The University of Denver College of Law was honored to have Professor Burns H. Weston, Professor of Law at the University of Iowa, as its guest speaker for the eighth annual Myres S. McDougal Distinguished Lecture. Professor Weston chose to address the topic of assessing the legality of nuclear weapons and warfare, and he notes it is the special obligation of lawyers, "together with our clerical friends, to point up the normative rights and wrongs of coercive nuclearism." In his remarks, Professor Weston acknowledges that while there are no explicit treaties or treaty provisions which render nuclear weapons illegal per se, there are six "core rules" applicable to nuclear weapons which may be derived from the conventional and customary laws of war. Having identified these six core rules, he then proceeds to analyze the potential ways in which nuclear weapons might be used in terms of these rules. These ways include first defensive use, second defensive use and threat of first or second defensive use. Professor Weston concludes his remarks by stating that "almost every use to which nuclear weapons might be put, most notably the standard strategic and theater-level options which dominate United States and Soviet nuclear policy, appear to violate one or more of the laws of war that serve to make up the contemporary humanitarian law of armed conflict, in particular the principal of proportionality."

The purpose of Professor Fix Zamudio's survey, which is a condensed version of his masterful study in Spanish, LA PROTECCIÓN PROCESAL DE LOS DERACHOS HUMANOS (1982), is "to demonstrate the fact that within almost every country of the world with an organized government, there exists some means by which citizens may redress grievances of fundamental rights violations." The survey is divided into two parts. The first part concerns legislative enactments, primarily constitutional provisions, and the judiciary, and examines the conceptualization and classification of domestic instruments, Anglo-American instruments, Latin American instruments, continental European instruments, and the Procurator of the socialist legal systems. The second part focuses on executive remedies and is examined primarily through the Ombudsman model, which originated in Scandinavia. Professor Fix Zamudio's overall thesis is that national institutions are more promising than multinational institutions for the redress of fundamental
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is an integral part of the University of Denver's International Legal Studies Program. The purpose of the Program is to prepare students for effective roles in the contemporary interdependent world of business, federal government, and international relations. The faculty includes members of the regular faculty at the University of Denver College of Law, professors from other schools and departments of the University, and several practicing attorneys. The Director of the Program is Professor Ved P. Nanda of the College of Law.

In addition to the regular course of study, the International Legal Studies Program makes special provision for internships, externships, and summer study in the United States and abroad. Students may also enroll in a joint degree program with the Graduate School of Business and Public Management or the Graduate School of International Studies, leading to the degrees of M.B.A., M.A., or Ph.D., in addition to the J.D.

Other components of the Program include the Denver International Law Society, the Myres S. McDougal Distinguished Lecture in International Law and Policy, the annual regional conference of the American Society of International Law, and the Philip C. Jessup International Law Moot Court Competition.

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rights violations, and he concludes that through this global survey, "we may obtain a better perspective of the most effective and expedient means for the protection and resolution of fundamental rights violations, namely the pursuit of domestic remedies rather than the more idealistic and cumbersome methods of external world pressure currently advocated." An Addendum is attached to the article to update the reader on events transpiring between authorship and publication.

**Legislative Reform of U.S. Extradition Statutes: Plugging the Terrorist's Loophole . . . William M. Hannay**

Mr. Hannay's basic contention in this article is that U.S. antiterrorist policy and U.S. antiterrorist law as set forth by current U.S. extradition procedures are unacceptably inconsistent. The reason for this inconsistency is the absence of legislation dealing with extradition procedures, which absence has resulted in a situation in which "recent U.S. court rulings have appeared to put the imprimatur of our judicial system on the violent acts of terrorists who have no respect for human life, for democratic process or for the Rule of Law." Mr. Hannay gives an overview of these cases as well as of legislation, developed in cooperation with the Departments of State and Justice, which would have transferred the standards for extradition from the judiciary had it been passed during the second session of the 97th Congress. Significant differences developed, however, between the House and Senate versions of the bill, with respect to the "political offense" exception to extradition treaty. Most of the article is spent analyzing the different approaches to defining the "political offense" exception. Mr. Hannay suggests that amendments proposed by the ABA's Section of International Law and Practice, a copy of which is appended to the article, provide a resolution of the issue. He concludes that the Senate's version "would be entirely satisfactory if it is recognized that the Senate Foreign Relations Committee has set forth the correct standard for interpreting "extraordinary circumstances" [which goes to the reasonableness of committing the political offense], if a new prohibition excluding terrorist attacks on civilians is added, and if the American Bar Association's proposed amendment is adopted. Such a statute will give courts the necessary tools with which to separate the truly downtrodden from the merely dissatisfied, to distinguish the rebel from the terrorist."

**An Overview of Comparative Environmental Law . . . A. Dan Tarlock and Pedro Tarak**

Professors Tarlock and Tarak attempt "a brief comparative analysis of the different [national] institutional responses to the various types of environmental degradation." They begin their study by categorizing environmental insults as episodic or periodic and then examining their legal consequences. From there they turn to the factors influencing environmental protection levels, which will vary from country to country, in terms of industrialization, political organization, political ideology and opportunities for public influence. Following this, they examine the costs and benefits of the two basic legal strategies to control environmental insults: private actions and public actions. In addition to judicial actions, they devote attention to public regulation by legislation, exploring how policy is formulated and how institutional and/or general arrangements are created to regulate the envi-
ronment. They conclude that all nations, despite their internal differences, should incorporate three essential features in their environmental protection policies. The first is for an arm of the central government to have an exclusive mandate, the second is that such arm have "the power to decide how pollution costs are to be allocated as between public and private entities" and the third is the integration of values promoting environmental goals must occur in the countries' general policymaking processes.

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Nuclear Weapons and International Law: Illegality in Context

Burns H. Weston

It is a distinct pleasure—more than that—a great privilege to speak tonight as this year’s McDougal lecturer. I thank you for the invitation. In my judgment, Myres McDougal is without peer among international law scholars and jurisprudential thinkers in the Twentieth Century. He is to the fields of international law and jurisprudence, I believe, what Albert Einstein was to the world of physics: a man of seismic vision and consequence. So it is for me a tremendous honor as well as pleasure to be here tonight, speaking under his name. Not that Mac would agree with everything I plan to say this evening; indeed, he sometimes thinks of me, I suspect, as one of his black sheep, somehow gone astray. But if ever there was a man willing to engage in honest disagreement and still call you a valued friend and colleague, that man is Myres McDougal—provided, of course, that you muster the intellectual wherewithal needed to make that disagreement honorable and respected. Myres McDougal does not suffer fools lightly.

Now in the interest of avoiding the fool’s errand, let me say at the outset that I harbor no illusions about the role of law and lawyers in relation to nuclear weapons and warfare. There is only so much any one constituency, professional or otherwise, can do by itself. But relative to the other professions, the legal profession can boast, I believe, at least three comparative advantages when it comes to such matters of high state policy as that of nuclear weapons and warfare; and each merits at least brief mention.

One is found in the realm of negotiation, mediation, conciliation, and the like—the so-called table skills of agreement-making and conflict settlement. Alan Sherr and others of us from LANAC (the Lawyers Alliance
DEN. J. INT’L L. & POL’Y for Nuclear Arms Control) are hard at work exploring and promoting such ways and means to minimize, if not altogether to eliminate, the threat of nuclear war from the face of the earth.

Another especially lawyerly function—one, frankly, that goes much too unsung these days—is the art of regime-building, of inventing and constituting institutions and structures that are capable of coping with major misfeasance of malfunction—for example, the twin diseases of militarism and nuclearism that now infest our planet. Lawyers, I believe, are especially well equipped for what McDougal would call the constitutive enterprise, although shamefully few are now seriously engaged in mapping out those alternatives to the present madness that realistically could enhance our collective national and international security without endangering our biological survival.

Finally, taking my cue from the religious communities (most conspicuously, perhaps, the Catholic Bishops) who with increasing unanimity now condemn the use and threat of use of nuclear weapons as fundamentally immoral and violative of our sacred traditions, there is the all-important business of rendering normative judgment—here, of assessing the legality of nuclear weapons and warfare—and it is this function or comparative advantage I want to stress this evening. We lawyers, particularly in the United States, are to a large degree the high priests of the secular order, and for this reason we have an especial obligation, together with our clerical friends, to point up the normative rights and wrongs of coercive nuclearism. It is an obligation that is, I think, especially important in an essentially voluntarist community, such as our present world community, where one is well advised to emphasize the authority over the control component of international legal prescription lest the law be revealed as merely or mainly the expression of the will of the strongest. The fox in the chicken coop has somehow to be leashed.

I.

Permit me to begin, then, by first acknowledging that, despite the aggravated mutilations we call Hiroshima and Nagasaki, which some reputable scholarship says lacked military necessity, the world community has yet to enact an explicit treaty or treaty provision that prohibits generally the development, manufacture, stockpiling, deployment, or actual use of nuclear weapons. True, a series of important treaties prohibit nuclear weapons in Antartica, Latin American, outer space, and on the seabed beyond the limit of the national territorial seas. The Partial Test Ban Treaty outlaws the testing of nuclear weapons in outer space, underwater, and within the earth’s atmosphere (testing nuclear weapons is truly the Devil’s act, you see; you have to go underground). The United Nations General Assembly has declared the use of nuclear weapons to be “a direct violation of the Charter of the United Nations,” “contrary to the rules of international law and to the laws of humanity,” “a crime against mankind and civilization,” and therefore a matter of “permanent prohibition.” And, in a much too neglected decision rendered almost twenty years ago,
in the Shimoda Case, a Japanese tribunal felt compelled to condemn as contrary to international law the only instance of actual belligerent use of nuclear weapons to date, the United States bombings of Hiroshima and Nagasaki. But the fact remains that, despite these various efforts to limit resort to nuclear weapons, there does not yet exist a general treaty ban on their use and threat of use.

Of course, this fact is not lost on those who defend the legality of these weapons. Consistent with the traditional state-centric theory of international legal obligation, which requires that prohibitions on international conduct be based on the express or implied consent of States, they rest their claim, in substantial part, on the proposition drawn from the World Court decision in The Case of the S. S. Lotus; i.e., that States are free to do whatever they are not strictly forbidden from doing. Indeed, consistent with Cicero's oft-quoted maxim inter arma silent leges (in war the law is silent), some go so far as to contend that nuclear weapons have made the laws of war obsolete.

But surely this is not the end of the matter. While the lack of an explicit ban may mean that nuclear weapons are not illegal per se, the face is that restraints on the conduct of war never have been limited to explicit treaty prohibitions alone. As stated by the International Military Tribunal at Nuremberg in September, 1946:

The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts.

The law of war, like the whole of international law, is composed of more than treaty rules, explicit and otherwise.

Well, taking my lead from the Nuremberg Judgment, I undertook this last year to consider what the conventional and customary laws of war had to say about our topic; and what I found were at least six core rules that struck me as prima facie relevant:

first, that is is prohibited to use weapons or tactics that cause unnecessary and/or aggravated devastation and suffering;

second, that is is prohibited to use weapons or tactics that cause indiscriminate harm as between combatants and noncombatant military and civilian personnel;

third, that is is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or that are disrespectful of persons, institutions, and resources otherwise protected by the laws of war;

fourth, that it is prohibited to use weapons or tactics that cause widespread, long-term, and severe damage to the natural environment;

fifth, that it is prohibited to use weapons or tactics that violate the neutral jurisdiction of non-participating States; and
sixth, that it is prohibited to use asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices, including bacteriological methods of warfare.

Of course, these humanitarian rules of armed conflict, as I choose to call them, are general rules, and like all general rules, which are susceptible of differing contextual as well as linguistic interpretation, they harbor exceptions. Also, each traditionally has involved, particularly the first three, a balancing of the customary principles of military necessity and humanity, with “the line of compromise,” as McDougal has written, tending to be “closer to the polar terminus of military necessity than to that of humanity.” The relative tolerance heretofore extended to “scorched earth” and “saturation bombing” policies and to incendiary and V-weapons, for example, probably attests to this observation. Nevertheless, even after subjecting these core rules to the sophisticated jurisprudence of New Haven, as I have attempted to do elsewhere for the purpose of determining their precise jural quality, one may reasonably accept their pertinence to nuclear weapons and warfare.

More precisely, one may reasonably reach the following three conclusions about them: first, that they continue as a vital civilizing influence upon the world community’s warring propensities; second, that as contemporaneously understood, they are endowed with an authority signal that communicates their applicability to nuclear as well as to conventional weapons and warfare; and finally, that there exists on the part of the world community as a whole, evidence—thankfully, more in words than in deeds—an unmistakable intention to have them govern the use of nuclear weapons should ever that terrible day arrive again. To be sure, there is manifest an ambiguity about the extent to which this control intention could in fact be fulfilled, and this ambiguity will persist as long as the distribution of the world’s effective power remains as oligarchic as it now is. But it would be error to conclude from this ambiguity that there is no prescription or law placing nuclear weapons and warfare under the legal scrutiny of the humanitarian rules of armed conflict. Moreover, in view of the horrifying and potentially irreversible devastation of which nuclear weapons are capable, not to mention the very little time their delivery systems allow for rational thought, it is only sensible that all doubts about whether they are subject to the humanitarian rules of armed conflict, as a matter of law, should be answered unequivocally in the affirmative, as a matter of policy. Such a response seems mandated, in any event, by a world public order of human dignity, in which, as McDougal has repeatedly stated, values are shaped and shared more by persuasion than they are by coercion.

In sum, despite an erosion over the years of legal inhibitions regarding the conduct as well as the initiation of war, there remains even in this nuclear age an inherited commitment to standards of humane conduct within which the reasonable belligerent can operate, a commitment to the fundamental principle from which all the laws of war derive, namely, that the right of belligerents to adopt means and methods of warfare is not
NUCLEAR WEAPONS AND INTERNATIONAL LAW

unlimited. It is, I think, not unreasonable to contend that nuclear weapons are illegal per se, within the terms of Rule 6 prohibiting the use of chemical, biological, and "analogous" means of warfare. Perhaps not all nuclear weapons conceivable, but certainly all nuclear weapons now deployed or planned, including the so-called "neutron bomb" or "enhanced radiation" (ER) weapon and the "reduced residual-radiation" (RRR) or "minimum residual-radiation" (MRR) weapon, manifest radiation effects that for all intents and purposes are the same as those that result from poison gas and bacteriological means of warfare; and, in any event, the 1925 Geneva Gas Protocol is so comprehensive in its prohibition that it may be said to dictate the nonuse of nuclear weapons altogether. But in the absence of a specific prohibition, one is expected to ask the same basic question that the conscientious belligerent is obliged to ask in any given conflict situation: Is resort to this means or method of warfare proportionate to a legitimate military end?

II.

In most if not all nuclear warfare situations, the answer to this foregoing question must be given, I believe, in the negative. It is hard to imagine any nuclear war, except possibly one involving a very restricted use of extremely low-yield battlefield weapons, where this vital link between humanity and military necessity, i.e., proportionality, would not be breached or threatened in the extreme; and it is especially hard to imagine in the face of the "countervalue" and "counterforce" strategic doctrines that underwrite the core of the nuclear deterrence policies of the two superpowers. Considering the millions of projected deaths and uncontrollable environmental harms that would result from any probable use of nuclear weapons, it seems inescapable that nuclear warfare is contrary to the core precepts of international law.

But the point here is not to deal in generalities, important as the generalities are. Rather, as my subtitle is meant to indicate, it is to investigate how and to what extent the humanitarian rules of armed conflict actually operate in concrete nuclear weapons contexts. After all, if Myres McDougal teaches us anything, it is that a proper appreciation of any prescription, whether explicitly or implicitly formulated, cannot be had without a conscious understanding of the "real world" contexts within which it has to function.

Let us first be clear, however, about the overall issue we are addressing, which is to say not the lawfulness of using or threatening to use nuclear weapons as part of a campaign or single act of aggression (as that term is defined in the 1974 United Nations General Assembly Resolution on the Definition of Aggression). Whatever the exact legal status of the Kellogg-Briand Pact and U.N. Charter article 2(4), particularly after the deafening silence that greeted the 1980 Iraqi invasion of Iran, arguably an act of aggression is unlawful irrespective of the kinds of weapons used, nuclear or conventional. Thus, recalling the customary right of individual and collective self-defense (now enshrined in U.N. Charter article 51),
and noting that all the nuclear weapon states admit to no other rationale for their arsenals, the question ultimately before us must be whether any defensive use or threat of use of nuclear weapons may be considered contrary to international law, and hence prohibited. The issue subdivides, first, in terms of the actual first- or second-strike defensive use of these weapons for "strategic" or "tactical" purposes; and second, in terms of the threat of their use by way of research and development, manufacture, stockpiling, or deployment for any defensive use or purpose. It should be understood, however, that "strategic" objectives and uses have been the centerpiece of U.S. and Soviet deterrence policies since the late 1940s and early 1950s when the nuclear arms race between them began. Indeed, despite a growing interest on both sides in counterforce doctrine and capabilities for damage limitation, the concept of "countervalue" or "assured (societal) destruction" has served at least the United States as the principal rationale for its nuclear arms buildup ever since it began.

A. First Defensive Use of Nuclear Weapons

1. Strategic Warfare: Countervalue Targeting

Nuclear weapons designed for countervalue or city-killing purposes tend to be of the strategic class, with known yields of deployed warheads averaging somewhere between two to three times and 1500 times the firepower of the bombs dropped on Hiroshima and Nagasaki. Further, they are "dirty" bombs, capable of producing severe initial nuclear radiation, spatially and temporally dispersed residual radiation (or radioactive fallout) and, in addition, wide-ranging electromagnetic pulse (EMP) effects. Further still, their CEP ("circular error probable") currently averages somewhere between 300 and 2500 meters (i.e., 0.3 to 2.5 kilometers)—which is to say that they lack pinpoint accuracy. Thus, in addition to violating the Rule 6 prohibition against chemical, biological, and "analogous" means of warfare, their capacity for violating all the other prohibitory rules noted, and on a truly awesome scale, seems self-evident.

However, when evaluating this defensive option, what really matters, in a certain sense, is less the fact that nuclear weapons would violate one or another of the prohibitory rules mentioned than the fact that massive nuclear warfare, as a defensive measure, would be unleashed most probably in response to a conventional warfare provocation. By any rational standard, this would constitute a gross violation of the cardinal principle of proportionality. Assuming even the so-called "worst-case" scenario, e.g., a Soviet conventional assault against Western Europe or the oilfields of the Middle East, where is the military necessity in incinerating entire urban populations, defiling the territory of neighboring and distant neutral countries, and ravaging the natural environment for generations to come simply for the purpose of containing or repelling a conventional attack? Surely a failure to provide for an adequate conventional defense or to develop alternative energy sources does not excuse these probable results. If so, then we are witness to the demise of Nuremberg, the triumph
of *Kriegsraison*, the virtual repudiation of the humanitarian rules of armed conflict in at least large-scale warfare. The very meaning of “proportionality” becomes lost, and we come dangerously close to condoning the crime of genocide, as a military campaign directed more towards the extinction of the enemy than towards the winning of a battle or conflict.

It is, of course, conceivable that a city-killing first strike might be in response to a perceived but as yet unexecuted threat of nuclear attack—an imminent one, we must assume. Indeed, it is conceivable that the threatened attack would be equivalent in character. Thus, however much the anticipatory or preemptive strike would run afoul of the rules against aggravated and indiscriminate suffering (Rules 1 and 2 above), it might nevertheless be argued to meet the test of proportionality in some rough way. But the argument would be, I think, deceptive. A preemptive strike of the sort contemplated here, particularly if surface bursts are involved, still would inflict large-scale collateral harms beyond the place and moment of immediate conflict. In addition to violating the Rule 6 ban on chemical, biological, and “analogous” weapons, it would likely violate also the minimal safeguards extended to internationally protected persons (Rules 2 and 3), the natural environment (Rule 4), nonparticipating neutral States (Rule 5), and consequently by these excesses would strain severely the principle of proportionality. Moreover, to the extent that U.N. Charter article 51 admonishes recourse to minimally coercive and nonviolent modes of conflict resolution, including resort to the collective conciliation functions of the United Nations, a preemptive strike probably would disproportionately violate Rules 1 and 2 as well. After all, the threat still would be unexecuted. In any event, the principle of proportionality surely would require that the burden of policy proof be shouldered by those who would unleash the preemptive countervalue strike, and that burden would be a heavy one considering the massive and extended deprivation potentially involved. It is difficult to conceive of any nuclear threat that could not be met by some lesser preemptive mode—except, of course, in the case of foreign policies lacking in creative imagination and insensitive to the magnitude of the human values at stake.

2. *Strategic Warfare: Counterforce Targeting*

Involving the same strategic weapons with the same odious capabilities relied upon for countervalue targeting, a counterforce first strike, like a countervalue first strike, faces the test of proportionality with many presumptions against it. Even if intended for essentially military targets alone, it still would have far-reaching EMP and radiation effects that could not be confined to the place and moment of immediate confrontation, thus violating not only the Rule 6 ban on chemical, biological, and “analogous” weapons but, as well, the rights of great numbers of innocent and neutral—including distant—third parties both living and unborn. And, however much actually restricted to essentially military targets, it still would consist of a massive nuclear retort to what likely would be only a conventional war provocation.
Concededly, because counterforce strategy is a policy of targeting the military, especially nuclear, forces rather than the cities of the other side, there is at least surface plausibility in the argument that a counterforce first strike would not unduly trample upon the Rule 2 prohibition against indiscriminate injury to noncombatant persons and property. Indeed, a lure of counterforce doctrine is that it makes nuclear weapons more credible as instruments of war in part because, at least theoretically, it is less subject to the legal and moral criticisms that can be leveled against countervalue doctrine. The plausibility of this argument quickly vanishes, however, when it is matched against the available data. An oft-cited Office of Technology Assessment study published in 1979, for example, quotes U.S. Government studies indicating that between 2 million and 20 million Americans would be killed within thirty days after a countersilo attack on United States ICBM sites, due mainly to early radiation fallout from likely surface bursts. The test of proportionality is thus greatly strained once again.

Indeed, when all the dynamics of an actual counterforce first strike are taken into account, the test of proportionality seems to be abrogated completely, particularly when the opposing sides are both nuclear powers, as would likely be the case. In the first place, unless the counterforce attack were an all-out “disarming first strike” aimed at the total incapacitation of the enemy’s nuclear forces (a highly unlikely achievement), it would virtually guarantee retaliation and therefore greater and more widespread devastation and suffering. Second, notwithstanding voguish theories of “intra-war bargaining,” “intra-war deterrence,” and “controlled escalation,” it is highly improbable that the opposing sides would or could restrict themselves to fighting a “limited” rather than “total” nuclear war, as if somehow governed by the rules of the Marquess of Queensbury. Finally, it seems fairly clear that counterforce capabilities, involving missiles that never have been tested over their expected wartime trajectories, are neither as accurate nor as reliable as publicly claimed.

Again, however, it remains to be asked whether different conclusions might not obtain in the case of an anticipatory counterforce first strike as distinguished from an initiating one. Such a strike, designed to preempt, say, an imminent devastation of equivalent or greater dimension, conceivably could meet the test of proportionality precisely because it would be directed, pursuant to counterforce doctrine, against only military targets. Particularly might this be the case where the statistical probability of accurate warhead delivery would be fairly high, i.e., where the CEP of the preemptive strike would be fairly low (within 100-200 meters by current standards). This logic is based, however, on a calculation of statistical probability, and probabilities, let us be clear, are not certainties. In addition, it suffers from all the disabilities concerning proportionality that we noted in connection with both the preemptive countervalue strike and the initiating counterforce strike. Again, therefore, it is reasonable to conclude that the test of proportionality would not be met or that, at the
very least, those who would unleash the preemptive counterforce strike would have the burden of proving otherwise.

3. Tactical Warfare: Theater/Battlefield Targeting

There is no clear borderline between so-called “tactical” and so-called “strategic” nuclear weapons, with the yields and consequent effects of the former commonly rising to the level and impact of the latter. The public debates and demonstrations in Europe since late 1979, which have related primarily to intermediate-range weapons and weapons systems such as the SS-20 ballistic missile and Backfire bomber on the WTO (Warsaw Pact) side, and the planned deployment of Tomahawk ground-launched cruise missiles and Pershing II ballistic missiles on the NATO side, are vivid witness to this fact. Accordingly, it is logical to conclude that the first-strike use of tactical nuclear weapons above, say, the 13 to 22 kiloton range of Hiroshima-Nagasaki, i.e., almost sixty percent of the estimated intermediate “theater of war” and more limited “battlefield” nuclear weapons currently deployed by the NATO and WTO countries, should be subject to the same legal judgments that attend the first-strike use of strategic nuclear weapons (both countervalue and counterforce). The first-strike use of their strategic (particularly counterforce) equivalents would appear to violate in the same way and to a similar degree, separately and in combination, not only all or most of the humanitarian rules of armed conflict listed in Section I but, as well, the fundamental principle of proportionality that mediates among them.

But what of tactical nuclear weapons below the 13 to 22 kiloton range of Hiroshima-Nagasaki? Would the first-strike use of such lower yield weapons, particularly those in the one to two kiloton or sub-kiloton range, equally violate the prohibitory rules discussed above? Would such a strike equally violate the principle of proportionality, on the grounds that, like its strategic counterparts, it probably would be in response to a conventional warfare provocation; indeed, in likely contrast to its strategic counterparts, probably in response to a conventional warfare provocation by a non-nuclear adversary? By common definitional agreement, it will be recalled, the term “tactical nuclear weapons” is intended generally to refer to those weapons systems that are designed or otherwise available for use against essentially military targets in so-called intermediate “theater of war” and more limited “battlefield” situations.

In theory, I agree, the answers to these questions must depend, inter alia, on the characteristics and capabilities of the tactical weapons in question. For example, though the provocation might be a conventional one or, indeed, at the hands of a non-nuclear opponent, it is possible at least to conceive of a low-yield, relatively “clean,” and reasonably accurate nuclear weapon or weapon system whose tactical first defensive use actually would save lives and protect property within the meaning of military necessity, that is, without violating the principle of proportionality. This “best-case” scenario, however, appears to be a limited one. Judging
from the state of the art as so far publicly revealed, no such option is available among existing intermediate-range theater weapons, although some "progress" in this direction appears to be taking place in connection with limited-range battlefield weapons. The possibility of minimizing destruction and of avoiding indiscriminate harm consonant with Rules 1 and 2 may be present, but not without substantial and, I submit, disproportionate cost in most circumstances relative to internationally protected persons (Rules 2 and 3), the natural environment (Rule 4) and nonparticipating neutral States (Rule 5), due to initial and residual radiation. Moreover, except by a process of interpretation that is uninformed by the basic assumptions of a world public order of human dignity, there is no getting around the Rule 6 prohibition of chemical, biological, and "analogous" weapons. By its very nature, a fission weapon must be regarded as "dirty," and even if a pure fusion weapon with no fission were developed, its explosion in the air and, of course, at ground-level still would result in some radioactive contamination, albeit not as extensive as when nuclear technology was less "tailored" than it is today.

But what truly is damning of the first defensive use of tactical nuclear weapons, whether in theater or battlefield operations, is less the nature of the weapons themselves than the nature of tactical nuclear warfare as a whole. In the first place, as should be apparent to all, if a military campaign defined in part by a first-strike use of nuclear weapons were ever to take place, it surely would not be limited to one or two nuclear strikes, even if only the first user were a nuclear power. Likely as not, as conservatively projected in the 1980 Report of the Secretary-General on nuclear weapons, tactical nuclear warfare, at least at theater level, would result in hundreds and thousands of nuclear explosions and, consequently, untold immediate and long-range, long-term collateral harms. In addition, once unleashed, the probability that tactical nuclear warfare could be kept at theater or battlefield level would be small. A crisis escalating to the actual first use of even relatively small nuclear weapons would bring us dangerously close to the ultimate stage, a "strategic exchange," particularly if one of the two sides saw itself at a disadvantage in a drawn-out "tactical exchange." In sum, once out of the bottle, likely as not even the tactical nuclear genie would quite literally cause "all hell to break loose;" and this fact, in combination with the observations already made regarding the humanitarian rules of armed conflict, would seem by any rational analysis to run hard up against the principle of proportionality upon which the doctrine of military necessity is premised.

Thus, the first use of nuclear weapons again would appear contrary to the basic laws of war as contemporaneously understood. It need only be added that, for all the reasons noted above, but especially the last two relative to the essential uncontrollability of tactical nuclear warfare in general, this conclusion may be seen to apply to the preemptive first use of tactical nuclear weapons as well as to their initiating first use.
B. Second Defensive Use of Nuclear Weapons

Would a second defensive use of nuclear weapons—one undertaken as a claimed "legitimate reprisal" in response to a prior attack unlawfully initiating the use of such weapons—equally or similarly violate the humanitarian rules of armed conflict? In view of the numerous qualifying reservations now attached to the 1925 Geneva Gas Protocol, conditioning adherence to it upon reciprocal observance of its terms, it may be that the Rule 6 ban on chemical, biological, and "analogous" means of warfare would not stand in the way. On this point, concededly, there is ambiguity. But what about the Rule 3 prohibition of reprisals that are disproportional to legitimate belligerent objectives or that are disrespectful of persons, institutions, and resources otherwise protected by the laws of war? Is there ambiguity here as well?

1. Strategic Warfare: Countervalue Targeting

In the case of a second use of nuclear weapons characterized by countervalue targeting, there is, I submit, no ambiguity. For at least three reasons, such a use may be said to violate the humanitarian rules of armed conflict as contemporaneously understood, especially Rule 3.

In the first place, a retaliatory city-killing attack would flagrantly trample upon guarantees extended to civilians and civilian populations, among other internationally protected persons, by the most recent formal statements on the laws of war. Article 51(6) of 1977 Protocol I Additional to the 1949 Geneva Conventions, for example, is characteristically unequivocal: "Attacks against the civilian population or civilians by way of reprisals are prohibited."

Second, except to destroy enemy morale, which is clearly an impermissible objective under the laws of war, and the more so, one would think, when the result is to terrorize an enemy community through the infliction of literally overwhelming—perhaps irremedial—societal destruction, it is difficult to see how a retaliatory countervalue strike would serve any military necessity whatsoever. To the contrary, even if the antecedent first use were likewise countervalue-destuctive in character, it would appear to serve mainly the purpose of vengeance rather than the values of proportionate policing (given, at least, the present essentially rural deployment of the world's strategic forces).

Finally, if the history of belligerent reprisals is any indication, there is the near certainty that a retaliatory countervalue strike would lead not to a reduction of hostilities nor to a moderation of tactics but to an escalatory spiral and spread of countervalue exchanges. At this point, virtually everything for which the principle of proportionality is supposed to stand, including the integrity of the natural environment and the inviolability of neutral state territory, would be threatened; the humanitarian rules of armed conflict would become all but obsolete.
2. Strategic Warfare: Counterforce Targeting

The case of a second counterforce use of nuclear weapons is not so clear-cut. Because such a response would be directed, pursuant to counterforce doctrine, against the military (especially nuclear) forces rather than the cities of the first user, and because the laws of war do not invite national suicide, there is room to contend that such a strike would be compatible with prohibitory Rule 3 and the other humanitarian rules of armed conflict, provided that it not be patently excessive relative to the antecedent attack and the goal of law-compliance or nonrecurrence. Indeed, paradoxical though it may seem, it might even be argued that, to ensure a minimum destruction of cherished values (preferably the values of freedom and equality), a nuclear counterstrike of this kind would be required. On the other hand, bearing in mind the characteristics and capabilities of the weapons and weapons systems that constitute today's counterforce arsenals, there remains the problem of reconciling the rights of states not party to the conflict and of persons and property expressly shielded by the law of reprisals and the more general laws of war. “Clean bombs” and “surgical strikes,” especially in relation to strategic warfare, exist more in the minds of military planners than they do in reality. Additionally, there is the customary injunction that reprisals be taken only as measures of last resort. In the context of nuclear war, this injunction is all the more imperative.

Thus, the permissibility of a counterforce second strike under the humanitarian rules of armed conflict may be regarded as ambiguous. Of course, because of the essentially uncontrollable dangers involved, one must assume that such a second use, if permissible, would be authorized only in response to an antecedent attack of equivalent or greater proportion, i.e., a prior counterforce or countervalue attack. But even then, because of the unrefined nature of the weaponry involved and the likelihood of crisis escalation and spread, the burden of policy proof would again weigh heavily on those who would retaliate in this manner. Let us be candid. As Roger Fisher has written, “Honestly, each of us would prefer to have our children in Havana, Belgrade, Beijing, Warsaw, or Leningrad today than in Hiroshima or Nagasaki when the nuclear bombs went off.”

3. Tactical Warfare: Theater/Battlefield Targeting

If there is a case to be made for the use of nuclear weapons consistent with the humanitarian rules of warfare, it is here, in respect of the second use of tactical nuclear weapons. Arguably, a second retaliatory use of a low-yield “clean,” and reasonably accurate intermediate- or limited-range nuclear weapon directed only at a military target could be said to meet the requirements of proportionality (or military necessity) that govern the law of reprisals as presently understood. When making the case beyond this highly circumscribed option, however, at least two major complexities arise. First, to the extent that a retaliatory second use would involve theater or battlefield weapons around or above the 13 to 22 kilo-
ton range of Hiroshima-Nagasaki, there is the problem of having to deal with all the ambiguities and qualifications noted in connection with a second counterforce use of nuclear weapons. And second, regarding all tactical nuclear weapons, including those in the one to two kiloton or sub-kiloton range, there is the problem of establishing upper limits on the number of retaliatory strikes that could be launched at any time without doing violence either to the rights of internationally protected persons (Rules 2 and 3) and neutral States (Rule 5) or, more generally, to the principle of proportionality. In other words, except in the narrowest of circumstances, the unrefined and unpredictable nature of nuclear weapons and weapon systems in general continues to cloud the legality of their second use even in tactical warfare. Add to this the extreme dangers that would attend a likely escalatory spiral once the process of reprisal and counter-reprisal were set into motion, and again the burden of proving that this retaliatory approach should be favored over other means of deterring the enemy becomes very heavy.

C. Threat of First or Second Defensive Use

If a given use of nuclear weapons is properly judged contrary to the humanitarian rules of armed conflict, then logically any threat of such use—including not only an ostentatious brandishing of arms (such as a menacing “demonstration burst”), but also their research and development, manufacture, stockpiling, and deployment—should be considered contrary to the humanitarian rules of armed conflict as well. In view of our preceding discussion, the threat at least of a strategic first strike, a tactical first strike, a second countervalue strike, and possibly also a second counterforce strike as well as most tactical second strikes would fit this logic.

