Indeed, for entities too small or underdeveloped to be economically or politically viable as independent States, association or integration with another State can provide the self-determining population with heightened security and broader access to other markets, while at the same time permitting the associate to maintain a discrete political identity and to participate in potentially significant ways in the international process.[279]

Association and integration have taken a variety of forms in the international system, providing populations with different levels of independence from metropolitan States. The formal status of association maintains both parties' legal status of statehood but involves "the significant subordination of and delegations of competence by one of the parties (the associate) to the other (the principal)."[280] Thus, to cite one example, although Puerto Rico maintains a relationship of association with the United States — it has delegated significant foreign affairs powers to the United States, and its citizens hold United States passports — it remains a sovereign State and legally may terminate the association if its population so desires. Even integration within another State need not entirely extinguish the autonomy and international personality of the subordinate political entity. For instance, although Greenland was integrated within the realm of Denmark in 1952, the territory retains a significant degree of autonomy under Home Rule arrangements,[281] and it maintains a limited international personality.[282]

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276. G.A. Res. 1541 (XV), *supra* note 24, at Annex, Principle VI; Declaration on Friendly Relations, *supra* note 9, at 124. The International Court of Justice endorsed the General Assembly's interpretation in the *Western Sahara Case*. *Western Sahara Case*, 1975 I.C.J. 12, 32.

277. As Crawford notes, "[o]f approximately 100 Chapter XI territories in the period 1945-78, 59 achieved joint or separate independence (this includes Grenada, Surinam, and Singapore, which had a previous status of self government)." CRAWFORD, *supra* note 8, at 369 n.60.

278. REISMAN, *supra* note 271, at 11.

279. *See generally id.* at 19-20, 51-103; *see also* CRAWFORD, *supra* note 8, at 370-77.

280. REISMAN, *supra* note 271, at 10. Neither the delegation of its foreign affairs competence nor the existence of common trade agreements, common currency, or common citizenship have deemed to extinguish the international personality of an associate. *Id.* at 17.

281. Under the Greenland Home Rule Act, Greenland is defined as a "distinct community within the Kingdom of Denmark." NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 191 (1994) (quoting the Greenland Home Rule Act art. 1). Accordingly, Greenland has a legislature and executive with authority in the areas of "taxation, education, culture, church affairs, production and export, supplies and

Similarly, while China resumed its sovereignty over Hong Kong in 1997, the Joint Declaration concluded between China and the United Kingdom assures that Hong Kong will enjoy "a high degree of autonomy, except in foreign and defense affairs."[283] These and many other precedents show that a territory may preserve limited international personality and autonomy even in the context of association or integration with another State.

Where the right of self-determination is involved, however, the legal inquiry in such cases does not end with a declaration that a self-determining population has opted for association or integration. As Professor Michael Reisman notes, "[t]he lawfulness of particular associations is determined by content and not by form."[284] Article One of the International Covenants on Civil and Political and Economic, Social, and Cultural Rights declares, "[a]ll peoples have the right to self-determination. By virtue of that right they *freely* determine their political status and *freely* pursue their economic, social, and cultural development."[285] Apparent from the Covenants' definition of self-determination is that the right, if nothing else, revolves around freedom — the freedom of a people to define their own political status and to determine for themselves the nature of their relationships with other members of the international system. That is not to say, of course, that that freedom is absolute. In a world system characterized by both interdependency and at least *de facto* inequality, the freedom of every community is constrained by myriad political and economic factors. Nevertheless, the right to self-determination would be rendered an empty promise if the choice among types of self-government were imposed upon, rather than selected by, the concerned population. Interna-

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transport, technology, telecommunications and housing." *Id.* at 191-92. The areas excluded from Greenland's home rule authority are external relations, financial, monetary and currency policy, defense, the administration of justice and police, and constitutional, contract, inheritance, and family law. *Id.* at 192.

282. Greenland is affiliated with the European Community as an Overseas Territory; it also sends its own delegation to the Nordic Council, where it is treated as an independent nation, and it is a member of the Inuit Circumpolar Conference, which has observer status at the United Nations. *Id.* at 192-93. Moreover, the Greenland Home Rule Act requires that treaties affecting the interests of Greenland be referred to home rule authorities before they are concluded by Denmark. *Id.* at 193.

283. *Id.* at 203-04. Hong Kong nevertheless will continue to participate, albeit to a limited degree, in the international arena. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China stipulates that, under the name Hong Kong, China, the territory may establish and maintain diplomatic relations and conclude agreements in the fields of economics, trade, financial, monetary, shipping, communications, tourism, culture, and sports. *Id.* at 204-05. Since Hong Kong has not been regarded as a self-determination unit, however, its disposition is not directly relevant to the question of Palestine.

284. REISMAN, *supra* note 271, at 11.

285. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, para. 1, 993 U.N.T.S. 5; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 1, para. 1, 999 U.N.T.S. 173 (emphasis added).

tional practice, accordingly, has been to strive to assure that self-government has been achieved through the free choice of the self-determining people.

One way in which the international community has evaluated the integrity of an exercise of self-determination is by examining popular support for the decision. A choice of association or integration has elicited particular scrutiny, since there is a greater possibility that these forms of self-determination resulted from coercion by a metropolitan State, rather than from the free choice of the concerned population.[286] Principle VII(a) of the Annex to U.N. General Assembly Resolution 1541 (XV) states, "[f]ree association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes."[287] As Professor Reisman points out, the consent of the elite or effective leader no longer suffices to ratify the association: "[i]n contemporary practice, the demand for plebiscite or some other reliable consultation of popular will indicates that dispositions of territorial communities can be effected lawfully only with the free and informed consent of the members of that community."[288] Resolution 1541 is even more explicit in its provisions regarding integration, requiring that integration be "the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."[289] Thus, the international community has come to require objective evidence of popular support among a self-determining population for a decision to associate with or be incorporated within another State.

This principle has also been applied, at least on one occasion, in the context of independence. The principle of self-determination requires not only that a territory be self-governing, but also that the people of that territory be self-governing. The international community consequently has been unwilling to recognize the independence of territories whose population effectively has been denied the opportunity to exercise self-determination by the transfer of power to an unsupported or unrepresentative government.[290] While, as Crawford points out, "self-determination does not necessarily involve the establishment of a democracy based on the principle of 'one vote, one value,' and the administering authority has a measure of discretion in determining the persons in the territory to whom the grant of authority will be made,"[291] the international community has required that authority be transferred to a government possessing the support of a territory's general popula-

286. *See* CRAWFORD, *supra* note 8, at 370, 373.

287. G.A. Res. 1541 (XV), *supra* note 12, at Annex, Principle VII(a).

288. Reisman, *supra* note 271, at 12, *quoting* STEPHANSKY, PUERTO RICO IN THE UNITED STATES AND THE CARIBBEAN 95 (T. Szulc. ed. 1971).

289. G.A. Res. 1514 (XV), *supra* note 12, at Annex, Principle IX(b).

290. *See* DUGARD, RECOGNITION AND THE UNITED NATIONS 97-98 (1987) (discussing non-recognition of white minority government of Rhodesia).

291. CRAWFORD, *supra* note 8, at 219.

tion.[292]

The United Nations also has sought to confirm the voluntary consent of a population to an association by scrutinizing the terms of the agreement between the metropolitan and associated States. It has required for instance that there be procedures in place that permit the Associate to terminate the association as easily as the metropolitan State and that demonstrate that the association is "a continued expression of the right of self-determination of the people of the Associated State."[293]

Because of concern about the voluntariness of putative exercises of self-determination, international law requires special scrutiny when a territory's status changes while it is under belligerent occupation. The Fourth Geneva Convention provides:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any matter whatsoever, of the benefits of the present Convention by any change introduces, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.[294]

There is a presumption that a State that comes into being under belligerent occupation is a puppet State, and, as a result, it should not be recognized as independent by other States.[295] The international norm against the recognition of puppet states traditionally has been defined in terms of state sovereignty: a puppet state is an organ of the occupant State and, therefore, is subordinate to its legal order; since a sovereign State is subordinate only to international law, a puppet state cannot be recognized as sovereign.[296] While this argument need not be framed with reference to self-determination, the norm against recognition of puppet States suggests that the creation of a puppet State is not a valid exercise of self-determination since Principle VI of General Assembly Resolution 1541 permits only "[e]mergence as a *sovereign* independent State." An occupant State, therefore, may not avoid its legal obligations to the population of an occupied territory simply by obscuring its control through the creation of a puppet State. Indeed, Marek suggests that the presumption that a State or government established during a belligerent occupation is of a puppet character can "only be re-

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292. *Id.* at 220 (citing the U.N. Security Council and General Assembly's insistence that the United Kingdom not transfer power to the white minority government of Rhodesia and, rather, "promote the country's attainment of independence in accordance with the aspirations of the majority of the population.").

293. *Id.* at 376.

294. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47, 6 U.S.T. 3548, 75 U.N.T.S. 318.

295. *See* KRYSTYNA MAREK, AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 113 (1968).

296. *See id.* at 113-14.

butted after the liberation of the territory."[297]

In sum, therefore, international law requires that self-determination be exercised with regard for the free will of the self-determining population. The establishment of statehood is not the only legitimate outcome: the international community has shown tolerance for decisions by self-determining populations to associate with or integrate within another State, rather than to establish complete independence. These alternative outcomes have, however, elicited greater scrutiny by the international community, particularly when, as in cases of military occupation, there is great potential that an ostensible exercise of self-determination resulted from coercion rather than free choice.

B. The Legal Status of Palestine

International law recognizes the participation of a variety of types of actors in the international process. Under traditional doctrine, states were the only recognized international participants.[298]Over the course of the twentieth century, however, international law has come to recognize the participation of other, non-state entities.[299] McDougal, Laswell, and Reisman define a participant in the international constitutive process as "an individual or an entity which has at least minimum access to the process of authority in the sense that it can make claims or be subjected to claims."[300] As their definition suggests, different types of international actors participate in different capacities, the breadth of their participation determined by their relations with other actors in the international system. Accordingly, "an international person need not possess all the international rights, duties, and powers normally possessed by states. Some states only possess some of those rights and duties; they are therefore only in those limited respects subjects of international law and thus only possess limited international personality."[301] Thus, although States remain preeminent within the international process, it is no longer their exclusive province.

Under prevailing international legal standards, Palestine is not a State. Although the PLO and the PA each fulfill aspects of the objective criteria for statehood at least as well as some recognized States, the two bodies do not, together, form a unit independent and unified enough to constitute a State. The PLO remains the independent voice and international representative of the Palestinian people, but it lacks direct authority over the population and territory of Palestine. Conversely, while the PA directly governs segments of the OPT, its authority is subordinated to Israel's, and it is prohibited by the DOP and subsequent

297. *Id.*

298. *See* Myres McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 262 & n.8 (1967); J.D. van der Vyver, *Statehood In International Law*, 5 EMORY INT'L L. REV. 9, 12 (1991).

299. *See* Suy, *supra* note 148 , at 84, 100-01.

300. McDougal, *supra* note 298, at 262.

301. LASSA OPPENHEIM, INTERNATIONAL LAW ch.2, sec. 33 (H. Lauterpacht ed., 8th ed. 1955).

agreements from independently participating in international affairs. The relationship between the PA and the PLO consequently may best be characterized as a variation on association, although neither entity is a sovereign State. Ultimately, while this arrangement does not itself represent a fulfillment of the Palestinian right to self-determination, it leaves open the possibility for the free exercise of self-determination in the future.

1. Statehood

The creation of States is a matter appraised by international law. Indeed, the idea that an entity's international legal status could be subject to definition by another State's municipal law repudiates one of the central premises of modern international law: the sovereign equality of States. Since no one State legally may impose its municipal order upon another, some higher order must prevail over interstate relations. As Marek explains, "[s]ince they break the framework of municipal law, the birth, extinction, and transformation of States can be made subject of a legal inquiry only by reference to a legal order which is both higher than State law and yet belongs to the same system of norms . . . ." [302] Thus, while "[i]nternational law does not 'create' States, just as a State does not 'create' individuals . . . [i]t is international law and international law alone which provides the legal evaluation of the process, determines whether the entity is in fact a State, delimits its competences and decides when it ceases to exist."[303] Since an entity's participation in the international system is defined by its perceived status among other international actors, however, there has been some controversy regarding the role that recognition plays in conferring the legal status of Statehood on aspirant communities.

Two predominant views have emerged regarding this issue: the declaratory approach and the constitutive approach. The orthodox constitutive approach holds, generally, that an entity legally becomes a State when other international actors recognize it to be one, the act of recognition being constitutive of a new State's legal status. According to Lauterpacht, this view is based upon a Hegelian vision of international law "as a loose 'law of co-ordination' based on agreement as distinguished from the overriding command of a superior rule of law." [304] States, within this perspective, exist only in relation to one another, their status emerging from their relationships, not on the basis of objective legal criteria. Proponents of the declaratory view argue that this relativist dimension of the constitutive approach is "destructive of the very notion of an international community."[305] They maintain that an entity becomes a State when it fulfills the legal criteria for statehood and that,

302. MAREK, *supra* note 295, at 2.

303. *Id.*

304. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 38 (1947).

305. MAREK, *supra* note 295, at 132, *quoting* TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION 42 (L.C. Green ed., 1951).

therefore, recognition by other states is simply declaratory of an existing fact. As Chen summarizes:

> The fact that States cannot have the same faculty for appreciating the fact of the fulfillment of [the] requirements [for statehood] is no reason for denying that there is an objective point of time at which such fulfillment takes place. Third States may be unable or unwilling to acknowledge this fact, but they certainly cannot alter it to suit their ignorance, caprice, or self-interest.[306]

Lauterpacht attempts to reconcile the declaratory and constitutive approaches by suggesting that while recognition is "declaratory of facts," it is "constitutive of rights." He reasons, "[a] State may exist as a physical fact. But it is a physical fact which is of no relevance for the commencement of particular international rights and duties until by recognition — and nothing else — it has been lifted into the sphere of law, until by recognition it has become a juridical fact."[307]

An evaluation of the relative merits of each of these approaches is beyond the scope of this essay. It suffices to note that an entity's claim to Statehood may be evaluated either on the basis of objective legal criteria or in light of the degree of recognition it has received by the international community. As discussed below, Palestine has yet to achieve statehood within either framework.

2. The Declaratory Approach and the Montevideo Convention Criteria for Statehood

The declaratory view of recognition, as noted above, holds that an entity becomes a State when it fulfills the internationally accepted criteria for statehood.[308] The Montevideo Convention of 1933 established four criteria for evaluating an entity's claim to statehood. The entity is required to possess: "(a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[309] The requirement of independence is also frequently appended to the Montevideo criteria.[310] Although the Montevideo Convention technically binds only the parties to it, its criteria for statehood, with minor variations, have been widely accepted as authoritative by international jurists.[311]

Although the analysis below addresses each of the criteria indi-

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306. CHEN, *supra* note 305, at 44-45.

307. LAUTERPACHT, *supra* note 303, at 75.

308. These criteria are also relevant to Lauterpacht's view of recognition insofar as he recommends that States base their decisions about whether to recognize a nascent State on the applicable legal criteria, rather than political concerns. *Id.* at 55.

309. Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 165 U.N.T.S. 19 [hereinafter Montevideo Convention].

310. *See generally* MAREK, *supra* note 295 at 162-68.

311. *See, e.g.*, CRAWFORD, *supra* note 8, at 31-34; WALLACE-BRUCE, *supra* note 281, at 51. *Cf.* OPPENHEIM, *supra* note 301, § 34 (replacing the requirement of capacity to enter into foreign relations with the requirement of sovereignty).

vidually, it is important to note, as an initial matter, that they cannot be applied piecemeal. Marek summarizes prevailing opinion as follows: "[t]here is a State in the international law sense, when there is an independent legal order, effectively *valid throughout* a defined territory *with regard to* a defined population."[312] Similarly, Oppenheim states, "[a] state proper is in existence when a people is settled *in* a territory *under its own* sovereign government."[313] As these jurists' opinions suggest, the Montevideo criteria relate to and find definition in one another. A putative state, therefore, must possess a government that, itself, governs a population within a specified territory and that, itself, has the capacity to enter into foreign relations. While Palestine fulfills aspects of each of the Montevideo criteria, it continues to lack a full measure of independence, which synthesizes and gives substance to the other criteria for statehood.

a. Defined Territory

The international community has adopted an exceptionally flexible construction of the "defined territory" criterion for statehood. In order to qualify for statehood, an entity's territory need not exceed a minimum size.[314] It also need not be "coherent . . . or conform to any particular form." [315] Finally, the entity seeking statehood need not have perfectly-delimited territorial boundaries. This standard was articulated in a well-known decision of the Polish-German Mixed Arbitral Tribunal:

> Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected, the state in question cannot be considered as having any territory whatsoever . . . In order to say that a state exists . . . it is enough that this territory has a sufficient consistency, even

312. MAREK, *supra* note 295, at 162 (emphasis added). The following statement by U.S. President Grant, cited by Marek as indicative of state practice regarding the conditions for statehood, also draws attention to the relationship between the criteria:

> [T]here must be a people occupying a *known* territory, united under some known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations and capable of performing the corresponding international duties *resulting from its acquisition of the rights of sovereignty*. A power should exist complete in its organization, ready to take and able to maintain its place among the nations of the earth.

Marek, *supra* note 295, at 165, *quoting* J.B. MOORE, A DIGEST OF INTERNATIONAL LAW 107-08 (1906).

313. OPPENHEIM, *supra* note 301, § 34 (emphasis added).

314. CRAWFORD, *supra* note 8, at 36 (stating that Tuvala, Malta, Nauru, Liechtenstein and Seychelles —ranging in size from 26 sq. km. to 170 sq. km.—have been all recognized as meeting the defined territory requirement). WALLACE-BRUCE, *supra* note 281, at 51.

315. WALLACE-BRUCE, *supra* note 281, at 38 (noting that the international community recognizes states, such as the United States and Tanzania, comprised of non-contiguous territory).

> though its boundaries have not yet been accurately delimited, and that the state actually exercises independent public authority over that territory.[316]

As the Tribunal made clear, the defined-territory criterion does not require the legal demarcation of a state's boundaries. Indeed, the international community has on several occasions extended recognition to states whose territorial borders remained in dispute.[317] What appears central, instead, is the putative state's exercise of independent governmental authority over a territory.[318]

It is in that last respect that Palestine, as presently constituted, fails to meet the defined territory criterion. One commentator has suggested that Palestine is not a defined territory because "[w]hat territory is Palestine remains the source of bitter conflict."[319] However, that analysis seems to ignore the traditionally flexible interpretation of the defined territory criterion. What territory is Palestine, after all, is no greater a source of conflict than what territory is Israel.[320] Moreover, the PLO has defined very specific territorial goals for a State of Palestine — the West Bank and Gaza Strip[321] — and a substantial portion of

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316. CRAWFORD, *supra* note 8, at 52 (quoting *Deutsche Continental Gas-Gesellschaft v. Polish State*, (1929) 5 A.D. No. 5, 14-15). *See also* MAREK, *supra* note 295, at 163 ("It may happen that, in special circumstances, international law will provisionally accept, as its subject, a community with only a rough delimitation of its territorial and personal spheres ."); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. 201 cmt. b ("An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state.").

317. *See, e.g., Monastery of St. Naoum Case*, 1924 P.C.I.J. (ser. B) No. 9, at 10 (granting Albania international recognition and induction into League of Nations despite dispute over Serbo-Albanian); *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 32 (Feb. 20).

318. *See* CRAWFORD, *supra* note 8, at 40 ("The only requirement is that the State must consist of a certain coherent territory effectively governed—a formula which demonstrates that the requirement of territory is rather a constituent of government and independence than a separate criterion of its own.").

319. Kathryn M. McKinney, Comment, *The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine*, 18 SEATLE U. L. REV. 93, 95 (1994).

320. Indeed, recognition of Israel was urged by the United States *despite* the controversy regarding its borders. WALLACE-BRUCE, *supra* note 281, at 53 (quoting Jessup, U.S. Representative to the Security Council, advocating admission of Israel to the U.N., U.N. SCOR, 383rd Mtg, Supp. No. 128, at 9-12, (1948):

> One does not find in the general classic treatment of this subject [definition of a state in international law] any insistence that the territory of a state must be exactly fixed by definite frontiers. . . The formulae in the classic treatises somewhat vary, one from the others, but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitations of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a state is that it shall possess territory is that one cannot contemplate a state as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some position of the earth's surface which its people inhabit and over which its government exercises authority.'

321. *See supra* text accompanying notes 179-180 (discussing Palestinian Declaration of Independence).

the international community recognizes the legitimacy of those territorial aspirations.[322] Although the precise boundaries of such a state have yet to be precisely delimited, that fact, as noted above, has never been regarded as a barrier to meeting the "defined territory" requirement. Thus, ongoing controversy regarding the proper boundaries of Palestine is not an impediment to the Palestinian claim to statehood.

What *is* an impediment is the fact that a Palestinian government does not yet exercise independent authority over a defined territory. As discussed above, agreements between Israel and the PLO severely limit the territorial, functional, and personal jurisdiction of the PA. While the PA has significant municipal authority over areas of the OPT, it does not possess sovereignty over them in any practical sense. Israel retains authority to review all legislation governing the administration of the territories, it has personal jurisdiction over all Israelis in the territories, it exercises control over most aspects of economic development and security in the territories, and it continues to regulate movement between the Palestinian administrative enclaves. As a result, it cannot be said that a Palestinian government exercises independent authority over any territory at all.

b. Permanent Population

International jurists also have construed broadly the Convention's permanent population requirement. According to Wallace-Bruce, the criterion "simply requires that there must be people identifying themselves with the territory no matter how small or large the population might be."[323] Oppenheim provides a somewhat different interpretation, defining a "people" as "an aggregate of individuals *who live together as a community*, though they may belong to different races or creeds or cultures, or be of different colour."[324] His definition suggests that a putative state's population not only must form a national community, but also must live together as one. Combining these two interpretations, a state's population should (1) identify themselves with a territory and (2) live together as a community.