A distinct problem with this thesis, however, is that nothing in the traditional rules of warfare prohibits the preparation in contrast to the actual use of weapons and weapon systems. Also, it flies in the face of the deterrence doctrines which are said to have kept the peace, at least between the superpowers, for the last thirty-odd years—a conflict of major significance because, to be minimally credible, a policy of deterrence requires the research and development, manufacture, stockpiling, and deployment of the weapons upon which it is premised. It is true that the nuclear deterrence policies currently practiced, between the superpowers especially, may be criticized in numerous ways: for involving unacceptably high risks; for building upon an inherently unstable balance; for terrorizing populations and holding them hostage as a consequence; for detracting from acceptable solutions or alternatives in case of failure of deterrence; and so forth. But because of the widespread preception, however much open to debate, that the prevention of widespread conflict rests on nuclear deterrence and that this system is, in turn, dependent on credible nuclear threat, it would be difficult to conclude that measures short of actual use would violate the humanitarian rules of armed conflict as presently understood. Not even U.N. General Assembly Resolution
1653 (XVI) or 2936 (XXVII), which declare the use of nuclear weapons, respectively, “a crime against mankind and civilization” and a matter of “permanent prohibition,” seek to outlaw measures short of actual use.

Nevertheless, to facilitate comprehensive outlook, at least three qualifying observations should be borne in mind. First a number of path-breaking treaties do specifically prohibit nuclear weapons preparations short of actual combat use: the 1959 Antarctica Treaty, the 1963 Partial Test Ban Treaty, the 1967 Treaty of Tlatelolco, the 1967 Outer Space Treaty, the 1971 Seabed Arms Control Treaty, and the 1979 Draft Moon Treaty. Second, where “demonstration bursts” or equivalent menacing tactics are involved, there is always the possibility of violating the Rule 6 ban on chemical, biological, and “analogous” weapons and, in addition, the other humanitarian rules of armed conflict designed to safeguard internationally protected persons, the natural environment, and neutral states. Finally, because of the high risks and monumental dangers involved, any nuclear weapons measure short of actual use, but especially those of a particularly ostentatious or provocative nature, must be taken with extreme caution. The history of war is riddled with well-meaning doctrines gone out of control, and the possibilities of war increase in direct proportion to the effectiveness of the instruments of war we adopt. It is, no doubt, this viewpoint that lies behind article 36 of 1977 Geneva Protocol I Additional to the 1949 Geneva Conventions: “In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether if employment would, in some or all circumstances, be prohibited by this Protocol or any other rule of international law applicable to the High Contracting Party.”

In sum, and by way of conclusion, while no treaty or treaty provision specifically forbids nuclear warfare per se, except in certain essentially isolated whereabouts, almost every use to which nuclear weapons might be put, most notably the standard strategic and theater-level options which dominate United States and Soviet nuclear policy, appear to violate one or more of the laws of war that serve to make up the contemporary humanitarian law of armed conflict, in particular the cardinal principle of proportionality. Whatever legal license is afforded appears restricted to the following at most:

- essentially cautious, long-term preparations for preventing or deterring nuclear war, short of provocative “saber-rattling” activities;
- very limited tactical—mainly battlefield—warfare utilizing low-yield, “clean,” and reasonably accurate nuclear weapons for second use retaliatory purposes only; and
- possibly, but not unambiguously (until as yet undeveloped technological refinements are achieved), an extremely limited counterforce strike in strategic and theater-level settings for second use retaliatory purposes only.

In other words, applying the humanitarian rules of armed conflict to dif-
ferent nuclear weapons options or uses tends to prove rather than dis-prove the illegality of these weapons generally. And when one adds to this the conclusion at Nuremberg that the extermination of a civilian population in whole or in part is a "crime against humanity," plus the spirit if not also the letter of the 1948 Convention of the Prevention and Punishment of the Crime of Genocide, then a presumption of illegality and a commensurate heavy burden of contrary proof relative to the use of nuclear weapons on any extended or large-scale basis seems beyond perad-venture. To be sure, ambiguities exist here and there, especially in the case of limited tactical uses where the venerable test of proportionality must struggle between increasingly "tailored" military technologies and the human propensity for escalatory violence. But overall, the law opposes resort to these instruments of death, and to argue otherwise on the basis of the arguable permissibility of some essentially restricted use is to engage in a high form of sophistry.

Of course, as I stated at the outset, it would be naive to expect that the law alone can make the progressive difference, particularly when, as here, it touches sensitively upon prevailing notions of national security. But more and more the strategic planners among the nuclear weapon states especially; the defense policymakers, the military operators, the laboratories of military R & D, and even the arms controllers have got to change their modes of thinking. More and more they (we) must come to see the essential incompatibility of nuclear weapons with the core precepts of international law. More and more they (we) must be made to understand that the bell tolls for us all—so that we can wake up to-morrow not to the threat of nuclear holocaust but, in the gentle words of Emily Dickinson, spoken at the close of that magnificent film Sophie's Choice to "a morning excellent and fair."
A Global Survey of Governmental Institutions to Protect Civil and Political Rights

HECTOR FIX ZAMUDIO*

INTRODUCTION

This global survey was written to demonstrate the fact that within almost every country of the world with an organized government, there exists some means by which citizens may redress grievances of fundamental rights violations. The present emphasis in world affairs has been on organizing sanctions exterior to the governmental structures of nation-states through such august bodies as the United Nations and the Organization of American States. However, such sanctions do not effectively and efficiently aid those who require the greatest protection: the citizens of nation-states themselves.

This survey attempts to show the philosophic and functional similarity between various nations with diverse governmental organization and geographic location. It is divided into two major parts. The first part is an examination of legislative enactments, primarily constitutional provisions, for the protection of certain fundamental human rights and an examination of judicial bodies where citizens may bring such violations to the attention of the courts for their resolution. The second part examines the executive branch as a possible source of non-judicial redress, or alternatively, as a vehicle to prevent fundamental rights violations in a prophylactic capacity. This latter method is examined through the Ombudsman model which has been established in Scandinavia and utilized in various capacities throughout Europe and certain developing nations.

Part One of this survey, concerning legislative enactments and the judiciary, is divided into five sections: (1) conceptualization and classification of domestic instruments; (2) Anglo-American instruments for the enforcement of fundamental rights guarantees; (3) the special system in Latin America; (4) the system of continental Europe; and (5) the Procurator as the instrument of socialist legal systems. The latter half of the paper, concerning the ability of the executive to remedy fundamental rights violations, is examined from the institutional model of the Ombudsman.

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An Addendum is appended at the end of the article to note briefly the most recent developments in the myriad of laws mentioned in this survey.
I. LEGISLATIVE ENACTMENTS AND JUDICIAL REMEDIES

A. Conceptualization and Classification of Domestic Remedies

1. The Necessity of Exhausting Domestic Judicial Remedies Before Recourse to the International System

The availability of international authorities and commissions such as the United Nations Commission on Human Rights, the Inter-American Commission and Court of Human Rights, and the European Commission and European Court of Human Rights to redress human rights violations is expanding. An essential pre-requisite for recourse to the international petition system is prior exhaustion of domestic remedies. Therefore, a study of the means by which human rights can be protected through the domestic legal process is of great importance.

2. Classification of Legal Remedies

a. Statutory Remedies for the Protection of Fundamental Rights

The first category refers to legal remedies that are directed to the protection of statutory rights, but which can be utilized indirectly for the protection of fundamental rights. Administrative justice and judicial actions, including civil and criminal actions, fall within this category. Though indirect, both legal forums can be used as direct means to protect basic human rights; for example, a judicial proceeding may assure the protection of fundamental rights such as due process, access to the court for redress of grievances, and the right to a fair trial. France provides an administrative remedy to protect the human rights of citizens through its Council of State.

1. The Optional Protocol to the Covenant on Civil and Political Rights of the United Nations states in article 2 as one condition for a complaint's admissability, "that the individual has exhausted all available domestic remedies." Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1967). The European Convention on Human Rights and Fundamental Freedoms states in article 26 that "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law." European Convention on Human Rights and Fundamental Freedoms, done Nov. 4, 1950, entered into force Sept. 3, 1953, Europ. T.S. No. 5. The American Convention on Human Rights states in article 46, section 1(a) that a petition will be admitted to the Commission only if "the requirements under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." American Convention on Human Rights, done Nov. 22, 1969, entered into force July 18, 1978, O.A.'S. T.S. No. 36 at 1.

2. The Council of State has jurisdiction over the activity of the executive branch in France, although it is an administrative tribunal within that branch and thus independent of it. Individuals can petition the Council to redress grievances caused by government actions and may be awarded damages or other remedies. For a complete description of the French judiciary, see R. David, French Law: Its Structure, Sources, and Methodology (M. Kindred trans. 1972).
b. Complementary Remedies

Complementary remedies are not created for the protection of the rights of man, but are used to compensate for the irreparable violations of fundamental rights when such violations have been committed. In this sense, they are equivalent to remedies that have been classified by one school of thought as restrictive. Two examples of complementary remedies are: (1) a judgment of a political nature about the accountability of high public officials when they have compromised the Constitution, and particularly the human rights guaranteed by it; and (2) the economic responsibility of the state when its activity has caused damage which has had a prejudicial effect on fundamental rights.

c. Specific Remedies

Specific legal remedies are those that have gradually been shaped with the purpose of granting rapid and effective protection to fundamental rights, in an immediate and direct manner, generally with remedial effect. These instruments can be grouped, according to the approach of the Italian jurist Mauro Cappelletti, as "constitutional jurisdiction over liberty."

In this category, we mention habeas corpus and judicial review of the constitutionality of laws and official acts from the Anglo-American system; the acción, recurso or juicio de amparo and the mandado de seguridad in the Latin American legal system; and the Verfassungsbeschwerde (constitutional appeal) of some continental European countries. Other protective mechanisms that cannot be considered strictly as part of the legal process, but which can be used specifically as legal instruments for the protection of human rights in various other countries include the Procurator of the socialist legal system and the Scandinavian Ombudsman.

B. Anglo-American Instruments

1. Habeas Corpus

Habeas corpus apparently had its origin in Roman law, but gradually developed into British custom in the Middle Ages. It began as a judicial order for the appearance of persons before the court, and during the 14th and 15th centuries, in such laws as the proceso foral aragonés de manifestacion de las personas (Aragonese statute to produce the person), it assumed the fundamental purpose of examining the legality of the detention of persons. Whereas the Aragonese statute was abolished in 1591,

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4. See LAW OF HABEAS CORPUS, 1679, 31 CAR. II. ch. 2, as amended by 56 Geo.III ch.
on the occasion of the famous episode of Antonio Perez, in England habeas corpus developed in an uninterrupted manner until it culminated in the Law of Habeas Corpus of 1679.

a. The Doctrine of Habeas Corpus in the United States

In the United States, the writ of habeas corpus was applied in colonial times by virtue of the above-mentioned Law of 1679. Subsequently it became incorporated into some of the constitutions drawn up after the War of Independence, such as the Massachusetts Constitution of 1780, the New Hampshire Constitution of 1784, and the Federal Constitution of 1787.

In federal law the writ of habeas corpus has had a very important evolution. The U.S. Supreme Court initially limited its scope to contesting acts of administrative authorities and, only in exceptional cases, to incompetent judicial decisions. Gradually, the possibility of challenging judicial decisions was recognized, especially when they were based on statutory provisions that were considered unconstitutional. Habeas corpus is now openly recognized as the means by which to appeal final decisions of local courts, based upon errors which have been committed that affect the constitutional rights of the accused.

In this regard, two opinions of the Warren Court are of particular note: Escobedo v. Illinois (1964) and Miranda v. Arizona (1966), both of which strengthened the exercise of the fifth amendment right against compulsory self-incrimination, as well as the right to counsel even during custodial investigation by the police.

Since 1969, the year in which Warren Burger became Chief Justice, the rights of accused persons have undergone significant changes. Specifically, the U.S. Supreme Court has restricted the scope of federal habeas corpus relief because of the growing number of petitions that have been brought before the federal courts challenging local decisions. However, these changes have not undermined the essential function of habeas corpus.

100 (1893); W. Church, A Treatise on the Writ of Habeas Corpus §§ 23 (2nd ed. 1893). See also V. FAIREN GUILLÉN, ANTECEDENTES AROGENSES DE LOS JUICIOS DE AMPARO (1971) (a study of the history of the evolution of amparo).

5. Antonio Perez was an extremely capable statesman and favorite in the Spanish court of Philip II, who was imprisoned for a murder in which the king allegedly had complicity. For a full treatment, see G. MARAÑON, ANTONIO PEREZ: "SPANISH TRAITOR" (C.D. Ley trans. 1954).


7. U.S. CONST. art. I, § 9, cl. 2; Mass. Const. pt. 2, ch. 6, art. 7; N.H. Const. pt. 2, art. 91.


b. The Doctrine of Habeas Corpus in England

In England, habeas corpus traditionally conformed to the law of 1679 and was utilized to defend individuals against detentions ordered by the administrative authorities subordinate to the Crown. It evolved to become the means by which the deprivation of liberty brought about by judicial order could be challenged. Because of its widespread application, with repeated and successful appeals before various judges, the Administration of Justice Act of 1960 now limits its use. The 1960 Act permits prison wardens, against whom habeas corpus petitions are directed, the possibility of appeal against the granting of habeas corpus protection. This is possible even when the appeal has a delaying effect prejudicial to the accused.

2. Judicial Review

The concept of judicial review that now exists in numerous countries of the world has its origin in the British Colonies. The control that the Private Council of the Crown exercised over decisions of the colonial courts was of particular influence in America. For example, the theory of the English Judge Edward Coke contained in the classic Bonham's Case stated that there exists a superior right which cannot be contradicted by the Laws of Parliament. Paradoxically, at that time the courts of England did not have the power to pass judgment on the constitutionality of laws, due to the principle of parliamentary supremacy.

The concept of judicial review was incorporated into the U.S. Constitution and was defined by the U.S. Supreme Court, most notably in the case of Marbury v. Madison. The case established that all legal decisions are subject to the principles of the Constitution, and in cases where Constitutional principles conflict, an individual may bring the question before local courts whose decisions are subject to appeal in the U.S. Supreme Court.

The principle of judicial review was introduced by almost all Latin American constitutions, as well as by the majority of countries that presently comprise the Commonwealth of Nations, with the exceptions of England, New Zealand, Israel and South Africa. The principle of judicial review has had an influence in various continental European countries, particularly Switzerland, and to some extent in Norway and Denmark.

10. 8 & 9 Eliz. 2, ch. 65, § 15.
11. 8 Co. Crep. 114a; 77 E.R. 646 (K.B. 1610).
12. 5 U.S. (1 Cranch) 137 (1803).
13. In addition, judicial review has influenced the legal systems of Rumania and the Weimar Republic in the first post-war period, as well as in the Italian Republic under its Constitution of 1948 and until the Constitutional Court began to function in 1956.
3. Extraordinary Writs

The writs of injunction and mandamus, in addition to those of quo warranto, prohibition and certiorari, were established in traditional English law as a means of collateral challenge. They have on occasion been utilized by individuals for the defense of specifically guaranteed rights under the law or by the Constitution, without losing their quality of being standard proceedings.

These methods of challenge have been transformed in some legal systems into specific instruments for the defense of fundamental rights. In this same manner, some Argentinian provincial constitutions, such as those of Santiago del Estero (1939), Chaco, Chubut, Rio Negro and Formosa—all written in 1957—have adopted the writs of injunction and mandamus with the names of mandamientos de prohibición y ejecución, which can be issued by the courts at the request of those affected to restrict state authorities from fulfillment of an obligation established under law.

C. The Special System in Latin America

The acción, recurso or juicio de amparo (injunction) is undoubtedly the prime instrument for the protection of human rights that has gained wide acceptance throughout Latin America. It was initially consecrated in the state constitution of Yucatan (Mexico) of 1841, due to the ideas of Manuel Crescencio Rejón. It was then introduced into the federal sphere in Mexico by Mariano Otero under the "Acta de Reformas" of 1847 and culminated in articles 101 and 102 of the Federal Constitution of February 5, 1857.

The Republic of El Salvador, in its Constitution of August 13, 1886, was the first country to introduce the amparo subsequent to Mexico. Later, Honduras and Nicaragua introduced the amparo into their Constitutions.

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14. In England, the writs were transformed into prerogative orders beginning in 1938.
15. See, e.g., Constitution of India arts. 32 & 246; and Constitution of the Union of Union of Burma art. 25.
18. Constitutional Act of Reforms Sanctioned by the Extraordinary Constitutional Congress of the Mexican United States on May 18, 1847.
tutions and Laws of Amparo, in 1894 and 1897, respectively.\(^2\)

At the present time, there are thirteen Latin American countries with constitutional enactments that guarantee the right of *amparo*: Argentina, Bolivia, Costa Rica, Chile, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, El Salvador and Venezuela, in addition to the Brazilian writ of security (*mandado de segurança*), translated by some authors as a *mandamiento de amparo* because of its similarity to the *amparo*.

In order to compare the protective capacity of the right of *amparo*, it is necessary to classify this very complex material as follows:

1. One type of *amparo* is intended solely as an instrument equivalent to the habeas corpus and can be utilized only for the protection of individual freedom against illegal detention or with respect to irregularities in criminal proceedings.\(^2\)

Some of the Argentine codes of criminal procedure refer indiscriminately to the writ of habeas corpus or to the *amparo* of personal liberty, and a similar provision appears in the Fifth Transitory Provision of the Venezuelan Constitution of 1961.

2. By way of contrast, in the laws of Argentina, Venezuela, and recently Peru, the *recurso* or *acción de amparo* has acquired significance as an instrument for the protection of fundamental constitutional rights other than personal liberty. Personal liberty, which is protected through the traditional writ of habeas corpus, constituting the first type of *amparo*, is an exception to the more general meaning and use of the second type of *amparo*.\(^2\)

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21. Guatemala introduced the *amparo* in the constitutional reform of March 11, 1921, and in Argentina it was introduced in the Constitution of the Province of Sante Fe, on August 13, 1921. Panama introduced it in its Constitution of January 2, 1941; Costa Rica in its Supreme Law of 1949; Venezuela in its Constitution of 1961; Bolivia, Paraguay, and Ecuador in their constitutions all promulgated the *amparo* in 1967 (although Ecuador has since abolished it), and finally Peru included it in its Constitution executed in July of 1979, which became effective July, 1980.

Also, the *amparo* was enacted in the two federal constitutions of Central America: the Political Constitution of the United States of Central America (Honduras, Nicaragua and El Salvador), promulgated in 1898; and the Charter of the Central American Republic (Guatemala, El Salvador, Honduras), of September 9, 1921.

It is appropriate to point out that the right of *amparo* has been reestablished in the Spanish Constitution that became effective on December 29, 1978. It was introduced previously in the Republican Charter, December 9, 1931, due to the teachings of the Mexican jurist, Rodolfo Reyes.

22. The *amparo* has been given this meaning in the Republic of Chile. The Political Constitution of the Republic of Chile of 1925 (at least prior to the military coups of 1973) provides for a habeas corpus type writ in its *amparo*.

23. The following countries’ laws have also included *amparo* procedures for the protection of fundamental human rights: Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Paraguay and the Republic of Panama.

Bolivia: The Constitution of Bolivia art. 19, promulgated Feb. 2, 1967, introduced the *recurso*
The right of *amparo* in the Republic of Argentina has been the object of an expansion that we can characterize as explosive, even though it was introduced long ago in article 17 of the Constitution of the Province of Santa Fe of 1921. With regard to this Argentine instrument, we ought to distinguish two sectors: the provincial sphere, where the regulation of the legal process at the provincial level is in conformity with national requirements, and the national sphere, where the right of *amparo* has been somewhat limited.

I. At the provincial level, the *recurso o acción de amparo* created in article 17 of the Constitution of Santa Fe in 1921 was first regulated by Law Number 2994 of October 1, 1935. Subsequently, it was created in article 22 of the Constitution of Santiago de Estero of June 2, 1939, regulated by articles 673 to 655 of the Code of Civil Procedure of the same.

de *amparo*, as independent from habeas corpus, against the illegal acts or wrongful omissions of public officials or individuals that restrict, suppress, or threaten to restrict or suppress the rights and guarantees recognized by the Constitution. This instrument has been regulated by arts. 762-767 of the Code of Civil Procedure of Bolivia.

Costa Rica:
The Constitution of the Republic of Costa Rica art. 48(3) (1949) regulates the *recurso de amparo* to maintain or re-establish the rights guaranteed by this same Constitution, with the exception of personal liberty protected by habeas corpus. This provision is regulated by Law No. 1161 of June 2, 1980.

Ecuador:
The former Constitution of Ecuador, promulgated May 25, 1967, established the *amparo jurisdiccional* in art. 28, cl. 15, as protection against “any violation of constitutional guarantees.” However, the *amparo jurisdiccional* has never been applied by virtue of the lack of a regulatory law, and also by the successive coup d'états of 1971 and 1972, which brought back the Constitutions of 1946 and 1945, respectively, both of which did not recognize the *amparo*. The current Constitution approved in the referendum of January 15, 1978 also does not contain the right of *amparo*.

El Salvador:

Guatemala:
The Constitution of the Republic of Guatemala art. 80 (1965) and the first part of pt. I of the Law of *Amparo*, Habeas Corpus, and Constitutionality of April 20, 1966, establish that the fundamental purpose of *amparo* consists in maintaining or restoring the enjoyment of rights and guarantees provided by the Constitution with the exception of personal liberty.

Paraguay:
The Constitution of Paraguay art. 77 (1967) provides for the right of *amparo* in a form similar to the Constitution of Bolivia. Although a regulatory law has not been passed, some case law has directly supported the constitutional provision.

Republic of Panama:
The Constitution of the Republic of Panama art. 49 regulates the *recurso de amparo* of constitutional guarantees in a form independent from the writ of habeas corpus against the acts of authority that violate constitutional rights and guarantees. This precept is regulated by the Enabling Law of Constitutional Remedies and Guarantees (Law No. 46 of November 24, 1956).

After the 1955 military overthrow of the first government of General Perón, the *recurso o accion de amparo* received a new impetus so that it was incorporated into the following provincial constitutions: Catamarca (1966); Corrientes (1960); Chubut (1957); Formosa (1957); Misiones (1958); La Pampa (1960); Rio Negro (1957); Santa Cruz (1957); and Santa Fe (1962).

In addition to the above-mentioned local constitutional enactments, a number of regulatory laws were passed and, without intending to be exhaustive, we mention the following, all of them called the Law of *Ac- cion de Amparo*: Buenos Aires (1965-66); Catamarca (1977); Cordoba (1967-74); Corrientes (1970); Entre Rios (1947-63); La Rioja (1960); Mendoza (1954-75); Misiones (1962-67); Salta (1977); San Luis (1958); Santa Cruz (1958-77/78); and Santa Fe (1935-69/73).

Thus, without even considering other local legislation which included the *amparo* (such as the Civil and Penal Codes of Santiago del Estero mentioned previously), we can affirm that practically all the provinces of Argentina have created the right of *amparo* in their constitutions, specific regulatory laws, or in their procedural codes.

II. Nationally, the *acción de amparo* first appeared in the Supreme Court of Justice through the cases of Angel Siri (December 27, 1957) and Samuel Kot (September 5, 1958). It has been expanded considerably by virtue of the decisions of the federal courts that have admitted the right of *amparo*, not only in opposition to the acts of the authorities, but also with respect to some social pressure groups. The National Law on the *acción de amparo* was subsequently passed, restricting the scope of this procedural instrument in various aspects and limiting it with respect to pressure groups. As a substitution, the so-called summary process, or *amparo* against the acts of individuals, was established.

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b. Venezuela

The Venezuelan Constitution of January 26, 1961 enacted the *amparo* in its article 49. The *amparo* serves as an instrument for the protection of all fundamental constitutional rights, with the exception of personal liberty, which is protected by the rules of the Fifth Transitory Provision of the same constitution. Article 49 has not been applied, however, because of the lack of a corresponding regulatory law. Although some judicial decisions began introducing this legal instrument into case law, this practice was curtailed with the resolutions of the *Sala Político Administrativo* (Political Administrative Division) of the Supreme Court, declaring the *amparo* ineffective until passage of a corresponding regulatory law.28


31. POLITICAL CONSTITUTION OF PERU SANCTIONED BY THE CONSTITUTIONAL CONGRESS OF 1931, promulgated Apr. 9, 1933.
32. See note 30 supra.

3. Peru

The right of *amparo* was not introduced until very recently in Peru, in the new Constitution approved in July, 1979.30 Only after a long evolution beginning with article 69 of the previous Constitution of 1933,31 in which the *amparo* was confused with the writ of habeas corpus, did the new Constitution extend to protect all constitutionally guaranteed fundamental rights. The current Constitution, executed by the Constitutional Assembly, July 13, 1979 and which became effective in July, 1980, initiated the new constitutional government that replaced the military regime and provided for the *amparo* in article 295.

This provision clearly distinguishes the *amparo* from the writ of habeas corpus, so that the writ of habeas corpus is limited to its traditional role of protecting personal liberty, while the purpose of the *amparo* is “to be on guard for those other rights recognized by the Constitution, that are vulnerable or are threatened by an authority, official or person.”29

3. There exists a third group of laws that gives the *amparo* a broader application than even the second group while retaining more precisely the direct influence of the Mexican *amparo*; for example, article 58 of the Constitution of the Republic of Honduras of June 3, 1965, regulated by the Law of *Amparo* of April 14, 1936; and the Nicaraguan Constitution of 1973, with its Law of *Amparo* of October 23, 1974. In these enactments, the *amparo* has assumed three purposes: (1) its own special protection of fundamental rights; (2) the protection of personal liberty for the purpose of habeas corpus; and (3) the very limited protection against
statutory provisions that violate the Constitution. Accordingly, a protective judgment invalidates the challenged provision, but only with regard to the petitioner.

Because of the popular revolution that overthrew the prolonged dictatorship of the Somoza family in 1979, the Nicaraguan Constitution of 1973 was replaced by the Fundamental Statute, promulgated by the Government of National Reconstruction on July 20, 1979. This same government issued the Law of August 31, 1979 on the rights and guarantees of Nicaraguans, in which article 50 guarantees the recurso de amparo for the protection of the rights or liberties recognized by both statutes. Based upon article 50, two statutes were enacted: the first, enacted January 8, 1980, exclusively protects the personal liberty of habeas corpus and the second, enacted May 28, 1980, protects other human rights.

4. The Mexican amparo possesses a protective sphere much wider than any of the other previously mentioned institutions by the same name. It serves five functions: (1) as an instrument to protect personal liberty, similar to the writ of habeas corpus; (2) as the only means by which to challenge the constitutionality of laws, thus receiving the name amparo contra leyes; (3) as a means to challenge judicial decisions in all courts of the country, local as well as federal, thus having been called "amparo judicial or casación" (repeal) because of its similarity to the recurso de casación; (4) as an appellate instrument to challenge the decisions or acts of administrative authorities that cannot otherwise be challenged in an administrative court, thus functioning as a "proceso contencioso administrativo" (adversarial administrative proceeding); and (5) at the beginning of the reforms to the legislation of amparo in February 1963, special formalities were introduced to protect legally the campesinos subject to the agrarian reform, such as the ejidatarios and comuneros. This has received the doctrinal name of amparo social agrario (social agrarian amparo).

The significance of the Mexican amparo can be distinguished from other Latin American legal systems which attribute these five functions to different procedural instruments. The Mexican amparo protects not only constitutional rights, but also rights established by legislation in a manner that constitutes an instrument to protect all laws—from the constitution to the most humble municipal ordinance.

34. Law of Amparo, May 28, 1980. The fundamental rights other than those under habeas corpus are protected by this law.
5. Upon examination of the European constitutional appeal, we will make a brief reference to that which is referred to as the *recurso de amparo*, established in the new Spanish Constitution of December 29, 1978.37

6. The *mandado de seguridad*, which has been previously mentioned and which has been characterized by some writers as the *mandamiento de amparo*, was introduced by the Brazilian Federal Constitution of 1934.38 The *mandado de seguridad* proceeds specifically against unconstitutional or illegal acts of administrative authorities and, in general, against administrative acts of any authority that affect the rights of the governed. In exceptional cases it also governs judicial decisions. Theoretically, the writ cannot be brought against legislative enactments that are considered to be unconstitutional, but can only be used to challenge administrative acts or decisions that are based on unconstitutional laws.

7. Finally, a mechanism peculiar to Latin American law should be mentioned. It is the *acción popular de inconstitucionalidad* (popular act of unconstitutionality), by which every citizen has standing to go before his respective Supreme Court to challenge the constitutionality of a law. If this claim is considered well-founded, the high court will declare the law unconstitutional with general effects (*erga omnes*). The Organic Law of the Supreme Court of Justice of July 30, 1976 and article 188, part I of the Constitution of the Republic of Panama of 1972, and the Law on Constitutional Appeals and Guarantees of October 24, 1956 as well as article 96 of the Constitution of El Salvador of 1962, all require a general interest on the part of the claimant. This mechanism was provided for, at least in theory, in articles 150 to 173 of the Constitution of the Republic of Cuba of 1940, which was amended in 1959. Beginning in July 1973, various reforms were established in the Cuban judicial system in accordance with the Soviet model, all of which were reaffirmed in the Constitution of 1976.39 Provision was expressly made for the type of constitutional control that predominates in the socialist legal systems and which will be examined later in this survey.

D. The System of Continental Europe

1. French Constitutional Analysis

French constitutional analysis must be understood within the framework of its traditional opposition to judicial review of the constitutionality of the acts of authority. In the absence of a specific mechanism for the
protection of fundamental rights by courts of first impression, this protection has been entrusted in an indirect manner to two specialized organs: the Council of State and the Constitutional Council, a political body.

a. French Council of State

The French Council of State, as an organ of administrative justice, has acquired great prestige due to the notable work achieved by its court decisions favoring the protection of civil liberties and the protection of constitutionally guaranteed human rights. This Council takes its modern form, by virtue of laws 6 and 7-11 of October 1790, issued by the Revolutionary French Assembly, which placed it within the administration’s control, but from which it later gradually acquired its independence.

The law of May 24, 1872 should be noted as truly important in the evolution of this institution. It transformed the judicial function of the Council into a court of delegated jurisdiction with a certain degree of autonomy in making decisions. The Law of September 30, 1953 further reorganized the administrative justice system, establishing inferior administrative courts of original jurisdiction in such a manner that, at present, the Council of State operates, except for special cases, as a court of appeals.

Three types of claims can be asserted before the Council of State: (1) quo warranto (excess or abuse of power), which involves the nullification of an administrative determination made by an incompetent authority when procedural formalities have not been followed, or because of its fundamental illegality; (2) abuse of discretion (the most important jurisprudentially), which involves the examination of administrative acts and decisions made in the exercise of discretionary authority; and (3) general administrative jurisdiction, which examines public services contracts and the responsibility of public officials and the administration to the public for such contracts.

Although the methods of challenge are not structured as specific remedies for the procedural protection of fundamental rights, according to some the Council of State has indirectly been converted into a “constitutional judge.” The Council looks to the preamble of the Constitution of 1958 as a source of fundamental “general principles of law.” The Council then applies them to controversies within its jurisdiction, and by these principles has given the force of law to the Declaration of Rights of 1789, completed by the Charter of 1946.

41. Under the law of May 24, 1872, “executory force was given to the judgments of the Conseil d’Etat.” See C. Hamson, Executive Discretion and Judicial Control 82 (1954).
42. H. Fix Zamudio, supra note 29, at 151.
43. Declaration of the Rights of Man and the Citizen, Aug. 26, 1789. For an English translation of the Declaration, see J. Brissaud, A History of French Public Law 543-45 (J.
b. **Constitutional Council**

The current Constitution of 1958 provided for the Constitutional Council, with antecedents in the Constitutional Committee of the 1946 Charter. In accordance with articles 56 to 63, the Constitutional Council must decide on the constitutionality of organic laws and rules of the Assembly before they are promulgated. At the request of either the President of the Republic, the Prime Minister, or a President of any of the two legislative houses (the National Assembly or the Senate), any other law can be submitted to the review of the Council. As a result, if the Council decides that a law or rule is unconstitutional, it cannot be promulgated.

This Council played a very modest role in the constitutional control of laws until 1971, when the Council came forth with a classic resolution on the protection of freedom of association. The number of members of the Council who were legal scholars increased and in 1974 amendments to article 61 of the Constitution and article 18 of the Organic Law of the Constitutional Council of November 7, 1958 created a new complaint (saisine) by which members of parliament could raise the issue of constitutionality of a law as a preventive measure.

This reform has stimulated a transformation of the activities of the Constitutional Council. It has been converted into an effective organ for the protection of fundamental rights by way of its prior review of numerous legislative enactments. This is essentially due to the high number of petitions from parliamentary groups. Doctrinally, the Council has come to be considered as having truly constitutional jurisdiction.

2. **Continental Constitutional Courts**

Constitutional courts have been established in accordance with the model initiated by the Austrian Constitution of 1920-29, with the support of ideas from the well-known Hans Kelsen on the necessity of establishing a true, specialized constitutional jurisdiction. It has become known as the “Austrian” system of constitutional control, which is to be distinguished from the “American” system of constitutional control.

In very broad terms, it can be stated that there are two ways in

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Garner trans. 1915).

45. **Constitution** of **France** arts. 56-63 (1958).
46. **Fundamental Law** of October 13, 1946, arts. 19 et seq.
49. The **Austrian Federal Constitution** of 1920-29 was re-established in 1945 and is regulated by the Law on the Constitutional Court of 1953 in accordance with the Constitutional Court (Verfassungsgerichtshof). See H. Kelsen, **La garantia jurisdiccional de la Constitución**, I [1974] **Anuario Jurídico** 471.
which constitutional courts can protect fundamental rights: first, through the control of the constitutionality of law, that is to say, annulment with effects *erga omnes* of legislation that is considered contrary to the fundamental rights guaranteed by the constitution; and second, by challenging the constitutionality of acts by any authority, especially those of an administrative nature that affect fundamental rights. Such legal challenges can be made through such mechanisms as the constitutional appeal under German law,\(^50\) and recently by means of the *recurso de amparo* provided for by the Spanish Constitution of 1978.\(^51\)

a. Articles 139 and 140 of the Austrian Federal Constitution of 1920-29 provide for review of the constitutionality of legislation, local or federal, on petitions from the federal government or governments of the federated states, respectively. Where some doubt exists as to the constitutionality of a law applicable in an actual case, jurisdiction has been given to the Supreme Court for Civil and Criminal Affairs (*Oberster Gerichtshof*), and to the Supreme Administrative Court (*Verwaltungsgerichtshof*) to suspend the proceedings and request that the fundamental rights issue be resolved by the Constitutional Court.

b. The most elaborate system of this type is that established by articles 93 and 94 of the 1949 Basic Law for the Federal Republic of Germany,\(^52\) which was inspired by the Austrian system and which provides for a Constitutional Court (*Bundesverfassungsgericht*).

This Federal Constitutional Court recognizes claims made by federal or state governments, challenging the constitutionality of state and federal laws respectively (*abstrakte Normenkontrolle*). In addition, it acts to review issues raised by the courts when doubt exists as to the constitutionality of laws applicable in cases being heard (*Richterklage*).