The Palestinian population meets both criteria. Palestinians not only identify with the territory of Palestine, they define themselves in terms of it.[325] Although a large segment of the Palestinian population, as defined by the PLO Covenant, is dispersed across the globe, the existence of Palestinian refugees does not, as some have suggested,[326] defeat their claim to constitute a permanent population. Palestinians live together as a community in the West Bank and Gaza Strip, where they form the vast majority of the population. The fact that members of

322. *See* G.A. Res. 48/158D, *supra* note 100.

323. WALLACE-BRUCE, *supra* note 281, at 53. In 1984, thirty-six United Nations member States had populations of less than one million. DUGARD, *supra* note 290 at 71.

324. OPPENHEIM, *supra* note 301, at sec. 34 (emphasis added).

325. *See supra* text accompanying notes 117-124.

326. McKinney, *supra* note 319, at 96.

their national community reside elsewhere and may, if circumstances permit, return to Palestine at a later date is irrelevant to Palestine's viability as a State. No doubt millions of people in the world may claim citizenship in countries in which they do not presently reside; their residence elsewhere does not, however, extinguish those states' claims to possessing a permanent population. The Palestinian population in the OPT, therefore, constitute Palestine's permanent population.

c. Government

Although there has been some movement toward making respect for the rights of citizens a requirement for statehood,[327] the government criterion does not require that a state adhere to a particular form of government. The international community has recognized states with myriad forms of government, from people's republics to constitutional monarchies to theocracies.[328] Rather, the government[329] criterion can be reduced to the elements of effectiveness and legal title. As Crawford observes, "[t]he point about 'government' is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority."[330] A government's effectiveness — or "actual exercise of authority" — refers to its structural coherence and its general capacity to maintain law and order within a territory. An examination of state practice with regard to this element, however, reveals little in the way of standards. States have recognized governments, such as the former Belgian Congo (Zaire), that possessed only the most tenuous grasp of authority.[331] The second element, legal title, refers to the government's exclusive legal right under international law to govern a territory.[332] This right may have been granted by the former sovereign of the territory[333] or recognized in accordance with the principle of self-determination. Therefore, the government criterion possesses both factual and legal dimensions.

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327. *See* DUGARD, *supra* note 290, at 97-98 (discussing developing norm of non-recognition of regimes based upon systematic denial of population's civil and political rights); van der Vyver, *supra* note 298, at 14.

328. WALLACE-BRUCE, *supra* note 281, at 54.

329. MAREK, *supra* note 295, at 162. Marek uses the term "legal order" instead of government.

330. CRAWFORD, *supra* note 8, at 44.

331. Crawford describes the situation in the Belgian Congo when recognition was granted to it in 1960 as follows:

> No effective preparations had been made; the new government was bankrupt, divided, and in practice hardly able to control even the capital. Belgian and other troops intervened, shortly after independence, under claim of humanitarian intervention; and extensive Unites States financial and military assistance became necessary almost immediately. Among the tasks of the United nations force was, or came to be, the suppression of secession in Katanga, the richest Congolese province. Anything less like effective government it would be hard to imagine.

Id. at 43.

332. *Id.* at 44.

333. *Id.*

State practice appears to indicate, however, that a strong legal title can compensate for a lack of effectiveness and, conversely, that a weak legal title requires more complete effectiveness.[334] According to Crawford, it is this inverse relationship that explains the international community's willingness to grant early recognition to the Belgian Congo despite its government's relative lack of control over the country.[335] It similarly explains the almost universal non-recognition of the government of Rhodesia, which assumed power in contravention of the principle of self-determination, even though the Rhodesian government maintained effective control over the country.[336]

The long-standing dispute over the legal title to the West Bank and Gaza Strip has been the focus of a large body of scholarly literature. An appraisal of that debate is beyond the scope of this essay. Regardless of the strength of the Palestinians' general claim of right to self-government, however, the interim character and extraordinarily limited powers of the PA make it impossible to characterize that body as the "effective government" of the OPT. The PA's authority, after all, is conferred on it by the agreements reached between Israel and the PLO, not by international law. While an independently constituted Palestinian government conceivably could assert a legitimate claim to being the "effective government" of Palestine without having established full control over the territory it claims, the PA is not such a government. Since the PLO at present exercises authority in the OPT only through its relationship to the PA, its effectiveness is similarly limited. Palestine therefore lacks an effective government.

d. Capacity to enter into foreign relations.

A state's capacity to enter into foreign relations is evaluated in terms of its legal competence to participate in the international process and to carry its international obligations into effect on the domestic level. The economic[337] and political[338] factors that define the breadth of its international activity are not relevant to the determination. As Crawford explains, the foreign relations requirement is essentially a synthesis of the government and independence criteria: "[c]apacity or competence . . . depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of such relations so that no other entity carries out and accepts

334. MAREK, *supra* note 295, at 102.

335. CRAWFORD, *supra* note 8, at 44.

336. *See* DUGARD, *supra* note 290, at 97-98.

337. "Capacity" here refers to a state's legal competence, not its economic or monetary situation. WALLACE-BRUCE, *supra* note 281, at 56-57 (discussing a significant number of countries that lack economic capacity to participate fully in the international system but are nevertheless recognized as states).

338. *See id.* at 55-56 ("'Capacity' in this context refers to legal competency. Once that competency exists, it is left to the discretion of the entity to choose which international persons it desires to engage in relations with.").

responsibility for them."[339] The international recognition of Liechtenstein's statehood[340] illustrates the centrality of independence to the foreign relations criterion: while Liechtenstein has delegated the conduct of its foreign relations to Switzerland, it remains politically independent, its foreign relations "carried out by Switzerland only from case to case and inasmuch as they are the subject of a special instruction of the Government of the Principality."[341] Thus, the actual capacity to participate in the international process is subordinate to independence, which is itself the legal basis for a state's foreign relations activity. Accordingly, while independent states participate more fully than other types of entities, their participation is "not a criterion, but rather a consequence, of statehood, and one which depends on the status and situation of particular states."[342]

Although the PLO has demonstrated its capacity to enter into foreign relations on behalf of the Palestinian people, the legal and functional separation of the PLO and the PA prevent the PLO from independently implementing international obligations in the territory and with regard to the population of Palestine. Under the terms of the DOP and the subsequent agreements concluded pursuant to it, Israel maintains authority over most aspects of the PA's external relations; the PLO is empowered to represent it only in international negotiations regarding economic, social, and technical development. It cannot regulate the flow of goods and persons into and out of Palestinian territory; it cannot facilitate the establishment of diplomatic missions from foreign countries in its territory; and it cannot translate international commitments affecting the territory or population of Palestine into PA policies without first obtaining Israel's consent. Thus, while the PLO engages in international relations, its activities are one step removed from the territory and population of Palestine.[343] Under these circumstances, Palestine, as a national and territorial unit, does not have the capacity to engage independently in international relations.

e. Independence

A requirement generally appended to — and implicit in[344] — the

339. CRAWFORD, *supra* note 8, at 47.

340. Liechtenstein is a party to the Statute of the International Court of Justice, a privilege reserved to states. U.N. Charter, art. 93. DUGARD, *supra* note 290, at 77.

341. CRAWFORD, *supra* note 8, at 190 (quoting Note of June 18, 1973: SCOR 29th yr., Sp. Supp. No. 2, 120).

342. *Id.* at 47.

343. *See* McKinney, supra note 319, at 112-13; James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L L. 681, 696 (1989).

344. Wallace-Bruce suggests that the independence requirement is implicit in the capacity to enter into foreign relations. WALLACE-BRUCE, *supra* note 281, at 57. *See also* CRAWFORD, *supra* note 8, at 47 ("[E]ach State is an original foundation predicated on a certain basic independence. This was represented in the Montevideo formula by 'capacity to enter into relations with other States.'").

Montevideo criteria is independence.[345] Indeed, some international jurists see independence as the central criterion for statehood, all other requirements subordinate to and emerging from it.[346] The classic formulation of the independence criterion appears in Judge Anzilotti's opinion in the *Austro-German Customs Union Case:*

> [T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint Germain, *as a separate state not subject to the authority of any other State or group of States.* Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no authority other than that of international law.[347]

Independence in this context means, therefore, that a State must be separate and sovereign, that is, that it possess a legal order that is both distinct from another State's and subordinate only to international law.[348]

The separateness requirement is logically grounded in the very concept of international law. As Marek explains, independence is a criterion for statehood because "international law, above all, is a legal order governing relations between independent States, that is to say, between separate and distinct entities. No international law would be either possible or necessary, without a clear delimitation of its subjects, which together form the international community."[349] The existence of an international community, therefore, presupposes the existence of defined individual members. It is perhaps in vindication of this principle that international law requires that a putative State govern a defined territory and population. Definition, after all, presupposes differentiation.

The independence requirement is not, however, satisfied by separateness alone. The additional element of sovereignty ensures that a State has the legal capacity to effect the commitments into which it has entered on behalf of its population and territory. As Judge Huber stated in the *Island of Palmas Case*: "[s]overeignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state."[350] Sovereignty, therefore, is framed in exclusive terms. An independent State, in the international context, cannot be subordinate to another State's legal order.

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345. *See generally* MAREK, *supra* note 295, at 162-68.

346. CRAWFORD, *supra* note 8, at 48 (citing a number of international legal scholars) (emphasis added).

347. 1931 P.C.I.J. (ser. A/B), at 57 (Anzilotti, J., concurring).

348. *See* CRAWFORD, *supra* note 8, at 51-52.

349. MAREK, *supra* note 295, at 162-63.

350. CRAWFORD, *supra* note 8, at 48 (quoting *Island of Palmas Arbitration*, 2 R.I.A.A. 829, 838 (1928) (Huber, J.)).

Palestine arguably fulfills the requirement of separateness, but not of sovereignty. The West Bank and Gaza Strip are territorially distinct from the State of Israel and are governed by a separate legal order.[351] Palestinian residents of the OPT are not represented in the Israeli Government, they are subject to separate laws and a separate judicial system, and they may not claim the legal rights guaranteed to residents of Israel. The international community, moreover, has consistently regarded the OPT as legally separate from Israel and has decried Israel's attempts to impose its legal order on the Territories.

As discussed at length in Section II(C), however, the PA has established, at best, only limited sovereignty over the territories under its administration. Israel continues to exercise many state functions in the OPT, including the maintenance of overriding control over the Territories' infrastructure, borders, and security; and it is empowered by the agreements concluded pursuant to the DOP to veto any of the PA's legislative enactments that it deems objectionable. In view of these arrangements, it would be difficult to characterize the PA as an independent entity. While the PLO's independence is not compromised by the DOP and subsequent agreements, the PLO does not, itself, possess legal authority over the OPT; under the DOP, that authority resides in the PA and in Israel. Thus, the government of the population and territory of Palestine, the PA, lacks the independence necessary to consolidate Palestine's legal status as a State.

3. The Constitutive Approach

In order for an entity's statehood to be "constituted" by recognition, it must first be recognized to be a State. The establishment of the PA has not, however, brought about international recognition of Palestinian statehood. Indeed, while the United Nations General Assembly and several individual States have expressed the hope that the current peace process will culminate in the establishment of a State of Palestine, no State or international body has recognized the PA as an independent State, and the PLO has not urged such recognition. Palestine consequently is no more a State under the constitutive approach than under the declaratory approach.

4. Transitional Association

As presently constituted, Palestine does not fit easily into defined

351. The recent agreements between the PLO and Israel affirm the legal and territorial distinctness of the OPT. *See, e.g.*, Interim Agreement, ch. 2, art. 11, para. 1, 36 I.L.M. 551 (stating that both sides regard the West Bank and Gaza Strip as "a single territorial unit, the integrity and status of which will be preserved during the interim period"). Although Israeli citizens residing in the OPT may claim the protection of Israeli law, those rights flow from their Israeli citizenship, not from their residence in the OPT. In much the same way, the United States Constitution protects American citizens abroad from invasions of their rights by the U.S. Government. *See generally*, Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

categories of international status. Under the interim arrangements established by the DOP, Palestine may best be described as a transitional association between the PA and the PLO. The PLO, which has been recognized to possess an independent international personality as representative of the Palestinian people, has been delegated the power to act on behalf of the PA in the international arena with regard to specific substantive areas. Nevertheless, the PA's constituent organs (the President and Legislative Council) are elected by and serve the interests of the population of the OPT. They form a local government with largely municipal functions and, with regard to those functions, they are independent of the PLO. In this limited respect, the relationship between the two public bodies approximates an association between states.

That noted, however, several factors distinguish the PA-PLO relationship from the traditional legal status of association. Foremost, of course, neither entity is a State. While each, as seen above, possesses certain attributes of statehood, neither meets the objective or subjective criteria requisite for that status. Moreover, the powers withheld from the PLO by the DOP — i.e. the authority to conclude international agreements (with parties other than Israel) that affect the status or security of the OPT — are held by Israel, not by the PA. The PA is consequently in a position of subordination to both the PLO and Israel. Further, the current arrangements have elicited the support of the Palestinian population only insofar as they are transitional. The terms of the DOP, as approved by the PNC, characterize the PA as an interim measure pending the conclusion of permanent status negotiations. The idiosyncratic association between the PA, the PLO, and Israel therefore cannot be seen as an exercise of the free choice of the Palestinian people, who cannot alter the international status of their territory at will.

The relationship between the existing Palestinian public bodies does, however, have an important function with regard to the exercise of Palestinian self-determination. As discussed in Section III(A), above, international law requires heightened scrutiny of changes to a territory's status while it is under belligerent occupation in order to ensure that the changes meet the approval of the territory's population. Agreements concluded between the authorities of an occupied territory and the Occupying Power are especially suspect, raising concerns about the authorities' capacity for independent action. Although the potential for coercion in negotiations between Israel and the Palestinians remains great so long as the OPT remain under Israeli occupation, the relationship between the PLO and the PA helps to preserve Palestinian negotiators' independence from Israel and to avoid the presumption that the PA is merely a puppet of the Government of Israel. Perhaps ironically, the separation between the two public bodies serves these interests as much as the connections between them. While the fact that the PLO sanctioned and negotiated the transitional arrangements pro-

vides them with international legitimacy,[352] its legal and functional separation from the PA ensures that the entity conducting permanent status negotiations with Israel is not subordinate to Israeli authority. Since independence is a prerequisite for freedom, the continuing independence of the international representative of the Palestinian people is essential to the free exercise of Palestinian self-determination.

IV. CONCLUSION

In the words of the Syrian poet Adonis, Palestine remains "stalled between seasons." The international community has afforded universal recognition to the Palestinians' peoplehood, and most States support their right to self-determination in the territory defined in the 1988 Palestinian Declaration of Independence. Moreover, all States recognize the special status of the PLO as international representative of the Palestinian people. Through the establishment of the PA, the PLO now has the opportunity to translate its efforts on the international front into more concrete benefits for the Palestinian population in the OPT. The creation of the PA has not, however, altered the international status of the PLO or, more broadly, of Palestine. It does not itself represent a fulfillment of the national aspirations articulated in the Palestinian Declaration of Independence or of the internationally-recognized legal rights that it invoked. The legal and functional separation of the PLO and the PA erected by the DOP and subsequent agreements maintains the independence of the PLO, despite Israeli control of the OPT. It also serves, however, as a barricade against changes in the status of either public body: it denies the PLO effective authority over the territory it claims for the Palestinians, and it denies the PA independence and access to the international decision-making process.

The Government of Israel and the PLO have allocated the permanent status of the OPT to the final stage of negotiations within the framework established by the DOP. The PLO has consistently articulated its commitment to the establishment of an independent Palestinian state in the OPT and has emphasized the inadequacy of any proposed solutions that fall short of that goal.[353] Although Israel's Labor Party adopted a platform omitting the once-standard clause rejecting the establishment of a Palestinian state before Israeli elections last June,[354] the Likud government of Benjamin Netanyahu has stated unequivocally that it opposes Palestinian statehood.[355] While a majority of

352. *See infra* Section II(C)(1).

353. The establishment of an independent Palestinian state remains the PLO's chief negotiating goal, according to the Organization's Chief Representative in the United States. Interview with Khalil A. Foutah, *supra* note 259; *see also Advisor to Yasser Arafat Rejects Puerto-Rico-like Palestine*, AGENCE FRANCE-PRESSE, Nov. 9, 1996, *available in* 1996 WL 12177831.

354. *See* Stephen McFarland, *Foes Soften on Palestine: Israel Party Platform Vote*, DAILY NEWS (New York), Apr. 26, 1996, at 2.

355. Government Guidelines for the Israeli Government Elected on 29 May 1996, JERUSALEM POST, June 18, 1996, at 3.

the States represented in the U.N. General Assembly regard Palestinian statehood to be a legitimate aspiration, the United States traditionally has opposed the idea, supporting instead association of Palestine with Jordan.[356] An evaluation of the status most beneficial to the Palestinian people and most likely to ensure the maintenance of long-term minimum order in the Middle East will require a thorough assessment of the political conditions and economic relationships in the region, an undertaking beyond the scope of this essay (and, regrettably, the capacities of its author). It is important to make clear at the outset, however, that the process of evaluating these alternatives should be informed, indeed governed, by certain core legal principles. Perhaps above all, while the Palestinians' exercise of self-determination may manifest itself in any one of a number of forms of self-government, international law requires that the outcome ultimately be the freely-expressed choice of the Palestinian people.

356. *See, e.g.*, Letter from President Ronald Reagan to Prime Minister Menachem Begin (Sept.1,1982), THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 253-56. ("In the Middle East context, the term self-determination has been identified exclusively with the formation of a Palestinian state. We will not support this definition of self-determination.") The United States government has not articulated its present official position on the issue. *See, Remarks of Former Secretary of State James A. Baker III at the Center for Middle East Peace and Economic Cooperation Conference*, FED. NEWS SERV., *available in* 1996 WL 5796086.

HUMAN RIGHTS IN INDIA — FIFTY YEARS AFTER INDEPENDENCE

VIJAYASHRI SRIPATI

I. INTRODUCTION

August 15, 1997 marked the fiftieth anniversary of India's independence.[1] A momentous day for all citizens of the subcontinent, it is of no less significance to the rest of the world. As the second most populous nation in the world and one occupying a significant geo-strategic location in Asia, the triumph of democracy and the strengthening of its roots in India augur well for international peace and security. Enduring for half a century as a vibrant, democratic and secular nation of teeming millions reflecting a rich diversity of caste, religion, language, culture, economic and social backgrounds is an achievement for India worthy of celebration.

This celebration has been at one and the same time an inspiring and introspective event. India's fiftieth anniversary provides evidence of survival, as well as an opportunity to pause and take measure of her half century of experience in promoting human rights among her own citizens. While India has come a long way since 1947 and has many impressive achievements to her credit, it would be less than honest not to take cognizance of the number of severe failings that have marked the past five decades. It is imperative that we understand the nature and cause of those failings, and put the lessons of the past to work in charting a future course. In the failure to do so, those deprived of basic rights may "blow up the structure of political democracy" that the

1. See Kennith J. Cooper, *Free but Bound by their Pasts — Fifty Years After Independence, India and Pakistan Face Same Ills*, WASH. POST, Aug. 14, 1997 at A1, A27; John F. Burns, India's Five Decades of Progress and Pain, N.Y. TIMES, Aug. 14, 1997 at A1, A10-A11; India at 50, N.Y. TIMES, Aug. 14, 1997 at A26.

On August 14, 1947, at the stroke of midnight, India emerged independent after two centuries of British colonial rule. The British had first set foot in India as traders in 1600. In that year, Queen Elizabeth I had granted a charter to the East India Company granting it a full monopoly on British trade with India. *See* M.V. PYLEE, CONSTITUTIONAL GOVERNMENT OF INDIA 47-139 (Asia Pub. House 1977) (discussing the establishment of the East India Company, its subsequent control over India, the commencement of India's struggle for freedom and the development leading to India's independence from Great Britain). Taking advantage of the prevailing disunity among the Indian rulers, the East India Company and later Her Majesty's government assumed full control over India by the second half of the eighteenth century. *Id.* The British domination continued up to the close of the second World War. In the aftermath of the war and with the disintegration of the British Empire, independence for India became imminent. *Id.* at 120-139.

founding fathers "so laboriously built up."[2]

John Hart Ely's remark that "constitutional law appropriately exists for those situations where the representative government cannot be trusted" evidences the crucial role of the judiciary in safeguarding human rights.[3] This is especially true of India where it is the Supreme Court that has been constitutionally vested with wide-ranging powers and the responsibility of protecting the citizens' human rights.[4] The significant, and arguably controversial, role the Court has come to play in the Indian polity can be traced back to this fact. It is sad that despite several economic successes, India is still plagued with the ubiquitous problems of poverty, illiteracy, housing, health, environmental degradation and exploitation, and other grave injustices. Judicial protection of human rights, therefore, takes on a desperate urgency. The challenges faced by the Court are daunting, and its failure to serve as a bastion of liberties could have a potentially explosive impact: threatening the most precious edifice of the Indian polity — democracy.

While the seriousness of India's current problems does not permit any slackening of effort by any branch of the government, this essay argues that the Supreme Court must continue to remain at the forefront of enforcing human rights. Article 21 is the life and liberty clause of the Indian Constitution.[5] This essay analyzes the jurisprudence of human rights that the Supreme Court has developed out of this seminal provision since independence. This analysis will be advanced against the backdrop of India's international obligations and international standards laid down in the International Covenant on Civil and Political Rights.[6]

This essay comprises four parts. Part I is devoted to a discussion of the framing of India's Constitution, an analysis of its Fundamental Rights Chapter and the Supreme Court's role in the first three decades of independence (1947-1977). Part II critically examines the principles and approaches that have guided the Court both in the expansion of Article 21 and its adoption of many procedural innovations beginning in the late seventies. What is the relationship between international law and municipal law in India? How informed is the Indian Judiciary of International Human Rights Law? What use, if any, has the Court made of international legal norms? Part III, entitled "Creative Impact of International Human Rights Norms," analyzes these issues. The concluding part highlights issues most in need of the Court's activist

2. SOLI SORABJEE, *Equality in the United States and India,* in CONSTITUTIONALISM AND RIGHTS 100 (Louis Henkin & Albert J. Rosenthal eds., Columbia University Press) (1990).

3. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980).

4. The Supreme Court heads the unified judicial system in India. Article 32 of the Constitution confers on every citizen the right to invoke the Court's original jurisdiction for the enforcement of his fundamental rights.

5. Article 21 confers the fundamental right to life and personal liberty.

6. *International Covenant on Civil and Political Rights,* GA Res. 2200, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter *International Covenant*].

thrust.

II. INDIA'S FIRST HOUR OF FREEDOM

A. Framing The Constitution

On December 9, 1946, eight months prior to the formal transition of power from the British Government to the Indians, the Constituent Assembly[7] convened to draft a constitution that was acceptable to all sections of free India and suitable to its peculiar needs and situation. It was a historic occasion and marked India's first hour of freedom. To use the words of Granville Austin, it was "perhaps the greatest political venture since that originated in Philadelphia in 1787."[8] What emerged after thirty-six months of deliberations was not merely a political document establishing a democratic, secular state but a document embodying the blueprint of a parliamentary form of government with all sovereignty vested in "the people."[9] As articulated in its evocative Preamble,[10] the Constitution, a social document, envisaged an egalitarian, just, and humane society committed to the dignity and liberty of the individual. It therefore enshrined an array of both Fundamental Rights[11] and Directive Principles,[12] which unlike the former, are non-justiciable, but nonetheless deemed to be "fundamental in the governance of the country," and it was the "duty" of the "State to apply these principles in making laws."[13] Part IV embodies the socio-economic responsibility of the state towards its citizens through provisions such as: securing for

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7. Once it became clear that independence for India was imminent, the British Government created a semi-sovereign Constituent Assembly for India in the Cabinet Mission Plan of 1946. The Constituent Assembly consisted of 296 elected members and was truly a representative body. *See* P. MISRA, THE MAKING OF INDIA'S REPUBLIC 56 (1966).

8. GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 308 (1966) [hereinafter AUSTIN].

9. India has a Parliamentary form of government with a bicameral Legislature: Lok Sabha - (House of people or the lower house) and Rajya Sabha (House of States or the Upper house). The Lok Sabha is the principal legislative body. The executive wing of the government is headed by the Prime Minister who is a member of the Lok Sabha. The President is merely a titular head. Each of the federal states that comprises the Indian union has its own government on a parliamentary model similar to that of the Central (federal) Government. The Indian Constitution provides for a strong Central (federal) Government.

10. We, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens—JUSTICE, social economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEARBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

11. Part III of the Constitution enumerates six fundamental rights.

12. Part IV of the Constitution contains Directive Principles of State Policy [hereinafter *Directive Principles*]. It is interesting to note that many rights enshrined in the International Covenant on Economic, Social and Cultural Rights find mention as Directive Principles in Part IV of the Indian Constitution.

13. *See* INDIA CONST. art. 37.

all citizens; just and humane conditions of work and maternity relief;[14] free and compulsory education;[15] and the establishment of sound international relations.[16] The communal riots and the bloody carnage that followed partition[17] prompted the framers to add two drastic provisions to safeguard their nascent republic's unity and integrity. The first allowed for preventive detention without trial,[18] even during peacetime; the second for the suspension of certain fundamental rights during an emergency.[19]

B. Constitutional Expression Of Human Rights

"Swaraj mera janma sidh adhikar hai" (Freedom is my birthright and I shall have it) was the daring declaration made by a great patriot, Lokmanya B. G. Tilak, before the British Government as far back as 1895. Tilak's and subsequent freedom fighters' demands for the guarantee of basic human rights denied to Indians during British rule found compendious expression in Part III.[20] The Constituent Assembly members debated the subject of fundamental rights, "the most criticized part of the constitution" with great passion for thirty-eight days.[21] They used the American Bill of Rights as their model in drafting the rights.[22] Thus, with respect to Part III, it was "the Potomac and not the Thames that fertilized the flow of Yamuna."[23]

The Constitution guarantees an impressive array of Fundamental Rights covering a wide range of civil, political, cultural, economic and social rights. These rights are subject to certain exceptions that do not render them illusory. Originally, the Constitution guaranteed a right to property and to obtain compensation for the property acquired by law for a public purpose except in the crucial areas of agrarian reform.[24] The Forty-fourth Constitutional Amendment introduced in 1978 removed property as a fundamental right. Today, the right to property

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14. *Id.* at art. 42.

15. *Id.* at art. 45.

16. *Id.* at art. 51.

17. On being granted independence, India was partitioned into two sovereign states: Pakistan and India by the British Government. What ensued was a panicky exodus of Muslims fleeing to Pakistan and Hindus fleeing to India and a communal carnage in which about a million lives were lost.

18. *See* INDIA CONST. art. 22 cl. 4-7.

19. *Id.* at arts. 352-360. The Constitution provides for three types of emergencies: National Emergency; State Emergency and Financial Emergency.

20. *See* 1 THE FRAMING OF INDIA'S CONSTITUTION 3-122 (B. Shiva Rao ed., Delhi 1968) (containing various documents relevant to the discourse of human rights before independence).

21. SORABJEE, *supra* note 2, at 96-97.

22. *Id.* at 97. *See generally* M. Abel, *American Influences on the Making of the Indian Constitution*, 1 J. CONST. PARLIAMENTARY STUDIES 35 (1967). Many of Part III's provisions correspond to the substance of one provision or the other in the United States Bill of Rights. In fact, almost every fundamental right in the India Constitution has its counterpart in the United States Bill of Rights. *Id.*

23. Shamsher Singh v. State of Punjab, A.I.R. 1974 S.C. 2192, 2212.

24. *See* INDIA CONST. at art. 31 (Forty-fourth Amendment) Act, 1976.

enjoys the status of a mere legal right.

The right to equality guarantees both equality before law and equal protection of all laws.[25] Specific kinds of discrimination such as those based on religion, race, caste, sex or place of birth are constitutionally prohibited.[26] Further, the Constitution sanctions "special treatment" in favor of women, children, scheduled castes and tribes[27] and "backward classes" of citizens.[28] The Constitution also abolishes untouchability, and forbids its practice in any form.[29] These provisions were designed to eradicate the evils of casteism and untouchability that had been practiced on a relentless scale in India. Unfortunately, they have not yet been totally banished from modern and free Indian society.

Other crucial rights such as freedoms of speech and expression,[30] to assemble peacefully without arms,[31] to form associations,[32] to move freely and to reside and settle in any part of the country,[33] to acquire, hold and dispose property,[34] and to practice any profession, occupation, trade or business,[35] have all been given constitutional protection. There are explicit grounds on which "reasonable restrictions" can be placed in exercising these freedoms.[36]

Article 21, which enshrines the most venerable right, reads as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Accepting an American jurist, Felix Frankfurter's, sagacious advice, the framers eliminated the original "due process" clause in this article. The resistance was not to due process as a requirement of fair procedure but to the substantive interpretation that could flow from it.[37] The phrase "due process" was replaced with the "procedure established by law" clause — a term borrowed from the Japanese Constitution.[38] Articles 20 and 22 provide a host of safeguards designed to assure a fair trial to all citizens. These crucial provisions were inserted at the behest of Dr. B.R. Ambedkar[39] to

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25. *Id.* at art. 14 [hereinafter *Equality Clause*].

26. *Id.* at art. 15 cl. (1).

27. Members belonging to Scheduled castes are the untouchables who suffered grave indignities prior to independence and who comprise the most oppressed minorities in the world. Mahatma Gandhi called them *"Harijans"* meaning children of God.

28. *See* INDIA CONST. at art. 15 cl. 4. For an authoritative discussion of the Equality Clause and Compensatory Discrimination in India *see also* MARK GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES OF INDIA (India 7 Gala 1984).

29. *See* INDIA CONST. at art.17.

30. *Id.* at art. 19 cl. (1) (a).

31. *Id.* at art. 19 cl.(1) (b).

32. *Id.* at art. 19 cl. (1) (c).

33. *Id.* at art. 19 cl. (1) (d) - (e).

34. *Id.* at art. 19 cl. (f).

35. *Id.* at art. 19 cl. (g).

36. *Id.* at art. 19 cl. (2) - (6).

37. *See infra* notes 60 and 63.

38. *See* SORABJEE, *supra* note 2, at 96-97. The framers chose the term "procedure est by law" on the ground that its language was less ambiguous than "due process caluse."

39. Chairman of the Drafting Committee in the Constituent Assembly and the chief architect of India's Constitution. Born as an untouchable, he had suffered grave indignities and had struggled relentlessly for the welfare of Harijans in India. He was instru-

compensate for the absence of a "due process" clause in Article 21.[40] They guarantee freedom from retroactive crimes,[41] double jeopardy,[42] self-incrimination,[43] imprisonment without being informed of the grounds of arrest,[44] the right to counsel on arrest,[45] the right to be produced before a magistrate within twenty four hours of arrest[46] and the right to magisterial supervision in case of imprisonment for a period beyond twenty four hours.[47] The framers' serious commitment to upholding the dignity of the individual is amply reflected in the constitutional ban on the traffic of human beings,[48] *'begar'* and other forms of forced labor,[49] and the employment of children below the age of fourteen years in any hazardous occupation or workplace.[50] These salutary provisions are grouped under the rubric — the right against exploitation.

Freedom of religious thought, belief, practice and "institutional existence" is also guaranteed.[51] It is interesting to note that the State has been vested with far reaching powers to regulate this freedom not merely in its secular aspects, in the interests of 'public order' and 'morality',[52] but also to effect social reform and compel public Hindu temples to open their doors to all classes of Hindus.[53] This was done with the intention of accelerating the emancipation of Indian women and abolishing the concept of untouchability.

Additional provisions were included to safeguard the rights of minorities — any distinct religious, cultural and linguistic group. These groups are free to establish and administer institutions to preserve their culture, language and script.[54] In cases where such institutions receive grants from the State, they are subject to the constitutional ban on the exercise of specific kinds of discrimination in their admission policies.[55]

The right to legal remedies is the last fundamental right. It se-

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mental in writing into the Constitution, the compensatory discrimination clause in favor of untouchables or the Scheduled Castes and Tribes.

40. *See infra* note 69 and corresponding text.

41. *See* INDIA CONST. art. 20 cl. (1).

42. *Id.* at art. 20 cl. (2).

43. *Id.* at art. 20 cl. (3)

44. *Id.* at art. 22 cl. (1).

45. Id.

46. *Id.* at art. 22 cl. (2).

47. Id.

48. *Id.* at art. 23 cl. (1).

49. Id.

50. *See id.* at art. 24. *See generally* Lee Tucker, *Child Slaves in Modern India: The Bonded Labor Problem*, 19 HUM. RTS. Q. 572 (1997) (exposing the Indian Government's lackadaisical approach in dealing with the problem of children caught in the death trap bonded labor in India).

51. *See* INDIA CONST. at arts. 25-26.

52. *Id.* at art. 25 cl. (1) - (2) (a).

53. *Id.* at art. 25 cl. (2) (b).

54. *Id.* at art. 29 cl. (1).

55. *Id.* at art. 29 cl. (2)

cures to every individual, citizens and aliens alike, the right to invoke the Supreme Court's original jurisdiction for enforcing any of the fundamental rights.[56] This is a very significant provision in that it prevents Part III from being reduced to mere chimerical constitutional claptrap.

C. Due Process: Elimination Of This Clause From The Draft Constitution

Although the framers borrowed heavily from the American Bill of Rights in framing Part III, the term "due process" is conspicuously absent in the Indian Constitution. Initially, the fundamental rights subcommittee[57] adopted the due process clause in its classic form.[58] As the drafting of the constitution progressed, however, some influential members of the Committee voiced their stiff opposition to its inclusion in the Constitution.[59] Influenced by the U.S. Supreme Court decisions of the early part of the century, B.N. Rau, the Constitutional Advisor to the Assembly, expressed his fear that due process would become an obstacle to social welfare legislation concerning tenancy reform, price control, wage legislation and working conditions of laborers.[60] He warned the members that the "[C]ourts manned by an irremovable judiciary not so sensitive to public needs in the social or economic sphere as the representatives of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant."[61]

Ultimately, and ironically, what hastened the elimination of the due process clause, was the advice of the U.S. Supreme Court justice, Felix Frankfurter.[62] Drawing Rau's attention to the obstruction to social reform and the excessive judicial power that the due process clause had created in the United States, the learned judge recommended the omission of this clause in the Indian Constitution.[63] Returning from the United States, Rau persuaded the Committee to drop the due process clause in the Draft Constitution because of the substantive interpretations that could be placed upon it.[64] If the dangers inherent in the substantive interpretation of due process had contributed to its demise, with regard to the property provisions in the Constitution, the conjunction of cataclysmic events in the wake of independence can be said to

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56. *Id.* at art. 32.

57. The provisions concerning fundamental rights in the Draft Constitution were mainly the product of the fundamental rights sub-committee. This committee began its task in February 1947. It submitted the Draft Consideration for the approval of the Constituent Assembly in February 1948.

58. AUSTIN, *supra* note 8, at 84-85. The classic statement of the right to due process is that of the Fifth Amendment of the U.S. Constitution. *See* U.S. CONST. amend. V.

59. AUSTIN, *supra* note 8, at 85-87; 101-03.

60. *Id.* at 86-87.

61. *Id.* at 87.

62. *Id.* at 103. *See* SORABJEE, *supra* note 2, at 96-97.

63. *Id.* at 96-97.

64. *Id.* at 102-04.

have influenced its non-application to the irreducible claims of life and individual liberty.

The horrors of partition and Mahatma Gandhi's brutal assassination by a Hindu fanatic in early 1948 influenced many members to opt for preventive detention, a harsh and draconian measure, and "place the citizens' freedom at the disposition of a legislature for the sake of a public peace in which social and economic reforms could be achieved."[65] Since "due process," applied to life and individual liberty, renders preventive detention or detention without trial unconstitutional, it was decided not to extend its safeguard to life and liberty as well.[66] Therefore, the Draft Constitution that was placed before the Constituent Assembly contained no due process clause. Article 15 of the Draft Constitution, which corresponds to Article 21 in the Constitution, simply read: "No person shall be deprived of his life or personal liberty except *according to procedure established by law.*"[67] The phrase, "procedure established by law," was borrowed from Article XXXI of the Japanese Constitution.[68]

D. Return Of Due Process: Infusion Of Its "Substance" Into The Constitution

The peculiarities of India's political and socio-economic condition discussed above, thus, compelled the framers to depart from the textual and substantive details of the U.S. Constitution. Nonetheless, they were committed to the doctrine of "due process," and therefore, they consciously wove its "substance" into the constitutional tapestry. The debates in the Constituent Assembly[69] and a closer reading of the fun-

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65. *Id.* at 102.

66. *Id.* at 86-87, 101-04.

67. *See* 1 THE FRAMING OF INDIA'S CONSTITUTION, 523 (B. Shiva Rao ed., 1967).

68. Id.

69. As noted earlier, the Draft Constitution submitted to the Constituent Assembly contained no due process clause. Many Constituent Assembly members strongly opposed the omission of due process safeguards for life and individual liberty. They pressed for restoring some safeguards for individual freedom. Dr. B.R. Ambedkar, the Chairman of the Drafting Committee, therefore moved an amendment introducing a new article: Article 15A (in the Draft Constitution). This article corresponds to Article 22 in the Constitution that guarantees to all citizens a fair trial in a duly established court of law. Referring to the apprehensions expressed by the Constituent Assembly members on the removal of "due process" from Article 15 of the Draft Constitution, he observed:

> We are therefore, now, by introducing Article 15A, making , if I may say so, compensation for what was done then in passing Article 15. In other words, we are providing for the *substance* of the law of "due process" by the introduction of Article 15A. IX. CONSTITUENT ASSEMBLY DEBATES 1497 (emphasis supplied) [hereinafter C.A.D.].

At the end of the debate on the inclusion of Article 15A he again stated:

> Ever since that Article (Article 15) was adopted, I and my friends had been trying in some way to restore the content of due procedure with its fundamentals without using the words "due process." I should have thought that the members who are interested in the liberty of the individual would be more than satisfied for being able to have the prospect before them of the provisions contained in Article 15A. *Id.* at 1556

damental rights provisions make this point clear. The fundamental freedoms clause (Article 19 clause (1)) sets out the various freedoms such as freedom of speech, assembly and so forth.[70] Clauses (2) to (6) of the same article provide explicit grounds on which "reasonable restrictions"[71] can be placed by the legislature to curb these various freedoms. It is ultimately the judiciary, however, that determines the reasonableness of these restrictions. These provisions, in effect, provide for nothing but due process and the police powers. For, after all, due process is equated with reasonableness, and the judiciary, itself, applies the test of reasonableness in determining the validity of a law restricting the liberty of the individual. The same is true of Articles 22[72] (right to a fair trial) and 20[73] that, in essence, define the contours of individual rights protected by due process and the corresponding police powers of the state. It is a pity that this crucial aspect escaped the attention of the learned judges of the Supreme Court for almost three decades.

E. Constitutional Supremacy And Judicial Review

India proudly shares with the United States, allegiance to the doctrine of judicial review. The express declaration of fundamental rights coupled from the introduction of judicial review[74] in the Constitution marks a radical departure with the pivotal British Constitutional doctrine of parliamentary supremacy. Although India is a federation (with unitary bias) of twenty three states, the Constitution provides for a single integrated judiciary. The Supreme Court, is the highest court in the land and has original, appellate and advisory jurisdiction. The law decided by it is binding on all courts functioning within the Indian "Union" or federation.[75]

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70. *See supra* notes 30-35, at 65 and accompanying text, at 6.

71. Article 13 of the Draft Constitution corresponds to Article 19 clauses (2)-(6), of the Indian Constitution (*see supra* note 36 and accompanying text). Initially, the restrictions permitted on the seven freedoms in Article 13 were not justiciable. One of the members of the Constituent Assembly, had made a prescient suggestion. He said:

> Sir, one speaker was asking where the soul in the lifeless article 13 was? I am putting the soul there. If you put the word "reasonable" there, the court will have to say whether a particular Act is in the interests of the public and, secondly, whether the restrictions imposed by the legislature are reasonable, proper and necessary in the circumstances of the case. The courts will have to go into the question and it will not be the legislature and the executive who could play with the fundamental rights of the people. It is the courts who will have the final say. Therefore, my submission is that we must put in these words "reasonable" or "proper" or "necessary," or whatever good word the House likes. I understand that Dr. Ambedkar is agreeable to the word "reasonable." Otherwise, Article 13 is a nullity. It is not fully justiciable now and the courts will not be able to say whether the restrictions are necessary or reasonable. VII. C.A.D., *supra* note 69, at 739 - 40.

72. *See supra* notes 44-47 and accompanying text.

73. See *supra* notes 41-43 and accompanying text.

74. INDIA CONST. at art. 13.

75. *Id.* at art. 141. The highest courts in each of the states comprising the Indian "Union" (Federation) are the "High Courts." All appeals from the High Courts lie to the Supreme Court. Under Article 226 of the Constitution, any citizen can invoke the High

The Indian Constitution was a product of the post World War II era – a seminal period in the development of human rights. Part III also reflects the inspirational impact of another great charter of liberties – the Universal Declaration of Human Rights – that was adopted by the U.N. General Assembly in 1948.[76] Many Fundamental Rights find mention in both the Universal Declaration and the International Covenant. Thus, Indian citizens had the good fortune to be constitutionally blessed with many of the International Covenant's rights twenty-one years before India became a signatory to it.[77] The table below shows the rights that are embodied in both the Indian Constitution and the International Covenant.

RIGHTS CONTAINED IN BOTH THE INDIAN CONSTITUTION AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

International Covenant on: The Right	***The Indian Constitution - Name of Civil and Political Rights***	***Fundamental Rights***
Article 8(3)	Article 23	Freedom from compulsory labor
Article 14(1)	Article 14	Right to Equality
Article 26	Article 15	Protection against Discrimination based on any ground
Article 25(c)	Article 16	Right to have access to public service
Article 19(1) & (2)	Article 19(1)(a)	Freedom of speech
Article 21	Article 19(1)(b)	The Right of Peaceful

Court's jurisdiction for the vindication of his Fundamental Rights. No citizen, however, is barred from bypassing the High Court (at the state level) and directly invoking the Supreme Court's (original) jurisdiction for the enforcement of his Fundamental Rights. Indeed, a citizen's right to approach the Supreme Court for the enforcement of his Fundamental Rights is itself a Fundamental Right (Article 32 -Right to Legal Remedies) under the Constitution [hereinafter *Universal Declaration*].

76. *Universal Declaration of Human Rights*, G.A. Res. 217A (III) U.N. GAOR Res. 71 U.N. Doc. A/811, (1948).