It ought to be noted that in the majority of West German states with courts functioning at the local level and in the same manner as this Federal Court, there are various constitutional courts which carry out the same functions, but which do not inhibit questions relating to the Federal Constitution from reaching the Federal Constitutional Court.\(^53\)

c. The Constitution of the Italian Republic, which became effective January 1, 1948, provided in articles 134 to 137 for a Constitutional Court, which, for political reasons, could not function until 1956.\(^54\) In ac-

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52. The Basic Law for the Federal Republic of Germany (*Grundgesetz*, cited GG), May 23, 1949, inspired by the Austrian system, provides for a Constitutional Court (*Bundesverfassungsgericht*), and is regulated by its Organic Law of March 12, 1951 (as amended).


54. "Largely because of the difficulty of selecting judges in a turbulent political climate, the Court was not instituted until 1956." M. Cappelletti, J. Merryman & J. Perillo, *The Italian Legal System* 77 (1967).
cordance with the Austrian model, this constitutional court takes jurisdiction of claims made directly by the national government or by autonomous regions regarding adherence to the Constitution of local or national laws. It differs from the Austrian model because the issue of constitutionality can be brought by the courts. When the question of constitutionality arises in an actual case, before a judge of a lower court can consider the issue to be justiciable, he must suspend the proceedings until the issue is resolved by the appropriate constitutional court.55

d. Title IX, articles 159 to 165 of the Spanish Constitution, which became effective December 29, 1978, provides for the structure and jurisdiction of the Constitutional Court, which very closely follows the examples of Austria and the Federal Republic of Germany. The Court's organic law was promulgated October 3, 1979.56 The above provisions establish the constitutional appeal as the means by which the following people or bodies can bring a claim of the unconstitutionality of national laws, provisions having the force of law and provisions of the Autonomous Committees before the Constitutional Court: the president of the government, the public defender (Ombudsman), fifty deputies, fifty senators, or the executive bodies of the Autonomous Communities. As in Italy, under article 163, judges in Spain also have access to this court if the issue is raised in an actual case.57

e. A similar although unique system has been created by the Constitution of the Portuguese Republic of April 25, 1976. Articles 280 to 282 regulate the jurisdiction and function of an organ of constitutional control called the Council of the Revolution. The Council, which is predominantly comprised of the military, is competent to declare laws unconstitutional at the request of the President of the Republic, the President of the Assembly, the Prime Minister, the Promoter of Justice (Ombudsman), the Attorney General of the Republic or the Assembly of Autonomous Regions. The Council of the Revolution is also competent to declare a legislative rule unconstitutional with general, binding effect when the Constitutional Commission, its administrative body, finds it to be contrary to the Constitution as applied in three actual cases, or in only one case, if it is found prima facie unconstitutional.58

f. A Supreme Constitutional Court was introduced in articles 133 to 151 of the Constitution of the Republic of Cyprus, promulgated August

55. "The competence of, and procedures before, the Court, as well as the necessary suspension of civil proceedings, are governed by the Constitution [arts. 127 & 13437], constitutional laws [Constitutional Laws of Feb. 9, 1948, no. 1 and Mar. 11, 1953, no. 87] and ordinary legislation [Law of Mar. 11, 1953, no. 87 and Law of Mar. 18, 1958, no. 265]." Id. at 117.


57. "When a court of law considers a legal norm determinative of a case, but of doubtful constitutional validity, it will submit the matter to the Constitutional Court in such cases . . . ." G. Glos, The New Spanish Constitution, Comments and Full Text, 7 Hastings Const. L.Q. 127 (1980).

16, 1960. The Court had extremely disparate and complicated powers, but had the fundamental purpose of achieving an equilibrium between the Greek and Turkish communities in accordance with the principles of the Constitution. This Court and the Court of Appeals were abolished in June 1964 in favor of a Supreme Court that combines the functions of both.  

\(^g\) In articles 145 to 152 of the Constitution of the Republic of Turkey, promulgated July 9, 1961, a constitutional court was established and expressly modeled after those of Italy and the Federal Republic of Germany.  

\(^h\) A Constitutional Court was created by the Greek Constitution of 1968.\(^0\) Drafted according to the Austrian model and with some influence from the German system, it existed, however, only theoretically by virtue of the authoritarian Government of the Colonels. The Constitution of June 9, 1975 abolished this court. Article 100 of the 1975 Constitution created a special court with jurisdiction over questions of the fundamental constitutionality or constitutional interpretations of laws when contradictory decisions have been made by the Council of State, the Court of Appeal, or the Exchequer.  

\(^i\) In some socialist countries, the door has been opened to the influence of the Austrian system. It was effectively introduced into the Constitution of the Federative People's Republic of Yugoslavia,\(^6\) which abandoned the Soviet system of constitutional control in order to follow the example of the Federal Republic of Germany. In articles 241 and 251 of the Constitution of April 7, 1963, as well as in the constitutions of all six republics that comprise the Federative People's Republic (promulgated the same year), the federal constitutional court and local constitutional courts, respectively, were established. In the two Federated Republics that comprise the Czechoslovak Socialist Republic, a Federal Constitutional Court, as well as local constitutional courts, exist by virtue of the Constitutional Amendment of October 27, 1968,\(^8\) lacking only the necessary regulatory laws.  

3. Austrian Influence On Latin American Constitutional Courts

With regard to Latin America, there have been various laws which

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60. The Law on a Constituent Assembly was promulgated on June 29, 1981, forming a Constituent Assembly to draft a constitution on political parties and an electoral law. It is not known whether the new constitution will provide for a constitutional court.  
62. These Republcs are the People's Republic of Serbia, the People's Republic of Croatia, the People's Republic of Slovenia, the People's Republic of Bosnia and Herzegovina, the People's Republic of Macedonia and the People's Republic of Montenegro.  
have introduced specialized constitutional courts according to the Austrian model.


b. The Constitutional Court of Chile functioned actively from 1971 until 1973, when it was abolished by the military junta that came to power in September of that year.

c. The Court of Constitutional Guarantees established by the Ecuadorian Constitution of January 15, 1978 does not have decisional powers equal to those of the National House of Representatives. However, when the House is not in session, the Court can formulate observations on the conformity of legislation to the Constitution.

d. The Peruvian Constitution of 1979 established a Court of Constitutional Guarantees similar to the Austrian model, wherein it empowered the court to declare, with general effect, the total or partial constitutionality of legislation. The court can be petitioned by the following: the President of the Republic, the Supreme Court of Justice, the Attorney General, sixty deputies, twenty senators, or 50,000 citizens with signatures verified by the National Panel of Elections.

e. Finally, the evolution of Colombian constitutional law, referred to previously as the acción popular de inconstitucionalidad, is highlighted in the amendments to the Constitution of 1968. A constitutional division was established at the headquarters of the Supreme Court of Justice to advise and formulate opinions as to the constitutionality of laws before such questions would be decided by the full court. Through the recent reforms of December 7, 1979, autonomy was given to this court to decide most questions of constitutionality in such a manner that, although it still forms a part of the Supreme Court, it in fact has been converted into a truly specialized constitutional court.

4. Direct Constitutional Claims

Another way exists by which constitutional courts can protect human rights, aside from a general declaration of the constitutionality of a law or
by constitutional appeal. This remedy exists when a specialized constitutional court of the Supreme Court accepts claims from persons whose fundamental rights have allegedly been infringed by some official act, particularly an administrative one.

The countries which merit special attention for providing this procedure for constitutional protection of fundamental rights are Austria, the Federal Republic of Germany, Switzerland, and recently Spain, which calls the remedy "recurso de amparo" as a result of Mexican influence.

a. In the Austrian system, the Beschwerde, or complaint, emerged during the previous century in the Constitutional Law of the Superior Court of the Empire (Reichsgericht) on December 21, 1897 and was perfected by article 144 of the Constitution of 1920-29, which was re-established in 1945.70

b. The specific instrument for protecting human rights in the Federal Republic of Germany is called the Verfassungsbeschwerde, or constitutional complaint. Similar institutions existed in the provincial constitutions of Bavaria of 1919 and 1946, but were not provided for in the original text of the Constitution of 1949. It was later introduced in articles 90 to 96 of the Law on the Federal Constitutional Court of 1951,71 and was subsequently elevated to constitutional status through the amendment of January 29, 1969.72

This petition of appeal can be presented to the Federal Constitutional Court or to the state constitutional courts by any individual or group whose fundamental constitutional rights have been affected.

Considering that the Verfassungsbeschwerde has been the method by which more than ninety-five percent of all constitutional questions have been brought before the Federal Constitutional Court, it is apparent that it has assumed great importance in German constitutional law.

c. Although a specialized constitutional court has not been created in Switzerland, article 113, paragraph 3 of the Federal Constitution of May 29, 1874 provides for an appeal of public right (Staatsrechtliche Beschwerde) by which any citizen can have recourse to the Federal Court. Complaints are limited to the challenge of administrative, legislative and judicial acts by the canton authorities when such acts infringe the fundamental rights recognized by the Federal Constitution or the Constitutions of each canton.

d. The Spanish Constitution, which became effective on December 29, 1978, re-establishes the remedy of amparo that had appeared in the Republican Constitution of 1931. This remedy is a final appeal to the Constitutional Court available to any citizen, the Public Defender, or the

70. The Beschwerde is regulated by Arts. 82-88 of the Law on the Constitutional Court (Verfassungsgerichtshofgesetz) of 1953 and its effectiveness has been amplified by the recent federal law which became effective July 1, 1976.


The Organic Law of the Court, as well as the Constitution, recognizes that there is no law specifically creating the action of amparo in the lower courts. The laws require that resort be made to the amparo only after the regular administrative adversarial process or the protective proceeding described in the Organic Act has taken place.

E. The Instrument of Socialist Legal Systems: The Procurator

1. Historical Background

The Procurator is not the sole agency that can be used for the protection of fundamental rights provided by the socialist constitutions. There exists a definite remedy, such as in article 58 of the Constitution of the U.S.S.R. of October 7, 1977, which provides that citizens whose constitutional rights have been infringed may obtain judicial review. The Procurator has been the major source for strengthening protection of socialist legality, including what we call human rights. The Procurator has its origin in the office known as the Procurador, utilized during Czarist times. In 1918, Lenin introduced the Procurator in its present form to serve as an organ of control and defense of the socialist legality in the nascent Soviet state, while the primary organic law was enacted in 1922. In examining the structure and function of the Procurator in the Soviet Union, one is able to view the institution as it exists in the Communist bloc nations.

a. Structure

In the Soviet Union, the Procurator is a very complex body, organized in a hierarchical form and headed by the Procurator General of the U.S.S.R., who has been appointed by the Supreme Soviet of the Union for a period of five years (seven years in the Constitution of 1936). The Procurator is responsible only to the Supreme Soviet or, during the time between its sessions, to the Presidium. The Procurator General directs the
central organ, located in Moscow, which is divided into various secretariats and departments for carrying out its numerous functions, including those of the Chief Military Procuracy and the Transportation Procuracy.  

There are three lower levels subordinate to the Procurator General, the first of which is comprised of the Procurators of the Union Republics and of the Autonomous Republics. Next are the Procurators of the territories, provinces, and autonomous regions, all of which are directly appointed by the Procurator General. The lowest level is comprised of the Procurators of the autonomous areas, districts, and cities, named by the Procurators of the Union Republics and confirmed by the Procurator General. All of these Procurators serve for five years.

b. Functions

It is difficult to classify the function of the Soviet Procurator. He is neither a judge nor an administrative official nor in a strict sense a public official, but he has aspects of all of these since he gives direction to and supervises socialist policy.

The Procurator has two principal functions: that of a public official, because the Procurator has charge of criminal prosecutions as well as the authority to impose disciplinary and administrative sanctions against officials and citizens who contravene the law, and that of supervising the prisons, with the power to order the immediate release of all persons illegally detained or held without legal basis.

Second, according to articles 22 to 25 of the Regulatory law, the Procurator carries out what is considered the most important of its functions: the supervision and enforcement of socialist policy with regard to a great portion of public officials, social and economic organizations, and citizens. Excluded from the Procurator’s control are the highest organs of the state, such as the Supreme Soviet of the U.S.S.R. and those of the Union and Autonomous Republics. The Council of Ministers in the local and federal sphere (certainly with respect to individual officials), as well
as the Communist Party which exercises control over the activities of Procurators, are also exempt from the scrutiny of the Procurator.

The procedures by which the Procurator General and the remaining Procurators at various levels exercise supervision of socialist policy can be classified in two categories. The first is the “protest,” which can be defined as a complaint made by a Procurator in order that an official or his immediate superior may correct a violation or remedy an error or deficiency in order to enforce socialist policy. The protest can also be brought to the courts as a means of challenging allegedly illegal decisions. Second, Procurators, at their respective levels, can present a proposal or recommendation before the organs of state, public officials, or social organizations, with the purpose of putting an end to violations of the law and the causes which make such violations possible. The necessary measures to eliminate such violations and underlying causes are taken within a period of one month. This activity can be compared to that of the Ombudsman in Scandinavia (examined infra). As was previously mentioned, the Procurator system has penetrated all of the socialist legal systems inspired by the Soviet model and has been regulated in a manner similar to that which has just been described.

2. Procurator General of the Republic

We refer briefly to the office of the Fiscalia General (Prosecutor General of the Republic) provided for in the Cuban Socialist Constitution of February 24, 1976. This institution, clearly inspired by the Soviet Procurator and socialist laws, was first introduced in the 1973 amendments to the previous Constitution of 1959. In accordance with the Soviet model, these constitutional provisions provide that the office of Prosecutor General include the prosecutors (fiscalias) of the provinces, municipalities, and the military, with the highest officials appointed by the General Assembly of Popular Power; the next level by the Council of State; and the lowest level by the same Prosecutor General, all for a period of five years with possible reappointment by the appointing organs.

83. Id. at arts. 29 & 30.
84. Id. at art. 28.
88. Law of Court Organization, arts. 106-42, Aug. 10, 1977. Authors Harold J. Bernhard and Van R. Whiting in Impressions of Cuban Law, 29 Am. J. Comp. L. 475, 480 (1980) note: [t]he Cuban Fiscalia General must investigate and answer any complaint whether from an individual or a government agency, within 20 days; if the Fiscalia finds that there has been an administrative violation or deficiency, the officials charged must correct it within 20 days or the Fiscalia will protest their
II. THE EXECUTIVE SOLUTION: THE OMBUDSMAN

A. Overview and Background

The Ombudsman has a clearly Scandinavian origin. Its name comes from a Swedish word that signifies representative, delegate or agent. It usually refers to one or more officials who have been appointed, in accordance with the original model, by the parliament, although there is a growing tendency for the Ombudsman to be named by the executive branch. The Ombudsman's principal functions are to investigate violations of fundamental rights of individuals by administrative authorities and to propose, although without binding effect, the most effective solutions to avoid or remedy these violations.

The Ombudsman emerged in the Regerisform (the Swedish constitutional law on the form of government) of June 6, 1809. With antecedents in the Chancellor of Justice, an Ombudsman was created by the Crown in the 18th century as a representative of the king for the supervision of administrative officials. At first, the Swedish Ombudsman was chosen by the Parliament (Riksdag) for the purpose of supervising the function of the courts, from which it has derived its present name, Justiceombudsman. Slowly, its supervision was extended to administrative authorities and thus it remained until 1915, when an Ombudsman for military affairs, or Militieombudsman was established. Thereafter, the institution experienced a slow but gradual evolution so that at present it has acquired a very complex structure.

In effect, in accordance with chapter 12, article 6 of the constitutional document called the Instrument of Government, there exist four Ombudsmen (Justiceombudsmen). They deal with separate matters (including military subjects, as the Military Ombudsman was eliminated in 1967), and one of the four serves as President.

In Sweden there also exist two other officials, as well as a representa-
tive of press organizations, who have received the name of Ombudsman because of the similarity of their powers to those possessed by the authentic Parliamentary Commissioners. The first, the Ombudsman for Protection of the Freedom of Trade, initiated its activities in 1954, for the purpose of protecting against restrictive trade practices. The Consumer Ombudsman emerged in 1971 with the purpose of ensuring that such laws as the Marketing Act, the Unfair Contract Terms Act and the Consumer Credit Act are observed. Both of these officials are appointed by the King for the Council of Ministers. Since 1959, the Ombudsman for the press has been chosen by the journalists' organizations and has remained independent and autonomous in carrying out its oversight of professional ethics and the protection of individuals from invasion of privacy. An Equality Ombudsman has also been created to prohibit discrimination based on sex. In certain circumstances, he will be able to take a case to court on behalf of an individual.

B. Diffusion of the Ombudsman

In the years following World War I and more extensively after World War II, the Ombudsman system was implemented in other Scandinavian countries and subsequently in various Western legal systems. It has been said that there is a true need for the establishment of the Ombudsman in even the most diverse systems. The French writer, Andre Legrand, has classified it as a "universal institution."

A simple description of the accelerated development of the institution of the Ombudsman would be difficult. Solely for the purposes of this survey, the following division of the material will be made: the remaining Scandinavian countries; the countries of the Commonwealth; the United States; the laws of Continental Europe; the possibility of its establishment in Latin America; and finally, its emergence in developing countries.

1. Other Scandinavian Countries

In the first group of those which have been heavily influenced by the Swedish model, the Scandinavian countries, the following is noted:

a. Finland, in obtaining its independence from Russia and in writing the Constitution of July 17, 1979, introduced the Ombudsman in article 49, which follows the Swedish model very closely. The Ombudsman's activities have been regulated by the law of January 10, 1920, with subsequent modifications.

b. By reason of the amendment to the Constitution of Denmark in

93. H. Fix Zamudio, supra note 29, at 287.
95. Fix Zamudio, supra note 29, at 287.
97. Legrand, supra note 89, at 3.
1953, the figure of the Parliamentary Commissioner was created in article 55, which establishes the organization and functions of the Ombudsman des Foketing along the lines of the Swedish model and Finnish precedent.

c. In Norway, two Parliamentary Commissioners were established with diverse responsibilities. The first was created to receive complaints regarding the military (Ombudsman for Forsvaret). Another Ombudsman was established to deal with civil administrative matters (Sivil Ombudsman for Forvaltningen). In addition, in 1973 a consumer Ombudsman, to be appointed by the government, was created according to the Swedish example.

Generally, in the Scandinavian countries, Ombudsmen are selected by the Parliament (with some exceptions in Sweden and Norway), but retain a certain autonomy. Citizens have direct access to the Ombudsmen, and the Ombudsmen have complete authority to accept or reject petitions and the full power to carry out all types of investigations. They can formulate recommendations that are non-binding, but that are accepted in the majority of cases by the respective officials. They must also submit annual reports to the Parliament and, when necessary, certain special reports.

2. The British Commonwealth

The Ombudsman has been established in the legal systems of the British Commonwealth. Within this second group, the laws of the United Kingdom, Canada, Australia, and India have the greatest importance.

a. New Zealand

The first common-law country to establish a Parliamentary Commissioner following the Scandinavian model was New Zealand, whose institution has had a considerable influence in other countries of the British Commonwealth. The institution was introduced in legislation called the Parliamentary Commissioner Ombudsman Act of 1962, culminating in the Ombudsman Act of June 26, 1975, which entered into effect the beginning of April 1976. The new law of 1975 established a collegial system of three Ombudsmen, each with a defined territorial scope (Wellington, Christ Church and Auckland). They are appointed by the Governor General at the proposal of the New Zealand Parliament for a period of three years (which equals the term of that legislative body). They also may be

102. Rowat, supra note 90, at 39.
reappointed.\textsuperscript{104}

\textbf{b. Great Britain}

The office of Ombudsman was introduced in Great Britain under a law called The Parliamentary Commissioner for Administration Act that became effective April 1, 1967 for England, Wales and Scotland.\textsuperscript{105} This Commissioner possesses special powers by virtue of being appointed by the Crown. At the request of the two houses of Parliament, the Ombudsman is elected for an indefinite term. However, he must retire at age 65. He is not subject, even indirectly, to the duration of a Parliamentary appointment. In addition, what is most important is that, unlike the Scandinavian model, this Commissioner cannot act on behalf of, nor directly receive complaints from, citizens who have been affected by the administrative authorities. Instead, a citizen must present his or her claim to a member of the House of Commons, who in turn reviews it and sends it on to the Commissioner. The Commissioner then undertakes an investigation and formulates the pertinent recommendations which are communicated to the member who solicited such intervention.\textsuperscript{106}

Notwithstanding these limitations, the Commissioner has played an important part in the solution of problems emanating from government administration. Through the National Health Services (Scotland) Act, passed in 1972,\textsuperscript{107} and the National Health Services Act of 1973,\textsuperscript{108} a Parliamentary Commissioner for Health was established with jurisdiction in England, Scotland and Wales. This Ombudsman function is carried out as an additional activity of the Commissioner for Administration. Those affected by the activities of public institutions, such as medical social security, can go directly to the Commissioner of Health after having gone to their respective government agencies.\textsuperscript{109}

The evolution of the British Ombudsman culminated in the establishment of the Commissioners for Local Administration, in accordance with the Local Government Act of 1974.\textsuperscript{110} At the present time, five commissioners have been designated, three for England, and the other two for Wales and Scotland. Their functions are similar to those of the Parliamentary Commissioner for Administration, except that they deal with problems arising in local government administration. A further difference is that if citizens have first gone to their local government representative (such as a city council member) who is obligated to receive complaints, and the complaint is not sent on to the Commissioner, the complaining citizen may go directly to the Commissioner to request an investigation

\textsuperscript{104} H. Fix Zamudio, supra note 29, at 298.
\textsuperscript{105} Parliamentary Commissioner Act, 1967, ch. 13.
\textsuperscript{106} Id. §§ 1, 6, 7 & 10(1).
\textsuperscript{107} National Health Service (Scotland) Act, 1972, ch. 58.
\textsuperscript{108} National Health Service Reorganization Act, 1973, ch. 32.
\textsuperscript{109} Id. Pt. III, § 35.
\textsuperscript{110} Local Government Act, 1974, ch. 7.
and to make recommendations to the appropriate authorities. 111

c. Northern Ireland

With regard to Northern Ireland (which is legislatively autonomous from Great Britain) two parliamentary commissioners' positions were created. The first, the Northern Ireland Parliamentary Commissioner for Administration, is similar in organization and function to the Commissioner in Great Britain. He can be directly approached only by members of the Irish Parliament. 112

The second, the Northern Ireland Commissioner for Complaints, was created for complaints against local authorities, and provides for the possibility of immediate access by those who have been injured. 113 In accordance with legislation passed in 1969, these two functions are carried out by the same person, which is similar to the British model. 114

d. Australia

The Australian legal system, a federal system, has been influenced by the New Zealand Commissioner (which is closer to the Scandinavian model than to the British model) and has followed its essential features with some variations. The office has been gradually established in the Australian states as well as in the Northern Territory. 115

A federal law, the Ombudsman Act of 1976, introduced the commissioner at a national level and the first Commonwealth Ombudsman initiated activities upon being appointed in March 1977. The Commonwealth Ombudsman had two assistants, one of them having jurisdiction in the Federal Capital of Canberra, and the other in the Northern Territory until 1978. 116 In 1978 Australia granted legislative autonomy to the Northern Territory, at which time the law establishing its own Ombudsman came into effect. 117

e. Canada

Canada has experienced an evolution of this institution similar to

114. Id.
that of Australia. Due to its federal structure, the office was first established in the provinces, beginning in New Brunswick and Alberta in 1967. Quebec followed in 1968 with the creation of the Protecteur du Citoyen. Nova Scotia and Manitoba established the office in 1969, and Ontario and Newfoundland did so in 1975, the latter designating an Ombudsman in accordance with a law first approved in 1970 but amended in 1975. Finally, British Columbia created the office by law, effective September 1, 1977.\textsuperscript{118}

At the national level, various proposals have been presented for the creation of a national Ombudsman. There has been success only in the establishment of two officials with very specialized responsibility: the Commissioner of Official Languages, who investigates complaints of the failure to fulfill official requirements for the use of English and French in public agencies;\textsuperscript{118} and the Correctional Investigator, who receives complaints from those detained by the federal penitentiary authorities.\textsuperscript{120}

\textbf{f. Israel}

Israel's legal system has been greatly influenced by Anglo-American law, and a discussion of Israeli Ombudsmen seems appropriate in this section. In Israel the Ombudsman was established in 1971 as Controller General, a special position within the state controller's office.\textsuperscript{121} Since this controller is appointed by the Israeli Parliament (Knesset), the Ombudsman ought to be considered as a Parliamentary Commissioner. The Controller General operates as commissioner for complaints from the public and is assisted by a special unit whose director is appointed by a Knesset committee upon recommendation of the Controller. In order to facilitate access by citizens, who are permitted to make complaints directly to the Controller General, offices have been established in the cities of Haifa, Jerusalem and Tel Aviv.\textsuperscript{122} A Soldier's Complaint Commissioner was also appointed under the Military Justice Law of 1972 to receive complaints from armed forces personnel. This Commissioner is appointed by the Minister of Defense in consultation with the Minister of Justice and with the approval of the Foreign Affairs and Security Committees of the Parliament.\textsuperscript{123}

\textbf{g. India}

The Republic of India, with its federal structure, does not have the designation of a national Parliamentary Commissioner. The institution, with the name of Lokayuta or Upa Lokayuta, has been introduced in

\textsuperscript{118} H. Fix Zamudio, \textit{supra} note 29, at 31516.
\textsuperscript{120} Penitentiary Act, CAN. REV. STAT. ch. P-6, § 12 (1970).
\textsuperscript{121} H. Fix Zamudio, \textit{supra} note 29, at 304.
\textsuperscript{122} Id. at 30405.
\textsuperscript{123} Id. at 305.
various states, such as Bihar (1973), Maharashtra (1971), Rajasthan (1973) and Uttar Pradesh (1975).  

3. The United States

The Ombudsman has emerged in diverse forms in the United States due to the country's federal structure. Many of these agencies and their officials have only a superficial similarity to either the basic Scandinavian model or to one of its varieties.

In the United States, as in Canada, various proposals have been presented to Congress to create a federal agency to function as an Ombudsman, but as of this date, these efforts have not been successful. In contrast, the states have been active in this area, and two types of offices can be classified as Ombudsmen. The first contains the features of the Parliamentary Commissioner of the Scandinavian model; the other, which has proliferated at the local as well as at the state level, can be characterized as an executive Ombudsman, i.e., appointed by the executive and not the legislative branch. This procedure can be explained by considering the character of the system that exists in the United States.

The states that have introduced the institution in accordance with the Scandinavian model are Hawaii (1967); Nebraska (1969); Iowa (1972); New Jersey (1974); and Alaska (1975). In all of them the official is appointed by and dependent upon the local legislature, although he retains a certain autonomy. The office in these five jurisdictions is given the power to receive complaints directly from citizens regarding the acts of administrative authorities, and to investigate and formulate proposals or recommendations, which have no binding effect. In addition, it must send an annual report to the state legislature. Puerto Rico has also enacted an Ombudsman Act (1977).

The second type of Ombudsman, which is appointed by the Executive, is being created at various governmental levels throughout the United States. A few examples are the Department of Neighborhood Complaints in Chicago; the Office of Information and Complaints in Honolulu; the Little City Hall Program in Boston, the Ombudsman of Nassau County in New York City; the Lieutenant Governor's office in some states; the Office of the State Citizen's Aid of Iowa; and the Ombudsman of Oregon, which has officially been given the classic title.

4. Continental Europe

In Continental Europe, the Ombudsman has been established with

some variations. The Federal Republic of Germany has a national Ombudsman for Military Matters, and in the German state of Rhineland-Palatinate, there is an Ombudsman for Administrative Matters. In other European nations the office carries various titles; for example, in France, the Mediateur; in Switzerland, the Ombudsman in the Canton and city of Zurich; the Promoter of Justice in Portugal; and the Public Defender in Spain. This position arguably exists as well in the local laws of Catalan and the Basque Region.

a. Federal Republic of Germany

The first country of Continental Europe to introduce the Ombudsman according to the Scandinavian example was the Federal Republic of Germany, although this position dealt exclusively with military affairs.127

The Parliamentary Commissioner of the Legislature of the Province of Rhineland-Palatinate (Bürgerbeauftragte des Landestages Rheinland Pfalz) was established by the law of May 31, 1974 for the purpose of investigating either complaints made directly to it, or those that had been presented to the Provincial Parliamentary Petitions Commission from citizens of this state about local administrative authorities.

b. France

An Ombudsman of major importance in the development of this institution in Continental Europe is the French Mediateur. The special characteristics of this office are partly a result of the semi-presidential structure of the French Constitution of October 1958. The Mediateur is appointed by the Executive for one term of six years under a decree issued by the Council of Ministers, yet at the same time retains certain autonomy from the government, since he cannot be dismissed except by impeachment proceedings by the Council of State.128

The French have also followed the British system by declining to permit direct claims by citizens to the Mediateur. Instead, such claims must be made first to a member of the National Assembly or the Senate and, if considered appropriate, will be sent to the Mediateur to carry out an investigation and formulate the recommendations considered necessary to resolve the issue. The Mediateur can also present general observations on administrative procedures in his annual report, including suggestions to reform specific legislation.129

Although the Mediateur has been received with skepticism doctri-

128. Law No. 736, June 3, 1973, art. 2.
129. Id. arts. 6 & 14.
nally, as well as by administrative officials, including members of the Council of State, the office has been very useful as an aid in the resolution of administrative problems and as a promoter of reforms in the provision of public services.

c. Switzerland

In Switzerland, Administrative Commissioners have been established in the City as well as in the Canton of Zurich. The City’s Commissioner of Complaints, with the name of Beauftragte in Beschwerdensachen der Stadt Zürich, has been in existence since 1971 and is local in nature. He is elected by the Municipal Council for a period of four years with the possibility of re-election, but is autonomous from the Council as well as from the City Government. The cantonal legislature of Zurich on September 25, 1977 passed a law establishing a Parliamentary Commissioner, who began functioning on June 5, 1978.

d. Austria

The Austrian National Assembly approved a law creating the Volksanwaltschaft (People’s Advocate) which became effective July 1, 1977. The Volksanwaltschaft is an autonomous organization comprised of three persons and selected by the National Assembly for a period of six years to receive complaints directly from citizens about the activities of federal administrative authorities.

e. Italy

In Italy, there have been several proposals to create national and regional “Civil Defenders” similar to the Scandinavian Ombudsman. Such plans have been approved in the regions of Tuscany and Liguria as well as in Campania, Lazio, Lombardia and Umbria. These regional Civil Defenders are appointed by decree of the Regional Council for a term of five years, with the possibility of re-election. They have jurisdiction over complaints presented by citizens who have come before regional administrative agencies when the agency has not responded to the citizen within twenty days, or where an unsatisfactory response has been given.

130. H. Fix Zamudio, supra note 29, at 309.
131. Id. at 313.
132. Id.
133. Id. at 312-13.
139. H. Fix Zamudio, supra note 29, at 314.
f. Portugal

The first Ombudsman introduced in the Iberian peninsula was the Portuguese Promoter of Justice under the Organic Law Decree of April 21, 1975, issued by the provisional government. Article 24 of the Constitution of 1976 transformed the Promoter into a Parliamentary Commissioner. In accordance with the Scandinavian model, the Commissioner is elected by the National Assembly and citizens can present their complaints directly about acts or omissions of public officials. The Commissioner does not have the power to make any binding decisions, but can make recommendations to competent bodies on how to remedy and prevent further injustices.\(^{140}\)

g. Spain

The Spanish Democratic Constitution of December 29, 1978 followed the example of Portuguese legislation and incorporated the figure of the Public Defender in article 54. The Public Defender is a high commissioner appointed by and accountable to the Cortes (legislative body), to “protect the fundamental rights contained in Title I of the Constitution, by supervising the functioning of the public administration.” On April 6, 1981 an organic law for the actual creation of a Public Defender was approved by the Cortes.\(^{141}\) In addition, the possibility of establishing Regional Defenders exists by virtue of the autonomy laws of the Basque region and Catalonia, approved through simultaneous referendums carried out October 25, 1979 and the autonomy law of Galicia, passed December 21, 1980.\(^{142}\)

h. Centrality

Finally, it should be noted that there is some hope for the establishment of a European Ombudsman. The Parliamentary Assembly of the Community is to be chosen by direct, popular election.\(^{143}\) A large number of member countries have already established the institution at a national level. Recommendations to promote an international Ombudsman on a community level were approved on November 29, 1974 by all the Ombudsmen and Parliamentary Commissioners of member states of the Council of Europe, together with experts and observers and by the Legal Commission of the Council of Europe.\(^{144}\)

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140. The Organic Law Decree of 1975 was repealed and replaced by the Laws of November 22, 1977 and March 2, 1978.
142. *Id.* at 335-46.
143. *Id.* at 323.
144. Official Recommendation No. 757 of January 29, 1975 of the Parliamentary Assembly of the Council of Europe proposed to the Committee of Ministers that they invite the governments of member states that have not adopted the institution to study the possibility of appointing, at a national level, persons who have assumed the function of
5. *Latin America*

Within Latin America, the prevailing attitude has been that an Ombudsman, either executive or parliamentary, is an institution far removed from the Latin American jurisprudential tradition, even though the Constitutions of Portugal and Spain both provide for such an office. It is foreseeable that a greater interest will awaken among Latin American jurists to study this means of protecting the rights of the governed.

It is notable that the figure of the Parliamentary Commissioner has at least appeared in Colombian law recently, although in an indirect form. After various projects for the creation of the classic Ombudsman with such names as Overseer of the Administration, Parliamentary Attorney or Defender of Human Rights were proposed, amendments to articles 142 and 143 of the Constitution by the Constitutional Reform of December 4, 1979 gave the Attorney General new power rather than creating a new office. He is appointed for a period of four years by the House of Representatives from among three names that are sent to that body by the President of the Republic. Like the Scandinavian Ombudsman, he can receive direct complaints from citizens regarding violations by officials and public employees of human rights and social guarantees. The Attorney General can carry out necessary investigations and present an annual report to the Colombian Congress on the exercise of these functions.

An evolution has begun, however weak, to create Ombudsmen to protect the consumer. Although their activity is limited to investigating the conduct of business and industry regarding complaints from injured consumers, they may lead to the creation of more comprehensive institutions of the sort described earlier in this study.145

6. *Developing Nations*

Finally, the Ombudsman has been introduced into the legal systems of various developing countries because of its effectiveness. A few examples include Jamaica (The Ombudsman Act, November 13, 1977), Mauritius (Constitution of 1968 and Ombudsman Act of 1969), Papua New Guinea (Ombudsman Commission, Constitution of 1979), Tanzania (a permanent Commission of Investigations established in the Provisional Constitution of 1965, and the Law of 1966, amended in 1975), Trinidad and Tobago (Ombudsman regulated by articles 91 to 98 of the Constitution of March 1976) and Zambia (Commission for Investigation, Constitution of 1973).

**Conclusion**

In every country examined, no matter what political philosophy gov-
erns, there is some provision, usually constitutional, that provides for the protection of certain fundamental human rights. These constitutional provisions range from the Constitution of the United States and its Bill of Rights to the amparo provided in Latin American constitutions to the French Constitution and the Council of State and to the Procurator of the Soviet bloc nations. A range of variations exists but no matter what the system, there is some provision, organized by legislation, for the protection of the fundamental rights of citizens.