77. India ratified the *International Covenant* in 1978.

		Assembly
Article 22(1)	Article 19(1)(c)	Freedom of Association
Article 12(1)	Article 19(1)(d) &(e)	Freedom of Movement and Freedom to choose one's own residence

International Covenant on: The Indian Constitution - Name of the Right Civil and Political Rights Fundamental Rights		
Article 15 (1)	Article 20(1)	Freedom from ex-post facto legislation
Article 14(7)	Article 20(2)	Freedom from double jeopardy
Article 14(3)(g)	Article 20(3)	Freedom from Self incrimination
Article 6(1) & 9(1)	Article 21	Right to life and personal liberty
Article 9(2)(3) & (4)	Article 22 & 23	Right to legal remedies
Article 18(1)	Article 25	Freedom of thought, religion and conscience
Article 27	Article 29(1)	Rights of minorities

There are rights in the International Covenant such as right to a speedy trial;[78] right to free legal services;[79] freedom from imprisonment

78. *International Covenant* at art. 14 (3)(c).

on the inability to fulfill a contractual obligation;[80] right to travel abroad;[81] right to privacy;[82] freedom from torture, cruel, inhuman or other degrading treatment or punishment;[83] and a right to compensation to the victims of unlawful arrest or detention,[84] which do not find express mention in the Constitution. The manner in which these rights will be available to the Indian citizens depends on the fashion in which international treaty law is given domestic legal effect in India. Suffice it to say at this point, India subscribes to the dualist view of international law — provisions of international treaty law can be given internal legal effect only through domestic legislation. The Supreme Court reiterated this view in *Jolly George Varghese v. Bank of Cochin.*[85]

F. Judicial Interpretation In The Post-Independence Era:(1947-77): Restrictive Interpretation Of Article 21

Despite the Constitution's emphasis on individual liberty, the Supreme Court initially gave only a niggardly reading to Article 21. The Court's 1950 decision in the celebrated case of *A.K. Gopalan v. State of Madras*[86] underscores the judiciary's colonial hangover and conservative attitude. The petitioner who was detained under the Preventive Detention Act challenged its validity on the ground that it violated his right to life.[87] What the Court did was to treat each of the Constitution's fundamental rights as separate and distinct from one another.[88] The Court reasoned that when the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental right guaranteed by that particular article, no recourse can be had to a Fundamental Right conferred by another article.[89] On this basis, the Court treated Article 22[90] as a code unto itself.[91] The Court reasoned that since the procedure in the impugned act did not come into conflict with the relevant provisions of Article 22, its validity could be upheld.[92] The Court added that the impugned act did not have to satisfy the tests of any other fundamental rights. Further, the Court interpreted "law" in Article 21 like any other state made law, rather than an abstract principle of natural justice.[93]

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79. *Id.* at art. 14 (3)(d).
80. *Id.* at art. 11.
81. *Id.* at art. 12.
82. *Id.* at art. 7.
83. *Id.* at art. 17.
84. *Id.* at art. 9(5).
85. A.I.R. 1980 S.C. 470, 473-74.
86. A.I.R. 1950 S.C. 27, 31-32 (Judgment of Kania, J.,).
87. *Id.*
88. *Id.* at 34-38.
89. *Id.*
90. *See supra* note 18 and accompanying text.
91. A.I.R. 1950 S.C. 32.
92. *Id.*
93. *Id.*

This led the Court to hold that the impugned act — a law duly enacted by Parliament within its legislative powers — did not violate Article 21.[94]

By failing to invoke the procedural safeguards inherent in Article 21, the Court stunted the true meaning and scope of this venerable right. The Court also stifled the cumulative impact of Fundamental Rights by treating them piecemeal, rather than as an organic whole. It would take more than two decades for this erroneous approach to give way to a progressive interpretation.

As a first step towards building an egalitarian society, Parliament and many State Legislatures enacted land reform legislation much to the discontent of the landed gentry. Thus, in the post-independence era, disgruntled landlords were the chief litigants and it was their rights and grievances — property rights and compensation for property acquired by the state[95] — that became one of the dominant issues before the Court. During this period, the Court displayed an excessive zeal to protect individuals' property rights which triggered a great parliamentary — judiciary controversy.[96] The Court went so far as to declare that the Indian Parliament has no power to amend any fundamental right.[97] In keeping with its image of a protector of privileged interests, the Court also struck down the Presidential Order terminating the pensions

94. *Id.*

95. INDIA CONST. arts. 31 and 19 cl. (f).

96. The very first Amendment to the Constitution in 1951 resulted from the controversy over the Bihar Land Reforms Act of 1950. The Patna High Court had struck down this Act as unconstitutional on the ground that it violated the equal protection guarantee in Article 14. Consequently, the Constitution (First Amendment) Act, 1951, was enacted. It created what has come to be known as the "Ninth Schedule Immunity." Certain acts concerning right to property were placed in the Ninth Schedule of the Constitution, which was immunized from judicial review on the basis of Articles 14, 19 cl. (f), and 31. In State of West Bengal v. Bela Banerjee A.I.R. 1954 S.C. 170, the Court ruled that compensation for property acquired by the state must be "full and fair," which meant the market value. The precipitated the Constitution (Forty-fourth Amendment) Act, 1955. This Act appended an express provision to Article 31(2), which stated: "no law shall be called in question in any court on the ground that the compensation provided by the law is not adequate." Then came L.C. Golaknath v. State of Punjab, 1967 S.C. 1643. In 1970, in R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564, the Court stoutly insisted that it will apply the "market price" rule in determining the constitutionality of the "compensation" that the State shall offer or pay for property acquired by it. What resulted was the Constitution (Twenty-fifth Amendment) Act, 1971, which replaced the word "compensation" in Article 31 with the word "amount." By removing the word "compensation," Parliament hoped its troubles were over. The Act also provided an immunity against judicial review to statutes which purported to give effect to the policy of securing principles enshrined in Articles 39(b) and (c) of Part IV (dealing with material resources and monopolies). Judicial review continued until a status quo was reached in Kesavananda v. State of Kerela, A.I.R. 1973 S.C. 1461. In that case, the Court declared that the right to property was not a basic feature of the Constitution and could therefore be amended by Parliament. The legislatures were given the power to determine the amount of compensation for property acquired for public purpose subject to an ultimate scrutiny by the courts (emphasis added). Ultimately, Parliament deleted the right to property from the list of fundamental rights in 1977.

97. *See* L.C. Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643.

and other privileges of the erstwhile princes in India.[98]

Confronted with a succession of resourceful judicial opinions insisting on full compensation, Parliament sought to acquire far reaching amendatory powers to reinforce its supremacy.[99] Thus, the crucial matter of accomplishment of land reform measures was converted into an issue of the Court's power of judicial review versus parliamentary sovereignty. This was ultimately resolved in *Kesavananda Bharathi v. State of Kerela.*[100] In a delicately balanced response, the Court placed an effective break on the emerging trend of parliamentary despotism. It accomplished this by enunciating an innovative doctrine of inviolability of the Constitution's "basic structure." The rationale of the Court's judgment in this historic case is simple and cogent. Since Parliament is only a creature of the Constitution, the Court declared that it can amend the Constitution, but it cannot use its amending power to destroy the Constitution's "basic structure."[101] Accordingly, since the Supreme Court's power of judicial review is a cardinal feature of the Constitution, Parliament cannot, even by an amendment, exclude the Court's scrutiny of laws that profess to fulfill directive principles but violate citizens' fundamental rights.[102] The Court reaffirmed and expanded this doctrine beyond the right to property in *Indira Gandhi v. Raj Narain.*[103] The Court struck down a Constitutional Amendment which made the Prime Minister's election to Parliament unassailable in a court of law on the ground that it violated the "democratic set-up" and the "rule of law" that were essential features of the Constitution's "basic structure" [104]

Although the Court had repudiated Parliament's claim to absolute power and lessened its scope for repression, it nonetheless acquiesced in the subversion of the Constitution during an emergency.[105] In *Addi-*

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98. *See* Madhava Rao Scindia v. Union of India, A.I.R. 1971 S.C. 530.

99. Parliament enacted two Constitutional Amendments: Constitution (Twenty-fourth Amendment) Act, 1971, and Constitution (Twenty-fifth Amendment) Act, 1971. Both Amendments had great political significance. The former Act sought to provide the widest possible meaning to the word "amendment" in the Constitution so as to empower Parliament to add, vary, or repeal any provision of the Constitution. The latter provided an immunity from judicial review to acts which purported to give effect to securing directive principles contained in the sub-clause (art. 39(b) and (c) dealing with material resources and monopolies). Taken to their logical outer limits, such immunities rendered judicial protection of Fundamental Rights useless.

100. (1973) 4 S.C.C. 225. *See generally* U. BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES 65-110 (N.M. Tripathi Pvt. Ltd. 1985) (analyzing and discussing the significance of the decision) [hereinafter BAXI.]

101. (1973) 4 S.C.C. 486.

102. *See id.* at 366, 454, 486.

103. (1975) Supp. S.C.C. 1.

104. *See id.* at 87-93.

105. In 1975, Mrs. Indira Gandhi, then Prime Minister, was held guilty of corrupt electoral practices by the judiciary. This created a furor among the opposition party members in Parliament who called for her immediate resignation. What ensued was a proclamation of emergency by the President of India at the behest of Mrs. Gandhi. Drastic preventive detention laws were enacted and all of Mrs. Gandhi's political opponents were detained without trial. The national press was gagged and civil liberties were drastically

tional District Magistrate v. Shiv Kant Shukla,[106] the Court had failed to stand four-square between the citizens and the chasm of unrestrained power. A Constitution Bench of the Court held that the proclamation of emergency and the Presidential Order, suspending Article 21, precluded the Court from considering the constitutional validity of any preventive detention laws.[107]

Deeply wedded to the traditional concept of property rights, the Court had for three long decades displayed scant regard to considerations of creation of a welfare state in India. It had consequently served as a bastion not of human, but of property rights. Further, it had forsaken its vital role of the custodian of the Constitution during emergency — India's gravest internal crisis since independence. Thus, despite some landmark decisions, the Supreme Court of the post-independence era made no enduring contributions towards strengthening constitutionalism in the subcontinent and left unfulfilled the constitutional aspirations of the vast majority of the citizens.

II. HUMAN RIGHTS JURISPRUDENCE

A. The Supreme Court Takes Suffering Seriously[108]

In the aftermath of emergency, the Supreme Court carved a role for itself in Indian politics quite differently from that which it had played since independence. One of the main reasons is that the concept of constitutional interpretation underwent a fundamental change in the late seventies. The Court's path-breaking decision in *Maneka Gandhi v. Union of India*[109] was the critical moment in this transformation. Thenceforth, the Court resuscitated judicial activism after the passivity that followed its deference to the executive during emergency.[110] The Court, however, did this for a purpose previously absent from its history, namely, to render constitutional liberties a living reality for the most vulnerable and powerless sections of Indian society. The Court's metamorphosis, from an executive serving institution to that of a dynamic one poised to exercise its solemn constitutional responsibility with aplomb and imaginative realism, "was partly an aspect of the post-

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curtailed. The emergency remained in force from June 1975-March 1977.

106. Additional Dist. Magistrate v. Shiv Kant Shukla, A.I.R. 1976 S.C. 1206, 1207.

107. *See id.* at 1241. As a result of the Constitution (Forty-fourth Amendment) Act, 1977, Article 21 can no longer be suspended during the proclamation of an emergency.

108. I have respectfully borrowed the idea for this appropriate heading from the eminent jurist Dr. Upendra Baxi's seminal article on the role of the Supreme Court in the post-emergency era. *See* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, in* THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 33 (N. Tiruchelvan & R. Coomaraswamy, eds., 1987).

109. A.I.R. 1978 S.C. 597, 616 [hereinafter *Maneka Gandhi*].

110. *See* A.I.R. 1976 S.C. 1207.

emergency catharsis."[111]

B. *Creative Expansion of Article 21*

1. Right To Travel Abroad

In *Maneka Gandhi*, the Court observed that fundamental rights "weave together a pattern of human rights guarantees" and that they are not mutually exclusive and distinct.[112] On this line of reasoning, the Court held that any act that violated article 21 must meet the additional tests of anti-arbitrariness of Article 14 and reasonableness of the fundamental freedoms clause.[113] In the Court's view, Article 21 covers a plethora of rights — some which are implicit and others that are expressly mentioned as fundamental rights.[114] In light of the constitutional ethos, mere freedom from physical restraints was not the true scope of the term "personal liberty." Rather, the term brought within its pale, a variety of rights that contributed to the blossoming of an individual's personality such as freedom to travel abroad.[115]

Significantly, the Court did not confine its scrutiny to the scope of an individual's personal liberty. Breaking from the past, the Court examined the nature of a procedure by which a person could be deprived of his life or personal liberty. After an elaborate survey of Anglo-American jurisprudence, the Court emphatically declared that the procedure must be infused with the principles of natural justice.[116] The procedure must be right, just and fair. It cannot be "arbitrary, fanciful or oppressive."[117]

Maneka Gandhi set the stage for the efflorescence of Article 21. In the years that ensued, Article 21, infused with the doctrines of anti-arbitrariness and reasonableness, became a potent weapon in the hands of a transformed judiciary that was consciously committed to redressing the grave and glaring injustices of Indian society.

2. Right To Privacy

The right to privacy was perhaps the first dimension of Article 21 that the Court unfolded, as early as in 1963, in *Kharak Singh v. State of Uttar Pradesh.*[118] The petitioner, an ex-dacoit contended that police surveillance, including their domiciliary visits to his house, violated his right to personal liberty.[119] Significantly, the Court examined the scope

111. *See* Baxi, *supra* note 108, at 36.
112. A.I.R. 1978 S.C. 597, 620-21.
113. *See id.* at 622-24.
114. *Id.* at 622.
115. *See id.* at 619-22. The Court drew attention to its earlier judgment in *Satwant Singh v. Assistant Passport Officer*, A.I.R. 1967 S.C. 1836 (holding that Article 21 included the right to travel abroad).
116. *See id.* at 624.
117. *Id.*
118. Kharak Singh v. State of U.P., A.I.R. 1963 S.C. 1295 (Judgment of Ayyangar, J.,).
119. *See id.* at 1298.

and content of the words "life" and "personal liberty"[120] in light of individual dignity — a cherished value underscored in the Constitution.[121] After an analysis of the issues involved and noting that freedom from unlawful searches and seizures was absent in the Indian Constitution, the Court concluded that domiciliary visits were in violation of a common law right to privacy.[122] Freedom from encroachments on a citizen's private life was an "ultimate essential of ordered liberty" inherent in Article 21.[123] The Supreme Court has reiterated that Article 21 guarantees the right to privacy in a 1991 decision.[124]

The Court's historic ruling, that law under Article 21 had to be fair, just, and reasonable in its procedural essence, had a humanizing impact on the lives of all those whose liberties were curtailed. Thus, prisoners deprived of certain fundamental freedoms were now brought under the Constitution's protective mantle.[125]

3. Freedom From Torture, Cruel, Inhuman And Degrading Treatment Or Punishment

The case of *Sunil Batra v. Delhi Administration*[126] set the trend for the development of a humane prison jurisprudence in India. Adopting a poignant definition of life given by an American judge, the Court poured new meaning and content into this term which is present in Article 21.[127] "Life, even behind the iron bars," said the sensitized judiciary, "did not mean mere 'animal existence'."[128] This led the Court to hold that death row prisoners were entitled to all the amenities on par with ordinary prisoners, that is, food, clothing and a bed.[129] Infliction of torture, mental or physical, on such prisoners who were in the safekeeping of prison authorities, was unconstitutional.[130]

The Court did not stop with humanizing the life style behind the iron bars. Applying *Maneka Gandhi's* rule of fair procedure to a prison setting, the Court declared inhumane prison practices, such as arbitrary imposition of solitary confinement and use of iron chains on prisoners,[131] infliction of physical cruelty and torture,[132] routine handcuff-

120. *Id.at* 1305-1306

121. *See* INDIA CONST. art. 21.

122. A.I.R. 1963 S.C. 1296, 1302.

123. *Id.*

124. *See* State of Maharashtra v. M.N. Mardikar, A.I.R. 1991 S.C. 207.

125. As a consequence of the Court's ruling in *A.K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27, individuals whose liberties were curtailed by a duly enacted law (e.g., prisoners) were denied fundamental freedoms, such as the right to free speech and expression, property, and intellectual pursuits.

126. A.I.R. 1978 S.C. 1675, 1691.

127. *See id.* (citing Justice Field's definition of "life" in the case of Munn v. Illinois, 94 U.S. 113, 142 (1877).

128. *See id.* at 1691, 1703, 1706.

129. *See* A.I.R., 1978 S.C. at 1703.

130. *Id.*

131. *See* A.I.R, 1978 S.C. at 1691 (citing Justice Field's definition of "life" in Munn v. Illinois, 94 U.S. 113, 142 (1877).

ing of prisoners,[133] and denial of permission to prison inmates to have interviews with their attorneys and family members,[134] to be violative of Article 21.

The following passage strikingly portrays the cumulative impact of the principles of fair procedure and anti-arbitrariness in outlawing prison caprice and cruelty:

> True, our constitution has no due process clause or the VIII amendment, but in this branch of law after . . . *Maneka Gandhi* the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive is unarguably unreasonable and arbitrary and is shot down by articles 14 and 19 and if inflicted with procedural unfairness falls foul of article 21. Part III of the constitution does not part company with the prisoner at the gates. Judicial oversight protects the prisoners' shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authorities.[135]

Significantly, the Court did not confine its task in these cases to fashioning an individual relief for the petitioners. Faced with the traumatic abridgment of prisoners' rights, the Court seized the opportunity to develop remedial processes to prevent similar future injustices. To make prisoners' rights viable, the Court directed the district magistrates concerned, to inspect the prisons in their jurisdictions once a week; to receive complaints from individual prisoners; to take remedial actions where they were deemed necessary; and to provide a grievance box to which all prisoners were to be given free access.[136] The Court did not stop with laying down such elaborate guidelines for the treatment of prisoners. It went a step ahead and vested the power of curtailing prisoners' liberties in judicial officers alone. It directed them to provide all prisoners a hearing complying with the principles of natural justice before revoking any benefit available to them.[137]

4. Right To A Speedy Trial

Incarceration as a pretrial prisoner for a patently long period of time awaiting one's trial is tantamount to torture that takes many protean forms. In *Hussainara Khatoon v. State of Bihar*,[138] the Court was faced with the desperate plight of several prisoners languishing in jail for years without their trials having been commenced. As a consequence of being denied a trial, leave alone a speedy trial, some of these persons were incarcerated for periods exceeding the punishment that

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132. *See* A.I.R. 1980 S.C. 1579, 1584.
133. *See* Sunil Batra v. Delhi Admin., A.I.R. 1980 S.C. 1535, 1585.
134. *See* Francis Coralie Mullin v. Union Territory of Delhi, A.I.R. 1981 S.C. 746.
135. A.I.R. 1978 S.C. 1690.
136. *See* A.I.R. 1980 S.C. 1602-04; A.I.R. 1980 S.C. 1593-94.
137. *See* cases cited in notes 131-134.
138. Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360.

could have been awarded to them had they been tried and convicted.[139] Given the broad sweep and content of Article 21, it was not difficult for the Court to rationalize that no procedure, which does not ensure a speedy trial, could be regarded as reasonable, fair or just. Accordingly, the right to a speedy trial — "a reasonably expeditious trial" — is implicit in Article 21.[140] The Court ordered the release of all the pretrial prisoners on personal bond.[141]

5. Right To Free Legal Services

The next important step of the Court was to use the guarantees of fair procedure and equal protection to ensure equality in criminal justice. By articulating the right to free legal services, the Court strove to ensure equality as between rich and poor defendants and to eliminate the inherent equality that exists between the prosecution and the defendant. Stating that the "Gideon's trumpet had been heard across the Atlantic," the Court held that free legal services is an "imperative processual piece of criminal justice" implicit in Article 21.[142] In *Khatri v. State of Bihar*,[143] the Court took the opportunity to make an important clarification pertaining to the new constitutional right that it had hitherto enunciated. Commenting on the excuse of financial and administrative inability that the state can put up to avoid its constitutional obligation, the Court rightly pointed out that "the law does not permit any government to deprive its citizens of constitutional rights on the plea of poverty."[144] The Court made it mandatory for every magistrate and sessions judge to inform the accused of his constitutional right to free legal services at the cost of the state.[145] Under *Hussainara Khatoon* and its progeny, every prisoner is entitled to a justiciable right to free legal services and to a speedy trial.[146]

The tremendous impact of these landmark decisions can be best summarized in the Court's own words:

> [A]ny form of torture, or cruel, inhuman or degrading treatment would be offensive to human dignity and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure established by law. But no law which authorizes and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness. It would plainly be unconstitutional and void as being violative of Articles 14 and 21. It

139. *Id.* at 1361.

140. *Id.* at 1365.

141. *Id.* at 1364, 1377.

142. M.M. Hoskot v. State of Maharashtra, A.I.R. 1978 S.C. 1548, 1554 (Judgment of Krishna Iyer, J.).

143. Khatri v. State of Bihar, A.I.R. 1981 S.C. 928.

144. *Id.* at 931 (citing *Rhem v. Malcom*, 377 F.Supp. 995).

145. *Id.* at 931.

146. *See, e.g.*, Kedar Pahadiya v. State of Bihar, A.I.R. 1982 S.C. 1167; Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378; Hussainara Khatoon v. State of Bihar (No.2), A.I.R. 1981 S.C. 736; Sukhdas v. Union Territory, A.I.R. 1986 S.C. 991.

would thus be seen that there is implicit in Article 21 the right to protection against torture, cruel inhuman and degrading treatment or punishment which is enunciated in Article 5 of the Universal declaration of human rights and Article 7 of the International Covenant on Civil and Political Rights.[147]

6. Freedom From Imprisonment For The Inability To Fulfill A Contractual Obligation

The right to free legal services was not the last civil and political right that was enunciated by the Court. Other crucial human rights were to be unfolded. In *Jolly George Varghese v. Bank of Cochin,*[148] the Supreme Court ruled that article 21's humane imperative for a fair procedure obligated the State not to incarcerate a judgment debtor who either could not afford to pay his debt or had money on which there were other pressing claims, so as to decree payment.[149] Such an interpretation was in consonance with Article 21's emphasis on human dignity.[150] Thus, Article 21 was infused with the flavor of Article 11 of the International Covenant that enshrines the freedom from imprisonment for the inability to fulfill a contractual obligation.

7. Socioeconomic And Environmental Dimension To Right To Life In International law

Article 6 of the International Covenant and Article 3 of the Universal Declaration of Human Rights embody the right to life — the most venerable human right. Taken in its wider and proper dimension, the fundamental right to life has both positive and negative connotations. The right to life comprises the right of every human being not to be arbitrarily deprived of his life (right to life) and the right to have the adequate means of subsistence and a decent standard of life. Such a broad meaning of the right to life is inevitable even in the case of those who insist on regarding it strictly as a civil right. Without an adequate standard of living that provides access to nutritious food, health and medical care, adequate housing, the right to life would be meaningless and illusory. From this perspective, the right to a healthy and a wholesome environment appears as a natural corollary of the right to life. [151]

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147. A.I.R. 1981 S.C. 753.

148. A.I.R. 1980 S.C. 470.

149. *Id.* at 475.

150. *Id.*

151. Prof. Louis B. Sohn opines that principle 1 of the Stockholm Declaration supports an individual's right to an environment. *See* PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 191 (1992).

Furthermore, the right to a healthy environment is recognized in a number of treaties. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, is titled "Right to a Healthy Environment" and states: "Everyone shall have the right to live in a healthy environment and to have access to basic public services" and; "The States Parties shall promote the protection, preservation and improvement of the environment." Additional Protocol to the American

Today, governments are under the duty to pursue policies and administer programs which are designed to ensure access to the means of survival for all individuals. The Supreme Court deserves to be richly commended for its wider characterization of the threats to the right to life in tune with the raw realities of the Indian socioeconomic and environmental milieu.

8. Right To Earn A Livelihood

An interesting issue came before the Court in the case of *Olga Tellis v. Bombay Municipal Corporation.*[152] A journalist challenged the Municipal Corporation's decision to evict pavement dwellers who were in the path of a modernizing freeway. The petitioner argued that since the pavement dwellers would be deprived of their livelihood if they were evicted and deported to their place of origin, their eviction was tantamount to a deprivation of their right to life and hence unconstitutional.[153] This argument found a receptive audience in the Court. The Court pointed out that although the state could not be compelled by way of affirmative action to provide means of subsistence to all its citizens, it could not deprive a person of the means to his livelihood.[154] Depriving a person of his right to livelihood, except by a law that was right, just and fair, was tantamount to depriving him of his life.[155] The Court halted all evictions of pavement dwellers and the demolition of huts for a period of four years following the filing of the writ petition.[156] The Court directed the municipal authorities to provide alternative

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Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *opened for signature* Nov. 17, 1988, art. 11,O.A.S.T.S. No. 69, *reprinted in* BASIC DOCUMENTS OF HUMAN RIGHTS 521, 525 (Ian Brownlie ed., 1992) [hereinafter BASIC DOCUMENTS].

Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights states: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 12(2) further states: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (b) The improvement of all aspects of environmental and industrial hygiene." International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 12 (1) and (2), 993 U.N.T.S. 3, *reprinted in* BASIC DOCUMENTS, *supra* notes 114, 118. *See also* Convention on the Rights of the Child, Nov. 20, 1989, art. 24 (2)(c), 28 I.L.M. 1448, 1466 (1989), *reprinted in* BASIC DOCUMENTS, *supra* notes 182, 191 (requiring States' Parties to provide children with nutritious food and potable drinking water viz. controlling health risks due to environmental contamination).

Moreover, the constitutions of at least 44 countries, ["in the world" is unnecessary] including the Indian Constitution, contain provisions for the protection of the environment in one form or another. *See* Alexandre Charles Kiss, *An Introductory Note to a Human Right on Environment, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 200 (Edith Brown Weiss ed., 1990).

152. A.I.R.1986 S.C. 180.

153. *Id.* at 183-184.

154. *Id.* at 193-94, 196.

155. *Id.* at 195.

156. *Id.* at 204.

sites or accommodation to the slum and pavement dwellers within a reasonable distance of their original sites.[157] The Court also took the opportunity to strongly urge the municipal government to implement a proposed housing scheme for the poor.[158]

More recently, in the case of *Banawasi Seva Ashram v. State of Uttar Pradesh*,[159] tribals were being ousted from their forest land by the National Thermal Power Corporation Ltd. (NTPC) for the establishment of a huge thermal power project.[160] Observing that "the tribals for generations had been using the jungles around for collecting the requirements for their livelihood — fruits, vegetables, fodder, etc." — the Court issued an order making such acquisition of land conditional on NTPC's arrangements to provide certain Court-approved facilities to the ousted forest dwellers.[161] The Court has relied on the right to livelihood, implicit in Article 21, in making interim orders requiring state agencies to rehabilitate tribals in cases involving the construction of dams and the consequent dislocation of tribals. [162]

9. Right To A Clean And A Wholesome Environment

In taking its first step towards sculpting an environmental dimension to Article 21, the Court acted on the implicit premise that environmental degradation affected the quality of life. The Court also hinted at recognizing the environment as intrinsically worthy of protection. This new and enlightened thinking is reflected in the Court's reasoning in *Rural Litigation & Entitlement Kendra, Dehradun v. State of Uttar Pradesh*,[163] one of the first environmental complaints that was addressed to it. The Court stated:

> Preservation of the environment and to keep the ecological balance unaffected is a task not only of governments but which every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Article 51a(g) of the constitution.[164]

In that case, the Court issued interim orders halting the operation of limestone quarries in the Doon valley, a picturesque hill station near the Himalayan range on the ground that mining had a deleterious impact on the surrounding environment.[165] Although the Court did not specifically mention Article 21 in this case, it is obvious that the Court was concerned with the "non-violent" threats to "life" that emanated

157. *Id.*
158. *Id.*
159. A.I.R. 1987 S.C. 374, 375, 378.
160. *Id.* at 374-75.
161. *Id.* at 374.
162. *See, e.g.*, Karajan Jalasay Y.A.S.A.S. Samiti v. State of Gujarat, A.I.R 1987 S.C. 532; Gramin Sewa Sanstha v. State of Uttar Pradesh, 1986 (Supp) S.C.C. 578.
163. A.I.R. 1985 S.C. 652.
164. *Id.* at 656.
165. *Id.* at 654-56.

from a gradually deteriorating environment.

In *Subhas Kumar v. State of Uttar Pradesh*[166] the Court readily accepted a slow, steady and subtle method of extinguishment — severe pollution — to be violative of the right to life. The Court reasoned that life in its proper dimension could not be enjoyed unless the ecological balance and the purity of air and water were preserved.[167] This led the Court to come out with an express declaration that "any action that would cause environmental, ecological, air, water pollution etc., should be regarded as amounting to a violation of Article 21."[168] In its 1995 decision in *Virendra Gaur v. State of Haryana* the Supreme Court clearly reiterated that Article 21 includes a *Right to a clean and a wholesome environment.*[169]

C. Universal Scope of Fundamental Rights

1. Enforceable Against Non-State Actors

One message that comes through clearly in the above cases is that in India it is the state that is the principal violator of the citizens' human rights. However, acute inequalities and maldistribution of wealth and resources engender many exploitative relationships between individuals in civil society. Thus, the silent exercise of power by private entities over other humans also results in some of the gravest injustices and atrocities. In this regard, it is interesting to note that many of the fundamental rights provisions are universal in scope; they have not been addressed merely to the state.[170] In light of these facts, one is prompted to pose the question: Should non-state entities' actions in certain circumstances be subject to the Court's scrutiny when they are violative of Part III's provisions?

In *People's Union for Democratic Rights v. Union of India,*[171] the Court's attention was drawn to the pitiable plight of several laborers who were silently suffering the cruelty of contractors who were paying them less than the legal minimum wages.[172] The contractors had been employed by the Delhi city authorities in connection with the running of the Asiad Games.[173] The Court struck down the government's specious plea that non-observance of labor laws by the contractors did not

166. J.T. 1991 (1) SC 531; 1991 (1) S.C. 598, 605.

167. *See* J.T. 1991 (1) S.C. 538.

168. *Id.*

169. (No.2) A.I.R. 1982 S.C. 577.

170. In Part III of the Constitution of India, the articles dealing with untouchability (art. 17), "fundamental freedoms" (art. 19), due process (art. 21), anti-exploitation (arts. 23-24), and religious and cultural rights (arts. 25, 26, 29 and 30) are all couched in general terms; they have not been addressed merely to the State. These rights can, therefore, be claimed against anybody without establishing a connection with State action. INDIA CONST. pt. III, arts. 17, 19, 21, 23-26, 29 and 30.

171. People's Union for Democratic Rights. V. Union of India, A.I.R. 1982 S.C. 1473.

172. *Id.* at 1483-84.

173. *Id.* at 1484.

amount to a fundamental rights violation.[174] The Court cogently reasoned that many benefits conferred by the labor laws were intended to ensure the workers' basic human dignity, a cherished human value inherent in Article 21.[175] Hence, any violation of the labor laws, even by private contractors, was a transgression of Article 21.[176] Further, denial of minimum wages to the laborers amounted to "forced labor" — a violation of freedom from exploitation — a right that was "enforceable against the whole world."[177] The Court proceeded to make the Delhi Administration responsible for the contractors' non-observance of labor laws.[178]

Not long after, came *Bandhua Mukti Morcha v. Union of India*,[179] a case concerning the existence of bonded labor in certain stone quarries. Although those guilty of violations were lessees of the quarries, the Court held the Union of India and the government of the state of Haryana responsible for the enforcement of the labor provisions, and the rehabilitation of the workers who were released.[180]

2. Right To Education

More recently, in *Mohini Jain v. State of Karnataka*,[181] the Court ruled that private institutions imparting education were amenable to the discipline of Part III. Declaring that the right to education was a fundamental right, the Court observed that the state was constitutionally obliged to provide educational facilities to its citizens at all levels.[182] No citizen could lead a life of dignity ensured under Article 21 unless he was educated.[183] Therefore, private educational institutions, receiving accreditation from the state, could not charge an exorbitant tuition fee for educational courses.[184] Commercialization of education was both repugnant to the Indian cultural ethos and violative of the Constitution. [185]

The salutary consequence of these pronouncements is that, today, the Court has begun drawing "private governments into the tent of state action."[186] Protection of human rights can never be meaningful and comprehensive, unless the Court maintains its momentum in subjecting diverse discriminatory and exploitative practices and relations

174. *Id.*
175. *Id.* at 1485.
176. *Id.* at 1484-86.
177. *Id.* at 1485.
178. *Id.* at 1484, 1491.
179. Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.
180. *Id.* at 811-12; 828-34.
181. A.I.R. 1992 S.C. 1858, 1871. *See also* Ajay Hasia v. Khalid Mujib, A.I.R. 1981 S.C. 481; Unnikrishan v. State of Bihar (1993) 1 S.C.C. 645.
182. Mahini Jain v. State of Karnataka, AIR 1992 S.C. at 1864-65.
183. *Id.* at 1863.
184. *Id.* at 1870-71.
185. *Id.* at 1865.
186. Sukhdev v. Bhagatram, A.I.R. 1975 S.C. 1331, 1355 (citing Arthur S. Miller, *The Constitutional Law of the "Security State*, 10 STAN. L. REV. 620, 664 (1958)).

between institutions and men and women in civil society to the discipline of Part III.

3. Right To Compensation For Violation Of Article 21

The process of Article 21's revitalization would seem fascinating. But, one cannot avoid believing that protecting the right to life would be futile, if the Court *merely* punished a state official or a non-state entity for its transgression. Indeed, in the absence of a constitutional right to compensation for its violation, the grand declaration of freedom to life and liberty would be reduced to a whisper, or a mere nullity.

It is fortunate that it was not long before the Court declared that ordering the payment of monetary compensation for the violation of Article 21 fell within its wide ranging powers. The Court's bold stroke, in 1983, added new vigor to Article 21 in this regard. In *Rudul Shah v. State of Bihar*,[187] the Court rightly conceded that the right to life would be denuded of its significant content, unless those who violated it were compelled to pay compensation. For the first time, the Court awarded compensation to the petitioner, who was tortured while in police custody.[188] By another bold stroke, in *M.C. Mehta v.. Union of India*,[189] the Court ordered a privately owned company, that had permitted the emission of noxious gases, to compensate the victims of the gas leak. With the Court's 1993 decision in *Nilabati Behera v.. State of Orissa*,[190] a constitutional right to monetary compensation, for the unlawful deprivation of an Article 21 right, seems well entrenched.[191] Articulating the underlying principle on which the liability of the state arose for payment of compensation, the Court stated:

> It may be mentioned straight-away that award of compensation in a proceeding under art. 32 by this Court . . . is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defense in private law in an action based on tort.[192]

Awarding compensation to the petitioner, a poor woman, for the death of her son in police custody, the Court rightly pointed out that this constitutional remedy had to be made more readily available in the case of the poor who lacked the means to vigorously pursue their rights

187. A.I.R. 1983 S.C. 1086, 1089.

188. Id.

189. M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965, A.I.R. 1987 S.C. 982; A.I.R. 1987 S.C. 1086. *See also* Bandhu Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802; Sebastian M. Hongray v. Union of India, A.I.R. 1984 S.C. 571; Bhim Singh v. State of Jammu and Kashmir, A.I.R. 1986 S.C. 494.

190. A.I.R. 1993 S.C. 1960.

191. *Id.* at 1970. Such a right was distinct from, and in addition to, a right to recover damages in private law. *See id.*

192. *Id.* at 1966 (emphasis added).

in private law.[193]

4. Discussion

A comparison of the Court's decision in the *A.K. Gopalan* case,[194]with its later decisions in the post-emergency era, demonstrates that although the Constitution guarantees human rights, judicial reasoning can either negate those rights or uphold them. Much credit then goes to the Supreme Court judges of the late 1970s for infusing Article 21 with vitality and enriching its content. Today, many international human rights, such as right to privacy; freedom from torture, cruel, inhuman and degrading treatment or punishment; right to a speedy trial; right to free legal services; freedom from imprisonment on the inability to fulfill a contractual obligation; right to compensation for unlawful arrest or detention; and right to education, have become part of India's constitutional heritage solely on account of perceptive judicial exegesis. In its expansive interpretation of Article 21, the Court has articulated rights that may not have been contemplated by the founding fathers. Even so, its construction is in active unison with the inherent spirit of the Constitution that underscores the dignity of the individual and the promotion of a humane society. These decisions also demonstrate that the gradual expansion of Article 21's ambit has resulted in a concomitant increase in the state's responsibility towards its citizens' total well being.

If Article 21 has become a living reality for some deprived citizens, it is largely because of the expansive manner in which the Supreme Court has interpreted the clause. The result has been a profound revolution — for social justice — ever achieved by essentially peaceful means. Indeed, it was a judge-led revolution. It is noteworthy that the judicial renaissance of the post-emergency era bears the individual insignia of a few activist judges such as P.N. Bhagwati,[195] Krishna Iyer, O. Chinnappa Reddy, D.A. Desai, and R.S. Pathak. Many of the landmark decisions analyzed above were handed down by these individuals.

D. The Procedural Dimension

The Supreme Court did not confine its juristic creativity to merely unraveling the varied facets of Article 21. The Court's newly articulated rights were not individual rights of eighteenth or nineteenth century vintage. Indeed, they were "meta-rights" or collective social rights that rendered the traditional Anglo-Saxon legal strategies woefully inadequate for their effective realization.[196] Responding to the challenges

193. *Id.* at 1969-70.

194. *See* A.I.R. 1950 S.C. 28.

195. Justice Bhagwati, former Chief Justice of the Supreme Court of India, was the chief architect of the Social Action Litigation (or the Public Interest Litigation) movement in India.

196. *See* P.N. Bhagwati, *Social Action Litigation: The Indian Experience, in* JUDICIARY IN PLURAL SOCIETIES 21 (N. Tiruchelvan & R. Coomaraswamy eds., 1987) [hereinafter

erected by the emergence of these new rights and keenly aware of the tremendous obstacles the downtrodden face in asserting their basic human rights, it initiated bold new judicial mechanisms with imaginative realism. These procedural innovations formed, in essence, the hallmarks of a radically new category of litigation that the Court initiated and fostered, such as social action litigation or public interest litigation.[197]

1. Expansion Of Locus Standi

Facilitating popular access to courts is perhaps one of the most significant steps taken by the Supreme Court in fulfilling the constitutional aspirations of the downtrodden. Abandoning the technical and conservative procedural rules of *locus standi* developed by Anglo-Saxon jurisprudence, the Court enabled "public spirited individuals" to bring legal action on behalf of many hapless citizens whose rights had been violated and against the state to compel it to perform its "public duties." The following passage sums up the Court's approach to the issue of *locus standi* in public interest cases:

> [W]here a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public can maintain an action for an appropriate direction order or writ . . . .[198]

Thus, in one stroke, the Court had extended the range of people with effective access to justice and the variety of issues that it could adjudicate upon. In rejecting public interest petitions motivated by malice and/or other personal gain, however, the Court made it clear that the public spirited litigant was expected to be acting *bona fide* and not for personal gain or any oblique consideration.[199] This procedural innovation served as a boon to many public spirited citizens, NGOs, journalists, social workers, environmental organizations, ecological groups, and activist lawyers who were now able to espouse challenges with a public interest flavor. Petitions concerning the horrifying prison

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Bhagwati].

197. There is a lot of literature on public interest litigation in India. *See, e.g.*, P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561 (1985); Upenda Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, *in* JUDICIARY IN PLURAL SOCIETIES 32 (N. Tiruchelvan & R. Coomaraswamy eds., 1987); G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L.Q. 66 (1991); Soli Sorabjee, *Protection and Promotion of Fundamental Rights by Public*, 51 REV. INT'L. COMM'N OF JURISTS. 31 (1993).

198. S. P. Gupta v. President of India & Others, A.I.R. 1982 S.C. 149, 188.

199. *Id.* at 189.

scene;[200] torture of children and women in police custody and state-run protection homes;[201] existence of bonded labor and forced labor;[202] eviction of pavement dwellers;[203] protection of India's cultural heritage (erosion of Taj Mahal's exquisite marble facade by pollution);[204] pollution of the sacred river Ganges;[205] air pollution caused by a chlorine Plant;[206] and by motor vehicles;[207] a plea to stop the construction of the *Tehri* Dam;[208] environmental degradation caused by limestone quarrying;[209] and a plea to stop the disingenuous strategy of issuance of ordinances by the Bihar State government done with a view to usurp legislative power,[210] soon began to flood the Court. In 1993, in *Tarun Bharat Sangh, Alwar v.. Union of India*,[211] a social action group was permitted standing to bring suit for the halting of mining operations in the Sariska Tiger Park.

2. Epistolary Jurisdiction

"Epistolary jurisdiction" is another momentous procedural innovation that the Court introduced. Any concerned citizen, NGO or a public spirited individual *could by writing a letter invoke the highest court's original jurisdiction* for the vindication of the Fundamental Rights of any aggrieved individual or group of oppressed people. Forsaking procedural formalities, the Court then treated such epistles as writ petitions, investigated the complaint (more often than not through Court-appointed commissions of inquiry), made provision for legal aid if necessary, heard arguments and passed interim or other orders as it deemed necessary. Cases involving torture of prisoners,[212] torture in police custody,[213] plight of women in state-run welfare homes,[214] plight

200. *See, e.g.*, Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360; Sunil Batra v. Delhi Admin., A.I.R. 1980 S.C. 1580; Prem Shankar Shukla v. Delhi Admin., A.I.R. 1981 S.C. 1535; Khatri v. State of Bihar, A.I.R. 1981 S.C. 928; Kedar Pahadiya v. State of Bihar, A.I.R. 1982 S.C. 1167; Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378.

201. *See, e.g.*, Veena Sethi v. State of Bihar, (1982) 2 S.C.C. 583; Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378; Sheela Barse v. Union of India, (1986) 3 S.C.C. 596; Sheela Barse v. Secretary, Children's Aid Soc'y, A.I.R. 1987 S.C. 656; Vikram Deo Singh v. State of Bihar, (1988) Supp. S.C.C. 734.

202. *See* People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473; Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.

203. *See* Olga Tellis v. Bombay Mun. Corp., A.I.R. 1986 S.C.180.

204. *See* M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 1120.

205. *See* M.C. Mehta v. Union of India, A.I.R. 1988 S.C. 1037; M.C. Mehta v. Union of India, A.I.R. 1988 S.C. 1115.

206. *See* M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965; 1086.

207. *See* M.C. Mehta v. Union of India, A.I.R. 1991 S.C. 1332.

208. *See* Tehri Badh Virodhi Samiti v. State of Uttar Pradesh, JT 1990 (4) S.C. 519.

209. *See* Rural Litig. & Entitlement Kendra, Dehradun v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652.

210. *See* Dr. D.C. Wadhwa v. State of Bihar, (1987) 1 S.C.C. 378.

211. A.I.R. 1993 S.C. 293.

212. *See, e.g.*, Sunil Batra v. Delhi Admin., A.I.R. 1980 S.C. 1580; Prem Shanker v. Delhi Admin., A.I.R. 1982 S.C. 1535; Vikram Deo Singh v. State of Bihar, 1988 Supp. S.C.C. 734, 736; Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378.

213. *See* Nilabeti Behera v. State of Orissa, A.I.R. 1993 S.C. 1960, *supra* note 190.

of inmates in a mental institution[215] degradation of the environment,[216] existence of bonded labor[217] and eviction of pavement dwellers[218] were brought on the judicial agenda thanks to this novel procedural rule.

3. Socio-Legal Commissions Of Fact-finding And Enquiry

The petitioners in most of the Public Interest Litigation cases were public spirited citizens or organizations who, having limited means at their disposal, found it onerous to establish and effectively prove violation of rights by the states before the courts.[219] Their other vexing problems included the stout denial by state governments of their well-founded allegations and denunciation of their reliable sources of information.[220] It is a tribute to the Supreme Court's craftsmanship, however, that it used its wide powers imaginatively to forge innovative though unconventional ways to assist the litigants in the expensive task of gathering evidence. The Court has evolved the practice of appointing commissioners for the purpose of gathering facts and data regarding the violations of citizens' fundamental rights.[221] The commissioners' reports are then circulated among the parties concerned, who may dispute the facts stated therein by filing affidavits. The Court then considers the commissioner's report and affidavits that may have been filed and proceeds to adjudicate upon the matter.[222] These commissioners are a diverse group of individuals ranging from social activists, teachers, research scholars, and journalists to government bureaucrats, technical experts and judicial officers.[223] It is obvious that in public interest litigation cases, the Court "assumes a more positive attitude in determining the facts."[224] In a case which concerned bonded labor in stone quarries, the Court appointed two Supreme Court attorneys to ascertain the true state of affairs and submit a detailed report on the basis of which it issued far-reaching orders for the release and rehabilitation of the

214. *See* Upendra Baxi v. State of U.P., A.I.R. 1987 S.C. 191.