In turn, we have seen that each system provides a judiciary branch to hear and decide cases of fundamental rights violations and the constitutionality of laws. Furthermore, we have seen that each system has similar instrumentalities, such as the writ of habeas corpus, by which to petition the government and address the judiciary for redress of grievances of fundamental rights violations.

Finally, in addition to legislative and judicial sanctions, we are witnessing an increasing role on the part of the executive branch in numerous governments. This role has been most often patterned after the Ombudsman of Scandinavia, although used in various capacities and under a variety of guises. The Ombudsman model seems to be one that is readily adaptable to diverse situations, political orientations and multiform tasks of government in pursuit of the protection of fundamental human rights. The role of the Ombudsman has proven adaptable to diverse tasks and governmental functions from Scandinavia to Tanzania. The fact that so many developing countries are using the Ombudsman model clearly demonstrates its remarkable flexibility. As a result of this global survey, we may obtain a better perspective of the most effective and expedient means for the protection and resolution of fundamental rights violations, namely the pursuit of domestic remedies rather than the more idealistic and cumbersome methods of external world pressure currently advocated.

**Addendum**

Since the time when this paper was first submitted, several modifications and amendments of the laws mentioned within have occurred, which is to be expected with a subject as dynamic as governmental institutions for the protection of human rights. Briefly, we shall point out just the most important reforms.

A. In relation to the special system in Latin America:

1. Two new laws of amparo have been passed: a Nicaraguan law, enacted May 28, 1980 and the Peruvian Law of Habeas Corpus and Amparo, promulgated Dec. 7, 1982 and published the following day in *El Peruano*.

   In spite of the new Constitution of Honduras, enacted by Decree Number 131 of January 11, 1982, the Law of Amparo of April 14, 1933 is still in force, although amended in January, 1982, because the new constitution regulates the amparo in the same manner as the former
2. The Chilean military government established an instrument for the protection of fundamental human rights, called recurso de protección, which is regulated by the Constitution of 1925. The new recurso de protección was enacted by Institutional Act Number 3, published September 13, 1976, and is regulated by the Supreme Court of Justice proceeding (Auto Acordado), published April 12, 1977; this remedy was incorporated into article 20 of the Constitution, passed by the plebiscite on September 11, 1980 and enacted on October 21, 1980. A full treatment of this topic may be found in the interesting book of the Chilean jurist Eduardo Soto Kloss, El Recurso de Protección, Orígenes, Doctrina y Jurisprudencia (Santiago 1982).

B. There has been an important development in the continental European system of constitutional courts as embodied in the Latin American constitutional courts:

1. The Constitutional Court established in the Republic of Chile by the 1970 amendment to the Constitution of 1925 was abolished by the military coup of September, 1973; however, it was restored with similar characteristics by articles 81 to 83 of the Constitution passed by the plebiscite on September 11, 1980. Although the legislative body has remained suspended by the Transitory Arrangements of the same Constitution, the Court has been established according to its Organic Law enacted by the Governmental Junta on May 12, 1981, published May 19, 1981 in the Diario Oficial.

2. The Court of Constitutional Guarantees, established by articles 296 and 297 of the Peruvian Constitution of 1979, was created by its Organic Law, enacted by the Congress of the Republic on May 19, 1982 and published the following day in El Peruano.

3. The Ecuadorean Court of Constitutional Guarantees was also reformed through the constitutional amendments published on September 1, 1983, which, inter alia, added article 141 of the Constitution of January, 1978 in order to encourage the functioning of the Court. Article 141 treats as an offense any contempt of the Court’s unconstitutional law declarations and any violation of human rights. These amendments will be in force beginning August 10, 1984.

4. There have also been important reforms in the Portuguese system of constitutional justice through the constitutional amendments enacted September 24, 1982 and published September 30, 1982 in the Diario República. These amendments abolished the Council of the Revolution, which had a military character, and its advisory body, the Constitutional Commission. The new articles 284 and 285 established a Constitutional Court, comprised of thirteen justices, ten of whom are to be chosen by the Assembly of the Republic and the remaining three to be appointed by the Court itself. The Constitutional Court is empowered with the function of constitutional control, which formerly belonged to the abolished bodies.
5. Changes have also occurred within the socialist countries. Following the example of the specialized courts of Yugoslavia (which are actually functioning) and of Czechoslovakia (which were established by the constitutional amendment of 1968, but which are still lacking the necessary organic law), the People's Republic of Poland established a Constitutional Court by the constitutional amendment of March 26, 1982, which reformed articles 30 and 33 and added articles 33a and 33b. The essential function of the Court is to make binding decisions regarding the compatibility between laws and the general decrees of the Constitution. As in Czechoslovakia, however, the necessary organic law for this judicial body has not yet been passed.
Legislative Reform of U.S. Extradition Statutes: Plugging The Terrorist's Loophole

WILLIAM M. HANNAY*

The United States has been in the forefront of those nations advocating mandatory extradition or prosecution of terrorists, the concept embodied in the Convention for the Suppression of Unlawful Seizure of Aircraft1 and in other multilateral agreements. Flaws in our own extradition procedures, however, make it difficult for us to practice what we preach. Indeed, recent U.S. court rulings have appeared to put the imprimatur of our judicial system on the violent acts of terrorists who have no respect for human life, for democratic process or for the Rule of Law. Extradition procedures that allow such dangerous precedents must be reformed as an essential step in improving U.S. antiterrorism efforts.

Legislation was almost enacted during the second session of the 97th Congress that would have recodified and modernized all U.S. extradition procedures. The Senate version of this legislation (S. 1940) was developed over a two-year period in cooperation with the Departments of State and Justice and was passed by the Senate with amendments in August of 1982.2 In June of 1982, the House Judiciary Committee reported out its own version of the legislation, which was also based in large part on the executive branch's recommendations.3 Many of the proposed changes in

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3. H.R. 5227 was introduced by Representative William J. Hughes, Chairman of the Subcommittee on Crime of the House Judiciary Committee on December 15, 1981. See 127 Cong. Rec. E5877 (1981). The bill was subsequently reintroduced as H.R. 6046 on April 1,
the existing statutory scheme were similar in both the House and Senate versions.4 There were, however, significant differences in the two versions with respect to the "political offense" exception to extradition treaties. The controversy surrounding the varying approaches to the "political offense" issue effectively prevented floor action in the House. Thus, it remains for the 98th Congress to consider resubmitted extradition reform legislation.

I. BACKGROUND TO THE "POLITICAL OFFENSE" ISSUE

Extradition treaties universally contain a list of enumerated offenses for which extradition is authorized. Extradition treaties of the United States, like those of virtually all other nations, also incorporate an exception or exclusion prohibiting extradition in two circumstances related to politics: (1) where the offense for which extradition is requested is a "political offense" and (2) where the extradition request is politically motivated, even though the offense charged is not itself a "political offense."

Typical of the language of such an exclusion is that in the extradition treaty between Great Britain and the United States, which states:

4. Section 3195 of both the House and Senate versions would correct a long-standing anomaly in extradition by creating a right of appeal for the government as well as the person faced with the extradition. Traditionally, the defendant could seek appellate review by habeas corpus, but the government had no means of review at all. Another curious procedural practice would also be changed in both versions. Under current law, extradition requests are heard by U.S. magistrates. Under § 3194(d)(1) of both the House and Senate versions, either party can have the political offense issue heard by a district judge instead of a magistrate due to the importance and complexity of that issue.

Other major changes in extradition procedures contained in S. 1940 include the following (the corresponding provisions of H.R. 6046 are noted in parentheses): § 3193 (§ 3191) recognizes that a U.S. obligation to extradite particular classes of offenders is created by certain multinational agreements, such as the Hague Convention, as well as by bilateral agreements; § 3192(d)(1) codifies existing standards for bail in extradition cases, permitting release only if the fugitive can demonstrate "special circumstances" warranting it (however, § 3192(d)(2) of H.R. 6046 takes a different approach, using the standards in the Bail Reform Act with slight modifications); § 3194(d) (§3194(g)(1)) simplifies procedures for the authentication of documents and also establishes that extraditability can be determined solely on hearsay or documentary evidence (§ 3194(g)(3) of H.R. 6046 only permits a court to "consider" such evidence); § 3196(a)(3) (§3196(a)) authorizes the Secretary of State to extradite U.S. nationals unless such surrender is expressly prohibited by the applicable treaty, thus reversing the effect of Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5 (1936). Differences between the original Senate version and the House version were discussed by Rep. Hughes in the Congressional Record. 128 CONG. REC. E2241 (May 13, 1982).
(1) Extradition shall not be granted if . . . (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.6

For sound policy reasons, it has long been considered the exclusive province of the Secretary of State to determine whether the extradition request is politically motivated.6 On the other hand, for no particularly apparent reason, American courts have exercised jurisdiction over the "political offense" issue since the case of In re Ezeta in 1894.7

Congress is attempting to revise U.S. extradition laws, spurred in part by recent efforts of international terrorists to use the "political offense" exception as a loophole to avoid extradition. The decisions in several recent extradition cases involving terrorists illustrate the problem. These cases reveal serious flaws in the existing judicial test for determining what constitutes a "political offense" and make clear that such a determination involves foreign policy choices that should be made by Congress and the President, not the courts.

The traditional Anglo-American test for defining a "political offense," as reflected in these decisions, represents a grave danger to world order. It is not so much that the United States may well become a more

6. The rationale for deferring to the executive branch is described in the leading case on this point:
   [It is not a part of the court proceedings . . . to exercise discretion as to whether the criminal charge is a cloak for political action, not whether the request is made in good faith. Such matters should be left to the Department of State.

   . . . It is thought by the court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is depending as an asylum because of political matters, and that the treaty is not actually used as a subterfuge.


7. 62 F. 972 (N.D. Cal. 1894). In Ezeta, the particular treaty specified that "the provisions of this treaty shall not apply to any crime or offense of a political character." Id. at 997. The district judge held that he could not leave it to the executive branch but rather had to determine the question, because the treaty "terminates [the magistrate's] jurisdiction when the political character of the crime or offense is established." Id. Until recently, the Government did not challenge the courts' exercise of jurisdiction over the political offense issue. When Government attorneys finally began to question jurisdiction, they were met with the courts' response that the practice was not too traditional to be changed without legislative approval. In re Mackin, 668 F. 2d 122, 13237 (2d Cir. 1981); Eain v. Wilkes, 641 F.2d 504, 51317 (7th Cir.) cert. denied, 454 U.S. 894 (1981).
attractive refuge for members of the Palestinian Liberation Organization (PLO), Provisional Irish Republican Army (PIRA), the Bader-Meinhoff gang, the Italian Red Brigade and other terrorists, though that is possible. Rather, the danger lies in the impact of these decisions overseas. Recent U.S. court decisions have sent out a message to the world that the American judicial system accepts the notion that the end justifies the means and that political violence is an acceptable method of accomplishing political goals. These decisions appear to place a stamp of approval on, and thereby sanctify, terrorist activities of all kinds. A legislative remedy to counter this danger is essential.

In each of these recent U.S. cases, the test of a "relative" political offense set forth in the nineteenth-century English case of In re Castioni was blindly accepted and mechanically applied. The court in Castioni stated that a political offense is a crime which is "incidental to and formed a part of political disturbances." In the McMullen case, Peter McMullen was charged with the bombing of a British army installation in England. In the Mackin case, Desmond Mackin was charged with the attempted murder of a British soldier dressed in civilian clothes who had been standing at a bus stop in Belfast. In the Quinn case, William Quinn was charged with the murder of a London police officer and participating in at least eight bombing incidents. Dutifully applying the Castioni test, the magistrates in both

8. [1891] 1 Q.B. 149. In Castioni, Switzerland sought the extradition of a man charged with murder. The death had occurred during a riot and appeared to have been more accidental than intentional. The court justified the decision not to extradite by stating that, after a civil war, "one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitements." Id. at 167.

9. Id. at 153.

10. In re the Extradition of McMullen, No. 37-81-099 MG (N.D. Cal., filed May 11, 1979) (Woelflen, Magis.), reprinted in 1981 Sen. Hearings, supra note 2, at 294. See also McMullen v. I.N.S., 658 F.2d 1312 (9th Cir. 1981) (deportation stayed on ground that the Provisional Irish Republican Army (PIRA) was likely to "persecute" him as a defector if he was returned to Ireland).

11. In re Extradition of Desmond Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y., filed Aug. 13, 1981) (Buchald, Magis.), reprinted in 1981 Sen. Hearings, supra note 2, at 140, appeal dismissed sub nom. U.S. v. States v. Mackin, 668 F.2d 122 (2d Cir. 1981). The magistrate concluded that the PIRA, or "provos," were conducting a violent political uprising in one area of Belfast. The U.S. executive branch took the position that PIRA activity consisted of individual acts of violence aimed frequently at civilians and designed to destabilize society rather than overthrow the government directly and accordingly fell outside the political offense exception, but the magistrate rejected this sensible analysis. 1981 Sen. Hearings, supra note 2, at 214-22. The author has been informed by the prosecutor in this case that, in return for the government's agreement to drop any further extradition proceedings, Mackin consented to be deported to the Republic of Ireland in December, 1981.

12. Quinn v. Robinson, No. C-82-6688, slip op. (N.D. Cal., filed Oct. 3, 1983) (Aguilar, J.). The district court granted Quinn's petition for habeas corpus and set aside an earlier decision by a magistrate ordering extradition. Crim. No. CR-81-146 Misc. (N.D. Cal., filed Sept. 29, 1982) (Langford, Magis.). U.S. District Judge Robert Aguilar concluded that the conspiracy to cause explosions charge against Quinn was "incidental to and in the course of" a political uprising because the bombings were intended "to protest British rule in Northern
Mackin and McMullen and the district court in Quinn concluded that extradition was prohibited since a political "disturbance" or "uprising" was taking place in Northern Ireland and the attempts by Mackin, McMullen, and Quinn, as members of the outlawed Provisional Irish Republican Army, to kill British security personnel, were "incidental to" these disturbances.

In the Abu Eain case, Ziyad Abu Eain, an alleged member of the Palestinian Liberation Organization, was charged with planting a bomb which killed or injured several children in an Israeli resort town. On habeas corpus review, the U.S. Court of Appeals for the Seventh Circuit upheld the magistrate's original determination that the "political offense" exception was inapplicable, because the bombing was not "incidental to" the PLO's objectives and "solely implicates anarchist-like activity." While the result is entirely correct, the Seventh Circuit's application of the Castioni test in Abu Eain was ultimately just as mechanical as that in Mackin, McMullen and Quinn. Indeed, the court appeared to accept the proposition that "acts that disrupt the political structure of a State, and not the social structure" would be exempt.

The absurdity and ultimate cruelty of the Castioni test is illustrated by the statement of the magistrate in McMullen that "[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from deportation [sic] if the crime is committed under these prerequisites."

Ireland and to bring the British to the bargaining table." Slip op. at 36. Judge Aguilar added that "any violence coming to the general civilian population was incidental to the political goal of seeking an end to Northern Ireland". Id. In rejecting the applicability of Abu Eain, the district court criticized the Seventh Circuit as "emotion[al]," and stated that "liberal application of the Eain decision could result in the extradition court making judgments as to the goals of a particular uprising group and the appropriateness of the acts of the uprising group." Id. at 3739. The district court also attacked the magistrate's conclusion that Quinn, who is an American, had to be a member of the uprising group in order to gain the protection of the political offense exceptions. Judge Aguilar held this requirement to be without precedent and "unwarranted." Id. at 17.


14. 641 F.2d at 52021.

15. Id. Moreover, it is a measure of how far the "political offense" exception can be cut loose from ethical moorings that Abu Eain's defense team could argue in apparent good faith that terror bombing of civilians is a legitimate technique in an "insurrection-liberation" struggle and that the political offense exception prevents extradition for such a crime. The defense argued that for the PLO to achieve its political purpose in Israel, it is necessary for it to engage in acts of violence such as bombings in public places, since "an occupied people regards every occupier as part of the usurping state's political being." Petitioner's Brief in Support of Petition for Writ of Habeas Corpus at 9, Eain, 641 F.2d 504.

The Castioni test used by the courts in the cases discussed above is seriously flawed. The courts in the relatively few English and American cases dealing with the “political offense” exception have repeated this test without once questioning its fundamental validity.

The unsettling results in McMullen, Mackin and Quinn and the implications of Abu Eain suggest that much of what has previously been written about the “political offense” exception by the courts is misleading or just plain wrong. The error may be accounted for because the “right” result in early cases seemed so obvious or was reached so intuitively that the courts were lulled into accepting the first “test” that fit the facts without giving much thought to its ramifications. Indeed, some of the cases suggest that the courts, despite their purported reliance on such a test, were actually engaged in making political judgments, not legal ones.

No court has ever questioned whether an all-encompassing, objective “test” is appropriate, and yet the “test” formulated by Anglo-American courts in the 1890s is in fact based on assumptions which, when extended to their logical conclusion, seem fundamentally at odds with the likely intent of the treaty draftsmen and our present beliefs. As modern courts carefully and conscientiously have applied the letter of this earlier case law, absurd and dangerous results have become more frequent, and the divergencies from the probable intent of the treaty writers has become more and more apparent. Neither before, during nor after the decisions that run from In re Ezeta to In re Quinn have the considerations in making a “political offense” determination been as simplistic as these cases have indicated. Certainly, there has never been any intellectually-accepted definition for a “political offense.” Other countries do not accept the mechanical Castioni test, either.

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17. For a discussion of the older cases as well as of McMullen and Abu Eain, see Hannon, International Terrorism and the Political Offense Exception to Extradition, 18 Colum. J. Transnat’l L. 381 (1980).

18. See United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 459 (S.D. Fla. 1959) and Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959). These cases can only be explained as efforts by the courts to avoid cooperating in any way with Communist regimes of which they did not approve; indeed, the court in Abu Eain characterized Artukovic, in which a Croatian war criminal was judged immune from extradition to Yugoslavia on political offense grounds, as “one of the most roundly criticized cases in the history of American jurisprudence.” 641 F.2d at 522.

19. See, e.g., Ruling on the Requests for the Extradition of Tomas Linaza-Echevarria, No. 57781 (Court of Appeals of Paris, filed June 3, 1981), reprinted in Dept. of State, Div. of Language Services, Translation No. 81/16601. There, the Chambre d’Accusation of the French Court of Appeals upheld the extradition of Linaza-Echevarria, a reputed Basque terrorist, for the murders of an alderman and six members of the Civil Guard in Spain. The fugitive claimed that the acts with which he was charged “were perpetrated as part of the struggle for political autonomy waged by a segment of the population in the Basque provinces of Spain.” Id. at 8. The Court rejected this claim, stating:

Irrespective of the objective sought or possible context, most of these offenses are too serious to be regarded as having a political character or as being related
As extradition treaties became prevalent in the nineteenth century, democratic nations undoubtedly found themselves facing the unpleasant task of sending political dissenters or activists back to tyrannical regimes to stand trial for acts which democracies did not perceive as "criminal" in any ethical or moral sense. Through the mechanism of the "political offense" exception, a conflict between the affirmative obligation to extradite under a treaty and the desire to grant political asylum was avoided. The fugitive newspaper editor or political candidate charged with sedition or treason merely for expressing his opinions could be sheltered from extradition for such a "pure" political offense, the sort of offense directly implicating cherished democratic values. Similarly, the fugitive dissident charged with criminal trespass or property damage during a protest rally could be sheltered from unjust persecution for his "relative" political offense, the sort of offense that smacks of a "trumped up" charge.

In addition to, and wholly apart from, its function of sheltering those whose only crime is speaking out, the "political offense" exception functions as a useful mechanism by which states may avoid becoming entangled in the internal political upheaval of other nations. Through the exception, states may avoid being forced to favor one side over another during uncertain civil wars or being compelled to assist the winners wreak vengeance on the losers after a political coup.

It is important to keep in mind that we are not dealing with the substantive rights of a fugitive. The "political offense" exception, just as the concept of political asylum, is not a recognition of some inalienable right of the fugitive to commit crimes in another country and escape extradition merely because the offenses were committed with a political purpose. The right involved is that of the state which has an interest in being able, when the state deems it appropriate, to give political asylum for humanitarian reasons or simply to refuse to become involved in the domestic
political disputes of other states.

The "political offense" exception thus serves as a useful shorthand or euphemism for these concerns of the state. There is widespread agreement for the abstract proposition that a state should refuse to send a dissident back to unjust persecution or refuse to allow the mechanism of extradition to be used for mere vengeance. The difficulty comes in properly categorizing particular fact situations in such terms. The attempt to define what constitutes a "political offense" by using a single "test" has created problems and led to an unfortunate confusion between the two different purposes of the exception.

The Castioni test seems to imply acceptance of a "right to rebel." It is doubtful, however, that a study of nineteenth-century diplomatic sources would corroborate the notion that the "political offense" exception was intended as a recognition of such an absolute and unqualified "right." Despite broadly-phrased statements by philosophers such as John Stuart Mill\(^2\) and by some of our founding fathers,\(^2^3\) democratic nations have never accepted the principle that any politically disaffected group anywhere can take up arms for the purpose of replacing the existing government and thereby be automatically protected from extradition for common crimes of violence. A situation in which "good" rebels are trying to overthrow "bad" rulers, such as the American Revolution, may be acceptable and even laudatory. But what about "bad" rebels and "good" governments? Do fair ends justify unfair means? And who is to judge? None of these questions can be thought to have been answered with unanimity in either the nineteenth or the twentieth century. The court in Castioni confused the two different purposes of the political offense exception and produced a "test" that, in the eyes of the later courts, appears to confer absolute and unqualified immunity from extradition on violent revolutionaries. Yet the judges who sat on the Castioni case would surely be shocked by the statement of the magistrate in McMullen, that their test precludes extradition "[e]ven though the offense be deplorable and heinous."\(^2^4\)

Such a conclusion could never have been intended by the diplomats

\(^2^2\) "Political liberties or rights which it was to be regarded as a breach of duty in the rule to infringe, and which, if he did infringe, specified resistance, or general rebellion, was to be held justifiable." J. MILL, ON LIBERTY 2 (1847). As the counsel for the defense in Castioni noted, Mill once suggested the following definition of a political offense: "Any offense committed in the course of or furthering of civil war, insurrection, or political commotion." In re Castioni, [1891] 1 Q.B. at 153.

\(^2^3\) E.g., Letter from Thomas Jefferson to James Madison (Jan. 30, 1787) ("I hold it that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical.") and First Inaugural Address by Abraham Lincoln (Mar. 4, 1861) ("Whenever [the people] shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it.")

who negotiated our extradition treaties or the Senators who consented to them. No possible value could be thought to accrue either to this country or to the international legal order from a rule that prevents the extradition of any and all who use political violence to achieve political ends.\textsuperscript{25}

The test applied by the magistrates in \textit{McMullen} and \textit{Mackin} and the district court in \textit{Quinn} was the same as that applied by the Seventh Circuit in \textit{Abu Eain} and by other courts reaching back to \textit{Ezeta}. Yet the ramifications of this test have not been clearly seen until now. There is no good reason to continue the unquestioned repetition of the \textit{Castioni} test, for it more often leads courts away from a just result rather than towards one. A better test must be fashioned.

\section*{II. EXECUTIVE DETERMINATION OF THE "POLITICAL OFFENSE" ISSUE: THE ROAD NOT TAKEN}

The original version of \textit{S. 1940} prohibited the courts from exercising jurisdiction over the "political offense" issue\textsuperscript{26} and provided that the Secretary of State alone shall determine the matter.\textsuperscript{27} Although this approach was recommended by the administrations of both President Carter and President Reagan,\textsuperscript{28} it was met by a barrage of criticism, par-
particularly from civil liberties groups who were generally suspicious of the executive branch and perceived the legislation as a direct assault on due process and other Constitutional protections for extradition targets.  

Hearings were held by both Houses, and battle lines were drawn on the issue of whether the executive "model" was superior to the judicial model. In reporting out a new version of S. 1940, the Senate Judiciary Committee rejected the criticism and recognized the strong and obvious policy considerations justifying the elimination of the courts' jurisdiction.

The McMullen, Mackin, Abu Eain, and Quinn cases have revealed something more than the flaws in the Castioni test. They have shown that the determination of the "political offense" issue is a major foreign policy determination which is ill-suited to the judiciary. The flaw permeating those cases cannot fully be corrected by drafting a statute to give courts more guidance. The "political offense" exception defies the creation of judiciously manageable standards. The analysis called for, whatever the test, inevitably thrusts the courts into foreign waters, both literally


29. See, e.g., Letter from American Civil Liberties Union to Sen. Thurmond, dated December 8, 1982, reprinted in 1981 Sen. Hearings, supra note 2, at 80. The ACLU expressed the following fear:

With regard to extradition, the exigencies of diplomatic relations render the exclusive determination of the political offense exception particularly unsuited to the executive branch; conflicting interests would undoubtedly result in an inconsistent and unfair application of standards. The integrity of such a process would be difficult, if not impossible, to preserve.


Far from being confined to mere paper-shuffling, as some critics think, our courts would have continued to play a central role in the extradition process. Under S. 1940, as in current practice, a judicial hearing before a neutral magistrate must be held to determine whether there was evidence establishing probable cause to believe that an offense had been committed and that the person sought had committed it. Compare 18 U.S.C. § 3184 with § 3194 of S. 1940. Thus, the most basic protection from spurious or "trumped up" charges would have remained intact.

30. The Senate hearings were published (See 1981 Sen. Hearings, note 2 supra), but the House hearings were not.

31. Professor Steven Lubet of Northwestern University, who testified at House hearings on extradition reform, has usefully analyzed the debate in terms of "executive, judicial, and synthesis models" of deciding the political offense question. See Lubet, Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists, 15 Cornell Int'l L.J. 247 (1982).

32. The Senate Judiciary Committee concluded that the Executive Branch should make such a determination because 1) most modern United States extradition treaties specify that the Executive Branch of the requested country shall decide the applicability of the political offense exception (e.g., Extradition Treaty, United States-Mexico, May 4, 1978, entered into force Jan. 25, 1980, art. 5(1), 31 U.S.T. 5059), 2) such decisions do not lend themselves to resolution through the judicial process, and 3) the U.S. government needs to take a public position on the applicability of the political offense exception before all the evidence and arguments are in to avoid a "devastating impact" and a "potentially crippling effect on the nation's foreign relations." S. Rep. No. 331 at 1415.
and figuratively. In order to apply the "political offense" exception, courts have been increasingly drawn into the most searching analyses of the social, political and economic histories of the foreign countries requesting extradition. Such analyses lead to lengthy and time consuming proceedings which delay extradition for months and even years. Moreover, the process creates a dangerous interference with the conduct of our foreign policy, as judges, distant from the diplomatic and political arena, make findings on political situations in foreign countries which are subject to misinterpretation and misuse abroad.

In the Mackin case, for example, the magistrate went far beyond the facts surrounding the alleged shooting incident and received lengthy testimony and elaborate documentary evidence bearing on the entire history of Anglo-Irish relations. After reviewing this evidence the magistrate concluded that "there was a political conflict in Andersontown, Belfast, Northern Ireland in March of 1978 which was part of an ongoing political uprising." The magistrate in Quinn went through a similar historical odyssey and was even more sweeping in his conclusions. In analyzing whether the political offense exception applied to Quinn's alleged crimes in London, the magistrate concluded that the element of a "violent political uprising" was satisfied, even by isolated incidents of violence in London, reasoning as follows:

[...]In a constitutional sense Northern Ireland is a part of the United Kingdom, and offenses committed in Northern Ireland are offenses against the same sovereign, though the Court notes that different sets of laws apply. In Northern Ireland, before, during, and after the period in question, there was what can only be described as a severe armed insurrection with a political basis. . . . [T]he violence was of such intensity that it brought down one government and forced its replacement to impose severe curbs on personal liberty.8

The potential detriment to our relations with the United Kingdom as well as the danger of interference in the domestic political affairs of another country from this sort of pronouncement is very real. Indeed, it

33. After hearings on the "political offense" issue lasting seven days and consuming more than a thousand pages of transcript, the magistrate issued a 100-page opinion that discussed the political and historical heritage of Northern Ireland, a treatment of the religious underpinnings of the past and present disturbances there, references to supposed abuses by various governmental authorities, a lengthy discussion of the general level of violence in Northern Ireland, a description of British legal procedures for the prosecution of suspected terrorists, and an assessment of the support for IRA activities within the Catholic community at large. See Magistrate's Opinion, No. 80 Cr. Misc. at 40, reprinted in 1981 Sen. Hearings, supra note 2, at 188-218.

34. Id. at 83, reprinted in 1981 Sen. Hearings, supra note 2, at 222.


36. "Finally, a decision on the political offense exception can have a devastating impact on United States relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise United States efforts to combat international terrorism." S. REP. No. 331, supra note 2, at 15.
appears that the magistrate's opinion in Mackin was widely circulated in Northern Ireland on behalf of the hunger strikers in British custody who sought to be recognized and treated as "political" offenders, thus inflaming an already tense situation. 37

The flaw in the present approach is precisely illustrated by testimony during hearings in the House on H.R. 5227. Arguing that the new legislation should not flatly exclude murder or other violent crimes from the "political offense" exception, one scholar pointed out to a Congressional committee: "We may not now wish to extend [political offense] protection to factions such as the Red Brigades of Italy, but we should not fashion a definition which also serves to exclude rebels such as the anti-Soviet partisans currently fighting in Afghanistan." 38 The witness went on to suggest that a definition should be devised which "[t]he courts would maintain . . . the ability to extend the protection of the exception to those whom we might wish to call legitimate rebels or actual contenders in a national struggle for power." 39 The United States should certainly be able to distinguish between "legitimate" rebels and "bad" ones and to grant asylum when appropriate, but judges should not be the ones to make that sort of political choice.

Any approach to the "political offense" exception which leaves to courts the determination of whether we extradite Red Brigadiers or Afghan guerrillas perpetuates a serious misalignment of responsibility. For example, the United States magistrates in the Mackin and McMullen cases and the district court in Quinn held that an unprovoked attack on British security personnel or installations by IRA gunmen constitutes a "political offense" and hence an act worthy of immunity from extradition. If such a dangerous policy is to be adopted, judges should not be the ones to do it. As the New York Times said in an editorial favoring the elimination of court jurisdiction, "Leaving diplomacy to diplomats provides better and speedier justice." 40

The question of whether an improper political motivation underlies an extradition request has always been decided by the Executive Branch. 41 No critic of the Senate approach has offered a single instance in which a Secretary of State has unjustly exercised his discretion over the

37. See Brief for Appellant at 32, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981).
39. Id. at 11.
40. New York Times, Dec. 29, 1981, at A14, col. 1. As Professor Lubet points out, "[t]here is no uniform international practice regarding the procedure for applying the political offense exception." Lubet, supra note 31, at 290 n.251. E.g., Canada, Australia, and West Germany follow a strictly executive approach. Id.; accord S. Rep. No. 331, supra note 2, at 1415. But see H.R. Rep. No. 627, supra note 3, Pt. 1 at 22 n.52, citing an unpublished Library of Congress report which asserts that the courts in all countries surveyed except Canada and Australia play at least some part in determining whether a person is extraditable or not because of the political or nonpolitical nature of his offense.
41. See text accompanying note 6 supra.
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political motivation question. There is no good reason not to entrust to executive discretion the equally "political" question of the nature of the offense.

Despite these strong arguments, the House Judiciary Committee opted to retain court jurisdiction over the political offense determination in reporting out its extradition reform bill. The House committee identified four reasons for this decision:

1. It accords with the "statutory and administrative practices of the past one hundred and forty years in the United States";
2. The Department of State can always "share" with the courts its unique expertise and specialized knowledge about conditions in the requesting country;
3. Extradition matters generally, and the political offense determination specifically, should take place before an independent judiciary because to do otherwise would be "highly dangerous to liberty"; and
4. Having the initial determination made by the judiciary allows our diplomats to "avoid . . . embarrassment" and, in effect, blame the courts when an ally's extradition request is denied.

The Senate Committee on Foreign Relations, which acted essentially contemporaneously with the House Committee, also adopted the judicial "model," recommending fundamental changes in the original version of S. 1940. The Senate adopted these amendments without any floor debate.

While this writer testified in support of the original version of S. 1940

42. If anything, political pressure is more often brought to bear on the Secretary of State not to grant extradition than to grant it. For example, a number of Arab ambassadors unsuccessfully pressured Secretary Haig to harbor PLO terrorist Ziyad Abu Eain after the courts in Chicago ordered him extradited to Israel. Washington Post, Dec. 13, 1981, at A8, col. 1. Under such pressure, other countries may be less willing than the United States to honor their international commitment to extradite terrorists, even where courts have ruled that their crimes are not "political offenses." For example, despite the French Court of Appeals decision in the Linaza-Echevarria case, the Socialist government of President Francois Mitterand announced its refusal to extradite any Basque terrorists. Note supra. See also The Economist, June 20, 1981, at 53. There is no more basis for the fear that our diplomats will capitulate to requests from authoritarian regimes for extradition of their political opponents than there is for a fear that judges will be bribed by the accused fugitive. Loose speculation about public officials' motivation is no good ground for opposition to a useful and needed piece of legislation.
45. The Senate Foreign Relations Committee expressed similar reasoning:
   Most countries with whom the U.S. has extradition agreements permit the courts to make such determinations. Moreover, American courts have reviewed political offense questions for nearly one hundred years. Preserving limited court jurisdiction to interpret the exception pursuant to legislative guidelines would continue this well-established tradition. It would also provide a check against an executive authority that could, depending upon the political sensitivities involved in a given case, result in inconsistent and unsound application of the political offense exception.
at hearings in October of 1981 and continues to believe that the executive model is the best approach to the "political offense" determination, it is unlikely that Congress will reconsider this fundamental issue. The central issue, therefore, is what legislative guidance should be given to the courts in exercising jurisdiction.

III. REPLACING THE CASTIONI TEST WITH NEW GUIDELINES

Both S. 1940 (the extradition reform bill passed by the Senate) and H.R. 6046 (the House Judiciary Committee version) set forth "negative" guidelines for the courts to use in determining what is not a "political offense." The Senate version identified certain crimes that could never be political offenses and certain other crimes that could only be political offenses "in extraordinary circumstances." Section 3194(e) of S. 1940 provides in pertinent part as follows:

(1) For purposes of this section a political offense does not include:
   (A) an offense within the scope of the [Hague] Convention . . . ;
   (B) an offense within the scope of the [Montreal] Convention . . . ;
   (C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons . . . , including diplomatic agents;
   (D) an offense with respect to which a . . . multilateral treaty obligates the United States either extradite or . . . prosecute a person accused of the offense;
   (E) [a narcotics] offense . . . ;
   (F) an attempt or conspiracy to commit an offense described [in A through E . . . above];

(2) For the purposes of this section a political offense, except in extraordinary circumstances, does not include:
   (A) an offense that consists of homicide, assault with intent to commit . . . serious bodily injury, rape, kidnapping, the taking of a hostage, or a . . . serious unlawful detention;
   (B) an offense involving the use of a firearm . . . if such use endangers a . . . person other than the offender . . . ;
   (C) an attempt or conspiracy to commit an offense described [in A or B . . . above].