215. *See* Vikram Deo Singh v. State of Bihar, 1988 Supp. S.C.C. 734, 736.

216. *See* Rural Litigation & Entitlement Kendra v State of Uttar Pradesh, A.I.R. 1985 S.C. 652.

217. *See* Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.

218. *See* Olga Tellis v. Bombay Mun. Corp., A.I.R. 1986 S.C. 180.

219. *See* Bhagwati, *supra* note 196, at 25-26.

220. *Id.*

221. *See, e.g.*, Ram Kumar v. State of Bihar, A.I.R. 1984 S.C. 537; Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652, 653; A.I.R. 1985 S.C. 1259; A.I.R. 1987 2426; Olga Tellis v. Bombay Municipal Corporation A.I.R. 1986 S.C. 180; Kutti Padma Rao v. State of A.P. (1986) (Supp.) S.C.C. 574; M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965; A.I.R. 1987 S.C. 2426; A.I.R. 1988 S.C. 2187; Vikram Deo Singh Tomar v. State of Bihar (1988) (Supp.) S.C.C. 734, 736; Dr. Shiv Rao Shanta Rao Wangla v. Union of India, (1988) 1 S.C.C. 452.

222. *See* Bhagwati, *supra* note 196, at 28.

223. *See* Bhagwati, *supra* note 196, at 27.

224. *See* Bandhua Mukti Morcha, A.I.R. 1984 S.C. 839-48.

bonded laborers.[225] In *Tarun Bhagat Sangh Alwar v. State of Uttar Pradesh,* the Court appointed a judge-led commission to assess the consequences mining in the "Sariska Tiger park" had on the environment, wildlife and forests, and to make appropriate recommendations as to remedial measures.[226]

4. Innovative Remedies

Some of the Public Interest Litigation cases involved flagrant human rights violations that rendered immensely inadequate traditional remedies, such as the issuance of prerogative writs by the Courts. What was required was an "affirmative action" that ensured "distributive justice."[227] Once again, the Court did not hesitate to forge unorthodox remedies. Where the peculiarities of the case prompted urgent action, the Court gave immediate and significant interim relief with a long deferral of final decision as to factual issues and legal liability. For instance, in a case involving the blinding of several pretrial prisoners by the police, the Court ordered the state of Bihar to provide medical and rehabilitative services to the blind prisoners. The Court gave directions for such relief, even before the culpability of the police officials was determined.[228] The case of *Hussainara Khatoon v. State of Bihar*[229] concerned the plight of a large number of young pre-trial prisoners languishing in jail without their trials having been commenced. In the months following the filing of the writ petition, the Court issued interim orders directing the immediate release of pre-trial prisoners on personal bond[230] and provision of free legal aid to all the accused.[231] The Court held that a speedy trial was a constitutional right;[232] and it imposed an affirmative duty on magistrates to inform pre-trial prisoners of their right to bail and legal aid.[233] The case, however, remained pending before the Court for a period of eight years without a final judgment.

The Court has also evolved the practice of appointing ombudsmen for the purpose of ensuring and monitoring the effective implementation of its far reaching orders. In *People's Union for Democratic Rights*

225. *Id.*

226. A.I.R. 1993 S.C. 293.

227. Bhagwati, *supra* note 196, at 28-29.

228. *See* Khatri v. State of Bihar, A.I.R. 1981 S.C. 930-35. *See also* Olga Tellis v. Bombay Mun. Corp., A.I.R. 1986 S.C. 180 (involving the halting of the eviction of pavement dwellers for four years after the filing of the petition); M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965, 982 (involving the closure of a private industry responsible for a gas leak and the establishment of a victim rehabilitation scheme by the Court prior to its determination of the issue as to whether a private actor could be held liable for the violation of fundamental rights).

229. *See* Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360. *See generally* U. Baxi, *The Supreme Court Under Trial: Undertrials and the Supreme Court*, 35 S.C.J. 1980 (analyzing the Court's bold remedies in this case).

230. *See* A.I.R. 1979 S.C. 1364, 1369.

231. *Id.* at 1369.

232. *Id.* at 1376.

233. *Id.* at 1377.

v. Union of India,[234] the Court appointed an ombudsman, comprising three individuals, for the purpose of monitoring the implementation of labor laws by the contractors and the Delhi administration.[235]

5. Detailed Administration Or "Creeping Jurisdiction"[236]

In India, where implementation of laws is tardy, government functionaries are corrupt, and the concept of *'public accountability'* of administrators is conspicuous by its absence, many human rights violations owe their origin to the exercise of state powers either by commission (repression) or omission (lawless disregard of statutory or constitutionally imposed duties). The Court's desire, to make the enforcement of public duties and dispensation of "distributive justice" effective, has resulted in its involvement even in the realm of administrative implementation. For instance, in a case involving the abhorrent conditions in a mental institution, the Court went to the extent of determining the amount to be allocated for provision of meals, directing the removal of the limit placed by the hospital authorities in respect to the cost of drugs which may be prescribed for patients.[237] The underlying rationale for this immersion of the Court into administrative minutiae has been its underlying conviction that justice in a country like India often requires the taking of affirmative steps by the state.[238]

Despite its significant successes in devising creative means of advancing human rights in the subcontinent, the apex Court has attracted some criticism from those wedded to a more conservative interpretation of the Constitution and mechanical interpretation of the rule of law. For instance, the Court's procedure of appointing commissioners for the purpose of assisting public interest litigants in the gathering of evidence has drawn some criticism. One attorney has opined, "a judge who appoints commissioners would be inclined to appoint those whom or about whom he knows personally . . . . Such commissioners are likely to be at least as biased as the judges who have been enthusiastic about Public Interest Litigation."[239] Judges have also been accused of displaying a bias in the selection of cases and "choosing their litigants."[240]

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234. A.I.R. 1982 S.C. 1473.

235. *See also* Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378 (involving the appointment of a female judicial officer to oversee the implementation of the Court's directives with regrads to the treatment of prisoners); Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802 (involving the appointment within the Ministry of Labor of a joint secretary to monitor the effective implementation of the release and rehabilitation of released bonded laborers).

236. Dr. Upendra Baxi coined the term: creeping jurisdiction.

237. *See* Rakesh Chand Narain v. State of Bihar (1986) (Supp.) S.C.C. 576. *See also* Khatri v. State of Bihar, A.I.R. 1978 S.C. 928 (involving the Supreme Court's detailed instruction to the State of Bihar regarding proper prison administration, including maintenance of pre-trial and convict population records).

238. *See* Bhagwati, *supra* note 196, at 27-28.

239. AGRAWALA, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE 26 (Tripathi Publications, Bombay 1985).

240. *Id.* at 17.

The nature of the Court's directives to the executive and its unhesitating forays in the realm of implementation of its orders has led to accusations that the "court is factually (not merely virtually) taking over the administrative function" and violating the doctrine of separation of powers.[241] The comment that the executive "cannot decide to start settling legal cases just because the judiciary has not been able to clear the piled up cases at every level,"[242] reflects the conviction among some members of the bar that the judiciary should consign itself to its assigned domain. In the words of a former Attorney Solicitor-general:

> The judiciary is assigned a certain role in our (India's) constitutional scheme of things. The apex court is for conflict resolution and it is duty bound to interpret the Constitution; whereas policy making is assigned to the legislature and the executive .... The judiciary is not appointed as the monitor of the working of democracy.[243]

Another voiced apprehension is that the Court may be involuntarily embroiled in political disputes brought on the judicial agenda under the guise of public interest litigation.[244] Further, the enormous backlog of cases in India has given rise to the "floodgates argument" — the threat that Public Interest Litigation poses to the timely disposal of traditional law suits filed in the Supreme Court and High Courts.[245]

These matters are legitimate concerns and ought to be taken very seriously indeed. The problems raised by Public Interest Litigation are not insuperable. Therefore, any call for its banishment from the legal landscape is akin to throwing the baby out with the bath water. As Justice Kuldip Singh, an activist judge who recently retired from the Supreme Court, rightly believes, the judiciary's encouragement to Public Interest Litigation "is doing more good than harm," especially in the areas of human rights, environment and corruption.[246] While there have been instances of misuse of Public Interest Litigation in the past,[247] the Court has repeatedly insisted that the public interest applicant must be a "public spirited person," "acting bona fide" and not for personal gain and has strongly condemned the use of Public Interest Litigation as a means of settling personal scores.[248] Further, in its zeal to safeguard citizens' liberties, the Court has not acted in a "confrontational mood or with a view to tilting at executive authority or seeking to usurp it."[249] The Court's recommendation for the creation of new bodies, such as Environmental Courts consisting of a professional judge

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241. *Id.*

242. *Judicial Activism ... The Good and the Not So Good*, THE HINDU, March 2, 1997, *available in* 1997 WL 7218402 [hereinafter *Judicial Activism*].

243. *Id.*

244. *Id.*

245. *See* Fertilizer Corp. Kamgar Union v. Union of India (1981) 1 S.C.C. 568.

246. *See Judicial Activism*, *supra* note 242, at 11.

247. *See* Chetriya Pardushan Mukti Sangharsh Samiti v. State of U.P., (1990) 1 S.C.C. 449.

248. *See* Subhas Kumar v. State of Bihar, (1992) 1 S.C.C. 598, 605.

249. Bandhua Mukti Morcha, A.I.R. 1984 S.C. 802.

and two environmental scientists,[250] reveals both a mature reflection and a realistic assessment by the judges of what they can accomplish in their quest for dispensing social justice to the common man. Judicial activism in India is, thus, certainly not a case of overzealous or unbridled activism. The Court's approach and reasoning in public interest cases is best reflected in Justice Pathak's observation: "we live in an age when this Court has demonstrated while interpreting Article 21 of the Constitution that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the Fundamental Right of every Indian citizen."[251]

What is called for is an open minded response to the healthy criticism that the Court has evoked in its approach to Public Interest Litigation. Mr. Soli Sorabjee's, former Attorney-general, suggestions of "strengthening" post-judgment monitoring and the prudent use of the Court's contempt power to secure compliance with its orders and directions in future, merit serious consideration in this regard.[252]

In the last two decades, the poor, starved and hapless millions have received the Court's protection for securing to themselves the enjoyment of basic human rights. This is no small gain. True, Public Interest Litigation has some remediable drawbacks but "in a society where freedoms suffer from atrophy and activism is essential for participative public justice, some risks have to be taken."[253]

III. CREATIVE IMPACT OF INTERNATIONAL HUMAN RIGHTS NORMS

Jack Greenberg, an American jurist, made a prescient observation fifteen years ago: "it may be time for United States Courts to begin looking to international criteria as sources of domestic law on human rights issues"[254] makes sense even for the Indian judiciary. Indeed, in a number of common law countries, domestic courts refer to international treaties ratified by their countries as a source of guidance in constitutional and statutory interpretation. Further, "the vast array of international human rights norms now available for use make it imperative that we not turn completely inward in judicial attitude in ways that deny the rich traditions of the rule of law beyond our borders."[255] This part analyzes the manner in which the normative content of international human rights law has infused Indian Constitutional standards. This necessitates a brief discussion of the relationship between international law and municipal law in India.

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250. *See* M.C. Mehta v. Union of India, (1986) 2 S.C.C. 176.

251. Vikram Deo Singh Tomar v. State of Bihar, 1988 Supp. S.C.C. 734,736

252. Soli Sorabjee, *Protection of Fundamental Rights by Public Interest Litigation in India*, 51 INT'L COMM'N OF JURISTS REV. 37 (1993).

253. *See* Fertilizer Corp. Kamgar Union v. Union of India (1981) 1 S.C.C. 568.

254. Jack Greenberg, *The Widening Circles of Freedom*, 8 HUMAN RTS. 10, 45 (Fall 1979).

255. Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 3, 35-36 (1983) [hereinafter Christenson].

A. Relationship Between Municipal Law And International Law In India

Indian Courts are potentially open to a liberal absorption of customary international law. During British rule in India, the courts applied common law doctrines in many fields. There has been no change in this policy even after independence since Article 372(1)of the Constitution provides for "the continued operation of the law in force immediately preceding its commencement." Therefore, by the analogy to the English common law, the municipal courts in India may apply well recognized principles of customary international law on the ground that they form the law of the land. As regards international conventional or treaty law, India subscribes to the dualist position. That is to say, international treaty law has no binding effect in India unless it has been implemented by legislation. The Supreme Court reiterated this position in *Jolly George Varghese v. Bank of Cochin.*[256]

Further, Part IV obligates the state, including the Supreme Court, to apply the Directive Principles in the making of laws. Since the Supreme Court makes binding law under the Constitution,[257] the duty to employ the directive principles for the interpretation of the Constitution and of statutes is imperative. Article 51 in Part IV provides that the "State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another." In light of this analysis, it can be argued that the Court must strive to interpret the constitutional provisions in a manner that is in accordance with India's international commitments and treaty obligations. Indeed, that was the Court's approach in construing the provisions of the Indian Code of Civil Procedure and Article 21 in *Jolly George Varghese v. Bank of Cochin.*[258]

B. "Indirect Incorporation" Of International Human Rights Norms

As noted above, the courts in India may give effect to rules of customary international law on the ground that they form part of the law of the land. Therefore, a norm of customary international law, such as freedom from torture,[259] is arguably binding on the Indian courts. In none of the cases concerning prisoners' rights, however, has the Supreme Court focused on the binding effect of customary international law. Instead, the Court relied solely on the Constitution to afford the petitioners relief, thereby securing a remedy based on domestic law. A fundamental reason for this approach stems from the Court's unwillingness to accept that the Indian constitutional values fall below international standards. As is apparent from its methodology, the Court ex-

256. A.I.R. 1980 S.C. 470.

257. *See* INDIA CONST. art. 141.

258. A.I.R. 1980 S.C. 472-73

259. *See* Richard Lillich, *The U.S. Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 73, n.132 (1990). *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980).

plicitly pointed out that there is a constitutional basis for holding that torture violated the petitioners' fundamental rights and was inconsistent with the inherent spirit of the Constitution.

The fact that the Court did not use principles of customary international law or other international human rights norms, however, to establish an independent rule of decision in its cases does not mean that it was insulated from their wholesome impact. Indeed, the Court's frequent references, in its decisions to norms laid down in treaties and declarations, reflects its awareness of India's international obligations and its underlying approach to take international human rights law seriously.[260] In *Prem Shankar Shukla v. Delhi Administration*, before embarking on a survey of the issues involved, the Court observed: "The Court must not forget the core principle found in Article 5 of the Universal Declaration of Human Rights . . . and . . . Article 10 of the International Covenant on Civil and Political Rights."[261]

In formulating elaborate guidelines for the treatment of prisoners, the Court has drawn upon Articles 8 and 9 of the United Nations General Assembly declaration on the protection of all persons from torture, cruel, inhuman, degrading treatment or punishment.[262] In another case involving children's rights, the Court pointed out that since India was a signatory to the *International Covenant* it was obligatory on the part of the Indian government to implement its provisions.[263] More recently, while reiterating that the award of monetary compensation for the unlawful deprivation of Article 21 amounted to its enforcement, the Court referred to the *International Covenant*.[264] It is clear that, although the Court has decided the cases addressed to it on the basis of Indian constitutional law, it has been equally desirous of being guided by international human rights norms and standards in determining the content and reach of the fundamental rights.

Some may perceive this "indirect incorporation" of international human rights law to be a timid and a cautious attitude on the part of the Indian Supreme Court. A perusal of the practice of courts elsewhere in the world, however, will show that such an approach is not unusual. Domestic courts all over the world will be, more often than not, reluctant to base their decisions on customary international human rights law or laws developed outside domestic law making processes when their own constitutions are thought to be sufficient.[265] The con-

260. *See, e.g.*, Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597.

261. A.I.R 1980 S.C. 1535, 1541.

262. *See* A.I.R. 1978 S.C. 1602.

263. *See* Sheela Barse v. Secretary, Children's Aid Society, A.I.R. 1987 S.C. 656 The Court cited to Article 24 of the International Covenant and to the 1959 U.N. Declaration of the Rights of the Child. *Id.* at 658.

264. *See* Nilabeti Behera v. State of Orissa, A.I.R. 1993 S.C. 1960. The Court referred to Article 9(5) of the International Covenant which enshrines the right to compensation for unlawful arrest or detention. *Id.* at 1970.

265. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). For an interesting discussion on the use of international human rights norms in U.S. courts see *The Doctrine of Incorporation: New Vistas for the enforcement of International Human*

cepts of "state sovereignty" and a preference for the law of the forum are also barriers to the use of principles developed outside the pale of domestic law making processes. In fact, this problem has been recognized in the drafting of the international lawmaking instruments. A high degree of deference for state sovereignty and domestic jurisdiction is manifest in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[266] This indirect incorporation of international human rights norms is thus a sound and a realistic approach.[267] It enriches evolving constitutional precepts and thereby ensures that internationally recognized rights do not remain a mere chimera for individuals all over the globe.

C. Influence Of International Environmental Norms

Interestingly, the Court has also cited to international environmental norms in supporting its conclusions. In *M.C. Mehta v. Union of India,* before embarking on a survey of the issues involved, the Court dwelt at length with the famous proclamation adopted at the UN Stockholm Conference on Human Environment in 1972 and the leading role played by the Indian delegation headed by the then Prime Minister, late Mrs. Indira Gandhi at that event.[268] It drew attention to the recommendation that required States to take all possible steps to prevent pollution of the seas.[269] In *Law Society of India v. Fertilizers and Chemicals, Travancore Ltd.*, while reiterating that the right to a wholesome environment is implicit in Article 21, the Court referred to the 1984 UN Resolution embodying a fundamental right to an environment adequate for health and well-being.[270] This clearly indicates that the

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Rights? 5 HUM. RTS. Q. 68-86 (1983); Robert J. Martineau, Jr., *Interpreting the Constitution: The Use of International Human Rights Norms* 5 HUM. RTS. Q. 87-107 (1983).

266. A. Luini Del Russo, *International Law of Human Rights: A Pragmatic Appraisal*, 9 WM. & MARY L. REV. 749 (1968). Del Russo opines: "The effort to reach a compromise [in passing the Covenants] has whittled away the effectiveness of the original proposal to a point of illusory consistency. The issue of Human Rights has remained a purely political question to be settled by sovereign States only . . ." *Id.*

The preamble to the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 19, 1966, G.A. Res. 2200, 2 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (*entered into force* Jan. 3, 1976), gives great deference to state sovereignty: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."

267. "Indirect incorporation" of international legal norms by domestic courts has won widespread scholarly support. *See generally* Christenson, *supra* note 255; Richard B. Lillich, *The U.S. Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53 (1990); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990).

268. (1987) 4 S.C.C. 467-69.

269. *Id.* at 468-69

270. 1994 A.I.R. 308 (Ker.) 370.

Court is receptive to international environmental norms and has used them as an interpretative tool in elaborating the constitutional provisions. In essence, the Court has used human rights and environmental norms in a "definitional manner." Further, by empowering individuals and environmental groups to safeguard the environment and to be free from the consequences of environmental harm or damage, the Supreme Court has served as an effective instrument for the enforcement of environmental justice.[271] In this connection, Principle 10 of the Rio Declaration, which recommends provision of effective access to judicial and administrative proceedings (including redress and remedy by member states for the protection of the environment), takes on special significance.

In sum, the Supreme Court's decisions involving fundamental rights are important landmarks in the domestic enforcement of international human rights law. They represent the Court's enlightened interpretation of the Constitution in consonance with principles of international human rights and environmental law. A colloquium, held in Harare in 1989, concluded that if texts of the most relevant international and regional human rights instruments are made accessible to judges and lawyers,

> the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarize themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights in the performance of their duties. In this way, the noble words of international instruments will be translated into legal reality for the benefit of the people we serve, but also . . . of people in every land.[272]"Let noble thoughts come to us from all sides" states an ancient Vedic prayer. One hopes that in keeping with the spirit of this noble invocation and the Harare Declaration, the Indian judiciary will continue to enrich its jurisprudence with international learning.

IV. WHAT OF THE FUTURE?

In this author's analysis of the Supreme Court's role since independence, she has defended and applauded the Court's expansive interpretation of Article 21, its creative procedural innovations, and its indirect method of weaving international human rights norms into the constitutional tapestry. She must hasten to add, however, that that this does not mean she applauds every decision rendered by the Court

271. *See, e.g.*, Rural Litig. Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652; M.C. Mehta v. Union of India, (1987) 4 S.C.C. 463 (Tanneries case); M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965 (Air pollution); Shri Sachidanand Pandey v. State of West Bengal, A.I.R. 1987 S.C. 1109; M.C. Mehta v. Union of India, A.I.R. 1988 S.C. 1037 (Pollution of River Ganges); M.C. Mehta v. Union of India, A.I.R. 1991 S.C. 1332 (Motor vehicles pollution).

272. Harare Declaration of Human Rights, *reprinted in* 2 DEVELOPING HUMAN RIGHTS JURISPRUDENCE: A SECOND JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS 9, 12 (1989).

in the post-emergency era or is oblivious to the fact that judges can go wrong in advancing human rights. Nonetheless, one must wonder what the landscape of human rights would be like today were it not for the Court's sensitivity to the harsh realities of Indian society and its juristic activism. The preceding analysis clearly illustrates the unique contributions that the judicial process can make to the task of fulfilling the constitutional aspirations of the poor and the downtrodden. It is fair to conclude that in its role as a "social auditor,"[273] the Court has taken "suffering seriously" and has made a significant contribution to the meaningful protection of human rights in India. A lot has been accomplished, but there is still much to be done. Indeed, at this moment during the celebration of the fiftieth anniversary of India's independence, one cannot avoid wondering if this new commitment of the judiciary to the poor and downtrodden — displayed after three decades of negation — will be kept? Will it continue and flourish? The landscape of human rights in India would be one of unrelieved gloom if the Court were to forsake its new activist role for a traditional one, merely presiding over adversarial proceedings, and concluding with an order to the parties. India, a pluralist society, can ill afford such a reactive and restrained judiciary. The concept of judicial activism and the need for a judiciary to serve as a bulwark of individuals' rights from legislative and executive encroachment is visibly highlighted on the constitutional landscape of the world today.[274] That judges make law and decide policy issues in the process of interpreting and applying the law is not a new discovery of our times. Rather, the focus is on what and for whom they should intervene and how far they should go. In this concluding part, I shall highlight a few issues where the new forward surge of constitutional concern is particularly required in future.

A. Strengthening Constitutionalism

The two fundamental "correlative elements of Constitutionalism" writes Charles Mc.Lewan are "the legal limits of arbitrary power and a complete political responsibility of government to the governed."[275] It is indeed unfortunate that the Indian political system has been rapidly deteriorating into a brazen display of naked political power ,without accountability to the real sovereigns of the land – the people. The history of the amendment process provides ample testimony to the abuse of constitutional processes by Parliament for partisan political ends. In *Kesavananda Bharathi v. State of Kerela*[276] what was really at stake

273. Fertilizer Corp. Kamgar Union v. Union of India, A.I.R. 1981 S.C. 344, 354. (Judgment of Krishna Iyer, J.).

274. *See* THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 179-182 (Neelan Tiruchelvam & Radhika Coomaraswamy eds., 1987) (giving the conclusion of the workshop on the theme: "The Role of the Judiciary in Plural Societies" held in India and organized by the International Center for Ethnic Studies, Sri Lanka).

275. J.N. Pandey, CONSTITUTIONAL LAW OF INDIA 52 (1990).

276. A.I.R. 1973 S.C. 1461. *See also* (1973) 4 S.C.C. 225, 336, 454, 486. *See generally* BAXI, *supra* note 100, at 65-110.

was Parliament's claim to unlimited power to make not merely changes in the constitution but of the constitution.[277] No party in power could abuse its majority in Parliament to convert "a Republican India into a hereditary monarchy, a secular India into a theocratic state, a federal India into an unitary state, an India with citizens into a [sic] India consisting only of subjects."[278] This was, in essence, what the Supreme Court judges accomplished by articulating the doctrine of "basic structure." All Indians ought to be grateful to them for ensuring that tyranny and despotism can no longer masquerade as Constitutionalism. In the words of Dr. Baxi, this case has a "structural message" for the people of India:

> [F]or the atisudras, (untouchables) the social and economic proletariat, the reaffirmation of the unchangeable basic structure not merely marks the limits of the power of the state but also the maintenance of civil and political *space* within which they can continue to articulate their struggle against the dominating groups.[279]

The recent eruption of a series of scandals has exposed the large-scale corruption, venality of public officials, and the unholy trinity of politicians, businessmen and bureaucrats in India.[280] Once again the limelight is thrust squarely on the judiciary to usher in accountability of the institutions of governance, even if in a limited sense. The Supreme Court's fearless directions in the Jain Diaries or the *Hawala* case, ordering the Central Bureau of Investigation[281] "to investigate every accusation made against each and every person irrespective of his status" and not to close the case against anybody without first satisfying the Court, is indeed welcome.[282] It is only a display of this sort of

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277. *See* BAXI, *supra* note 100, at 65-69.

278. *Id.* at 66.

279. Upendra Baxi, *Judicial Discourse: Dialectics of the Face and the Mask*, 35 J. INDIAN L. INST. 1, 6 (1993).

280. *See* Zafar Agha, *Hawala: Congress – Explosive Fallout*, INDIA TODAY, Feb. 15, 1996, at 22; Bharat Desai, *Hawala: Jain Family: The Bold and the Brazen*, INDIA TODAY, Feb. 15, 1996, at 40; N.K. Singh, *Hawala: BJP: Tarred with the Same Brush*, INDIA TODAY, Feb. 15, 1996, at 28; Charu Lata Joshi, *Hawala: Interrogations – Jain's Confessions*, INDIA TODAY, Feb. 15, 1996, at 30; Charu Lata Joshi, *Hawala Charge Sheets: Inexplicable Lapses*, INDIA TODAY, Feb. 15, 1996, at 34; Manoj Mitta, *Supreme Court – Setting the Agenda*, INDIA TODAY, Feb. 15, 1996, at 62; Charu Lata Joshi, *CBI: Going Soft on the PM*, INDIA TODAY, Feb. 29, 1996, at 22; *JMM Payoffs*, INDIA TODAY, Mar. 15, 1996, at 26; Charu Lata Joshi, *Hawala Case*, INDIA TODAY, Mar. 15, 1996, at 30; Manoj Mitta & Raj Kumar Jha, *Judiciary: Mr. Justice J.S. Verma*, INDIA TODAY, Mar. 15, 1996, at 98; Zafar Agha, *Under Assault*, INDIA TODAY, July 31, 1996, at 24; Charu Lata Joshi, *Legal Offensive*, INDIA TODAY, July 31, 1996, at 28; Navneet Sharma & Shefali Rekhi, *Sukh Ram: The Stench of Corruption*, INDIA TODAY, Sept. 15, 1996, at 28; Charu Lata Joshi, *Judiciary: Steely Resolve*, INDIA TODAY, Oct. 31, 1996, at 20; Charu Lata Joshi, *JMM Payoffs Case: Tortuous Progress*, INDIA TODAY, Nov. 15, 1996, at 36; Amarnath K. Menon & G.C. Shekhar, *J. Jayalalitha: Booty Queen*, INDIA TODAY, Dec. 31, 1996, at 20; Harinder Baweja, *Jain Hawala Case: Stuck in Legalese*, INDIA TODAY, Apr. 15, 1997, at 44.

281. The Central Bureau of Investigation is the nation's premier investigative agency.

282. Manoj Mitta & Raj Kumar Jha, *Judiciary – Mr. Justice J.S. Verma*, INDIA TODAY, Mar. 15, 1996, at 112. In March 1997, Mr. J.S. Verma was elevated to the post of the Chief Justice of the Supreme Court of India.

judicial assertiveness that can restore a modicum of the two crucial "correlative elements of Constitutionalism" to the Indian polity that is now facing a new internal and insidious peril – corruption.

It is, however, insufficient if the Court confines its role merely to that of a watchdog to check the arbitrariness of the executive and the legislature. If the roots of democracy are to be cemented in India, it is essential that the constitutional processes be involved in issues of poverty, political repression, social and environmental justice and the protection of the most vulnerable sections of society such as the ethnic groups, Scheduled Castes and Tribes, women, children, criminal and terrorists suspects, prisoners and other unpopular minorities.

B. Women's Rights

Women often are the most vulnerable and exploited group in any society. This is equally true of India where the constitutional guarantees have not had much impact on their lives. In India members of different religious communities are governed by their personal religious laws in matters pertaining to marriage, divorce, inheritance etc. These laws are in many respects discriminatory and violative of women's human rights.[283] For instance, polygamy, an abhorrent practice prevalent among the Muslim population has survived constitutional challenge on the grounds that it involved discrimination against women on the basis of religion as well as gender.[284] In the absence of an Uniform Civil Code women have no escape from the oppressive clutches of their personal laws and their emancipation remains a far cry. While the Court has boldly asserted that a "custom"[285] "must yield to a fundamental right"[286] it is a pity that it has not subjected oppressive personal religious laws to the rigor of Article 21 and the Equality Clauses of Part III. True, the Constitution guarantees religious freedom. But, it also underscores the dignity of the individual. Therefore, any practice which denigrates women ought not to escape the constitutional gauntlet masked as a "personal religious law." In a recent decision, the Supreme Court has called upon the government to introduce an Uniform Civil Code to pave the way for women's liberation and strengthen national unity.[287] Significantly, the Court also noted with approval the prohibition of polygamy in the United States on the ground of public morals and expressly criticized its practice in India.[288] This new change of atti-

283. *See generally* Anika Rahman, *Religious Rights Versus Women's Rights in India: A Test Case for International Human Rights Law*, 28 COLUM. J. TRANSNAT'L L. 473 (1990) (discussing the Indian Supreme Court's valiant attempt to secularize Muslim personal law in India); Farah Baria, *Gender: Marital Laws*, INDIA TODAY, June 30, 1997, at 60.

284. *See e.g.*, State of Bombay v. Narasau Appu, A.I.R. 1952 Bombay 85; Sambu Reccy v. G. Jayamma, A.I.R. 1972 A.P. 136; Sonu Bai v. Bala A.I.R. 1983 Bombay 156.

285. The Supreme Court's power of judicial review is not confined to statutes and laws. It also extends to Custom or Usage. *See* INDIA CONST. art. 13 cl. (2).

286. *See* Rama Rao v. State of Andhra Pradesh, A.I.R. 1961 S.C. 564, 570.

287. *See* Sarla Mudgal, President, Kalyani & Ors v. Union of India and Ors, J.T. 1995 (4) 331.

288. *Id.* at 345-346.

tude is welcome as an important beginning for judicial activism *vis-à-vis* women's rights. One hopes that in the years to come, the Court will construe Article 21 as mandating gender justice and fairness within the family.

C. Protection Of Prisoners And Mentally Ill Persons

In *Veena Sethi v. State of Bihar,*[289] the Court was faced with the horrifying situation where persons who were detained in state-run homes on account of their alleged insanity continued to be incarcerated for years even after they had been certified as having regained their sanity. Yet another case, *Tomar v. State of Bihar* [290] exposed the sub-human conditions in which individuals in a "care home" were confined. The district magistrate's report revealed that the "Care Home" was a "crowded hovel, in which a large number of human beings had been thrown together, compelled to subsist in animal survival conditions which blatantly denied their basic humanity."[291] These cases typify the brutal and inhumane conditions that homeless and mentally ill persons are forced to exist in Indian society. The situation with respect to conditions in Indian penal institutions is no better.[292] Penal institutions and State run welfare homes for the poor and the mentally ill are plagued with the same problems: serious overcrowding; unsanitary and understaffed physical facilities; insufficient medical and psychiatric services; and deplorable material conditions that have made rehabilitation of the inmates well nigh impossible. The Supreme Court has in its judgments hauled up the government for this horrible state of affairs, provided elaborate guidelines for the treatment of such individuals, and, in certain instances, has virtually taken over the administration of these institutions. For instance, the Agra Protective Home for women has been virtually run by the judiciary for well over ten years.[293] The degrading brutal conditions exposed and challenged in these cases are undoubtedly the product of legislative and bureaucratic apathy, callousness and of course budgetary constraints. Part III exists as much for the propertied class as for those confined to prisons and welfare homes. Therefore, if judicial intervention should be exercised for the

289. Veena Sethi v. State of Bihar, (1982) 2 S.C.C. 583.

290. *See* Vikram Deo Singh Tomar v. State of Bihar, (1988) Supp. S.C.C. 734.

291. *Id.* at 734, 736.

292. *See* U.S. DEP'T OF STATE, *Country Reports on Human Rights Practices for 1996*, S. Rep. No. 382-5, at 1435 (1997).

The report regarding India states: Prison conditions are poor. Prisons are grossly overcrowded, often housing over three times their designed capacity. The largest class of prisoners typically sleeps on bare floors, has inadequate sanitary facilities, and receives inadequate food and medical care. Overcrowding in jails is severe. According to a statement in Parliament in 1994 by the Minister of State for Home Affairs, New Delhi's Tihar Jail, considered one of the best-run in the country, housed 8,577 prisoners - - facilities designed to hold 2,487. According to the Minister, 7,505 detainees awaited the completion of their trials, while 672 others had been on trial 3 years or longer. Press reports, statements in court cases, and statements by government officials indicate that conditions remained essentially unchanged in 1996. *Id.* at 1440.

293. *See* Upendra Baxi v. State of U.P., A.I.R. 1986 S.C. 191.

protection of any group in India, certainly it should be exercised for the protection of this utterly vulnerable lot. As Winston Churchill reminded us many years ago: "the mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of civilization of any country."[294]

A sad and deplorable feature of the Indian polity is that Parliament and the executive have on several occasions effectively abdicated their constitutionally defined responsibilities. These defaults, when they occur, are a breakdown not only of the substantive scheme of the Constitution, a failure to protect human rights. In these circumstances, the Court has had no choice but to step in to fill the void. This has led to its inescapable involvement in the formulation and implementation of broad social policy often impinging on controversial matters. To give just two examples: although the Constitution declared as violative of the Fundamental Rights, the practice of bonded labor, and commanded Parliament to make a law declaring this an offense, it was only in 1976 that a Bonded Labor Prohibition Act was enacted. The tragic consequence of this brazen abdication of responsibility by the august body of elected representatives was that freedom from exploitation, a Fundamental Right remained a chimera for about a quarter of a century.

For five decades each succeeding government has callously ignored Article 38-A in Part IV that mandates the state to provide free legal services to the poor. It was left to the judiciary to declare free legal services to be a justiciable right and direct the executive to fulfill its mandate in this regard. Defending the Court's role in this regard, Mr. Ahmadi, who recently retired as the Chief Justice of the Supreme Court observed:

> When such (aggrieved) citizens raise grave constitutional issues and exercise their fundamental rights in invoking its jurisdiction, the Supreme Court is left with little choice but to act in deference to its constitutionally prescribed obligations. This is the reason why the Court has had to expand its jurisdiction, by at times, issuing novel directions to the executive; something it would never have resorted to had the other two democratic institutions functioned in an effective manner.[295]

Prolonged systemic injustice in a democracy can only survive for so long. Grave consequences would ensue if the Court were to turn a blind eye to the government agencies' 'lawlessness' or to the abdication of their constitutional responsibilities. The state would then be left free to transgress the law and what would result is subversion of the rule of law. Thus "it is essential that rule of law must wean the people away from the lawless street and win them for the Court of law."[296] Any failure to do so would threaten the survival of our constitutional system no less than the subversion by a skillful, ruthless, neighboring foreign enemy. This is a very important reason why the Supreme Court must re-

294. P. LAL, BOOK OF QUOTATIONS 12 (S. Chand & Co. 1989).
295. *See Judicial Activism*, *supra* note 242, at 11 (emphasis added).
296. Fertilizer Corp. Kamgar Union (Regd.) v. Union of India, (1981) 1 S.C.C. 568.

main in the vanguard in enforcing human rights.

Judicial activism has other beneficial effects. In one sense, the Court acts as a "teacher of the community." The Court's crucial directives to the government and appointment of individuals as commissions of enquiry enhance the political visibility of human rights violations, serve to ignite effective legislative action, raise public consciousness and create opportunities for individuals and institutions[297] to make meaningful contributions for the realization of constitutional values. What Eugene Rostow has written in the context of the United States Supreme Court holds good for its Indian counterpart as well:

> The process of forming opinion in the United States is a continuous one with many participants — Congress, the President, the press, political parties, scholars, pressure groups and so on. The discussion of problems and the declaration of broad principles by the Court is a vital element in the community experience through which American policy is made. The Supreme Court is amongst other things an educational body and the justices are inevitably teachers in a vital national seminar.[298]

This perception of the function of the Court in human rights cases is one that appeals to me and which I find persuasive.

In articulating new rights and placing the mantle of constitutional protection over a variety of claims, judges in India, have unhesitatingly donned the robes of high priests, academicians, environmentalists and social reformers. This serves as a reminder of the danger that they may silence a just claim espoused by an unpopular group on the basis that their collective wisdom finds it unworthy of constitutional protection. For instance, homosexual men in India have demanded the repeal of a few discriminatory provisions of the Indian Penal Code that criminalizes certain types of sexual activity. It is imperative that in the coming years, "constitutional interpretation by the judges must view the definition of human rights with an expansive wisdom to interpret the text purposively so as to preserve the right of all human beings to mutual respect and concern."[299]

My emphasis has been on the importance of robust participation by the Court in the task of translating the Constitution's promise into meaningful action. I do not mean by my emphasis to suggest that the Supreme Court is the sole agency to safeguard and advance human

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297. In Sheela Barse v. Union of India, A.I.R. (1986) 3 S.C.C. 596, 632, the Court directed the College of Social Work, University of Bombay to submit a report on the conditions of women prisoners in Bombay.

In another case, the Court appointed the President of a University as a commissioner with the task of submitting a report on the working and living conditions of migrant workers in textiles (powerloom) production. *See* SOUTH GUJARAT UNIVERSITY, A REPORT ON WORKING AND LIVING CONDITIONS OF TEXTILE WORKERS: A SURVEY (1985).

298. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

299. B.P. JEEWAN & RAJEEV DHAVAN, *The Jurisprudence of Human Rights, in* HUMAN RIGHTS AND JUDICIAL REVIEW 205 (D.M. Beatty ed., Kulwer Academic Publishers 1994).

rights in a democratic society like India. While it is not the sole institution, it is nonetheless a crucial agency, sometimes perhaps — in the light of a corrupt and an errant executive, an irresponsible Parliament — a virtually indispensable one for the protection of human rights in India. The Indian Constitution explicitly lacks much of what is identified with modern Indian Constitutionalism; it is the Supreme Court's contribution that has established the impressive array of Fundamental Rights as we know them today. I can, therefore, think of no good reason why the Supreme Court should forsake its activism and revert to a restrained and passive role in the future.

Our founding fathers were men of great vision and integrity. In fighting for liberation from colonial rule and drafting our national charter – imbued with a socialistic spirit – they have both left us (their descendants) a valuable heritage and expressed their basic faith in our ability to solve through democratic processes the most complex problems. They had envisaged the Judiciary as a bastion of rights and of justice, and, therefore, decided to rely on the Supreme Court to define and enforce the guarantees of Part III. They were, in effect, acknowledging the peculiar competence of that branch of government to perform such crucial tasks. Such expectations, is after all, the heart of our constitutional blueprint of justiciable Fundamental Rights. It is, therefore, the judiciary's responsibility to ensure that their faith was not unfounded. Indeed, on the occasion of the Fiftieth Anniversary of India's independence, there is no more vital task to which we (citizens and the judiciary) can dedicate ourselves. Our task is arduous but certainly not insurmountable. A crucial ingredient in the success or failure of a national task of this magnitude is the dream that inspires hard and sustained work and the vision that impels the enduring belief in the future greatness of India. The eminent historian, E.P. Thompson's poignant words will perhaps inspire us in our collective endeavor and give us some idea of the momentous destiny that India is called upon to fulfill. He writes:

> India is not an important but perhaps the most important country for the future of the world. All the convergent influences of the world run through this society: Hindu, Muslim, Christian, Secular, Stalinist, Liberal, Maoist, Democratic-Socialist, and Gandhian. There is not a thought that is being thought in the East or the West which is not active in some Indian mind. If that subcontinent is rolled up into authoritarianism, if that varied intelligence and creativity should be submerged into conformist darkness, it would be one of the greatest defeats of the human record, sealing the fate of a penumbra of other Asiatic nations.[300]

300. P. Lal, *supra* note 294, at 129.

Book Review

Good Government and Law: Legal and Institutional Reform in Developing Countries

REVIEWED BY CELIA TAYLOR*

GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES; St. Martin's Press, Inc., New York, NY (1997) (Julio Faundez, ed.); ($65.00); ISBN 0-3120-16473-4; 285pp. (hardcover).

Good Government and Law: Legal and Institutional Reform in Developing Countries is a compilation of papers presented by academics and practitioners at a conference organized by the British Council. The papers attempt to address the role of legal technical assistance in the process of development. In that attempt, they meet with varying levels of success. While several of the papers are interesting and thoughtful in their own right, the volume fails to come together as a unified piece. Part of the difficulty is a failure to define with precision what is meant by "good government" or by "legal technical assistance." The absence of these definitions permit inclusion of papers ranging from theoretical considerations, such as *Bureaucracy and Law and Order* by Reginald Herbold Green,[1] to empirical studies such as *Competition Policy in Latin America: Legal and Institutional Issues* by Malcolm D. Rowat,[2] but prevent the collection from being a comprehensive treatment of an increasingly important area of law and development concern. This problem is freely acknowledged by the editor, who states that the goal, rather, is to "offer a variety of critical perspectives for the evaluation of legal technical assistance projects and . . . concrete proposals for action and research."[3] That goal is achieved with some success, although (as is

* Assistant Professor of Law, University of Denver College of Law; LL.M. Columbia University; J.D. New York University School of Law; B.A. George Washington University.

1. Reginald Herbold Green, *Bureaucracy and Law and Order*, *in* GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES, 1, 51 (Julio Faundez ed., St. Martin's Press 1997) [hereinafter GOOD GOVERNMENT AND LAW].

2. Malcolm D. Rowat, *Competition policy in Latin America: Legal and Institutional Issues*, *in* GOOD GOVERNMENT AND LAW *supra* note 1, at 165.

3. Julio Faundez, *Introduction* to GOOD GOVERNMENT AND LAW *supra* note 1, at 1, 2.

common in writings in the development field) most of the pieces are strong in identifying the problems endemic to an area, they are less successful in articulating new approaches.

That "good government" or "good governance"[4] is the new mantra of the development arena is well established. International financial institutions and bilateral aid agencies are increasingly basing their funding decisions on considerations about governance. Leading the charge in this arena is the World Bank, which in 1992 published a report entitled "Governance and Development" (Washington: 1992). This report is the culmination of a shift in the approach to development which has taken place both at the Bank and the IMF and in the policies of individual donors. Starting in the 1970s, donors began to shift from addressing underdevelopment as the result of structural problems to be remedied by extensive state intervention to an approach that favored reliance on the free market. "Good government" came to mean non-intrusive government—one that supported the growth of a market. The prime focus of aid to developing countries is now the imposition of policy and institutional changes designed to advance the imperatives of the market in the hope that this in the long run would lead to greater equality and empowerment for all. With the free market now seen as the solution for under-development ills, donors are increasingly concerned with the institutional framework of recipient countries. An essential part of that framework is the governance structure.