If an extradition bill had been passed in the 97th Congress, it would most likely have included a "political offense" provision in the form set forth above. The question then becomes whether these guidelines would do

48. H.R. 6046 had the same list of crimes quoted in the text, but applied the "extraordinary circumstances" concept to all of them. The sponsor of the House bill subsequently agreed that the Senate's language was preferable. See Letter from William J. Hughes, Chairman, House Subcomm. on Crime, to Clement J. Zablocki, Chairman, House
the job.

At this stage, both Houses have rejected the approach of enunciating a new, positive definition of what constitutes a "political offense." This makes sense. First, the "pure" political offenses, such as advocating the overthrow of a government and other conduct punishable as seditious or treasonous, so implicate free speech and other democratic ideals that no extradition treaty to which the United States is a party even includes them as extraditable offenses. Moreover, any attempt to list or define such "pure" offenses runs the risk of quickly becoming overbroad, as the House Judiciary Committee has concluded. Similar problems of overbreadth afflict any attempt to define "relative" political offense. Indeed, it is the overbreadth inherent in the Castioni test that produced the furor that, in large measure, produced the impetus for new legislation.

Even in eschewing a positive definition of political offense, Congress is making one thing clear: the traditional Castioni test is no longer to be viewed as the only (or even the best) guide to what a political offense is. Regardless of their views on which particular crimes should be excluded from the political offense exception, the Congressmen involved in the drafting process are unanimous in their desire for courts to apply the concepts of "predominance" and "proportionality" in deciding whether a crime is a political offense. These concepts were developed in the legislative history, as follows.

While the Senate Committee on Foreign Relations "recognizes that current case law continues to apply" to crimes not specified on the list of nonpolitical offenses, the Committee took pains to draw attention to the "commonly-used standard" that bars extradition "when the state from which extradition is sought determines that the political content of the act outweighs the harm that may have been done in committing the offense." Similarly, the House Judiciary Committee stated its expectation

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49. A predecessor version of H.R. 6046 listed certain acts which would "normally" constitute political offenses. See H.R. 5227, 96th Cong., 2d Sess. § 3194(e)(2) (1981). The list included "sedition," "treason," and "unlawful political advocacy, but only if the advocacy is not to engage imminently in violence under circumstances in which it is likely that such advocacy will imminently incite such violence." These positive definitions were eliminated by the House Judiciary Committee as overbroad, stating that "although treason and espionage have traditionally been considered as political offenses, some conduct that is encompassed within these types of crimes will also constitute a violation of generally recognized international law, and therefore not be appropriate to always treat as a political offense." H. R. Rep. No. 627, Pt. 1 supra note 3, at 24.

50. S. Rep. No. 475, supra note 2, at 3 & 8. The Committee also quoted with approval the testimony of Professor Lubet, who explained that "[a] broad definition need not be a mechanistic or all-inclusive one. The word 'political' may have different meanings in different contexts, and the United States is under no legal or moral obligation to shelter a fugitive from extradition simply because he claims a political motive for his crime." Lubet, Statement before the House Comm. on the Judiciary, Subcomm. on Crime, supra note 38, re-
that, except for the enumerated offenses, "courts will continue to apply the traditional political offense test as enunciated in In re Castioni," but the Committee prefaced this statement by pointing out that:

[T]he traditional definition of political offenses encompasses too many crimes. In the nearly one hundred years since the first political offense cases were decided, the international legal community has come to recognize that certain offenses, even if they involve an offense of a political character, are too heinous to escape prosecution and punishment. Recognized examples of these offenses include killing a head of state.\footnote{51}

In addition, the House Judiciary Committee expressly stated its expectation that courts will "examine existing French and Swiss motivation precedents in this area" in determining whether crimes not listed in the new legislation are to be deemed "political."\footnote{52}

Turning to the approach of enumerating crimes that are not political offenses, the first question is whether there are crimes that should never be considered political offenses. For several reasons, the answer to that is certainly "yes." As the Senate Foreign Relations Committee has recognized, "it is inappropriate to apply the political offense exception to conduct that the international community has taken formal steps to prohibit and punish."\footnote{53} Thus the political offense exception should not even be considered by the court if applying it would have the effect of protecting behavior that is specifically outlawed by international treaties, such as the Tokyo,\footnote{54} Hague,\footnote{55} and Montreal\footnote{56} conventions with respect to aircraft

\footnotesize{printed in S. Rep. No. 475, supra note 2, at 3.}
\footnotesize{51. H. R. Rep. No. 627, Pt. 1, supra note 3, at 23-24.}
\footnotesize{52. Id. at 26. The Committee specifically referred courts to the discussion of those precedents discussed in a seminal article by Garcia-Mora, The Nature of Political Offenses: A Knotty Problem of Extradition Law, 48 VA. L. Rev. 1226, 1249-57 (1962). There, Professor Garcia-Mora quoted the rule in In re Giovanni Gatti, [1947] Ann. Dig. 145 (No. 70) (Fr.): "The offense does not derive its political character from the motive of the offender but from the nature of the rights it injures." Id. at 145-46. He also described "the celebrated Swiss theory of predominance, which essentially means that... the political element must predominate over the common crime," i.e., must not be out of proportion to the end sought. Garcia-Mora, supra, at 1249-50. In discussing the Swiss proportionality test the author relied on the Wassilieff case, where the murder of a police chief was held not to be a political offense "since other means of redress were available." Id. at 1254. For further discussion of the Swiss proportionality test, see generally Abu Eain, 641 F.2d at 521 n.21 ("proportionality and predominance may be unarticulated concepts in the existing Anglo-American framework of extradition") and Note, Bringing the Terrorist to Justice: A Domestic Law Approach, 11 CORNELL INT'L L.J. 71, 82-83 (1978).}
\footnotesize{53. S. Rep. No. 475, supra note 2, at 7.}
hijacking, the Internationally Protected Persons (IPP) Convention, the Hostage Convention, and any future multilateral treaties obligating the United States either to extradite or prosecute. The absolute prohibition approach is also appropriate for crimes such as rape and narcotics violations, which could never have any meaningful nexus to a political controversy.

An absolute prohibition, of course, has the procedural advantage of sure and quick application, for courts can decide the political offense issue "on the pleadings," as it were. It would be a great boon to prosecutors and defendants alike if time-consuming exercises in history, sociology, and philosophy, such as those conducted in Mackin, McMullen, Abu Eain, and Quinn, could be avoided and the time devoted to reviewing these complex issues on appeal reduced. Unfortunately, Congress has been unable to devise either an all-encompassing positive definition or a complete list of negatives that will relieve courts of that burden. Some flexibility in the area of "relative" political offenses seems necessary, and the approach excluding crimes of violence or the use of firearms except "in extraordinary circumstances" is acceptable when read in light of the legislative history.

The Senate Foreign Relations Committee, which amended the original version of S. 1940 to include the "extraordinary circumstances" concept, makes clear that the burden of demonstrating such circumstances is on the person resisting extradition and that this burden is "a considerable one." The Committee explained the criteria for applying the concept as follows:

It should not be the policy of the United States to encourage or condone violent or other criminal behavior simply because it is the view of the persons committing such acts that they are somehow connected with a political activity or have an obstensible [sic] political purpose or justification. However, it should also not be the policy of the United States to render up automatically to foreign authorities an individual who, in the course of seeking to exercise legitimate civil or

59. In S. 1940, rape was unintentionally listed among the crimes that could be deemed a political offense "in extraordinary circumstances." That error has been corrected in the version of the legislation now pending in the 98th Congress. See S. 220, 98th Cong., 1st Sess. § 3194(e)(1)(F), introduced by Sen. Strom Thurmond on Jan. 27, 1983.
60. See, e.g., note 34 supra. Each of the trials in these cases lasted more than a week and produced some two thousand pages of transcripts and documents. The possibility of delay is great. For example, Ziyad Abu Eain was arrested on August 21, 1979 and finally extradited to Israel on December 12, 1981. Wash. Post., Dec. 13, 1981, at A8, col. 3.
political rights in a nonviolent manner, is placed in such a position that he has no reasonable choice except to commit an otherwise criminal act. For the court to make such a determination the test should be focused upon the individual and whether the offense for which he is sought was a consequence of the violation of his internationally recognized civil or political rights by the state requesting extradition. Acts of indiscriminate or excessive violence or acts of deliberate brutality would presumably never fall within the exception.2

The Senate Committee's focus on the lack of any "reasonable choice," i.e., any alternative means of redress, is the correct focus for what constitutes an "extraordinary" circumstance. It has also been urged by an influential voice on the House side.3

In reporting out H.R. 6046, the House Judiciary Committee suggested that courts should "evaluate a large number of factors" when applying the "extraordinary circumstances" language.4 These factors include whether the victim is "civilian, governmental or military," what relationship exists between the person whose extradition is being sought and any political organization, whether the crime allegedly committed was done in furtherance of such organization's political goals, and what the relative seriousness of the offense is.5 The House Committee's suggestion, however, leaves the matter too open-ended and fails to provide courts with sufficient guidance at the very point they most need it.

The critical question is what kind of conduct is being protected by the use of the "extraordinary circumstances" language. The Senate Committee protects one kind of conduct—unavoidable violence occasioned by a violation of civil or political rights—and gives adequate guidance to courts as to when to invoke the political offense exception. The House Committee is obviously trying to protect, or at least to keep, the U.S. from becoming embroiled in another kind of conduct: civil war.6 More precision in defining the intended result can be achieved without the risk of courts sweeping too much into the political offense exception or excluding too much from its protection. This can be accomplished by two steps: first, by creating an additional absolute prohibition and, second, by clarifying the circumstances in which the Castioni test should apply.

As explained above, both Houses appear to agree that violence out of proportion to the political end sought cannot be defined as a "political

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62. Id.
63. Rep. Paul Findley has suggested that "extraordinary circumstances" include "acts committed as a last resort by a person who has been subjected, in the state where such acts occurred, to serious violations of internationally protected human rights and for whom such acts are the only reasonable means of protection or flight from such conditions." H.R. REP. No. 627, Pt. 2, supra note 3, at 7. (Statement of Hon. Paul Findley).
64. H.R. REP. No. 627, Pt. 1, supra note 3, at 24.
65. Id. at 2425.
66. The House Committee defined the "underlying rationale" of the political offense exception as keeping out of "another country's political dispute." H.R. REP. No. 627, Pt. 1, supra note 3, at 23. See also note 22 supra.
offense." Therefore, a new provision should be added to the absolute prohibitions in Section 3194(e)(1) of S. 1940, such as the following: "An offense that consists of intentional, direct participation in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to persons not taking part in armed hostilities." This provision would draw a sharp line between hostile acts against a state and mere terrorism.67 Such a salutory rule would plainly have covered the situation in Abu Eain and eliminated the drawnout efforts of apologists for the PLO to characterize "a random bombing intended to result in the cold-blooded murder of civilians" as a political offense.68 It would also cover cases in which the victims include civilians even though the targets are governmental facilities or officials. This new exclusion alone, however, is not enough.

The second step to improving the legislative guidelines contained in S. 1940 involves clarifying the circumstances in which the Castioni test should be applied. This in turn involves a clarification of two factors: the type of behavior that is not to be protected even in an armed conflict, and the type of armed conflict that should trigger the Castioni test at all. Recent work in this area by the American Bar Association is enormously helpful and points the way to the correct resolution of the problem.

At its 1983 Annual Meeting in Atlanta, Georgia, the House of Delegates of the American Bar Association adopted a resolution "strongly recommend[ing]" that extradition legislation be passed which will:

exclude all acts of terrorist violence from the application of the political offense exception . . . [and] preclude the application of the political offense exception to offenses which constitute serious breaches of the norms established under international humanitarian law applicable in international and noninternational armed conflicts, without subjecting to extradition combatants for warlike acts which do not transgress those norms."69

67. Such a provision embodies the rationale of the Seventh Circuit's decision in Abu Eain, 641 F.2d at 521 ("an offense having its impact on the citizenry, but not directly upon the government, does not fall within the political offense exception") and responds to the well-founded belief of many Congressmen that attacks on civilians can never be justified; see, e.g., H.R. REP. No. 627, Pt. 2, supra note 3, at 8 (Statement of Hon. A. Erdahl) ("political offense does not include acts of violence involving wanton, indiscriminate, or reckless bodily injury to persons in order to generate terror within a civilian population").

68. Abu Eain, 641 F.2d at 521. The proposed amendment would also slam shut the loophole that the Seventh Circuit arguably left open in Abu Eain when it held that the bombing was not "incidental to" the political conflict in Israel because there was no "direct tie between the PLO and the specific violence alleged." Id. at 520. Though the court quoted with approval a United Nations Secretariat study which stated that "the legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent," id. at 521, it left unclear what result would follow if the evidence had established such a "direct tie." The correct answer is, of course, that the crime would still not be a political offense because it fails the "proportionality" test. See note 53 supra. See also In re Meunier, [1894] 2 Q.B. 415, discussed in Hannay, supra note 17, at 388-90.

To accomplish these goals, the ABA's Section of International Law and Practice proposed certain amendments to Section 3194(e) of S. 1940. The ABA's proposed amendments would first of all delete “the taking of a hostage” from the offenses subject to the “extraordinary circumstances” test and add it to the list of absolute prohibitions in Section 3194(e)(1). This change makes sense because such conduct is now expressly forbidden by the 1979 Hostage Convention and because, as the ABA points out, “[i]t is difficult to conceive of any circumstance which would justify this offense.”

Second, the ABA's proposed amendments would specifically incorporate into the political offense definition the international laws of war which have “developed limitations on the methods, means, and measures of coercion and violence which may be used by the parties in any armed conflict.” The ABA's proposed amendment would retain the prefatory language in Section 3194(e)(2) of S. 1940, “[f]or the purposes of this section a political offense, except in extraordinary circumstances, does not include . . .,” but would substitute the following in place of Section 3194(e)(2)(A) and (B):

(A) except for acts [that are] committed in the course of a non-international armed conflict in furtherance of the objectives of the party to the conflict to which the person belongs [that] do not violate the norms referred to in subparagraph (B), an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, serious unlawful detention, or an offense involving the use of firearms . . . if such use endangers a person other than the offender;

(B)(i) an offense consisting of conduct which violates the provisions of subparagraph (1) of Article 3 Common to the Geneva Conventions of 12 August 1949 and any Protocol additional thereto Relating to the Protection of Victims of Non-international Armed Conflict to which the United States is a party.

This approach is first-rate. Subsection (B)(i), of course, should logically


70. See American Bar Association, Report of the Section of International Law and Practice, appended to ABA Report No. 104A (1983) [hereinafter cited as ABA Section Report]. The Proposed Amendments are set forth in Inclusion 4 to the Section Report (Incl. 4). The report was drafted by the Section's International Criminal Law Committee under the co-chairmanship of Waldemar A. Solf and James D. Clause.

71. ABA Section Report, supra note 70, at 6, para. c.

72. Id. at 12 n.6.

73. Id. at 78.

74. Id. at Incl. 4. See, e.g., Geneva Convention for the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, reprinted in 72 Am. J. INT'L. L. 457 (1978). A detailed discussion of the standards of international humanitarian law applicable in armed conflict, including the 1949 Geneva Conventions and their relationship to the political offense exception, was attached to the ABA Section Report as a separate inclosure (Incl. 3). That portion of the report is reprinted as Appendix A to this article.
be listed among the “absolute prohibitions” of Section 3194(e)(1), but the idea is right on the mark. When combined with one other piece of the definitional puzzle and with the Senate Foreign Relations Committee’s interpretation of “extraordinary circumstances,” the ABA proposal accounts for all of the situations that present hard cases or produce bad results under the Castioni test.

Importantly, the ABA report recognizes the absence of a proportionality dimension to the Castioni test, stating:

The difficulty with the simple formula of the Castioni case is that it did not recognize that there are limitations on the conduct of internal armed conflict and that revolutionary violence which trangresses these limitations is not tolerable under the political offenses exception. Moreover, every political disturbance does not provide justification for violent criminal acts.  

This fundamental flaw in the prevailing test of a “relative” political offense would be remedied by reference to the normative humanitarian rules established by 1949 Geneva Conventions and the 1977 Protocol II, which prohibit murder, cruel or degrading treatment, hostage-taking, terrorism, and pillage directed at persons not, or no longer, taking an active part in hostilities.

With the outer limit of conduct permissible under the political exception established by the first part of the ABA’s proposed amendment, there remains one other piece of the puzzle necessary for an acceptable guideline: a definition of “non-international armed conflict” establishing the lower limit or threshold for invoking the exception. The ABA’s proposed amendment sets forth such a definition, and it is generally a satisfactory one. The ABA definition has two parts. First, it expressly excludes certain situations from the definition stating that the term “armed conflict” does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” This aspect of the definition is eminently correct, for the purposes behind the political offense exception are not achieved by applying the Castioni test to such situations. As the ABA report accom-

75. ABA Section Report, supra note 70, at Incl. 3.
76. Id. In support of its approach, the ABA quotes with approval the French extradition treaty which excludes from the political offense exception “acts committed in the course of an insurrection or a civil war” that constitute “acts of odious barbarism and vandalism prohibited by the laws of war.” Id. at 9. See also German Extradition Law of Dec. 23, 1929, which provides in part, “Extradition is permissible if the act constitutes a deliberate offense against life, unless committed in open combat.” Harvard Research in Int’l. Law, 29 Am. J. Int’l L. 385 (Supp. 1935).
77. ABA Section Report, supra note 70, at Incl. 4. This provision is taken directly from Article 1.2 of the 1977 Protocol II, 72 Am. J. Int’l L. 502, 503 (1978). The ABA explained that the proposed amendment “uses the negative provisions of Prctocol II to make certain that acts of violence against the police of a State in situations falling short of ‘armed conflict’ do not benefit from the political offenses exception.” ABA Section Report, supra note 70, at 7.
panying the proposed amendment recognizes: "[T]errorist acts of violence in situations falling short of armed conflict even when directed against the security forces of a state, such as those perpetrated by the Red Brigade of Italy or the Bader-Meinhoff gang of Germany and similar groups should . . . be excluded [from the exception]."\(^78\)

The second and most critical part of the definition in the ABA’s proposed amendment is the positive portion defining the threshold for what constitutes a “noninternational armed conflict.” The model for the ABA’s definition is contained in article 1.1 of the 1977 Protocol II to the 1949 Geneva Conventions, which states:

This Protocol . . . shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.\(^79\)

The ABA essentially adopted this definition but modified it slightly in the proposed amendment, omitting the latter part which refers to dissident armed forces exercising “such control over a part of [the State’s] territory as to enable them to carry out sustained and concerted military operations.”\(^80\) For the sake of consistency and clarity, the entire definition from Protocol II should be built into the legislative guidelines. However, even if the ABA’s definition is adopted in haec verba, the effect is the same, for the proposed definition, just as the language in Protocol II, plainly contemplates: “[s]ufficient statelike characteristics on the part of the rebels, as to suggest a level of organization and violence to be found in a classical civil war, where one might expect international armed conflict rules to apply, either under recognized belligerence or a prudent expectation of reciprocity.”\(^81\) It is in precisely the circumstances of a “classical civil war,” and only in those circumstances, that the theory of the political offense exception embodied in Castioni and in the Ezeta decision in the U.S. should come into play. In such circumstances, and only therein, does the rationale of those cases have validity. During a “classical

78. ABA Section Report, supra note 70, at 8.
80. Including the excerpt set forth in the text at note 76, the ABA definition in its entirety states as follows:

(ii) for purposes of this subparagraph a non-international armed conflict within the meaning of Common Article 3 to the 1949 Geneva Convention shall be an armed conflict which takes place within the territory of a foreign state between its armed forces and dissident armed forces or other armed groups which are under a command responsible to a party to the conflict for the conduct of its subordinates. The term “armed conflict” does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

ABA Section Report, supra note 70, at Incl. 4.
81. Id. at 10.
civil war” or revolution (such as in Lebanon, El Salvador, or Afghanistan), other nations should be able to avoid becoming embroiled in an unstable internal dispute by extraditing combatants, no matter whether revolutionaries or tyrants, who have not breached the 1949 Geneva Conventions or the 1977 Protocol II. At the other end of the spectrum, where no such condition pertains and where the forms of meaningful democratic process exist, other nations should remain free to extradite those who use violence to try to gain their goals despite the existence of other means of redress. In the absence of civil war, political violence directed at governmental officials or security personnel should be deemed a “political offense” only in the “extraordinary circumstance” that no other means of political redress is available. By enacting S. 1940 with the Senate Foreign Relations Committee’s view of “extraordinary circumstances,” with the new absolute prohibition suggested above, and with the ABA’s proposed amendment, combatants in armed conflicts would be protected; mere terrorists would not.

The measure of the effect of this approach is to ask what would have happened in McMullen and Mackin if the ABA amendments had been in place. The answer is that the opposite results would have obtained, and properly so. Much as the PIRA would like it otherwise, the “troubles” in Northern Ireland do not constitute a civil war and do not justify invoking the exception.

The political offense exception could never have been intended to provide blanket immunity and asylum to every politically disaffected individual who in the company of a few others of like mind wishes to take the law—and a gun—into his own hands. Where the institutions of democratic governance exist as they do, for example, in Northern Ireland, it ill serves the interests of those who live in a free and open society to cast a cloak of protection over impatient extremists who demand their own way now and will kill anyone who stands in their way—whether policeman, politician, soldier, or civilian. There is no rule of international law that sanctifies political murder merely because the victim wears a uniform. There is no open season on soldiers or policemen, nor should the city streets and village lanes of a democratic nation be considered a war zone merely because there are a hundred terrorists at large rather than one.

Conclusion

While the best approach is to defer to the Secretary of State in determining whether or not a particular crime is a “political offense” under our extradition treaties, it appears that Congress has moved past this stage of the argument. The decision to leave the matter in the courts’ hands seems irreversible; the task that is left is to provide more detailed guidance to the courts in their interpretive task.

Section 3194(e) of S. 1940, as passed by the Senate in 1982, provides excellent guidance and would be entirely satisfactory if it is recognized that the Senate Foreign Relations Committee has set forth the correct
standard for interpreting “extraordinary circumstances,” if a new prohibition excluding terrorist attacks on civilians is added, and if the American Bar Association’s proposed amendment is adopted. Such a statute will give courts the necessary tools with which to separate the truly downtrodden from the merely dissatisfied, to distinguish the rebel from the terrorist. By enacting such legislation, Congress will ensure that the balancing of interests inherent in the political offense determination will be made with a sense of proportion and in a manner consistent with our democratic notions of decency, world order, and the Rule of Law.
EXTRADITION IN RELATION TO INTERNATIONAL LAW APPLICABLE IN ARMED CONFLICT

1. The International Law rules applicable in armed conflict consist of restraints formulated to prevent, or at least to mitigate, the destruction of shared values occasioned by armed conflict. The underlying stimulus for the development has been the realization that violence and destruction which is unnecessary to actual military requirements is not only immoral and wasteful of scarce resources, but also counterproductive to the attainment of the political objectives for which military force is used.

2. Breaches of the norms developed under customary and Conventional International Law are war crimes. The 1949 Geneva Conventions designate certain aggravated breaches as universal and extraditable offenses within the criminal jurisdiction of each contracting party. As of January 1, 1983, 152 nations are parties to those conventions.

Each of the four 1949 Geneva Conventions obliges the contracting parties:

a. To enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches defined therein.

b. To search for alleged offenders of such grave breaches, and to submit them for prosecution before its own courts, regardless of their nationality; or, in accordance with its own legislation, to extradite them to another contracting party concerned, provided the requesting party has made out a prima facie case. (Common Articles 49/50/129/146).

As there are now 152 parties to the 1949 Geneva Conventions, grave breaches denounced therein are universal crimes subject to the jurisdiction of each party to the conventions. They would be extraditable offenses, not subject to the political offenses exception, under the proposed standard of S. 220(e)(1)(D) and H.R. 2643, Section 3194(e)(2)(D) which prescribe that an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of an offense is not a political offense.

c. The grave breaches defined in the 1949 Geneva Conventions are the following, if committed in an international armed conflict against protected persons and objects:

in the case of all four Conventions: willful killing, torturing or inhuman treatment, including biological experiments, willfully causing great
suffering or serious injury to body or health;

in the case of the First, Second and Fourth Conventions: extensive
destruction and appropriation of property, not justified by military neces-
sity and carried out unlawfully and wantonly;

in the case of the Third Convention: compelling a prisoner of war to
serve in the forces of the hostile Power, or willfully depriving him of the
rights of fair and regular trial prescribed in the Convention;

in the case of the Fourth Convention: unlawful deportation or trans-
fer or unlawful confinement of a protected person, compelling a protected
person to serve in the forces of a hostile Power, or willfully depriving a
protected person of the rights of fair and regular trial prescribed by the
Convention; taking of hostages.

(Common Articles 50/51/130/147).

"Protected persons" within the meaning of the 1949 Geneva Conven-
tion are the wounded, sick and shipwrecked persons of the armed forces,
medical personnel, prisoners of war and civilians in the power of a party
to the conflict of which they are not nationals. (Fourth Convention, Art.
4).

3. The 1977 Protocol Additional to the Geneva Conventions of 12
August 1949, relating to the Protection of Victims of International Armed
Conflict (Protocol I), adds several new offenses as grave breaches
including:

willful and unjustified acts of omissions which seriously endanger the
physical or mental health or persons in the power of an adverse party, by
medical procedures not indicated by the medical needs of that person, or
not consistent with generally accepted medical standards, including muti-
lations, medical experiments, and removal of organs for transplantation
(Protocol I, Art. 11(4));

willfully causing death or seriously injury to body or health by:

making the civilian population the object of attack;

launching an indiscriminate attack or an attack against works
or installations containing dangerous forces (dams, dykes, nuclear
electric power generating stations), knowing that it will cause civilian
casualties, excessive in relation to the concrete and direct military
advantage anticipated;

making nondefended localities or demilitarized zones the
object of attack and;

the perfidious use of the Red Cross emblem. (Protocol I, Art. 85).

The United States has signed, but not ratified, the 1977 Protocols.
Protocol I is now effective as to twenty-seven states.

4. In international armed conflicts, prisoner of war status flows from
the combatants' privilege. Those who are entitled to the juridical status
of "privileged combatant" are immune from criminal prosecution for
those warlike acts which do not violate the laws and customs of war but
which might otherwise be common crimes under municipal law. This is a concept recognized by the classic publicists, including Belli, Grotius, Pufendorf, and Vattel. It was recognized in Article 57 of the Lieber Instructions of 1863, which states that “[s]o soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.” Under the law of the United States, any killing while on combat operations which is not violative of the laws of war is recognized to be justifiable homicide. Civil law courts recognized this concept in the post-World War II trials when they provided immunity to those defendants charged with violations of domestic criminal law if it was established that their acts were privileged under international law.

In view of the clear distinction between grave breaches of the Geneva Conventions and legitimate acts of combat by privileged combatants, the standards developed in S. 220 and H.R. 2643 can be applied without difficulty as to acts of violence performed in the course of an international armed conflict. Grave breaches are not political offenses; legitimate acts of combat are not offenses at all and thus do not come within the scope of extradition treaties.

5. Acts of violence occurring in the course of a non-international armed conflict (insurrection, rebellion or civil war) pose a more difficult problem. Although the 1949 Geneva Conventions and the 1977 Protocol II establish normative humanitarian rules applicable in non-international armed conflict, they do not provide for any enforcement measures. Moreover, they do not oblige states affected by an internal armed conflict to recognize the combatants’ privilege or to accord prisoner of war treatment to captured combatants of the other side. For self-evident reasons, governments (particularly those which may be affected by an emerging dissident or separatist movement) are unwilling to concur in any international law which would, in effect, repeal its treason laws and confer on its domestic enemies a license to kill, maim or kidnap its security personnel and destroy its security installations subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict. They fear that any international rule establishing the combatants’ privilege and prisoner of war status in internal armed conflicts would tend to encourage insurrection by reducing the personal risks of rebels. It follows that within the scope of the domestic law of a country affected by such an armed conflict, the rebels have committed treason and their acts of violence may be punished as common criminal offenses. As a matter of policy, States sometimes apply international armed conflict practices to a civil war and are generous with amnesty in order to facilitate a restoration of peace, or in a prudent expectation of reciprocity, but international law does not require such a policy except with respect to recognized belligerency, a rare event in this century.

6. Without affecting the legal status of the parties to a noninternational armed conflict, Common Article 3 of the 1949 Geneva Convention applies certain minimum human rights standards applicable to persons
not, or no longer, taking an active part in the hostilities as follows:

**ARTICLE 3.**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

These standards have been extensively elaborated and particularized in the 1977 Protocol II to the 1949 Geneva Conventions. Relevant portions provide:

**Article 4 — Fundamental guarantees**

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall
remain prohibited at any time and in any place whatsoever;

(a) violence to the life, health and physical or mental wellbeing of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any of the foregoing acts.

Article 6 — Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offenses related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offense except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offense alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offense except on the basis of individual penal responsibility;
(c) no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offense was committed; if, after the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offense is presumed innocent until proved guilty according to law;
(e) anyone charged with an offense shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt.

In addition to the foregoing, Protocol II includes standards for humane treatment of persons deprived of their liberty for reasons related to the armed conflict (Art. 5); the care of the wounded, sick and shipwrecked, (Arts. 7-12); and the protection of the civilian population against direct attack and other effects of hostilities (Arts. 13-18).

7. Because common Article 3 of the 1949 Geneva Conventions are the Conventions' only articles relating to non-international armed conflicts,
none of the provisions of the conventions relating to the enforcement, including the prosecute or extradite provisions are applicable to the norms of Article 3. It follows that the only basis for extradition under U.S. law for offenses violative of Art. 3 are the various bilateral extradition treaties relevant to common crimes. These are subject to the political offenses exception. Indeed the political offenses exception was invented in 1840 for the purpose of shielding from extradition the participants in the liberal and nationalistic revolutions which occurred in mid-nineteenth century Europe and the Americas.

8. Although there is no mandatory combatants' privilege and prisoner of war status or treatment in internal armed conflicts within the scope of any nation's municipal law, a qualified combatants' privilege has been recognized by third states in matters relating to asylum and extradition. The dichotomy between the state of municipal law and transnational practice in this regard was vividly expressed by Sir James Stephen in his explanation of the British Extradition Act of 1870:

[I]f a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle . . . by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.” (J. Stephen, A History of the Criminal Law of England (1883), Vol II, at 70-71).

This reasoning was applied in the case of In re Castioni [1891] 1 Q.B. 149, 167 which became the leading influence on the application of the political offenses exception in American courts. The difficulty with the simple formula of the Castioni case is that it did not recognize that there are limitations on the conduct of internal armed conflict and that revolutionary violence which transgresses these limitations is not tolerable under the political offenses exception. Moreover, every political disturbance does not provide justification for violent criminal acts.

A 1907 French law comes much closer to the recognition of these limitations. It provided:

[Extradition is not granted] when the crime or offense has a political character or when it is clear [resulte] from the circumstances that the extradition is requested for a political end.

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance . . . of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended. (Law of March 10, 1927, Tit. 1, Art. 5, para. 2, as quoted in Hannay, Inter-
national Terrorism and the Political Offense Exception to Extradition, 18 Columbia Journal of Transnational Law 381, 386 (1979).

Similarly, the 1967 Protocol relating to the Status of Refugees (606 U.N.T.S. 267, 19 U.S.T. 6223) which prohibits the expulsion or return of a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or membership of a particular social group or political opinion, does not apply to persons with respect to whom there are serious reasons for considering that he has committed a war crime or a serious nonpolitical crime (Arts. 2F, 33).

The gap between normative prohibitions and measures of enforcement in the 1949 Geneva Conventions and its Protocols is plugged with respect to hostage taking by the 1979 Convention Against the Taking of Hostages. (Senate consent completed, but treaty not yet in effect).

Common Article 3 and Article 4 of Protocol II prohibit the taking of hostages in a non-international armed conflict. Article 75 of Protocol I, which lays down fundamental human rights for persons who do not qualify as “protected persons,” also prohibits this act. But the grave breach of the Fourth Convention applies only to “protected” civilians in the power of an adverse party in an international armed conflict. The effect of Article 12 of the 1979 Hostage Convention, however, is to make the Hostage Convention with its very strong prosecute or extradite provisions applicable to acts of hostage taking in armed conflicts, whenever the Geneva Conventions and its Protocols do not establish the obligation to submit [?] for prosecution or to extradite.

In view of the practice of states in regard to applying the political offenses exception to normal combat activities occurring in a non-international armed conflict occurring in another country, the provision of S. 220 and H.R. 2643 which excludes all acts of violence from the benefits of the exception, should be modified.

9. There remains for consideration, the issue whether a particular situation amounts to an armed conflict.

The 1977 Protocol II Applicable in Non-International Armed Conflict has a very high threshold. Under Art. 1, that Protocol (which includes rules regulating combat activities as well as basic human rights provisions) is applicable to armed conflicts:

... which take place in the territory of a high Contracting party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. (Protocol I, Art. 1(1)).

In view of the sophisticated provisions of Protocol II its implementation requires sufficient statelike characteristics on the part of the rebels as to suggest a level of organization and violence to be found in a classical civil war, where one might expect international armed conflict rules to
apply, either under recognized belligerence or a prudent expectation of reciprocity.

Protocol II also establishes a negative limitation which is relevant to Common Article 3 (despite the express disclaimer that Protocol II does not modify its existing application). Art. 1(2) provides: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

The term "armed conflict" is not defined in Common Article 3, mainly because no definition was able to command a consensus in the 1949 Geneva Conference. Presumably, in view of its basic minimum human rights provisions it should be much lower than the threshold for Protocol II. There is nothing in paragraph 1 of Common Article 3 which is not already demanded by the procedure of penal law of "civilized" states in relation to the treatment of common criminals.

Nevertheless, as the application of Common Article 3 acknowledges the existence of an "armed conflict," many states have refused to admit its application to insurgencies occurring in their territories. Thus, France refused to apply Common Article 3 until late in the Algerian war; Pakistan denied its applicability to the Bengladesh secession. The U.K. has never conceded that the troubles in Northern Ireland constitute an armed conflict, despite its declaration, in justifying its derogation of certain provisions of the European Convention on human rights, that an emergency exists threatening the life of the nation.

Insofar as foreign governments do not consider themselves bound to refrain from applying the combatants' privilege as it applies to extradition cases involving violent acts occurring in an internal armed conflict, it would seem that they are similarly not bound to follow the de jure government's determination as to whether an armed conflict exists for purposes of the political offenses exception.

The threshold article proposed for initial application (Incl. 4) consists of the minimum requirements that the dissident armed forces:

a. be linked to a party to the conflict;
b. be organized;
c. be under a command responsible to the party for the conduct of subordinates, and;
d. that, the government's armed forces (rather than the civil police) be committed to suppress the insurrection.

It also uses the negative provisions of Protocol II to make certain that acts of violence against the police of a State in situations falling short of "armed conflict" do not benefit from the political offenses exception. The "extraordinary circumstances" clause, however, remains in the draft proposal in order to allow courts to apply the exception to meritorious cases involving the use of violence in situations falling short of armed conflict. The burden of establishing extraordinary circumstances by a preponderance of the evidence is on the person sought.
An Overview of Comparative Environmental Law

A. Dan Tarlock
Pedro Tarak

I. Introduction

The recognition of environmental disruption as an issue demanding political action has become a worldwide phenomenon.1 There is growing recognition that the continued use of watersheds, land resources and the atmosphere as sinks for the disposal of human residuals results in unacceptable social costs, such as increased illness, crop losses, ecosystem disruption and the creation of low-level, long-term health risks such as cancer. Moreover, there is a growing societal preference, especially in the developed nations, for increased amenity levels.2 This preference has led to demands for greater governmental protection of the natural landscape from developmental "insults," for the maintenance of a "human scale" in urban planning and for a greater role for social and aesthetic considerations in developmental planning of all kinds.3

Public health protection and amenity enhancement are often achieved by either the reduction of residual discharge levels or the promotion of less polluting activities. Environmental problems are present to some degree in all nations, independent of the political, economic, and social organization of the country. Pollution and the demand for amenity enhancement are largely functions of the levels of industrial development and education, and of the distribution of population within a country. For example, one can trace the evolution of air and water pollution laws in

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2. The increased desire for cleaner, more aesthetically pleasing environments has been noted by all major studies concerned with global resource needs. See, e.g., W. Hafele, J. Anderer, A. McDonald & N. Nakicenovic, Energy in a Finite World: A Global Systems Analysis (1981).

3. In this article, the standard three-part classification of environmental planning and management objectives has been collapsed into two parts. The three traditional environmental planning objectives are (1) the protection of physical and mental health, (2) the enhancement of economic value and (3) the preservation of sensory pleasure. See T. O'Riordan, Environmentalism 202 (1976).
the United States as well as in both Eastern and Western Europe from general prohibitions against harmful discharges to technology-forcing licensing laws that specify the parameters of lawful air and water emissions.4

Despite common environmental problems and similarities among the institutional responses to environmental degradation and threats to human health, environmental protection is still primarily the responsibility of individual sovereign nations. This is true even though regional organizations, such as the European Economic Community (EEC), are playing an increasingly active role in policy formulation and coordination.5 In the foreseeable future, however, the persistence of differing economic and political goals suggests that there will be great variations among nations in the balances struck between the costs of maintaining environmental quality and the opportunity costs of achieving this objective.6 Some countries accord greater weight to the benefits of industrial development and wealth redistribution while others emphasize the benefits of a stable and healthy environment. These differences manifest themselves in the institutional structures and legal regimes devised to govern environmental quality.

This article attempts a brief comparative analysis of the different institutional responses to the various types of environmental degradation. The common types of environmental insult which have been the subject of legislation are initially classified and a model of the evolution of environmental strategies is proposed. The general schemes of environmental regulation utilized in various countries are identified by an examination of the different institutional arrangements which have been created to enforce such schemes. The different methods of pollution reduction and public health protection are compared in order to identify common approaches and to point out unique features of the methods employed by the countries surveyed. For the sake of brevity, selected examples from

4. An illustration of this general development can be seen in the evolution of Poland’s water pollution control law from the Water Act of 30 May 1962, Dz V (Pol.), No. 34, at 158, to the Water Act of 24 October 1974, Dz V (Pol.), No. 74, at 430 (Trybuna Ludu), described in S. ERCMAN, EUROPEAN ENVIRONMENTAL LAW: LEGAL AND ECONOMIC APPRAISAL 89-93 (1977) [hereinafter cited as EUROPEAN ENVIRONMENTAL LAW]. For a more extended discussion of environmental protection planning in socialist systems, see Somer, Legal Ways and Means of Environmental Protection in the Legal System of Industrial Investments in Socialist Countries, 3 EARTH L.J. 7 (1979).

5. See note 94 infra.

6. Considerable debate exists about the priority to be given to environmental issues in developing countries. Many of these nations view stringent environmental protection policies as luxuries they cannot afford or, worse yet, as a plot by the developed nations to perpetuate the present unequal distribution of wealth throughout the world. For an early exposition of this theme, see Castro, The Case of the Developing Countries, in WORLD ECOCRISIS: INTERNATIONAL ORGANIZATIONS IN RESPONSE 237 (D. Kay & E. Skolnikoff eds. 1972). There is some evidence that the attitudes of the developing nations are changing. See Bassow, The Third World: Changing Attitudes Toward Environmental Protection, 444 AN- NALS 112 (1979).
the three major legal systems of the Americas and Europe—the common law, civil law, and socialist law—will be used to illustrate such approaches and the impact of differing economic and social priorities on environmental law. To a lesser extent, the institutional responses to environmental degradation in countries on the road to development will be explored and, at the risk of emphasizing common aspects of environmental protection against the particular circumstances which influence the institutional responses to demands for environmental quality in a specific country, a generally applicable model of legal and environmental protection will be sketched.

II. CATEGORIZATION OF ENVIRONMENTAL INSULTS AND THEIR LEGAL CONSEQUENCES

Environmental insults which threaten public health may usefully be categorized as either episodic or persistent in nature. Different institutional responses are required depending on whether the problem is one of redressing past harm by compensating victims of isolated incidents or preventing future risks arising from persistent discharges.

Episodic insults are discrete pollution events occurring on a large or small scale. An accidental discharge of toxic effluents into a stream that kills fish and closes recreation areas or an air inversion which traps pollutants over a city for several days or perhaps weeks are typical episodic insults. The harm done by these discrete insults is measured by short-term exposure to the pollution. In contrast, persistent insults are more diffuse and more difficult to measure. They result from continuing, potentially harmful emissions produced by economically valuable activities and are exemplified by untreated sewage discharges, sulphur dioxide emissions from coal burning facilities, automobile exhausts, low level radiation emissions, and acid rain. Further complications arise from the potential irreversibility of such pollution phenomena as acid rain.7

Discrete environmental insults may be further classified into three types, and legal systems often respond differently to each of these. Harm from an environmental result may be past, imminent, or long-term and merely possible. All legal systems permit individuals injured by a discrete episode of pollution to seek a remedy in damages and, in some instances, an injunction against an activity which threatens immediate harm.8 Collective responses, however, are generally required to prevent persistent pollution since it is this type which often does not go unredressed by individuals’ private actions. As a result, persistent pollution has increasingly become the subject of administrative regulation, although the regulations tend to focus on the prevention of measurable, known harms as opposed

8. See, e.g., Bürgerliches Gesetzbuch [BGB] arts. 906 & 1004 (W. Ger.).
to the minimization of serious, persistent, but unquantifiable public health threats.9

An increasingly accepted justification for the regulation of persistent pollution sources derives from the notion that often no one individual will suffer sufficient damage to make a threshold showing of injury under applicable private law doctrines. Even if a number of persons suffering legally cognizable harm were to aggregate their claims so as to give each more incentive to litigate,10 such incentive would more than likely be insufficient, given the paucity of each individual's potential share of any recovery.

Perhaps a more powerful justification for regulating activities such as pesticide use or the discharge of toxic substances into the air, water, or earth is the fact that those who are involuntarily exposed to the risk of future ill health often have little or no idea of the dangers of such exposure. While intervention by a government to protect the citizenry from unwitting exposure to subtle health risks is increasingly accepted, it remains controversial because of the opportunity costs of risk minimization. Attempts to reduce substantially societal exposure to certain risks will increase the costs of bringing new products to market and may thus serve to deprive society of those products' benefits. For this reason, some countries, such as Japan, emphasize after-the-fact compensation for environmental disasters,11 rather than the prevention of future harm.

In the public mind, the impairment of public health and welfare is associated with discharges of residuals, commonly described as “pollution.” This appellation gives rise to the normative inference that government intervention is justified to reduce or eliminate such discharges. While there is some basis for using the term “pollution” to refer loosely to any undesirable concentration of chemicals or particulates, the term is not truly self-defining. Two reduction goals exist which have sharply dif-

9. One commentator has written of acid rain:

[air pollution] standards are especially ineffective in addressing long range transport because concern for compliance focuses on ground level concentrations, not on higher altitudes more relevant to the transportation process . . . .

[T]he laxity of present standards is largely due to poor documentation of the health effects associated with exposure to low levels of the pollutants.

Weston, Air Pollution Control Laws in North America and the Problem of Acid Rain and Snow, 10 ENVT'L. L. REP., Mar. 1980, at 50001, 50005.

In comparison, U.S. regulation of pesticide use focuses both on the problems of acute and chronic toxicity in evaluating the safety of various chemical compounds. The primary focus is on screening out those compounds that present a substantial, but highly probabilistic, risk of producing cancer in persons exposed to pesticide residues. See NATIONAL ACADEMY OF SCIENCES, REGULATING PESTICIDES (1980).


different consequences, and the goal chosen by a government controls the operative definition of "pollution." A conservative goal defines pollution as any concentration of a substance that degrades the air or a watershed below its natural background level; in short, the term is defined as any artificial change. A rational goal, by contrast, defines pollution in terms of the measurable or assumed costs of degradation. A rational strategy does not define changes in natural background levels as pollution per se. Rather, it requires that beyond proof of degradation, there must be some level of aggregate damage beyond proof(?) of degradation, the reduction of which will yield benefits in excess of the costs of reducing emissions. The pursuit of a conservative goal, in sum, is equivalent to the imposition of ambient air standards to eliminate or reduce substantially all known and unknown risks, whereas the pursuit of a rational goal is tantamount to following control strategies based on a social cost accounting approach that stops short of eliminating all discharges.

Since the laws of most countries reflect a tension between conservative and rational goals, the term "pollution" can only be defined in the context of specific regulatory programs. Unfortunately, legislatures, courts and commentators generally do not use the term to describe precise emission reduction goals. Instead, it is used to refer to any degradation generally considered intolerable, a usage that obscures the hard choices involved in formulating any emission reduction strategy. In this article, however, the term will refer to receiving media content levels that are in excess of emission levels deemed safe or reasonable by a court or legislature with respect to the public health or other interests.

Pollution is said to result from historic assumptions that watersheds, the air and many land resources are, in economic terms, free goods. Because their ownership has never been clearly defined, no person or entity could charge for their use for waste disposal purposes. Disposal costs were not, therefore, internalized by the disposer. As a matter of economic theory, the costs of waste disposal are no different from those using other factors of production, such as labor and raw materials, but these costs have been ignored because there has been no market to discipline producers’ waste production levels. As a consequence, the

14. Some costs, such as those to human health, are obvious—see L. Lave & E. Seskine, Air Pollution and Human Health (1975)—but others are more subtle and longterm. See, e.g., Georgescu-Roegen, The Entropy Law and the Economic Problem, in Economics, Ecology, Ethics: Essays Towards a Steady-State Economy 49, 57 (H. Daly ed. 1980).
15. For a readable introduction to this literature, see A. Kneese & C. Schultz, Pollution, Prices, and Public Policy (1975).

One conspicuous example of a country's decision to allow the continued free use of
price system which forced the efficient use of labor and raw materials did not have the same effect on disposal sinks. The inevitable result of the free use of natural resources as sinks has been overuse. Such overuse becomes a problem for the following reason: whenever an activity (e.g. pollution), free to the market actor, imposes costs (e.g. health problems), the market or market substitute will not guarantee the proper allocation of resources, with the consequent risk that resources will be inefficiently allocated. This is the standard explanation of the cause of the "pollution problem," and it has provided a universally powerful rationale for public intervention to protect public health. As a reformist rather than a radical theory, however, such an explanation does not challenge the prevailing assumption throughout the world that economic development (along with the provision for national defense) should be given the highest priority by a country. While this theory suggests only that gross abuses of development should be curbed, other more radical theories based on the "lessons" of ecology argue that the world must squarely face the fact of limited resources and decrease its overall consumption levels to ensure environmental quality and human survival.\(^6\)

What follows from the welfare economics approach is a rational pollution strategy, and the laws of many countries, as will be discussed below, are premised on the goal of allocating resources efficiently. Achieving this goal requires balancing the costs and benefits of pollution reduction. The notion that the control of pollution is a simple cost-benefit problem, however, is being increasingly rejected. It is often argued that certain discharges are potentially so harmful that the public should be protected from them regardless of the opportunity costs of the regulation.\(^7\) Simply put, rationales for pollution reduction to achieve a conservative goal exist, apart from improved efficiency.

### III. Factors Influencing Environmental Protection Levels

The desired level of environmental protection and the method of seeking public health protection and environmental quality enhancement vary from country to country. Ultimately, a detailed knowledge of each country's culture, history, and political organization is necessary to understand fully its environmental laws and policies, but common variables exist which can be used to predict both the level of environmental protection and the means chosen to reach it. These variables can initially be

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\(^7\) This literature is summarized in Duvall, The Deep Ecology Movement, 20 Nat. Resources J. 299 (1980).

allocated among four categories: industrialization; political organization; cultural and ideological values; and public awareness, demand and organization for governmental action to solve environmental problems, a category which cuts across the first three categories but is sufficiently important to merit separate discussion.

A. Industrialization

Of necessity, all countries desire economic growth and consequently pursue or have pursued aggressive industrialization programs. In a few countries, such as Norway and Sweden, the optimal degree of growth has been debated politically, but in most countries the need for industrialization is assumed as an article of faith. Since pollution is caused by, among other things, the discharge of residuals from industrial and associated activities, it is found in all developing as well as developed countries, regardless of political organization or ideology.

B. Political Organization

For environmental policy-making purposes, it may be easier for interests without formal governmental representation to elevate environmental issues to the level of important political questions in democratic nations than it is in totalitarian regimes. Even though environmental problems are no less serious in the latter, they are less likely to engage the attention of the ruling elites, who are usually concerned primarily with economic, military and internal security. The recognition of environmental interests is often seen as a generally destabilizing force.

In countries organized on the basis of a federal administrative system, a national government with specifically delimited powers governs, with states or provinces possessing semi-autonomous authority. In these countries, control over natural resources is often considered a state or provincial function and thus states have considerable discretion to define environmental priorities on self-interest grounds alone unless the national government intervenes. In the United States, states competed for industry by allowing lax pollution standards, but this problem has been dealt with by uniform national standards which set maximum levels for discharges into the water and air. In contrast, Canada's federal system allows the ten provinces to enjoy greater

18. C. Enloe, supra note 1, at 150.
19. Id.
20. In unitary systems, by contrast, as exemplified by the United Kingdom and France, subunits of government exist as well, but only as administrative arms of the national government, which has complete authority to dictate policy to them. See G. Lefcoe, LAND DEVELOPMENT IN CROWDED PLACES (1979).
freedom to set nonuniform standards.23

C. Political Ideology

A country's political ideology influences 1) the effective allocation of environmental regulatory authority among different units of government, 2) the impetus with which environmental objectives are sought to be achieved, 3) the division of power between formal institutions and the public, and 4) the general receptivity of the government to popular pressure for increased environmental protection. Both the Judeo-Christian foundations of Western liberal democracy and the Marxist-Leninist theory of socialism place man above nature.24 Additionally, both the Western tradition of individualism and mainstream Marxist ideology and practice stress the need for man to struggle against nature in order to better himself.25 However, two important minority currents in Western thinking—the theory of man's stewardship responsibility for preserving the natural environment, and the theory stemming from the eighteenth-century German transcendental idealist, Fichte, that one can only perfect nature by cooperating with it—have proved to be important justifications for environmental legislation in many Western countries.26 In contrast, it is argued that in socialist countries with highly centralized bureaucracies, such as the U.S.S.R., the economic, political, and military benefits derived from traditional (socialist) patterns of production far outweigh environmental concerns, given that increased production constitutes the only acceptable measure of bureaucratic success.27 It has also been suggested that Far Eastern values, which emphasize reverence for nature, animals and inner self-fulfillment, are more compatible with environmental protection; however, the Japanese, with their tradition of respect for authority, have allowed post-war governments to establish "industrial growth as the formula for National happiness"28 and to deflect the rising concern over the costs of unrestrained industrial development. Still, the anti-materialistic, spiritual values of grace and restraint in Japanese culture

25. A recent summary of the Western and other views of nature can be found in Callcott, Traditional American Indian and Western European Attitudes Toward Nature: An Overview, 4 ENVTL. ETHICS 293 (1982).
28. C. ENLOE, supra note 1, at 178. See also M. REICH, N. HUDDLE & N. STIDSKIN, ISLAND OF DREAMS, ENVIRONMENTAL CRISIS IN JAPAN (1975).
played some role in the elevation of environmental concerns to a central political issue in the early 1970s.  

D. Opportunities for Public Influence

In many countries, organized public action has influenced the political process by generating debate about environmental problems and their solutions. The extent to which a political system allows interest groups to organize and participate in the political process influences responses to environmental questions. For example, in the United States, the relative openness of the political system facilitated the quick rise of influential "public action" groups calling for new regulatory initiatives and allowed these same groups to secure a prominent place for environmental issues on the national agenda. In contrast, the relatively closed nature of the political process in Japan has led to violence in popular expressions of concern about environmental issues.

IV. Legal Strategies to Control Environmental Insults

Any pollution control program designed to protect public health must choose from among limited emission reduction or minimization strategies. Any country's pollution control program will likely combine elements from all of these strategies, but it is useful to analyze them separately due to the different costs and benefits associated with each.

A. Private Actions

Every legal system allows those who suffer injury by living in close proximity to a pollution source to seek redress. In civil law systems, private actions against activities which cause damage to health and property are based on the theory of abuse of established rights. An abuse occurs whenever a right is "exercised in a manner contrary to the societal interest," and the standard is an objective one. This same concept, i.e., that law is for the benefit of the community, is expressed by the common law maxim sic utere ut alienum non laedes (every person should use his own property so as not to injure that of another), which allows courts to define the correlative rights of landowners to use their property. The potential for private actions to eliminate many environmental harms is limited, however, because any system of private rights must decide which activities causing discomfort to others are legal and which are not. Were it otherwise, every activity carried on in connection with land could be potentially tortious. In both the civil law and common law systems, the

30. C. Enloe, supra note 1, at 180.
32. See R. Ellickson & A. Tarlock, Land Use Controls 564-70 (1982).
granting of damages and specific relief is confined to "abnormal activities." All systems of landowner rights and remedies are based on the idea that normal levels of background activities for an area can be determined and that liability should only attach to those activities which exceed such levels. However, this standard for landowners' rights has given courts considerable discretion to balance the costs and benefits of any given activity. Because only those acts which exceed the normal background activity of a neighborhood constitute a nuisance, many environmental harms go unredressed—especially those which first manifest themselves to the sensitive person and those which are only considered harmful once their cumulative impact is understood.

B. Public Actions

Private actions have been rejected as the sole means of controlling pollution in many countries because of the technical difficulties of proving harm and cause in fact, and because of disincentives to organizing suits to reduce many serious but diffuse sources of pollution. Still, in some countries private actions remain an important means of obtaining relief and of bringing regulatory gaps to public attention. In fact, many public regulatory programs actually rely on private actions for their effectiveness. For example, the Clean Air Act and Clean Water Act in the United States allow citizens' suits against public officials who fail to carry out their clearly defined statutory duties or against polluters who violate air and water quality standards.

In 1972, the U.S. Supreme Court recognized a federal common law of water pollution that allowed direct actions against sources of pollution that were alleged to cause injury despite compliance with applicable regulations, but subsequently the Court held that comprehensive water pollution control legislation preempted common law actions. Similarly, the Court has also refused to recognize any implied private rights of action under the pollution statutes. In civil law systems, the ability of private plaintiffs to bring a public action is alien to the more rigid theory that

33. See, e.g., Greek Civil Code arts. 1003-05, reprinted in A. Mastorogamvraki, Environmental Protection in Greece, in EUROPEAN ENVIRONMENTAL LAW, supra note 4, at 351.
34. See, e.g., T. Fleiner, Swiss Environmental Law-The Position at April 1976, in EUROPEAN ENVIRONMENTAL LAW, supra note 4, at 431-32.
35. E.g., Spain's fragmentary law of air and water pollution control is basically a codification of the civil law prohibitions against the maintenance of nuisances. Id. at 98-103, 165-67.
rights must be either public or private. By way of exception, however, such actions brought by recognized nature protection associations have been allowed by statute in two states in the Federal Republic of Germany.

V. PUBLIC REGULATION

A. Environmental Policy Formulation and Expression

As noted above, significant variations exist among countries regarding environmental goals and the means of accomplishing them. Sometimes these goals are expressed directly through substantive legislative standards that state the weight given to environmental values relative to other societal values. In other instances, the formal substantive standards are less important than the means chosen to implement the goals. In general, environmental goals and substantive standards are related to the level of industrial and technological development of a country, while the regulatory strategies chosen to implement the goals reflect the political, economic and social organization obtaining there. Prior to the passage of the National Environmental Policy Act of 1969 (NEPA) in the United States, countries had often devised natural resources use goals in terms of the optimal level of development of a single resource, with environmental values being relegated to a position of secondary concern. The early forerunners of modern comprehensive pollution control enactments were various acts of public health legislation dealing with nuisance-like substances such as sewage and smoke. A country's environmental policy, if one existed, was often directed against specific problems, for example, the killer fog of 1952 in England.

In 1963, a general model of the evolution of environmental policy was proposed by Lynton K. Caldwell. It was argued that environmental policy is "an outgrowth of the conservation movement, and often still appears under the names of conservation or natural resources administration in many countries." This evolution was generally thought to have three distinct stages: (1) a public awareness of values, as occurred in the United States between the years 1890-1908; (2) the conservation of specific resources such as the water, air, soil, or forests; and (3) concern

41. See Reh binder, Controlling the Environmental Enforcement Deficit: West Germany, 24 AM. J. COMP. L. 373 (1976). Citizens in the Federal Republic of Germany do, however, have considerable rights to participate in administrative proceedings.


47. In the United States, environmental policy was confined to conservation and the preservation of nature until the late 1950s and early 1960s. See J. Petulla, American Envir-
with the totality of man's environmental relationships.\textsuperscript{48}

The method of formulating an environmental policy, as the Caldwell model indicates, is inevitably piecemeal and leaves many gaps. Generally, if an agency has no express authority to deal with the environmental aspects of a problem, it will not do so until specific legislation forces it to act.\textsuperscript{49} Although some countries continue to address specific gaps with specific legislation, others have tried to "short circuit" the process by adopting general policy statements. While policy statements do not, of course, serve to commit the resources and political will necessary to cope with environmental problems, they are nonetheless important because they stimulate new efforts and reinforce existing ones. NEPA was adopted as U.S. national policy with little debate, but it produced far-reaching, if ambiguous, changes in federal decision-making processes.\textsuperscript{50}

To effectuate a policy of giving environmental concerns equal weight with developmental ones, NEPA declares "a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . . and stimulate the health and welfare of man . . . ."\textsuperscript{51} While this statute has influenced other countries, many European nations have been more cautious in according environmental protection equal status with the goals of economic development, because of the problems inherent in their integration with the former.\textsuperscript{52} The economic
consequences of such a policy were quickly perceived by these nations and thus, when they enacted their own comprehensive acts, a more explicit balance was struck. For example, the Swedish Environmental Protection Act of 1969, drafted so as not to handicap the international competitive position of Swedish industry, simply does not state general future goals.53 The German Program for the Protection of the Human Environment of 1971 was drafted after extensive deliberations by ten project groups, including different economic groups.54 The Program, although influenced by the American model, merely states ten general goals, leaving it to the several German states (Länder) to choose between economic and environmental priorities. The most explicit legislative decision to pit environmental enhancement against industrial development was found prior to 1970 in the Japanese Basic Act for Environmental Pollution Control of 1967. The listed goals of the Act were to be harmonized with "sound economic development."55 In the U.S.S.R., environmental goals are recognized by supplemental economic planning. GOSPLAN, the State Planning Committee, was directed in 1974 to include conservation indices and plans in its long-term and annual plans, especially in the 25th Five Year Plan (1976-80).56

B. Institutional Arrangements For Environmental Regulation

Legislative declarations of environmental policies are meaningless without the creation of institutions to implement them. Such policies generally require industries and public entities to invest considerable sums of money in pollution abatement technologies or in the development of less harmful products, or to modify their behavior otherwise in costly ways. Prior to the last decade, government institutions in almost all countries had only fragmented authority to deal with problems now called environmental. Moreover, these institutions often lacked sufficient geographical authority to deal with the scope of pollution spillovers or administrative authority to attempt any kind of comprehensive management approach to the problem posed by even one source of pollution. Thus, countries desiring to respond to environmental problems were then

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53. S. Westerlund, The Legal Control of Land Use and Environmental Quality in Sweden, in European Environmental Law, supra note 4, at 401.
55. This phrase was stricken in the December 1970 amendments to this legislation. For a brief but useful discussion of the background of the 1970 legislation, see generally Air Pollution Control in Japan 22-24 (1972), prepared for the U.N. Conference on the Human Environment.
and are today confronted with two sets of potential problems. First, a choice must be made among modes of institutional reform. The available choices are (1) expansion of existing regulatory jurisdictions, (2) coordination of existing jurisdictions through a central coordinating body, and (3) creation of new management institutions. Second, the choice of institutional design is further complicated by the physical nature of environmental problems, which often calls for action from progressively higher levels of government, generally at the national level. The increased centralization of regulatory functions, however, may well create stresses in federal systems; even in unitary forms of government, such a trend may be controversial. Notwithstanding these problems, the move from the second to third stages of the Caldwell model is often signalled by the expansion of existing regulatory authorities or the creation of new, national regulatory institutions.

When strong, centralized institutions already exist at the national level, a country may be able to respond to the need for increased regulation of public health-threatening activities by the jurisdictional expansion of existing agencies. Sweden's experience exemplifies this manner of regulation. Jurisdictional expansion is especially successful when a regulatory authority with jurisdiction coterminus with a physical problem is already in place. This situation exists in France, where six extant river basin authorities (agences du bassin) were given the power to control pollution. The agence concept has also been used as a model for bilateral institutions to deal with the related environmental problems of impacted areas such as river corridors.

Often, there is an interim step between the expansion of the jurisdiction of existing regulatory bodies and the creation of a new, often centralized body: that is, the coordination of existing jurisdictions. The policies of the various governmental agencies in most countries have environmental consequences of one kind or another and some mechanism is needed to harmonize the nation's environmental and non-environmental goals. While diverse functions should naturally be coordinated, any coordination without the prior resolution of underlying value conflicts is meaning-

57. A Natural Conservancy Act (Naturvardslag) was enacted in 1964 primarily to protect the scientific and amenity value of the country's parks and coastline—an atypical late conservation era policy. In 1969, Sweden initiated a technology-forcing pollution control program. A licensing system was enacted and the executive functions were given to the Nature Conservancy Agency, which was renamed the Environment Protection Board. The Environment Protection Act (Miljöskyddslag) created a new, quasi-judicial body, the Franchise Board (Koncessionamnd), to issue licenses, but the real power to implement the purpose of the act, i.e., to exempt and vary the terms of licenses (dispens), remained with the Environmental Protection Board. Sand, Sweden: Basic Laws and Institutions, FAO LEGIS. STUD. No. 4 (1974). See also S. Westerlund, supra note 53, at 392.

less. A classic coordination scheme is illustrated by the powers given to the federal Minister of the Interior in the Federal Republic of Germany.  

The United States and Japan illustrate the third option, the creation of new regulatory institutions. In 1971, the two countries more or less simultaneously decided to create new environmental protection agencies. At the federal level in the United States, responsibility for environmental functions had previously been scattered among many government agencies. For example, responsibility for air and water pollution was split between two Cabinet departments: Interior; and Health, Education and Welfare (HEW). Allegations were made that some departments (such as HEW) with jurisdiction over air pollution, but not over water pollution, ranked air pollution abatement low on their list of priorities. In other cases, the fundamental mission of the agency was simply inconsistent with environmental regulation. As a consequence of the foregoing, a new executive agency, the Environmental Protection Agency (EPA), was established, which was neither a part of the Cabinet nor an independent regulatory commission. Following the recommendations that agencies with direct control over business conduct be administered by single administrators with significantly reduced judicial authority, the EPA is directed by a single administrator appointed by the President and directly responsible to him. The hope was that the agency would be the vehicle by which a clear and consistent executive environmental policy could be executed.

C. General Forms of Environmental And Public Health Regulation

In most industrialized countries, regulation is the preferred method of pollution control and public health protection. From an administrative perspective, as opposed to an economic efficiency perspective, regulation is often the least costly means of emission reduction and of behavior and product modification strategy. Regulation allows uniform standards to be formulated at relatively high levels of governmental decision-making. It has also been suggested that regulation is popular with governments because the creation of new entities and the enactment of new standards of conduct constitute the fastest ways of convincing an electorate that the

60. Environmentalists argued that the Department of Agriculture could not evaluate the safety of chemical pesticides having substantial production benefits because of its mission to promote food production. See Rodgers, The Persistent Problem of the Persistent Pesticides: A Lesson in Environmental Law, 70 Colum. L. Rev. 567 (1970).
62. Japan undertook a similar consolidation of specialized environmental programs to create the National Environmental Agency in 1971. Unlike the American system, the agency head is a ministerial appointment—the Minister of State for Environmental Affairs. See Y. Nomura, The Creation and Development of Japan's Anti-Pollution Laws (1976).
government is responding to a "crisis."63

At the outset, two fundamental choices must be made with respect to any regulatory program. First, it must be decided whether emission standards will be based on the desired quality of the individual receiving medium, such as an airshed or river basin, or whether the standards will be based on the source of the emission. The first generation of pollution control programs often relied on receiving media standards, because emission reduction was seen as a rational resource allocation problem similar to the conservation of renewable and non-renewable resources. Second generation programs, as the widely studied and copied U.S. experience illustrates, often shift their basis to emission source standards.64 It has proved very difficult, as a practical matter, to work backwards from general media quality standards to individual emissions in order to enforce source standards against polluters. Governments have found it far easier to specify the allowable chemical contents of drainage pipe, smokestack, and industrial process effluents and the technologies which must be used to achieve these results, and then to require that identifiable sources of emission apply for some type of permit.65

After the issue of receiving-media quality versus source-of-emission standards is resolved, a choice between performance and specification standards must be made.66 In practice, many pollution abatement and control programs apply performance and specification standards simultaneously.67 Countries which desire significant pollution reduction often seek performance goals through technology-forcing standards which specify increasingly sophisticated emission control technology by legislatively- or administratively-set deadlines. This is a popular method of controlling automobile pollution inasmuch as the concentrated nature of the industry facilitates the establishment of uniform engine-design standards to meet a performance goal.68

Pollution reduction standards are generally set to achieve one of three goals: immediate public health protection, general welfare enhance-

64. The Federal Republic of Germany requires the use of emission limitation equipment reflecting the state of the art. BundesImmissionsschutzgesetz [BIMSchG] 5 § 2. The statute is described in Currie, Air Pollution in West Germany, 49 U. Chi. L. Rev. 355 (1982).
65. Currie, supra note 64, at 356-58.
66. Performance standards allow polluters to act as they wish, so long as their emissions do not exceed specified limits for particular pollutants . . . and specification standards decree not what goal must be accomplished but how it must be accomplished. Most commonly they require pollution control equipment which meets certain design requirements . . . .
67. E.g., The Belgian Act of March 26, 1971 on the Protection of Surface Waters, reprinted in European Environmental Law, supra note 4, at 29.
ment, or public health and safety risk minimization. Standards often attempt to promote these goals simultaneously, but it is useful to distinguish among them because the distribution of costs and benefits associated with attaining each may be radically different. Each goal either takes the form of a statement of general objectives or precise numerical limitations on the amount of pollutants that can be discharged over time. Whatever the goal, standards must initially rest on a foundation of scientific data, the first step of which is the development of common scientific criteria and methodologies for measuring pollution damage and setting emission reduction regulations. However, environmental standards cannot ultimately rest on scientific criteria alone; the uncertainties surrounding the effects of various discharges on receiving media and those persons exposed to such media remain too great. As a result, any standard adopted ultimately reflects a value judgment about the degree of risk minimization to be afforded society.

Public health protection standards are designed to protect the public from known, immediate health and crop threats. Administrators are generally directed to base the standards on existing scientific knowledge of cause and effect relationships between exposure to a particular pollutant and resulting damage to health or crops. Because of the uncertainty of scientific knowledge in many countries, the standards are conservative in that “margins of safety” are included to protect the public from potential underestimates of the harmful effects of pollutants. Nonetheless, public health standards are still limited to the protection from serious harm of people and the flora and fauna useful to them. Pollution which causes aesthetic damage in the form of visibility impairment or historic building decay, for example, is often excluded from this calculus.

However, the United States and other countries have adopted secondary standards to address this problem. Whereas under the Clean Air Act primary standards are aimed at public health protection, secondary standards, which in some cases may be more stringent, are aimed at broader “general welfare” effects such as visibility impairment. These latter standards are especially controversial because the causal link between emission and harm is more speculative and thus the ratio of quantifiable benefits gained compared to the costs of achievement may be small.

The third goal of standards is to protect the public from long-term, low probability, yet high-cost risks of health impairment. Unfortunately, the kinds of controls that are effective for smoke reduction do not necessarily work for substances such as pesticides, toxic chemicals, and hazard-

71. See B. Ackerman & W. Hassler, Clean Coal/Dirty Air or How the Clean Air Act Became a Multibillion Dollar Bailout for High Sulphur Coal Producers and What Should Be Done About It (1981).
ous wastes. These latter are diffused into the environment in ways that make it impossible to trace causal relationships between exposure and harm. As such, science can only demonstrate that various risk levels of future harm are thereby created.\textsuperscript{72} These risk levels are intensely controversial because of the regulatory consequences of standards designed to minimize long-term, low probability risks.\textsuperscript{73} There is increasing recognition that because toxic pollutants are inorganic and tend to concentrate in food chains, such chemicals differ from conventional organic pollutants. To protect the public from the health hazards associated with toxic pollutants, the burden is increasingly being placed on those who seek the benefits of a chemical to prove its safety.\textsuperscript{74} Further, discharge and use limitations need not be restricted by the current findings of scientific research; rather, regulators may deal with uncertainty by establishing standards with wide margins of safety.\textsuperscript{75}

As noted above, any pollution control strategy must make an initial choice between reliance on the assimilative capacity of the receiving media and the application of technology to eliminate the alleged harmful effects of the discharges. Prior to the worldwide recognition of the harmful consequences of pollution, use of the assimilative capacities of air-, water- and landsheds was the primary means of waste disposal, and this strategy is still often followed in developing nations, if only by default. Reaction against the social costs of the overuse of free goods has led to the adoption of the "polluter pays" principle, based on the ambiguous notion that the discharger is responsible for all costs of his activity,\textsuperscript{76} and consequently to a rejection of the assimilative capacity of receiving media as the primary pollution control strategy. However, such capacity is still a factor to be considered in setting technology-based standards for individual discharges (which generally are used to force the internalization of external costs by the polluters). The quality of the receiving media is also considered in designing laws to influence the location of industrial processes and other polluting activities. Where an activity is located may not only determine the degree of pollution hazard that it poses but may influence the cost of emissions-reduction as well.\textsuperscript{77}

\textsuperscript{72} The problem of agency ability to do more than specify potential risks within a wide range of probability is discussed in Latin, The "Significance" of Toxic Health Risks: An Essay on Legal Decisionmaking Under Uncertainty, 10 Ecology L.J. 339 (1982).