This strong focus on governance necessarily demands increased attention to the role of law and the legal system. Policy makers and donors must determine how law could facilitate the creation of a state in which market development can flourish. It is not the first time that law has been a focus of development concern. Laws and legal institutions have been shared, willingly or not, throughout history. In the development arena, law was an explicit component of aid during the 1960s when the "Law and Development" movement placed great emphasis on legal education as a major focus of aid. Adherents believed that legal education would train lawyers to use law as a tool for social change and thus advance development. This approach ultimately failed and donors eliminated, to a large degree, their inclusion of law and legal education from aid decisions. With law once again being added as a central consideration of the aid equation, an important preliminary issue to consider is whether these new efforts will meet with the same fate as did the Law and Development movement.

Julio Faundez examines this concern in his introductory piece, *Le-*

4. Although the volume is titled "Good Government and Law," good governance is a preferred term for many given that the World Bank is not permitted to make decisions based on political concerns. "Governance" enables the Bank to couch its decisions in economic language and thereby stay within its mandate.

gal Technical Assistance.[5] He posits that while the Law and Development movement and the current push towards exporting legal technical assistance have many commonalities, important differences exist. Significantly, he points out that the two approaches differ in their view of the role of the state in the process of development. Law and development advocates maintained a vision of the state as the central actor in economic development. Lawyers would head up efforts conceived of and orchestrated by purposeful state action. In contrast, the market-driven approach of the governance trend favors state-intervention only to "[f]urther rather than undermine the market process."[6] Law's (and lawyers') role is passive rather than instrumentalist. It is to help create and support institutions that foster market development. Is this difference one which will save the good governance approach? Faundez is skeptical, although he recognizes that the effort is too new to judge definitively. He suggests that "shifting the focus of attention from legal institutions to economic analysis"[7] will not help the new approach avoid the many problems which plagued the Law and Development movement, including what role law should play, and what "law" is appropriate for developing countries and others.

Patrick McAuslan echoes this concern in *Government and the Market*[8] arguing that "[a]n agenda which concentrates on the development of a market economy and uses that perspective to advance the cause of good government is misguided."[9] McAuslan's criticism of a purely market driven approach towards legal reform in developing countries focuses on the difficulty of exporting legal models from countries that are in very different developmental stages than those to which they are imported. What may serve US markets well may not answer the unique concerns of Africa or the former Soviet Union where "the appropriate cultural endowments"[10] do not exist. McAuslan suggests that what is needed is more attention being paid towards "differently structured, empowered and accountable government" and calls generally for a more comparative approach which relies on indigenous participation.[11] He notes, also, that law reform is a slow process and quick fixes are likely to do more harm than good.

The concern with the exportation of "Western" legal institutions and processes is also reflected in Leila Frischtak's work, *Political Mandate, Institutional Change and Economic Reform*.[12] Frischtak recog-

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5. Faundez, *supra* note 3.

6. *Id.* at 13.

7. *Id.* at 14.

8. Patrick McAuslan, *Law, Governance and the development of the market: practical problems and possible solutions*, *in* GOOD GOVERNMENT AND LAW *supra* note 1, at 25.

9. *Id.* at 34.

10. *Id.* at 33.

11. *Id.* at 34.

12. Lelia Frischtak, *Political mandate, institutional change and economic reform*, *in*

nizes that ignoring the history of the development of established markets means ignoring the unique circumstances each country must confront and threatens the efficacy of the "good governance" model. Frischtak concludes that reform should focus on "[a]chieving stabilization and reversal of governance crisis"[13] rather than on "[t]he longer, more complex and demanding processes of institutional change."[14] In this way, institutions could grow from within as a response to particular societal needs and circumstances and would thus be better suited to each developing country.

While there is validity in this point and in those raised by the other contributors, it is clear that large donors, including the international financial institutions, are not taking that approach and are unlikely to be convinced to do so in the near future. Underlying each of the main theoretical pieces (including those referred to specifically and others addressing governance and bureaucracy (Reginald Herbold Green) and governance and civil society (Nancy Bermeo) is the recognition that the current push towards "good governance" is lacking careful consideration of regional differences, including social realities and culture. The solution for each of the authors is a familiar one — solicit the participation of those at whom the legal reforms are aimed. What is not clearly defined is how to achieve this ambitious goal. It is no answer to suggest slowing the process. Developing countries are eager for development funds and understand that access to monies they view as necessary to their well-being turns upon conforming (at least in appearance) to the models most donors favor. The system provides little incentive for change, although perhaps if legal reform projects fail, under the current approach, those failures will encourage alternative approaches.[15]

The second portion of this volume attempts to suggest some practical approaches towards meaningful implementation of legal reform in developing countries, moving from theoretical discussion of the validity of a market-driven approach to presentation of several case studies of attempted reforms. These case studies support the general conclusion that reforms which pay attention to the particular needs and circumstances of a country have the best chance for success and that those needs may not be for less government (as the good governance movement would support) but for different structures of government. One example is provided in a paper by Robert A. Annibale that examines the development of financial markets in Africa.[16] Annibale argues that less

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GOOD GOVERNMENT AND LAW *supra* note 1, at 95.

13. *Id.* at 118.

14. *Id.*

15. This hindsight is twenty-twenty approach is well known to the World Bank, evidenced by its changing attitude on participation in development.

16. Robert A. Annibale, *The need for a regulatory framework in the development and*

regulation is not the solution, but rather, that effective and comprehensive regulation is necessary to insure that structures are in place and individuals are trained to deal in the markets being created. While this may slow the speed of "reform," it would prolong it's life. Similar points about the complexity of importing regulatory frameworks are made in John McEldowney's paper on the regulation of public utilities in Britain.

Some further difficulties of the good governance approach are explored in Joseph R. Thome's *Land Rights and Agrarian Reform: Latin American and South African Perspectives*,[17] and Ross Cranston's *Access to Justice in South and South-East Asia*.[18] Taken together, these pieces clearly show that without consideration of the characteristics of the country to which aid is provided, the well intended aid is unlikely to have the desired effect. For example, how should legal reform efforts deal with various views on land ownership? Although couched in terms of pure "technical" legal reform assistance, land titling programs have serious political and social implications. Good governance would push for the conversion of communal property rights into individual holdings while local populations may resist and, thus, ultimately frustrate these efforts.

Cranston examines access to justice and the various approaches South and South-East Asian countries have taken to this problem, concluding that the focus on formal court proceedings or other formal dispute resolution processes, favored by the good governance approach, may not be the most efficacious. Instead, he suggests that many developing countries place far greater faith in informal processes and often have institutional mechanisms in place specifically designed to circumvent the court system.

These, and the other case studies, which include works on competition policy in Latin America, and Women, Representation and Good Government in India and Chile are useful to those interested in the particular field. Like the theoretical pieces, they tend to be more descriptive of difficulties than prescriptive of solutions, but each makes a valuable contribution. In sum it is fair to say that each of the contributors to this volume would agree that legal and institutional reform is necessary in developing countries. Each would also agree that in order for that reform to be effective it must be generated from within. As his-

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liberalization of financial markets in Africa, *in* GOOD GOVERNMENT AND LAW *supra* note 1, at 123.

17. Joseph R. Thome, *Land and rights and agrarian reform: Latin American and South African perspectives*, *in* GOOD GOVERNMENT AND LAW *supra* note 1, at 201.

18. Ross Cranston, *Access to justice in South and South-east Asia*, *in* GOOD GOVERNMENT AND LAW *supra* note 1, at 233.

tory demonstrates, the imposition of models from other countries at other stages of development without consideration of unique societal concerns is doomed to failure. On those points, the book does an admirable job in making its case both from a theoretical and practical perspective. The weakness of the work is its attempt to address the entire topic of good governance and legal reform without a centralizing theme. Thus, while the individual pieces included in the volume are relevant and interesting, as a whole the work frustrates. It identifies a serious and vast issue and then illuminates only a small portion of the problem. Of course, no work could possibly provide a solution to the problem of what place law should have in development. If this volume is viewed as a springboard to further consideration of the issue rather than an attempt at comprehensive treatment, it makes a useful contribution.

Book Notes

VESNA PESIC, SERBIAN NATIONALISM AND THE ORIGINS OF THE YUGOSLAV CRISIS; Peaceworks No. 8; United Nations Institute of Peace, Washington, D.C. (1996); 41 pp. (paperback). For free copies, contact United States Institute of Peace.

Serbian Nationalism and the Origins of the Yugoslav Crisis is the eighth paper in the Peaceworks series published by the United States Institute of Peace. The Peaceworks series is intended to promote peaceful solutions to international conflicts by disclosing the findings of the nonpartisan institution created by Congress. The author of this study, Vesna Pesic, takes seriously the roles of researcher and suggestion-maker by writing a concise and understandable survey of the beginnings of the disintegration of Yugoslavia. Her study includes suggestions for the international community. She intends for her suggestions to be considered when countries erupt with internal crises which resemble Yugoslavia's struggle with a variety of ethnic groups attempting to maintain separate cultural and political control for each ethnicity. The struggle to maintain territorial integrity by each ethnicity in Yugoslavia created the "national question" that was never adequately addressed there. The Yugoslav response to the national question is the focus of Pesic's paper.

Pesic labels the ethnic struggle that took place in Yugoslavia a national question. It is easiest to understand what she means by looking to the meaning of the three parts that she divides the national question into. First, Pesic details the internal institutional structures that were in place in Yugoslavia and points out that the structures were inconsistent with one another and were inherently unable to achieve the goals of a united federation. After World War I, Yugoslavia was formed by combining the various republics of Croatia, Slovenia, and Bosnia-Herzegovina, among others, under one common democratic democratic government. However, the common government could not quell the strong cultural ties within each ethnic group and the feelings of mis-

trust between the separate republics and peoples. The major conflicts arose between the Croats with the majority of Croats living in a single republic and the Serbs who were spread throughout the federation. The Croats believed that an independent nation for Croatia and the Croatian people utilizing their ability to produce, sell, and compete economically was the best answer to ensure the integrity of Croatian culture and livelihood. Alternatively, the Serbs believed in the continuing unification of the various states under a single government. While the Serbs could not claim a strong economy to support their cause, they did control the army and threatened to use it whenever there was talk of breaking up. The Serb backing for either a strong federal government or for outright rule by Serbs varied with the political leanings of the republics at a particular time.

Due to the reasons listed above, the first Yugoslavia failed to answer the needs of the various ethnic groups organized under one state. The democratic nation ended. After World War II, the first Yugoslavia collapsed leaving the path clear for communism to try to answer the national question. In the end, neither communism nor democracy provided the calming answer to the intense feelings felt by each ethnicity. Instead, each system combined to encourage and to fuel the ethnic conflicts that were bound to ignite.

Second, the author examines the role that Serbian *ressentiment*, the feeling of being threatened and hated throughout Yugoslavia, planned in bringing about the violence that ultimately ended Yugoslavia. Due to these strong feelings, Serbs were unwilling to look for solutions to the ethnic struggles within Yugoslavia. They believed in maintaining a strong central government that protected the Serbs. Serbs threatened that if member nations did not voluntarily maintain a federal government that served the Serbian interests, Serbs throughout Yugoslavia would unite and fight for a Serb conscious government. The Serb leaders capitalized on the Serbian's fear that it was subject to potential exploitation and possible control by other Yugoslavian republics. This caused the tensions among the ethnic groups to escalate.

Third, the author interprets the collapse of authoritarian rule as a primary point that was not addressed properly by the Yugoslavian government or by the international community. As communist regimes throughout Eastern Europe failed, the Yugoslav republic's leaders were forced to address the specific elements of the national question and to find the optimal solution for withdrawing from communism which would allow them to maintain their positions of power. The republics began to favor the dominant ethnic majority within their borders and to discriminate against ethnic minorities. A unified belief among all Yugoslavia was no longer a possibility. Finally, the disintegration of the League of Communists of Yugoslavia left an inadequate system of free elections and political pluralism among the republics with no method of compromise to resolve the national question for each republic. Violence and warfare became the solution to the national question.

Following the analysis of these three factors, the author suggests some general recommendations for the international community to use

with countries plagued with internal conflict similar to Yugoslavia. Pesic suggests that the international community intervene to prevent "all or nothing" results to the national question. By stepping in and advising compromise and negotiation, the international community should assist the struggling countries to find a solution to internal conflict other than war. Intervention is triggered when there is no internal consensus on terms for proposed new states, borders, the treatment of minorities, or cooperation and security agreements. Pesic also suggests that the international community formulate a standard policy that applies to all countries facing internal conflict, rather than varying the policy with each particular situation. The international community should insist that claims to collective rights by the majority must not infringe on individual rights of the minority, as well as the majority. Pesic believes an international system should be adopted for a renegotiation of boundaries when disputes arise and threaten a population's security.

This study takes an important look at the internal causes of the Yugoslavian crisis and offers some important conclusions that the international community should recognize. Pesic's recommendations are based on common sense and are feasible to implement.

Cindy Ferrier

WANG GUIGO AND WEI ZHENYING (Eds.), LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY AND LAW, Sweet & Maxwell, Hong Kong (1996); ($96.00); ISBN 0-421-56890-9; 426 pp. (paperback).

Since 1994, the City University of Hong Kong and the Law Department of Peking University have held annual academic conferences to achieve a better understanding between the people of Hong Kong and Mainland China. This book is a collection of articles delivered at the October 1995 conference held in Hong Kong.

The 23 articles in this book are divided into six parts. Part One acquaints the reader with the concept of a market economy in modern China. The section begins with an article by Albert H.Y. Chen which distinguishes the connecting legal theories behind a "market economy" and a "planned economy." This article is followed by a discussion of the new administrative law in China. Part 1 is concluded by illuminating India's experience in changing from a mixed economy to a market economy.

Parts Two and Three are dedicated to a comprehensive discussion of China's business law. This section includes topics ranging from corporate law in Hong Kong to contemporary market economies to mathematical jurisprudence. Information throughout these articles include topical matters such as the family-oriented corporate structure in Hong Kong; the history and background of The Securities and Futures Commission of Hong Kong; the role of the Central Bank of China in the new market reform era; and the problem of contract interpretation under the socialist

legal system.

One of the most enjoyable aspects of reading this book is its distinct Chinese perspective and voice. "The Function of Legal Evasion in China's Economic Reform," by Dr. Zhu Suli, in Part Four, and "The Present and Future of Criminal Defence in China," by Dr. Hualing, in Part Five, are perfect examples of this trend. Although the articles are brief, their arguments on the legal problems facing China are sharp and well crafted, while presented in an easily understandable manner.

Part Six is dedicated to the environmental and consumer protection problems plaguing modern China. Several articles critically analyze the 1987 Air Pollution law and its 1995 Amendments. New legislation addressing a consumer's right to information, such as the Law Against Unfair Competition, and the Law of Advertisement, are also given ample discussion. This book is an essential read for all practitioners and academics wishing to gain an understanding of the legal reforms which are giving shape to China's emerging market economy.

Jason Chin Hung Kwan

FERNAND DEVARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS; Martinus Nijoff Publishers, The Hague, Netherlands (1996); (295 Dutch Guilders); ISBN 90-411-0206-X; 532 pp. (hard cover).

Minorities have often been the subject of scrutiny, debate and study during the Twentieth Century. Likewise, human rights have often been the focus of much attention, especially within the arena of international law. In *Language, Minorities and Human Rights*, Fernand deVarennes takes an innovative look at both of these subjects and resolves that language is the key to society.

The book begins with an explanation of the link between language and human rights. Human rights is deemed a way to protect minority languages. The author eloquently and creatively emphasizes the importance of language, through historical examples.

Next, deVarennes gives a historical overview of language based conflicts and the involvement of international law in such conflicts. He intermittently addresses various treaties relating to minority rights and containing language provisions. Some of these treaties include the United Nations Charter, the Universal Declaration on Human Rights, the African Charter of Human Rights and People's Rights, and the Convention Against Discrimination in Education.

Turning from historical to theoretical, deVarennes addresses the freedom of expression. This right leads to a state's duty not to intervene in the use of language in private matters. Moreover, deVarennes considers equality and the prohibition of discrimination based on language. The author presents an overview of this issue then compares various national systems for handling this equality. The systems ex-

amined include Spain, Austria, the United States, England, Wales, Japan and Canada. These international comparisons give the reader a more detailed appreciation of the concept of non-discrimination based on language.

The author then attempts to define language discrimination by drawing upon existing definitions created by the Inter-American Court of Human Rights, the European Court of Justice, the European Court of Human Rights and judicial interpretations by a number of states. The author relies upon these sources, because a court can determine whether a language policy is unreasonable by balancing the general interests of a nation against the protection and respect of the rights of individuals who primarily use a different language. He determines that, at its most essential level, non-discrimination constitutes a limit on the conduct of the state and their agents.

Linguistic minorities and the use of their language is examined in the next section. This subject, as the author explains, is delicate because it encompasses membership in minority groups, protection of cultural based languages and the issue of assimilation and conforming to the majority. The author argues that Article 27 of the United Nations Charter provides certain rights to persons who prove themselves to be members of a minority group.

The next section addresses state language preferences, practices or restrictions as well as human rights. This section depicts a state's role in language use and the limitations placed on the states. A state must respect, by way of its actions and in providing services and benefits, the human rights of the members of a linguistic minority. Such respect includes allowing the minority to use their language with other members of the group. This section outlines various rights that people possess with regard to language. The concept of prohibiting discrimination means that no state policy for an "official language" will be acceptable. A sliding scale model for education requires that public education offer instruction in languages spoken by its population at a level corresponding to the number of persons speaking that language. He author states that it is improper to isolate minorities in "linguistic ghettos" because they need exposure to the majority language. The media is another forum for language debate. Public media applies the same sliding scale formula as education. Within private media, state authorities cannot interfere with language because of the right to freedom of expression.

The final section contemplates indigenous people and language. Indigenous people comprise a group that is entitled to "special consideration" in international as well as national law. The author first presents an historical overview of the indigenous people. He then focuses on the present status of these people. He argues that their position in international law differs from that of individuals and minorities. The rights of indigenous people are the same as those of minorities, the right to non-discrimination, the right to freedom of expression and entitlement to other measures based on their unique political and legal status. They are not subject to the minority requirement of relative

numbers, as described above. Rather, indigenous people are given a degree of political autonomy, including the means and resources to protect and use their language in the community and in institutional settings.

In his conclusion, deVarennes asks, why should human rights be used to protect language? He then resolves that human rights are not, and have never been, concerned with safeguarding languages. This study attempts to determine how certain well-established human rights can impact the burdens and benefits of a state's linguistic policies or restrictions on the private use of language.

Ester Martin

PUBLIC CITIZEN'S GLOBAL TRADE WATCH STAFF, NAFTA'S BROKEN PROMISES: THE BORDER BETRAYED, Public Citizen, Inc., Washington, D.C. (1996); ($15.00); ISBN 0-937188-03-4; 82 pp. (paperback).

NAFTA's Broken Promises attempts to answer the question: Will the passage of NAFTA exacerbate our environmental problems or give us effective mechanisms to ameliorate them? The authors answered this question by gathering environmental health evidence on the U.S.- Mexico border conditions between 1993 and 1995. The evidence included interviews with academics, activists, medical doctors, representatives from NAFTA, the United States and Mexico, and hundreds of articles. The research revealed two results. First, NAFTA has failed a "do no further harm test" for U.S.- Mexico border environmental and health conditions. Second, two years of NAFTA data show that NAFTA is not on target to satisfy its proponent's promises in the future.

The book is divided into seven chapters which describe different elements of the environmental research gathered. Chapter one details the broken promise that NAFTA would decrease the number of "maquilladoras," U.S. owned manufacturing plants, in Mexico. In fact, statistics showed a 20 percent increase in maquilladora workers from 1993 to 1995. In addition, the devaluation of the peso and high interest rates further increased the environmental cleanup costs in Mexico.

Chapter two examines the increase in border hazardous waste generated under NAFTA. Data revealed not only an increase in hazardous waste, but also, that much of it has been washed down the drain. Further, resources for hazardous waste management have not improved since NAFTA. The third chapter discusses the increased incidence of neural birth defects in the border area. Although a direct link has yet to be proven, the higher than average rate of birth defects correlates to the high pollution levels in the border area.

Chapter four addresses the problem of contaminated water and its negative affect on border health. The incidence of waterborne diseases, such as Hepatitis-A, is two to five times higher than the national averages in the border region. Chapter five shows that border air pollution

has increased proportionately as industry and auto traffic have increased. For example, pollution from the Carbon II plant, which is across the border from Eagle Pass, Texas, produces 230,000 tons of sulphur dioxide annually. This is twice the rate allowed for U.S. plants in the 1970s.

Chapter six highlights the slow startup of environmental enforcement by the recently formed Commission for Environmental Cooperation (CEC). Plagued by limited authority and less money than expected, the CEC has not been very effective. Chapter seven demonstrates the difficulty in obtaining funding for border clean-up projects. U.S. government budget cuts and the Mexican economic depression have limited money otherwise available for binational cleanup projects. Consequently, less projects have been started then anticipated.

Public Citizen, a public interest group, recommends no expansion of NAFTA, increased monitoring, and the provision of standing in U.S. courts to citizens of NAFTA countries allowing them to sue U.S. companies that pollute. The group also recommends a transactional tax on NAFTA trade. A portion of the tax should then be used for grants and interest free loans so that the poorer border communities can afford sanitation and clean drinking water systems. According to Public Citizen, these recommendations would help to fix the broken environmental promises that NAFTA has made.

Scott Madsen