\textsuperscript{74} The shift of the burden of proof is the result of many statutory changes and more subtle changes in administrative attitudes. The idea has received formal legal recognition in the United States in a series of cases holding that the EPA need not prove that a substance is harmful in order to limit substantially its use and discharge; the agency's decisions need only rest on respectable, even though disputed, scientific evidence. See, e.g., Envtl. Defense Fund v. EPA, 598 F.2d 62, 82-83 (D.C. Cir. 1978).

\textsuperscript{75} An important U.S. judicial decision establishing this principle is Ethyl Corp. v. EPA, 541 F.2d 1, 24 (D.C. Cir. 1976), \textit{cert. denied} 426 U.S. 941 (1976).

\textsuperscript{76} For a concise discussion of the ambiguities in cost assessment, see S. Ercman, \textit{supra} note 4, at 489.

\textsuperscript{77} See D. Mandelker, \textit{Environmental and Land Use Controls Legislation} 169-221
Pollution reduction planning throughout the world often consists of the designation of pristine or relatively clean areas, where new industrial development and other polluting activities are discouraged, and the designation of relatively dirty areas, where stringent, technology-forcing standards or other pollution reduction strategies, such as fuel substitution, apply.78

Some types of pollution which threaten public health may be minimized simply by locating the polluting activity in a place where the assimilative capacity of an air-, water- or landshed can deal effectively with the pollution, thus consuming rather than conserving clean media. This theory, however, "has no validity at all for synthetics like petrochemicals, to say nothing of radionuclides . . . . [T]here is little or no safe assimilative capacity for such unnatural compounds."79 Land use planning programs are the primary means of implementing such a consumption strategy: basically, industry is steered to geographic areas of the country where the receiving media are able to minimize the impacts of pollution, so that already overloaded media elsewhere will not be further stressed. Of course, such planning often conflicts with other environmental goals which seek to preserve environmentally sensitive areas from degradation.80

Environmental planning encompasses a number of functions, which include the making of background assessments, the measurement of existing pollution levels and the likely impact of regulatory measures. There

78. In the United States, regulations have been enacted to preserve the air quality of relatively pristine areas such as national parks and Indian reservations. Excessively dirty areas are designated as non-attainment areas, i.e., areas where the primary and secondary standards cannot be met, and stringent limitations are placed on the construction of new pollutant-emitting facilities. See Currie, Nondegradation and Visibility Under the Clean Air Act, 68 CALIF. L. REV. 48, 51 (1980).

Pursuant to EEC recommendations, Belgium has designated its heavy industrial concentrations as special protection areas for the purposes of imposing special controls. Royal Order of 26 July 1971, MB (Belg.), No. 150, at 9258 (5 Aug. 1974).

Bulgaria has established a special program for the capital city of Sofia and various industrial areas, which provides for air quality monitoring, the installation of filters and other purification devices, and the substitution of natural gas for oil. Decree on the Sanitary Classification of Industrial Activities and the Minimum Health Protection Areas of 13 Feb. 1970, Dz V (Bulgaria), at 3.


80. The problems of implementing such programs are illustrated by the Swedish experience. Since 1966, Sweden has undertaken "National Physical Planning" to determine the areas where major industrialization is likely to stress valuable ecological resources. While the government lacks the power to compel an industry to locate in a place which is consistent with national planning objectives, three coastal regions have nonetheless been withdrawn from development. Lundquist, Sweden's National Physical Planning for Resources Management, 2 ENVTL. AFF. 487, 496-98 (1972). While industrial growth is encouraged outside of existing major metropolitan areas to promote equal regional development, this goal conflicts with a concentration policy which dictates that, insofar as it is compatible with the regional dispersion policy, new polluting industries should be concentrated in already industrialized regions.
has been widespread dissatisfaction with single resource or single pollution source planning and consequently, in the past decade, there have been ambitious, though largely futile, attempts to mandate holistic, rational environmental planning. In 1970, the United States attempted to mandate formal national planning procedures for all federal activities which have a significant environmental impact. These procedures included consideration of all likely impacts of these activities and mitigation possibilities with respect thereto, and even study of a no action alternative. Because of the gap, under NEPA, between the costs of compliance and the environmental benefits received and the fact that mandatory planning leaves administrators no discretion to concentrate their resources on truly significant issues, among other reasons, most countries which have examined the U.S. experience have been reluctant to adopt the American model fully. However, environmental assessment exists in various countries by administrative decree, and in Japan a trial court has held that the civil tort law allows plaintiffs affected by the health hazards of a lake development project to require the government to prepare an environmental assessment of the project and consult with interested citizens.

Inorganic chemical products and wastes are often toxic, and all radioactive materials present possible health hazards if not carefully managed. Toxic substances are generally defined as wastes from chemical and other manufacturing processes, and products which present serious, often unascertainable health and other environmental hazards, even when used for their intended purposes. Increasingly, nations and international organizations subject toxic substances to special regulation. Regulatory regimes in industrialized countries share the following common features: (1) a regulatory authority with the power to screen products for health hazards before they reach the marketplace; (2) governmental authority to re-


82. See generally, 2 INT'L ENVT'L REP. 651 (1979).


84. In Sweden, the government has been allowed since 1973 to control the manufacture, import, trade, and use of poisons and other dangerous products. See S. Westerlund, supra note 53, at 392.


For a discussion of pre-market screening of hazardous products, see COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—10TH ANNUAL REPORT 215-21 (1979).

In June 1980, OECD nations reached agreement on pre-market data and testing requirements for toxic substances, which the EPA plans to integrate into its rules for pre-
quire testing protocols involving the use of laboratory animals, on which
inferences that a substance is potentially harmful may be based in lieu of
epidemiological evidence; (3) authority to base conclusions about sub-
stance safety on risk-benefit analyses; (4) the shifting of the burden of
proving a substance unsafe away from the governmental authority be-
cause of the often inconclusive nature of the evidence about public health
hazards; and (5) the requirement of stringent management practices for
toxic and other hazardous wastes as the only way to balance the interests
of industrial development and public safety in modern economies that
require the use of many dangerous substances. Management options in-
clude recycling, storage, disposal, and treatment to alter the chemical
content of the substance. Disposal practices are being tightened in many
countries, more attention is being paid to the siting of hazardous waste
management facilities and incentives are being provided for recycling
action.

D. Alternatives to Regulation

Two powerful charges have been directed at regulatory programs
based on across-the-board standards. First, standards often require re-
ductions in emissions which cannot be economically justified in terms of
the emissions' social costs. Second, uniform standards are an inefficient
means of achieving administratively-mandated pollution reduction levels
because they do not encourage the least costly method of emission reduc-
tion. In fact, such standards can work to lock industries into using ineffi-
cient technologies. Two alternative methods of emission reduction have
been proposed to cure these deficiencies and at the same time protect the
public from environmental harm: pricing mechanisms and subsidies. Pric-
ing mechanisms take the form of charges or taxes on the amounts of
waste disposed. The theory behind this strategy is that the more the pol-
luter is charged, the greater his incentive to reduce the amount of his

market notification by American industries. See Note, Control of Toxic Substances: The
Attempt to Harmonize the Notification Requirements of the U.S. Toxic Substances Con-
85. Such authority is required because of the great difficulties in determining whether
and how a substance will actually cause harm to whom and at what time. A risk-benefit
analysis substitutes state-of-the-art evidence about possible future harms for traditional
concepts of cause-in-fact and immediate personal injury.
86. The Swedish hazardous products law expressly provides that public officials do not
bear the burden of proving a product dangerous. See S. Westerlund, supra note 53, at 411.
In the United States, the courts have approved the use of sensitive evidentiary triggers
to allow the government to ban a substance from the market and shift the burden of proving
its safety to the manufacturer. See Envtl. Defense Fund, Inc. v. EPA, 548 F.2d 998, 1004
(D.C. Cir. 1978) and Hercules, Inc. v. EPA, 598 F.2d 91, 106 (D.C. Cir. 1978).
87. See SITING NON-RADIOACTIVE HAZARDOUS WASTE MANAGEMENT FACILITIES: AN OVER-
VIEW, FINAL REPORT OF THE FIRST KEYSTONE WORKSHOP ON MANAGING NON-RADIOACTIVE
HAZARDOUS WASTES (1980).
88. See Krier, The Irrational National Air Quality Standards: Macro- and Micro-Mis-
waste discharges and to do so efficiently. On the other hand, subsidies can take the form of either tax incentives or direct government payments for the construction of abatement facilities.

The United States has made use of these strategies only sparingly, preferring to try to correct the economic inefficiencies which allegedly result from its standards. This has been done through assorted variance procedures applied on a case-by-case basis and through flexibility devices such as "bubbles." In France and the Federal Republic of Germany, however, where pollution control is more integrated with industrial development planning than in the United States, there has been much more widespread use of charges and subsidies.

In deciding whether to adopt a pricing strategy, it is important for a country to distinguish between the two uses of charge systems. In the first instance, those polluters who fail to comply with applicable effluent or emissions standards may be subject to criminal fines. The payment of such fines, however, often costs less than implementing any serious program aimed at reducing the pollution. To prevent the creation of a low cost right to pollute, many countries have moved to set higher fines to encourage compliance. This theory of charges, though, still relegates such penalties to the role of backstop for emission level standards. In the second instance, many economists who have studied environmental problems urge that pollution charges be used as the primary rather than the secondary or tertiary method of reducing unwanted discharges. It is posited that an entity with functional geographic boundaries and the capabilities of treating wastes and imposing charges on dischargers will force public entities and private industry alike to consider waste disposal costs and pollution control technology in choosing product mixes and plant locations. The expected result would be a reduction in emissions to more efficient levels. Various models based on the water management associations (Genossenschaften) operating in the Ruhr region of the Federal Republic of Germany have been proposed.

Many environmentalists are suspicious of effluent charges and taxes

90. The EPA allows operators of a single plant or plants in close proximity to one another to treat an entire complex, as opposed to its component parts, as a single source of emissions. All emission sources are thus put under a "bubble" for the purpose of allowing tradeoffs, i.e., a reduction in the emission levels of certain pollutants in exchange for higher allowable levels for others.
91. A. Kiss & C. Lambrechts, supra note 58, at 324.
92. E.g., factory managers in the Soviet Union may be deprived of bonuses which represent fully half of their personal income. Louchs, Water Quality Management in the Soviet Union, 1977 J. WATER POLLUTION CONTROL Fed'n 176-78.
93. See, e.g., J. Dales, Pollution, Property & Prices (1968) for an influential early statement of this position.
on the ground that such schemes will only legitimize generous rights to pollute. This argument has influenced the widespread governmental preference for licensing regulation with the result that a different use has, in recent years, been made of the taxing power from that advocated by economists. Environmental disasters, such as oil spills and the abandoned hazardous chemical waste site at Love Canal in Niagara Falls, New York, often leave large property and health losses uncompensated. Liability standards are often unclear, though there is a general global trend toward the adoption of strict liability for environmental accidents, and the problems of proving that a given entity caused the harm inflicted are formidable. One variant of the "polluter pays" principle requires the industry reaping the benefits of activities that pose high risks of environmental damage to bear the collective responsibility for those accidents which are seemingly inevitable. Industrywide responsibility is fixed by taxes imposed on the risk-causing activities—for example, the levy of a certain charge for each barrel of oil unloaded at a port. Such taxes inflate a fund upon which governments (and sometimes private individuals) may draw for cleanup and damage costs in the event of an accident. Industry generally argues that since society as a whole benefits from its high-risk activities, responsibility ought thus to be borne by all citizens, or at least shared, and indeed, some funds are supported by activity taxes and general tax revenues. In addition to their use in compensating victims of environmental disasters, such funds, especially those with strict liability rules, may have a beneficial deterrent effect against loose risk-management practices.

As environmental quality goals have increased in number and strictness, governments have had to cooperate with public and private entities to induce the construction and use of treatment facilities. Such cooperation of state and private enterprises has been facilitated through grants from various levels of government and resource management authorities. Subsidies are usually granted through legislation, although the French water basin agencies grant them through private arrangements as well. The United States has established a substantial, though chronically underfunded, federal grant system for the construction of municipal

96. S. Ercman, supra note 4, at 488.
100. An exception to the use of general legislation or subsidies granted by the central government is the Japanese concept of administrative contracts between local governments and private industry. See Sand, Legal Systems for Environmental Protection: Japan, Sweden, United States, FAO Legis. Stud. No. 4 (1974).
waste treatment facilities.\textsuperscript{101} Other countries provide special depreciation rules in their tax laws for the installation of pollution abatement equipment by private firms.\textsuperscript{102}

VI. Conclusions

At the risk of overgeneralization, a country's political structure and legal system should incorporate three essential features in order to promote effective protection against environmental hazards. First, an arm of the central government, whether in the context of a federal or unitary system, should have an exclusive mandate to promote environmental goals. At least for the foreseeable future, it will not be sufficient to merely decree that all governmental agencies shall consider environmental values in executing their missions. Second, this arm of government must have delegated to it the power to decide how pollution costs are to be allocated as between public and private entities. In most countries, this translates into the ability to license discharges or mandate what fuels, chemicals, and other necessary inputs to industrial processes may be used and under what conditions. While it might be argued that these "structural" solutions should be accompanied by strong mechanisms to allow the public and the courts to serve as watchdogs of the regulators, the problem of insufficient diligence in the promotion of environmental goals, as serious as it is, is less important than achieving the third feature of an effective system for environmental protection. Although an exclusive mandate to promote environmental values is necessary, at some point the protection of those values must become integrated into the country's general policy-making processes, which is the third essential feature. Otherwise, policies protective of the public health and the earth's fragile life support systems will remain too vulnerable to pressures that they be ignored or made less restrictive. The integration of such values requires that regulatory agencies have the flexibility to vary the degree of emission reduction and substance use they require, according to the severity of the situation. Where toxic chemicals and radioactive wastes are concerned, severe restrictions may be in order regardless of the costs of regulation. In some instances, however, it may be useful merely to create standards based on a state of the art cost-benefit analysis, while charges, taxes, or post-occurrence compensation may in other situations be the most effective remedy for public health protection.

\textsuperscript{101} Id.
DEVELOPMENTS


I. INTRODUCTION

In an effort to curb drug traffic, the United States has demonstrated a growing judicial willingness to exercise jurisdiction over stateless vessels on the high seas. This article will focus on three issues raised by recent statutory interpretations of section 955a of the Marihuana on the High Seas Act1 (hereinafter referred to as section 955a).

The first issue relates to the use of section 955a by courts to obtain jurisdiction over stateless vessels suspected of transporting illegal drugs. The second issue involves an analysis of general definitions of stateless vessels as applied to section 955a and how this has affected the exercise of jurisdiction. A third issue explores the consequences of denying Fourth Amendment rights to persons aboard stateless vessels on the high seas. The article concludes with a few observations by the writer concerning probable trends and solutions to the constitutional and jurisdictional problems raised by section 955a.

II. THE USE OF SECTION 955A AS A MEANS OF OBTAINING JURISDICTION

There are a number of principles by which jurisdiction over a vessel on the high seas can be obtained.2 Those cases involving stateless vessels most often use the protective or objective territorial principles.3 These

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1. Marihuana on the High Seas Act, 21 U.S.C. § 955a-d (Supp. V 1981). Section 955a of this Act embodies the enforcement provision; sections 955b-955d relate to definitions used throughout the Act, offenses and punishments, and the seizure and forfeiture of property, respectively.

2. These theories of jurisdiction are part of international customary law. For example, the "law of the flag" theory recognizes that a vessel on the high seas is subject to the jurisdiction of the state of the flag it flies. The universality principle recognizes that some crimes, such as piracy, are of such a universal character that any nation may participate in their suppression. For a thorough treatment of these and other bases of jurisdiction, see N. LEECH, C. OLIVER & J. SWEENY, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 891-44 (2d ed. 1980).

3. See, e.g., United States v. Hayes, 653 F.2d 8 (1st Cir. 1981); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968); Rivard v. United States, 375 F.2d 882 (5th Cir. 1967) (applying objective territoriality principle); and United States v. James-Robinson, 515 F.
principles require proof of a potential or actual effect in the nation asserting jurisdiction. A nexus, or connection with the country, must be demonstrated in order to maintain jurisdiction over the vessel.4

In stateless vessel cases, a nexus with the United States has been established by showing an intent to distribute narcotics in the United States. In the past, the prosecution's assertion of this intent was easily rebutted by the defense that the drugs were not headed for American shores.5 In addition, the inadvertent repeal of a prior law had left prosecutors without a statutory basis for their argument.6 Section 955a strengthens the prosecution's case by abrogating these traditional principles of jurisdiction and providing a long-awaited legal weapon against smuggling.7

The scope of the statute was intended by Congress to reach acts of possession, manufacture or distribution committed outside the territorial jurisdiction of the United States.8 Furthermore, “[t]he intent element


4. Note 3 supra.


7. See HOUSE REPORT, supra note 4, at 4, which states that: “[A]dequate material support and sufficient minimal sanctions are necessary to neutralize smugglers and provide a credible deterrent to smuggling through uniformly high conviction rates in the criminal justice system. There is presently no potent legal weapon in our anti-smuggling arsenal with which to combat drug offenses on the high seas.” See also Coast Guard Drug Law Enforcement: Hearings before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 16 (1979). At these hearings, Morris Bushby, counsel for the U.S. Department of State said that “[w]hile ordinarily the United States does not favor a unilateral extension of jurisdiction by the United States over activities of non-U.S. citizens on board stateless vessels without proof of some connection to the United States, the serious nature of this problem [dictates otherwise].”

8. 21 U.S.C. § 955a[h] (Supp. V 1981). At least one court has implied that the statute may exceed the bounds of international law by extending jurisdiction beyond territorial limits. In United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982), defendants' ship became disabled 60 miles off the coast of Virginia where they boarded an Italian vessel. The Coast Guard searched the disabled vessel and found a large quantity of marihuana. The defense argued proof of a nexus was required; otherwise, the exercise of jurisdiction via section 955a would violate international law. The court recognized the potential conflict between section 955a and international law. Instead of justifying its decision in light of international law as the court in United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982) had done, the court in Howard-Arias concluded that while international law is a part of United States law, it must give way when in conflict with a federal statute. See also The Pacquette Habana,
may be inferred by proof of a presence of a large quantity of the narcotic, giving rise to an inference of trafficking.” The statute passed as recommended, and section 955a now reads:

It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.\(^9\)

Subsequent interpretations of section 955a effectuated the intent of Congress. Courts upheld convictions absent proof of an intent to cause any effect in the United States.\(^11\) At first, these interpretations were limited to United States registered vessels, \(^12\) but United States v. Marino-Garcia\(^13\) was a natural extension of this interpretation to stateless vessels.

In Marino-Garcia, the vessel FOUR ROSES was apprehended by the Coast Guard DEPENDABLE on the high seas, 300 miles south of Florida and 65 miles west of Cuba. When the DEPENDABLE approached the FOUR ROSES and requested identification, the Coast Guard was told that the ship’s home port was Miami, Florida. The words “Miami, Florida” were also stenciled on the bow. A subsequent document check revealed that the vessel was not registered in the United States but in Honduras. All nine crewmen aboard the FOUR ROSES were foreign nationals. Upon discovery of 57,000 pounds of marihuana in the hold, the crew was indicted and subsequently convicted under section 955a.\(^14\)

The Marino-Garcia court rebutted the defendants’ assertion that section 955a required a showing of a nexus to the United States. Section 955a prohibits any person aboard “a vessel subject to the jurisdiction of the United States” from possessing a controlled substance with intent to distribute or manufacture. As the statutory definition of “vessel subject to the jurisdiction of the United States” includes stateless vessels,\(^15\) the court concluded that “the statute does not require that there be a nexus

\(^{175}\) U.S. 677 (1900), which held that international law is binding on the United States, and Zenith Radio Corp. v. Matsushita Electric Industrial Co., 494 F. Supp. 1161 (E.D. Pa. 1980) for the rule that United States law takes precedence over international law.


11. The Fourth Circuit followed suit in United States v. Alonzo, 689 F.2d 1202 (4th Cir. 1982). See also United States v. Riker, 670 F.2d 987 (11th Cir. 1982); United States v. Liles, 670 F.2d 989 (11th Cir. 1982); United States v. Quesada-Rosadal, 685 F.2d 1281 (11th Cir. 1982); and United States v. Stuart-Caballero, 686 F.2d 890 (11th Cir. 1982).

12. United States v. Julio-Diaz, 678 F.2d 1031 (11th Cir. 1982).


14. Id. at 1377.

15. 21 U.S.C. § 955b(d) provides that a “vessel subject to the jurisdiction of the United States includes a vessel without nationality or a vessel assimilated to a vessel without a nationality, in accordance with paragraph (2) of article 6 of the [United Nations] Convention on the High Seas, 1958.”
between stateless vessels and the U.S. but instead extends this country's jurisdiction to all such cases."16 Thus, "[j]urisdiction exists solely as a consequence of the vessel's status as stateless."17 By dispensing with the traditional requirement of proving a nexus, prosecution becomes easier not only for the United States, but for all nations. A vessel's stateless status "makes [it] subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating the proscriptions."18

III. Definitions of Stateless Vessels As Applied to Section 955a

Once the Marino-Garcia court held that a vessel becomes subject to the jurisdiction of the United States if it is stateless, the next issue then became how "stateless" was to be defined.

In America, stateless vessels have often been defined as "international pariahs [without] any recognized right to navigate freely on the high seas."19 They are considered modern-day pirates—men and vessels without a country.20

The United Nations Convention on the High Seas21 provides that "[a] ship which sails under the flags of two or more states, using them according to convenience . . . may be assimilated to a ship without nationality."22 Furthermore, an English court has held that "[n]o question . . . of any breach of international law can arise if there is no state under whose flag the vessel sails."23 Based on this decision and on the fact that commentators discussing the issue have unanimously agreed that all nations have the right to assert jurisdiction over stateless vessels on the high seas,24 the Marino-Garcia court concluded that the exercise of jurisdiction did not transgress recognized principles of international law.25

The expanding jurisdictional base provided by section 955a and the generalized definition of "stateless vessel" are indications that the crime of transporting illegal drugs by ship is being treated as a universal crime because "any nation" can prosecute.26 This "universal crime implication"

17. Id. at 1383.
18. Id.
22. Id. at art. 6, para. 2. "Flags of convenience" is a term of art denoting the use of more than one flag as a means of evading the law of any given state.
23. Molvan v. Attorney-General for Palestine, 1948 A.C. 351
24. 679 F.2d at 1383. The court cites, inter alia, 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 21 (1968) and 1 L. OPPENHEIM, INTERNATIONAL LAW 546 (7th ed. 1948).
25. 679 F.2d at 1382.
26. Id. at 1383.
is also supported by the recent case of United States v. Martinez. In that case, the vessel was stateless not because of proof that it was using flags according to convenience, but because it was not validly registered under Honduran law, as the defendants claimed. The emphasis on invalid registration was justified under paragraph 2 of article 6 of the Convention on the High Seas. However, this provision addresses only vessels that use flags of convenience, without mentioning registration. This extension of the "stateless" definition clearly aids prosecution, although its justification remains unclear.

United States v. Knight further supports the pro-prosecution stance adopted by the Marino-Garcia court. In Knight, the vessel KRIS was apprehended on the high seas in an exclusive Mexican fishing zone. The home port, "Brownsville, Texas", was stenciled on the stern, although the captain had claimed that the vessel and crew were Colombian. When the defense introduced evidence that the ship was of Panamanian registry, the vessel was considered stateless because it had adopted various nationalities according to convenience. The court clearly required that the proof of a nexus, long a thorn in the side of the prosecution, was a burden to be borne by the defense. Thus, the defense had to show a "sufficient nexus between the KRIS and another country in order to preclude [United States] jurisdiction."

Cases such as Martinez and Knight illustrate the judicial willingness to aid prosecution. In addition, the Eleventh Circuit has also indicated that stateless vessels may not be entitled to constitutional protection.

IV. THE CONSTITUTIONAL LIMITS ON SEARCHES AND SEIZURES OF STATELESS VESSELS ON THE HIGH SEAS

The United States constitutional provision most often invoked to dismiss high seas narcotics confiscation cases is the Fourth Amendment proscription against unreasonable search and seizures. It requires that every search and seizure on land be based on probable cause. The Ninth and Second Circuits have drawn a parallel between the search and seizure of vessels, concluding that in both instances an "articulate and reasonable

27. 700 F.2d 1358 (11th Cir. 1983).
28. Id. at 1362. The defendants had produced an Honduran certificate upon boarding, which was later refuted by the Honduran government.
32. Id. at 433.
33. Id.
34. U.S. CONST. amend. IV.
35. Delaware v. Prouse, 440 U.S. 648 (1979). This case held that a valid search of an automobile required a "reasonable and articulate suspicion."
suspicion" is required. The rationale is that the lesser expectation of privacy on board a ship justifies a lesser standard than probable cause. The Fifth Circuit rejected the applicability of landbased Fourth Amendment requirements, holding that because seizures on the high seas were fundamentally different from those on land due to limited enforcement personnel, there was no need to show reasonable suspicion or probable cause.

The Eleventh Circuit adopted the Fifth Circuit's standard that the Coast Guard need not have a reasonable suspicion of an ongoing violation in order to implement a valid seizure. Stateless vessels, as well as American vessels, are subject to this rule. The Marino-Garcia decision indicated in dicta that even if the Fourth Amendment applied, the seizure would still be valid because, under international law, the Coast Guard has the right to approach an unidentified vessel in order to ascertain the vessel's nationality. This rule was extended by providing that the Coast Guard may subject the unidentified vessel to a seizure for the limited purpose of a document inspection. There must be a reasonable suspicion that the vessel is an American flagship or that the vessel is attempting to conceal its identity. However, the potential for abuse is great, as random and subterfuge searches designed to seek evidence of a crime are covertly authorized under the guise of administrative searches. In addition, the

36. In United States v. Piner, 608 F.2d 358 (9th Cir. 1979), a divided panel concluded that a random inspection of an American vessel conducted at night without a reasonable suspicion of illegal activity transgressed the Fourth Amendment. See also United States v. Streifel, 665 F.2d 414 (2d Cir. 1981).
37. United States v. Shelnut, 625 F.2d 59 (5th Cir. 1980); United States v. Williams, 617 F.2d 1063 (5th Cir. 1980).
38. 679 F.2d at 1385.
40. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980); United States v. Rubies, 612 F.2d 397 (9th Cir. 1979), cert. denied, 446 U.S. 940 (1980). The Supreme Court has recently ruled that the search and seizure of a ship located in U.S. waters providing ready access to the open sea was valid even though there was no suspicion of wrongdoing at the time of boarding. United States v. Villamonte-Marquez et al., ___U.S.____, 103 S.Ct. 2573 (1983). In Villamonte-Marquez, a ship was boarded by customs officers pursuant to 19 U.S.C. § 1581a, which authorizes them to board any vessel at any place for a document inspection. Marihuana was discovered in the hold, and the defendants were prosecuted under 21 U.S.C. § 963. The gist of the Supreme Court's holding (by Justice Rehnquist) was that, in boarding the vessel, customs officers need not suspect any wrongdoing by the crew because "the nature of the governmental interest in assuring compliance with documentation requirements, particularly in waters where the need to deter or apprehend smugglers is great, [and] the type of intrusion, while not minimal, is limited." 103 S.Ct. at 2582. The dissent argued, however, that "[t]oday's holding . . . r[a]n roughshod over the previously well-established principle that the police may not be issued a free commission to invade any private premises without a requirement of probable cause, reason, suspicion or some other limit on their discretion or abuse thereof." Id. at 2589.
Marino-Garcia court's extension of the right to approach was allegedly authorized by article 22 of the Convention on the High Seas. In invoking this provision, however, the court misapplied it. Article 22 provides that:

[a] warship which has encountered a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting . . . that, although flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. 42

The United States Coast Guard is boarding vessels on the high seas because of a suspicion that they are stateless. The U.N. Convention requires that the suspicion must be based on the fact that the ship is of the same nationality as the state asserting jurisdiction; therefore, it does not provide a basis in international law for denying constitutional rights.

Domestic constitutional law provides no more justification for a denial of the constitutional rights of the crew of stateless vessels on the high seas than does international law. It is an accepted principle of United States law that the Fourth Amendment is not limited to domestic vessels or United States citizens. "[O]nce a foreign vessel is subjected to criminal prosecution, it is entitled to the equal protection of all laws; including the Fourth Amendment." 43 The Eleventh Circuit has interpreted this provision as encompassing foreign vessels but excluding stateless vessels, as follows:

Without deciding the issue, we note that a number of considerations militate against the extension of the Amendment to stateless vessels. Stateless vessels have no right to travel freely on the high seas and are considered a threat to the order and stability of the oceans. Since the vessels have no rights under international law, we find it somewhat dubious to suggest that the Founding Fathers intended to provide these vessels with the prophylactic safeguards contained in the Fourth Amendment." 44

Indeed, the court went further and indicated that even if the Fourth Amendment were applicable, a vessel’s status as stateless might render any search and seizure reasonable. 45 The defect in this argument is that a vessel’s status cannot be determined until boarding for a document inspection; yet, this prior boarding is sanctioned by a subsequent discovery. 46

43. United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978).
44. 679 F.2d at 1384 n.21.
45. Id. at 1384.
46. A sounder approach was utilized in United States v. Barrio, 556 F. Supp. 395 (D.P.R. 1982). This case involved a stateless vessel boarded while on the high seas. The defendant crew members’ motion to suppress evidence was denied as Fourth Amendment rights were “personal rights not to be vicariously asserted.” This analysis was made in conformity with Alderman v. United States, 394 U.S. 165 (1969), which ruled that a person who is aggrieved by an illegal search and seizure as a result of a third person’s premises or prop-
This circular reasoning should not be the basis for denying constitutional rights. The equal protection clause under the United States Constitution demands that foreign persons prosecuted under United States laws receive constitutional protection.  

V. Conclusion

In the wake of Marino-Garcia and its progeny, a clear trend can be identified which dramatically alters the prosecution of suspected drug smugglers on the high seas. The Eleventh Circuit has begun to treat drug smuggling as a universal crime by expanding the jurisdictional base of section 955a. It does so by including invalid registration within its definition of stateless vessel and also by placing the burden of showing a nexus upon the defense. Instead of focusing on the statelessness of the vessel, international dialogue would be encouraged by focusing on the vessel's activities vis-à-vis drug smuggling. This would preserve the constitutional rights afforded crews of stateless vessels under United States law, while allowing for effective prosecution of illegal drug traffic on the high seas.  

Lynda Hettich Knowles

Directed-Energy Weapons
On The “High Frontier”

I. Introduction

President Reagan recently announced the proposed development and deployment by the U.S. of a space-based ABM system utilizing directed-energy weapons (DEWs).  Although the proposal provoked a variety of intense reactions from the political and scientific communities in both the U.S. and U.S.S.R., it failed to arouse and sustain the public concern which might otherwise be forthcoming. The “Star Wars” quality of the plan perhaps renders it superfluous in the minds of most.

Although doubts exist as to whether the technology necessary to implement the President's proposal will ever be available, they do not warrant disregard of the impact which would be caused by the development

erty has not suffered any loss of Fourth Amendment rights.

47. See NOWAK, ROTUNDA & YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 592 (1982). The Fourth Amendment is applied through the Fourteenth Amendment, which requires equal protection under the law for all persons. “Aliens are persons, so they receive the protection of . . . the Equal Protection Clause.” See also United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1979).

This circular reasoning should not be the basis for denying constitutional rights. The equal protection clause under the United States Constitution demands that foreign persons prosecuted under United States laws receive constitutional protection.47

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President Reagan recently announced the proposed development and deployment by the U.S. of a space-based ABM system utilizing directed-energy weapons (DEWs).1 Although the proposal provoked a variety of intense reactions from the political and scientific communities in both the U.S. and U.S.S.R., it failed to arouse and sustain the public concern which might otherwise be forthcoming. The “Star Wars” quality of the plan perhaps renders it superfluous in the minds of most.

Although doubts exist as to whether the technology necessary to implement the President’s proposal will ever be available, they do not warrant disregard of the impact which would be caused by the development

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of such a system. This is particularly true in light of the increasing militarization of space and the desire of both the U.S. and Soviet Union to achieve and maintain military stability.

The Outer Space Treaty\(^2\) and the ABM Treaty,\(^3\) both designed to address these concerns, may be inadequate when applied to the emerging beam technology, in view of the probable U.S. and Soviet constructions of the relevant provisions of these treaties. Consequently, this article will focus on this problem of treaty interpretation, as well as on the nature of DEWs and the strategic value of their incorporation into an ABM system. Included also is a brief discussion of certain policy concerns associated with the development and deployment of these newest among the so-called “ultimate weapons.”

II. THE DEVELOPMENT OF DEWs

Throughout the 1970s, the Soviets experimented intensively with anti-satellite weaponry (ASATs),\(^4\) and although the Pentagon claims to be at least fifteen years behind the Soviets in ASAT technology, the U.S. is scheduled to test its first ASAT later this year.\(^5\) The development of directed-energy weapons such as the high-energy laser (HEL) and the particle beam weapon (PBW) have become more of a priority to both the U.S. and Soviet Union in recent years.\(^6\) By 1978, the Soviets were suspected of having developed and successfully tested a PBW and of having developed the world’s largest HEL.\(^7\) Yet, the Pentagon has only recently

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2. Outer Space Treaty, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205. This treaty reveals the early expectations of the signatories that space would eventually be used for military purposes and that general guidelines are necessary to restrain that activity to some degree.

3. ABM Treaty, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503. As an integral part of the SALT I accords, this bilateral treaty prohibits anti-ballistic missile systems in an attempt to restrict the strategic offensive arms race. It is also the formal embodiment of the MAD (mutually assured destruction) doctrine, which proposes that if each state is exposed to the offensive nuclear weapons of the other, neither state will have the incentive to launch a first-strike attack.

4. See also STAFF OF SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 97TH CONG., 2ND SESS., SOVIET SPACE PROGRAMS 1976-80, at 184-91 (Comm. Print 1982) [hereinafter cited as SOVIET SPACE PROGRAMS].


6. The most promising HEL derives its power from chemical reactions and is capable of producing a 200-billion-watt beam of energy for 20 billionths of a second at the speed of light. This creates a thermal reaction within the target causing it to melt, vaporize or possibly shatter as a result of internal shock waves, depending on the wavelength used, and the chemical composition and speed of the target. The PBW is a device “using directed beams of charged or neutral particles at high energies as projectiles to inflict damage.” Such beams are essentially man-made lightning. For an excellent comprehensive analysis of the operational aspects of these particular DEWs and an in-depth study of the applicable international law, see E. FESSLER, DIRECTED-ENERGY WEAPONS: A JURIDICAL ANALYSIS 8-29 (1979).

7. Cady, Beam Weapons in Space, AIR U. REV., May-June 1982, at 33, 38. See also Vlasic, Disarmament Decade, Outer Space, and International Law, 26 MCGILL L.J. 135,
confirmed that it has successfully test-fired its own two-million-volt PBW as part of the top secret "White Horse" program.8 Testing of HELs by the Department of Defense, however, has been in progress since 1973.9 The Pentagon expects to begin testing the first generation of HELs with ASAT and ABM capability by 1987.10 It has been recently disclosed that U.S. high-energy microwave weaponry is in an even further stage of development than both the HEL and PBW.11

Considering the relatively early stages of development of these DEWs, it is odd that the President made public the plan of their eventual deployment as the principle components of future ABM systems. In fact, the majority of the scientific community in the U.S. and Soviet Union, while acknowledging the viability of these weapons in component form, declares that the technology necessary to incorporate them into an effective ABM system is unachievable, as well as extremely destabilizing.12 Others, however, including renowned physicist and current member of the White House Science Council, Edward Teller, believe that the current status of DEWs is comparable to the "same stage of development as was the Manhattan Project in 1940." Teller further implies that with public support and massive research and development expenditures, ABM systems utilizing DEWs could be deployed before the turn of the century, perhaps even within the next decade.14

III. PROJECT HIGH FRONTIER

Directed-energy weapons technology is currently being developed for integration into an ABM system, most notably the High Frontier proposal. High Frontier, a think tank funded by the conservative Heritage Foundation, is headed by retired Lieutenant General Daniel Graham, a former Director of the Defense Intelligence Agency and more recently Ronald Reagan's military advisor during the 1976 and 1980 presidential campaigns. The administration's support of the High Frontier plan clearly requires renunciation of the MAD (mutually assured destruction)
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Doctrine, and is hoped to "fast thaw the nuclear freeze movement." In a speech delivered in 1982, Graham outlined the High Frontier concept in some detail, referring to it as a "layered strategic defense" incorporating space and land-based beam weapons capable of filtering out most incoming Soviet missiles, as well as protecting other space assets. Seven years and $35 billion from now, High Frontier's "purely defensive" system could be fully operational. Admittedly, the plan and its "purely defensive" application has some appeal in light of the nuclear alternative. There are some problems, however, which arise upon application of certain international treaties to the proposal.

IV. Application of the Outer Space and ABM Treaties to Project High Frontier

Despite proponents' apparent disregard for international legal restraints, both the Outer Space Treaty and the ABM Treaty are immediately relevant to any discussion of the implementation of the High Frontier proposal. However, intentional ambiguities in the drafting of these two treaties and an inclination to construe their relevant provisions very narrowly makes them nearly inadequate to address the plan.

A. The Outer Space Treaty

The Outer Space Treaty is flawed by the inclusion of two ambiguous phrases: "peaceful purposes" and "weapons of mass destruction." Because of the vagueness of these terms, the treaty's applicability in allowing or prohibiting space-based DEWs is uncertain. The main problem concerns the construction of article IV.

17. Id. at 2.
18. Id. at 4-5. The High Frontier program also involves the utilization of non-nuclear space-based missiles, the development of a "high performance space plane," upgrading of the current Space Shuttle Program, development of a manned low-earth orbit space station and a space power station, and a stepped-up civil defense program. In addition, the plan envisions a space industrial systems research and development program to be funded mostly through private enterprise.
19. Consider the statement of Major Steven Cady, an enthusiastic supporter of beam-weapornry deployment in space: "Throughout history, great nations wishing to remain great have interpreted principles of law in a manner consistent with their own needs and interests. A preoccupation with the niceties [sic] of law... has always been the road to disaster. Cady, supra note 7, at 36. (Emphasis added).
20. The Outer Space Treaty, supra note 2, at art. IV, states:

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.
unius est exclusio alterius to this article, it appears that outer space itself is not restricted to exclusively "peaceful purposes," whereas the "moon and other celestial bodies" are restricted. The early Soviet position maintained that "peaceful purposes" meant "non-military," but both the Soviets and the U.S. currently view the term as meaning "non-aggressive."

In addition, the treaty's proscription against specific military activities can easily be interpreted as allowing all other military activities. This means that unspecified military activity will be permitted on the moon and other celestial bodies as long as it is non-aggressive. This interpretation would also imply that aggressive activity is permissible in outer space, since article IV's first paragraph does not contain the "peaceful purposes/non-aggressive" limitations.

High Frontier seems to dismiss the "peaceful purposes" issue altogether. If the U.S. currently equates this phrase with "non-aggressive," then former Lieutenant General Graham's revealing comment that "[w]e should harbor no illusions that space can be limited to 'peaceful uses' . . . " may be an indication that those orchestrating the plan have little intention of maintaining a "non-aggressive" posture, let alone a "non-military" one.

Another controversial element of article IV is the phrase "weapons of mass destruction," which is generally construed to prohibit the orbiting, installation, or stationing in space of weapons capable of "inflicting damage to extensive geographical areas or injury to substantial populations, such as nuclear, chemical, or bacteriological weapons." This interpretation is thought to permit extremely selective, albeit destructive weapons, including conventional weaponry of less destructive power. Consequently, since DEWs are comparatively clean, discriminating, and controllable weapons capable of being operated so as to avoid the excess of devastation sought to be prevented, they may well fall outside of the treaty restrictions.

On the whole, the Outer Space Treaty seems to delegate to the superpowers "a large degree of freedom to turn this common domain into an area of bilateral arms competition to the detriment of all the others."

The moon and other celestial bodies shall be used . . . exclusively for peaceful purposes. The establishment of military bases . . . the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden.

21. E. Fessler, supra note 6, at 51.
22. Id. at 49.
23. Vlasic, supra note 7, at 171.
24. E. Fessler, supra note 6, at 51.
27. For a more detailed discussion, see E. Fessler, supra note 6, at 52-56.
B. The ABM Treaty

The Reagan administration claims that the planned research and development of this proposed “high tech” ABM system will not violate provisions of the ABM Treaty, and that only at the deployment stage would there be any actual conflict with its provisions. This assertion is probably incorrect since the purpose of the treaty is to forego the development of such systems, limiting each party’s exposure to the existing offensive weaponry of the other. By this process, “the pressures of technological change and its destabilizing effects on the strategic balance” will be minimized.

Several problems arise in the application of this treaty to the High Frontier proposal of using DEWs in an ABM mode. For example, article II describes specific components of an ABM system. The problem is whether this description is an exclusive or exemplary listing of the components intended to be prohibited. If intended as examples, then DEWs within an ABM system are likely to be proscribed. If article II is intended to be an exclusive enumeration of prohibited components, then DEWs, not having these components, would fall outside the provision’s prohibition.

Agreement (D) of the treaty provides that “in the event ABM systems based on other physical principles . . . are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII of the Treaty.” This would imply that future developments in ABM technology, including DEWs, were not intended to be included in the components listed in article II.

Despite this interpretation, DEWs as components within an ABM system would be prohibited from being developed, tested, and deployed pursuant to article V, but only where they were “sea-based, air-based, space-based, or mobile land-based.” These components could therefore be developed and tested if fixed and land-based, assuming that DEWs are not construed as being included under article II.

Ironically, DEWs could be developed, tested, and deployed in space within an ASAT mode as long as they were not actually used to interfere with verification satellites protected by article XII.

Both the Outer Space and the ABM treaties are, in reality, binding only to the extent that the signatories wish to be bound; thus, circumvention of their purpose and specific provisions can easily be accomplished by self-serving interpretations. However, in light of the potentially grave
consequences of proceeding with the High Frontier proposal without clearly-defined restraints, it would be in the best interests of both super-powers to come to some agreement on procedure before a destabilizing imbalance occurs.

V. OTHER POLICY PROBLEMS PRESENTED BY THE HIGH FRONTIER PROPOSAL

In addition to doubts about the viability and effectiveness of the High Frontier plan, the issue of destabilization has caused prominent members of the scientific community to condemn the President's proposal. The essence of their opposition is that the extension of the arms race into space merely increases the possibilities of war on earth. Any shift in the balance of power caused by either nation's sole possession of these “ultimate weapons” would be likely to set in motion a dangerous escalation of DEW development by both nations, as well as the escalation of other weapons designed to penetrate the other's system. For example, if the U.S. suspected the Soviets of having attained first-strike capability without fear of a retaliatory strike, it might then be induced to launch a first-strike against the Soviets before the Soviet ABM system is fully developed.

While the President has proposed the use of DEWs in a purely defensive manner, former Lieutenant General Graham has proposed other possible uses, including the preservation of the West's access to raw materials and the assurance of U.S. preeminence in space for military and commercial exploitation. His philosophy is to “move the contest into a new arena where we could exploit the technological advantages we hold.”

Other strategists envision even first generation DEWs as “politically useful instruments for achieving critical objectives of American foreign policy . . . ,” and as permitting the “fighting [of] non-nuclear wars with the Soviet Union involving vital U.S. national interests . . . .” This kind of diplomatic blackmail is not new. Threats of using atomic and hydrogen bombs to coerce other nations to comply with U.S. demands has apparently been practiced by every President (with the exception of Gerald Ford) since Harry S. Truman.

37. Space Weapons Invite Earth War, Rocky Mt. News, May 13, 1983, at 29, col. 1. Featured in this article are the comments of Astronomer Carl Sagan and Columbia University Professor of Physics Richard Garwin, who spoke in Washington, D.C. in favor of a resolution to ban space weapons.
39. Id. at 4.
40. Id. at 2.
42. Id. at 11.
43. Ellsberg, Introduction to E. THOMPSON & D. SMITH, PROTEST AND SURVIVE at v-vi
Because DEWs can be used offensively within an ABM system for detonating nuclear warheads and other purposes, it is naive to assume that they will only be restricted to defensive measures, especially since they may not be singularly effective and may be extremely vulnerable as well. The main criticism of the High Frontier plan is that in order for such a system to provide more than just the illusion of security, it would have to be 100% effective. Leakage of 5-10% is not a problem, however, according to former Lieutenant General Graham, who asserts that “[d]efenses throughout military history have been designed to make attack more difficult and more costly—not impossible.”

VI. Conclusion

The containment of space militarization and the alleviation of the continuous threat of nuclear war are two worthy and compatible goals. However, if judged to be in the interests of “national security,” the development and deployment of a space-based ABM system for the stated purpose of defense will most likely be pursued by the U.S. and the Soviet Union, despite possible treaty restrictions and the undesirable effect of destabilization. Such a course will not be the panacea that President Reagan and his advisors envision, however. Technology breeds technology, and it is almost ludicrous to believe that either superpower will ever be able to develop the ultimate, impenetrable defensive system. In fact, inherent in the development and testing of such a system is the simultaneous development and testing of technology designed to counteract or limit its effectiveness. On the other hand, once a certain level of technology has been achieved, it can then only be channeled, not suppressed or ignored. The threat of the military application of such technology will exist as long as the materials, knowledge, and technology exist. An attempt to stifle the military exploitation of directed-energy technology by application of ambiguously worded treaties destined to be ignored, or worse, abused, is a futile effort. New treaties could be formulated, however, with unambiguous provisions specifically addressing the issue of space-based DEWs and providing effective sanctions in case of violations. This would allow research in this area to proceed within well-defined guidelines to the mutual advantage of all parties.

With or without new or renegotiated treaties, the suggestion has been made that research and development of DEWs should continue as a joint effort so as to strengthen the validity of U.S. and Soviet claims of “purely

(1981). See generally id. at i-xxviii.
44. Rocky Mt. News, note 37 supra.
46. The Soviets have apparently submitted a draft of a proposed treaty to the UN calling for participant states “not to test or deploy . . . any space-based weapons intended to hit targets on Earth, in the atmosphere, or in outer space” in addition to other provisions addressing the militarization of space. Soviets Want UN to Ban Manned Military Spacecraft, Rocky Mt. News, Aug. 22, 1983, at 32, col. 3.
defensive" intentions. Although a well-reasoned approach, this is a highly unlikely alternative, in spite of the almost inevitable destabilization resulting from a unilateral breakthrough. A better and more palatable solution would be the simultaneous reduction of offensive weaponry by both nations, which would serve to demonstrate further the sincerity of their intentions. Recent developments demand that we begin now to re-evaluate our dependence on largely ineffective legal restraints and consider the propriety of these and other proposed methods designed to avoid the over-militarization of space as well as the catastrophic destabilization that would be likely to occur with the implementation of High Frontier.

Mark A. Clark


In its recent decision in Powell v. U.S. Bureau of Prisons,1 the Court of Appeals for the Fifth Circuit determined that the work credits earned in a Mexican prison by a prisoner subsequently transferred to the United States represented only a conditional reduction in the offender’s sentence. The court held that U.S. authorities could order such work credits forfeited when the offender violated the conditions of his parole. Through the court’s interpretation of the terms of the United States-Mexico Prisoner Transfer Treaty,2 the decision clarifies the Treaty’s jurisdictional allocation of sentencing issues to the Transferring State and parole issues to the Receiving State.

The United States entered into the treaty negotiations with Mexico in response to public concern over the frequently inhumane treatment U.S. nationals received in Mexican prisons and out of a desire to lessen the bilateral tensions which resulted.3 Under the terms of the Treaty, U.S. nationals serving time in Mexico can be transferred to American custody for the remainder of their sentences.4 Mexican nationals held in U.S.


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4. In addition to several conditions which must be met before a transfer can be ef-
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Mark A. Clark

**Powell v. U.S. Bureau of Prisons:**
The Treatment of Mexican Work Credits by U.S. Authorities Under the Prisoner Transfer Treaty with Mexico

In its recent decision in *Powell v. U.S. Bureau of Prisons,*¹ the Court of Appeals for the Fifth Circuit determined that the work credits earned in a Mexican prison by a prisoner subsequently transferred to the United States represented only a conditional reduction in the offender's sentence. The court held that U.S. authorities could order such work credits forfeited when the offender violated the conditions of his parole. Through the court's interpretation of the terms of the United States-Mexico Prisoner Transfer Treaty,² the decision clarifies the Treaty's jurisdictional allocation of sentencing issues to the Transferring State and parole issues to the Receiving State.

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prisons can be returned to their home country as well. In either case, the Receiving State assumes the role of jailer. The completion of the transferred offender’s sentence will be carried out according to that State’s laws, including any provisions for parole, but the sentence itself can only be challenged in the Transferring State. Powell focuses on this division of jurisdiction.

Powell, an American national, was convicted of a drug offense in Mexico and sentenced to six years and three months in prison. Initially, the term was due to end August 13, 1982, but Powell earned 336 days of work credits, and the Mexican authorities advanced his release date to September 8, 1981. Powell was transferred to the United States in 1978, pursuant to the terms of the Treaty. The U.S. authorities released Powell on parole in September of that year. While still on parole, Powell was convicted of another drug-related offense, this time in the United States. The U.S. Parole Commission revoked his parole and ordered additional time added to the two year sentence he received for his latest conviction. The order forfeited the work credits which Powell had earned in Mexico.

Powell initiated habeas corpus proceedings, arguing that the work credits permanently reduced his original sentence and could not be forfeited under Articles V(3) and VI of the Treaty. The District Court for the Northern District of Texas agreed. It granted the writ and ordered that the sentence be recomputed to restore the work credits. The Fifth Circuit reversed, finding that the work credits constituted only a condi-

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5. Id. at art. V(2).
7. Powell was ordered to serve two years, four months and seventeen days. The presumptive parole date was set as March 1, 1982. Powell, 695 F.2d at 869.
8. Article V(3) provides: “No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the Transferring State.” The pertinent part of article VI provides: “The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts.”
9. Powell, 695 F.2d at 869-70 n.2. Footnote 2 of the federal circuit court opinion discussed the opinion of the lower court, which stressed time constraints and rejected the recommendation of the magistrate that the issue be referred to the Mexican courts for determination. The federal district court also asserted that the Mexican courts would hold that Powell’s work credits operated to reduce his prison sentence permanently.
tional reduction in Powell's sentence.

After disposing of Powell's mootness argument, the court turned to the issues surrounding the forfeiture of the work credits. It found that the only clearly applicable Treaty provision stated that the laws of the Receiving State govern the completion of the transferred prisoner's sentence, including the granting of parole, unless another term of the Treaty provided otherwise. The provisions relied upon by Powell dealt only with the modification or improper enforcement of the sentence handed down by the Mexican courts. Since Powell's work credits were administratively awarded, they were not part of the sentence of the court. The court thus found the Treaty articles cited by Powell inapplicable.

Once the Fifth Circuit concluded that no other Treaty term removed jurisdiction of the matter from the Receiving State, the court was faced with the dilemma of deciding how American laws could be applied to a foreign penal program. Using the legislation passed to implement the Treaty in the U.S., the court drew an analogy between work credits and the good time credits awarded in the U.S. prison system. Because the two credit systems are treated as equal under the implementing legislation and good time credits may be revoked because of parole violations, the court reasoned that work credits should also be forfeitable. In a footnote, the court cited Mexico's Penal Code to show that Mexico would also consider the award of work credits as conditioned upon the offender's continued good behavior.

The Powell decision is in harmony with Boyden v. Bell, a Ninth Circuit decision involving the United States-Canada Prisoner Transfer Treaty. The Boyden case concerned a prisoner transferred to the United States after being sentenced to twenty years of imprisonment by a Cana-

10. Powell argued that the full term of the sentence imposed by the Mexican court had ended on August 13, 1982, and that a reversal of the district court would have no effect. In addition, article V(3) does not permit the U.S. to extend the sentence beyond that date. The Fifth Circuit pointed out that Powell had been released pending this appeal and determined that the sentence would terminate with the expiration of the six year and three month term, not the specific date of August 13, 1982. The six year and three month period would expire when Powell served the balance owed on that term at the time of his early release. Id. at 870.

11. Article V(2) provides in pertinent part: "Except as otherwise provided in this Treaty, the completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise."

12. Powell, 695 F.2d at 871-72.

13. Act of Oct. 28, 1977, § 1, 18 U.S.C. §§ 3244, 4100-4115 (Supp. V 1981). The court quoted specific sections of section 4105(c), which provides in subpara. (1) that "all credits for good time, for labor or any other credit" awarded by the Transferring State will be added to the good time credits given by the United States. Powell, 695 F.2d at 871.

14. Powell, 695 F.2d at 871 n.5.


The Canadian authorities informed the U.S. authorities that the prisoner was entitled to 1,827 days of remission credit over the life of the sentence. The Ninth Circuit, faced with a Treaty very similar to the Treaty with Mexico and the same implementing legislation, concluded that U.S. authorities could prorate the prisoner's remission credits before awarding him any good time credits. In both the Boyden case and the Powell case, American authorities were permitted to modify sentence reductions awarded by foreign governmental authorities other than the sentencing courts. The Ninth Circuit's reasoning was nearly identical to that of the Powell court.

The Fifth Circuit court in Powell felt no need to consult the Mexican government concerning the classification of work credits as conditional sentence reductions. Once it found Treaty provisions allowing application of U.S. law to the case, the court ignored any interest which Mexico might have had in its outcome. In addition, the court saw no conceptual difficulty in basing its decision to permit the revocation of the credits earned before the prisoner's transfer on a Treaty provision that only granted U.S. jurisdiction over the completion of the offender's sentence. Given the basic similarities between all the prisoner transfer treaties to which the United States is a party, the reasoning of the Powell decision could well be applied in situations involving such treaties. Although decisions such as Powell are not likely to harm foreign relations significantly, future prisoner transfer treaties should be carefully drafted to avoid any potential misunderstandings.

Michael R. de Lisle

17. Articles V(2) and (3) of the Treaty with Mexico appear almost verbatim in the Treaty with Canada in articles IV(1) and (3) respectively. The same legislation is used to implement all prisoner transfer treaties to which the United States is a party.

18. The prisoner was allowed 240 days of Canadian remission credits to be combined with over 2,084 days of good time credits awarded under U.S. law. Boyden, 631 F.2d at 122.

19. The court stated specifically that it did not "accept Boyden's argument that the proration of remission credits contravenes the 'exclusive jurisdiction' of Canadian courts under art. V of the Treaty. Remission credits do not modify the term of a prisoner's sentence, but determine his release on parole." Id. at 123 n.11.

In The Matter of a Grand Jury
Subpoena to Marc Rich & Company, A. G.:
Preventing Evasion of U.S. Tax Laws
By Foreign Companies

A federal grand jury recently investigated an alleged tax evasion scheme whereby a Swiss-based commodities concern, Marc Rich & Company, A.G. (hereinafter AG), allegedly attempted to evade U.S. tax law by diverting income from its wholly-owned U.S. subsidiary, Marc Rich & Company International, Ltd. (hereinafter International) to the parent firm. A grand jury subpoena duces tecum was served on the U.S. subsidiary, International, on March 9, 1982. International complied with the subpoena and began to produce the business records requested.

On April 15, 1982, a subpoena duces tecum was served upon the counsel of International for the production of documents held by AG. Counsel for International accepted the service on behalf of International but did not purport to accept service for AG. AG’s board of directors determined that compliance with the subpoena would violate Swiss law and resolved not to comply and instead sought to establish the ineffectiveness of the subpoena.

I. The United States District Court’s Decision

On June 4, 1982, AG filed a motion to quash the subpoena, for lack of in personam jurisdiction, in the United States District Court for the Southern District of New York. On August 25, 1982, the motion to quash was denied. In denying AG’s motion, United States District Judge Leonard Sands determined that the court had jurisdiction to enforce the subpoena despite claims by AG to the contrary. AG contended that its business was deliberately structured so as to avoid any contact with the United States and that it was therefore not subject to the court’s jurisdiction. The government, however, asserted that AG’s wholly owned subsidiary, International, provided a sufficient basis for an assertion of jurisdiction.

3. Id.
5. Id.
6. Id. at 2-3.
7. Brief, supra note 2, at 3.
8. District Court Opinion, supra note 4, at 19.
9. Id. at 1.
10. Id.
In determining that there was in fact a proper assertion of jurisdiction, the court first considered the problem via a "burden of proof" analysis. Noting the difference between a grand jury proceeding and a civil case, the court found that "the appropriate allocation of the burden of proof is as follows: once the moving party raises the issue of jurisdiction, the Government must show that it has a good faith basis for asserting jurisdiction; thereafter, the burden of proof shifts to the party challenging jurisdiction." Then, applying New York law, the court determined that "if the subject matter of the investigation is related to the contact with the jurisdiction, the grand jury's exercise of its subpoena power should not be invalidated by the court."

In deciding that the subject matter of the investigation was related to the contact with the jurisdiction, the court considered an ex-parte affidavit submitted by the government. In answer to AG's protest concerning the unfairness of an ex-parte affidavit, the court noted the government's allegation that disclosing the name of the informant would jeopardize the investigation, and stated:

The Court is thus placed in the position of having to balance the Government's need to maintain in secret the identity of the informant and the movant's need to know the asserted grounds for jurisdiction in order to refute them. AG's need for the information is heightened since the Court has imposed the burden of proof on it. Under the circumstances presented in this case, we will consider the ex-parte affidavit, because the Government has generally revealed its contents and demonstrated the significance of the secret information, and because the need for secrecy appears to be genuinely invoked. In order to mitigate the possible unfairness to the AG, we will only hold AG to a burden of proof which addresses the general disclosure made to AG.

Finding that AG had not met its burden of proof, the court went on to consider whether or not a Swiss statute barring disclosure of a "business..."
ness secret' to a foreign government"17 would require the subpoena to be quashed.18 Noting that AG had shown by affidavit that the delivery of the requested documents would violate Swiss law,19 the court balanced the interests of the United States and Switzerland20 and decided:

[T]he interest of the United States in investigating violations of its tax laws outweighs the Swiss interest in avoiding possible disclosure of business secrets in this case. The Government has made a substantial showing indicating that AG used its United States subsidiary to convey income to it overseas in circumvention of United States tax laws. To permit AG to shield this conduct from the scrutiny of the grand jury would be a "travesty of justice."21

Subsequent to this decision, AG continued to refuse to produce the business records and on September 13, 1982, a judgment of civil contempt was entered against AG in the United States District Court for the Southern District of New York.22

II. THE SECOND CIRCUIT OPINION

Marc Rich & Company, A.G. appealed the contempt order in the United States Court of Appeals for the Second Circuit. The court noted:

It would be strange, indeed, if the United States could punish a foreign corporation for violating its criminal laws upon a theory that the corporation was constructively present in the country at the time the violation occurred [citation omitted], but a federal grand jury could not investigate to ascertain the probability that the crime had taken place.23

The court then stated that the issue involved was whether or not the District Court had such personal jurisdiction over AG that it could enforce

17. Id.
18. Id.
19. Id. at 20 n.2. The Schweizerischer Strafgesetzbuch, Code pénal suisse, Codice penale svizzero, art. 273, provides in part:
a person who discloses a manufacturing or business secret to a foreign governmental authority or to a foreign organization or to a foreign private enterprize or their agents, shall be punished with prison, in severe cases with jail. The imprisonment may be combined with a fine.
20. In balancing the interests of each country the court considered:
   (a) vital interests of each of the states,
   (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
   (c) the extent to which the required conduct is to take place in the territory of the other state,
   (d) the nationality of the person, and
   (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.
Id. at 18, citing United States v. First National City Bank, 366 F.2d 897, 902 (2d Cir. 1968).
21. District Court Opinion, supra note 4, at 18.
22. Brief, supra note 2, at 1.
obedience to the grand jury subpoena.24

Referring to McGee v. International Life Insurance Company,25 the court stated that it subscribed to the notion that "where a person has sufficiently caused adverse consequences within a state, he may be subjected to its judicial jurisdiction so long as he is given adequate notice and an opportunity to be heard."26

Commenting that if, in fact, there was a conspiracy between AG and International to evade the tax laws, both a conspiracy and at least part of the conspiratorial acts would have occurred within the United States. The court went on to state that service upon AG's officers within the territorial boundaries of the United States was sufficient to warrant judicial enforcement of the subpoena.27

The Second Circuit concluded its opinion by affirming the decision of the lower court and stating that "in a case such as this, if the Government shows that there is a reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of jurisdiction, compliance with the grand jury's subpoena may be directed."28

III. Conclusion

In light of the above decisions on the Marc Rich case, it is clear that case law is beginning to strengthen the idea that a federal grand jury should have access to overseas documents.29 Just how far these decisions will reach, however, and to what extent they will prove effective against foreign companies seeking to evade U.S. tax laws remains to be seen. For example, despite the decisions of the federal district and circuit courts, the United States has yet to receive the requested documents from Marc Rich & Company, A.G. As of June 29, 1983, fines of $50,000 per day were being assessed against AG for its refusal to comply with the subpoena served upon it by U.S. District Court for the Southern District of New York.30 After finally agreeing to comply with the subpoena, AG attempted to ship documents to Switzerland, maintaining that they had to be shown to a Swiss lawyer.31 Although the documents which the company attempted to ship were seized by federal agents at Kennedy International

24. Id. at 7.
27. Id. at 9.
28. Id. at 14.
30. Denver Post, Sept. 20, 1983, at F1, col. 2. It is also interesting to note that a 51-count indictment was handed down Sept. 19, 1983, by the grand jury charging that Marc Rich evaded $48 million in taxes and "traded with the enemy" by purchasing $200 million worth of oil from Iran during the Iranian hostage crisis. Id. at F1, col. 1-2.
31. Id. at F1, col. 3. U.S. Attorney R. Guillano has said that the Government is currently seeking to confiscate the stock in AG held by an affiliate and plans to attempt to extradite defendants who have fled the country.
Airport, some of the other subpoenaed documents were impounded in Switzerland by Swiss police. International negotiations have been entered into concerning the dispute.32

The Marc Rich decisions of the United States District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit should serve greatly to improve the ability of U.S. officials to enforce United States tax laws against foreign corporations maintaining subsidiaries in the U.S. As long as a foreign company operates a wholly-owned subsidiary in the U.S., in personam jurisdiction can be exercised by U.S. courts to obtain essential financial records of any foreign company suspected of evading U.S. tax laws. While this legal tool will promote the effective enforcement of U.S. tax laws overseas, it may also jeopardize significantly the future of international business transactions. Only time will tell whether foreign companies will be prompted to decrease or abandon U.S. operations as a result of the Marc Rich decisions.

Jill Weinger

32. Id.
BOOK REVIEW

The War-Making Powers of the President
Reviewed by William M. Beaney*


This carefully written, scholarly study brings the debate over the respective war-making powers of the President and Congress to the posture it had assumed by November 1982. Such has been the rapid flow of events that recently, in November 1983, important new chapters have been added to the tale ably recounted by Thomas and Thomas, co-authors of nine books dealing with important international issues and developments. As Charles O. Galvin concludes in the Foreward to this book:

[T]hey [the Thomases] have provided a historical, a critical, and an analytical treatise which is a major contribution in the field. Although they conclude that the power of the President to commit forces abroad remains a dark continent of American jurisprudence, their splendid work has illumined the subject to the benefit of all who search the area.¹

The heart of the difficulty arises from our separated and shared power system which inevitably gives rise to many questions concerning the respective powers of Congress and the President. One of the most serious questions which arises is where the boundaries of their respective roles in war-making lie. Article II of the Constitution spells out a potentially powerful role in foreign affairs and national security in its terse list of grants of presidential powers: "The executive power" encompasses duties including commander-in-chief, making treaties, receiving ambassadors and taking "care that the laws be faithfully executed." In the historical chapters (1-5) the authors reveal the accordion-like expansion and continuation of war-making powers, dependent upon the philosophy of the presidential office-holder and the particular issue involved. Franklin D. Roosevelt, a strong President by any standard, abandoned use of force

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in Latin America, but did not hesitate to commit acts against Germany long before the outbreak of World War II, belying United States neutrality. His Secretary of State, Dean Acheson, told the Senate Committees on Foreign Relations and the Armed Services that the Congress, in the exercise of its power under the Constitution, lacked power to interfere with the President's powers in the implementation of foreign policy and treaties.¹

The Constitution gives to Congress the power "to declare war."³ The same law allows Congress to "grant Letters of Marque and Reprisal," and clause 14 authorizes "Rules for the Government and Regulation of the land and naval forces."⁴ In addition, Congress can point to the power of the purse and the "necessary and proper" clause as justification for a role in war-making short of a declaration of war.⁵

The basic dilemma facing the United States since the end of World War II, when it assumed the role of leader of the free world, is that the perceived enemy—the Soviet Union—has long-term goals which it seeks to achieve by overturning unstable regimes through revolutionary means and by confrontations with the United States in situations where it believes the United States will not respond. The Berlin airlift and the Cuban Missile crisis and ensuing naval blockade represent Soviet miscalculations. Vietnam, on the other hand, was a Soviet triumph, because at little cost (personnel and materiel) its surrogates inflicted a shattering blow to the prestige and morale of the United States.

It is increasingly obvious that the "cold war" policies do not involve declarations of war. Congress sat by during the Vietnam conflict, quite content to follow presidential leadership (repeated appropriations; Tonkin Gulf Resolution) as the stakes and costs grew ever greater. As success evaded South Vietnam and the United States, a "let's bring the boys home" attitude developed in the American public. Nightly TV exposure of the human and material costs of an undeclared war that refused to yield victory turned public opinion, and eventually Congress, against President Johnson's protestation that the United States effort would eventually prevail. His successor, President Nixon, compounded his problem in Vietnam by covert actions which amounted to waging an undeclared executive war.

Extending military assistance to a nation that seeks it violates no principle of international law nor any provision of the United States Constitution. This is true whether a treaty or simple executive agreement is the chosen instrument for justifying the placement or employment of armed forces.⁶ More controversial are those agreements made in times of

². Id. at 21.
³. U.S. Const. art. I, § 8, cl. 11.
⁴. Id. cl. 14.
⁵. Id. cl. 18.
⁶. THOMAS & THOMAS, supra note 1, at 85.
rebellion or turmoil when the United States intervenes to maintain peace and stable government, such as in El Salvador. Of doubtful validity is intervention, not at the request of the “assisted government” but of their neighbors who claim to act under a treaty with the invaded nation, as in Grenada this last fall. Of course, there are other acceptable principles of international law available to justify such actions, as the supporters of the Grenada “rescue” mission have made clear. The United States Constitution gives its citizens travelling abroad the right to protection and international law recognizes the legitimate exercise of sovereign power for that purpose. Given the way the superpowers, and lesser powers, tend to tailor the facts of any given situation to conform with international law norms, there is nothing but the momentary displeasure of the world community to deter or punish a major nation bent on protecting a self-proclaimed national interest. Therefore, the heart of the controversy in the United States arises from the endless struggle for supremacy between Congress and the President with respect to war-making without a declaration.

Recognizing that the precedents and realities supported presidential preeminence, Congress in 1973 adopted, over a presidential veto, the War Powers Resolution,7 the most serious effort to this date by Congress to limit presidential war-making powers. Claiming that the Act fulfilled “the intention of the framers of the Constitution,” the Act required consultation with Congress, reports to Congress and an opportunity for Congress to ensure termination of hostilities and removal of United States forces whenever the President proposes to introduce, or has introduced, United States Armed Forces into hostile situations. Except for emergencies, the import of the Act is that the President should consult with, and receive congressional approval for, potential or actual war-making exercises. The Act is filled with ambiguities and unanswered questions.

As the authors point out:

Section 2(c) of the resolution seems to restrict presidential power by asserting that the constitutional powers of the President as Commander-in-Chief to deploy forces abroad is limited to three types of situations: (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by ‘attack upon the United States, its territories, or possessions, or its armed forces.’ 8

None of these conditions was present in the Cuban missile crisis in which President Kennedy acted to forestall the introduction of missiles with a nuclear capacity in Cuba. Nor does this section take into account the other foreign policy bases for presidential action: treaty power, executive power, and, as Justice Sutherland proclaimed in U.S. v. Curtiss-Wright, 209 U.S. 304 (1936), the President’s role as the nation’s exclusive agent in foreign affairs plus certain attributes derived from national sovereignty.

Understandably, President Nixon, who attempted to veto the 1973

8. THOMAS & THOMAS, supra note 1, at 133.
Joint Resolution, and subsequent Presidents have been unenthusiastic with this effort of Congress to gain a more explicit share of the undeclared war-making power. As early as 1975, President Ford showed little concern for the Resolution's provisions in evacuating Americans and Vietnamese from South Vietnam and in rescuing the merchant ship Mayaguez and her crew, though he did in the latter case notify Congress after the action was completed.

The Carter Administration's softer international line presented fewer occasions for controversy but the Reagan Administration's hawkish policies produced episodes in late 1983 that brought into sharp focus the attempt by Congress to share in the war-making process. The suicide bombing of the Marine quarters in Beirut, Lebanon in October led to an agreement by the President to accept an eighteen-month limit on the presence of the peacekeeping force, though the President skirted the direct application of the War Powers Resolution. United States intervention in Grenada later in October, assertedly to rescue American students and to forestall the creation of a firmer Cuban presence, again raised questions about the applicability of the War Powers Resolution. President Reagan, without formally complying with the Resolution, informed Congress by a letter only after the military operation was well-advanced, and subsequently announced through a spokesman that virtually all forces would be withdrawn within 60 days. The popular success of the American Grenada operation has blunted criticism based on international law and the Constitution. After failures in Lebanon, Iran, and South Vietnam, the frustrating program to prop up El Salvador, the lack of success in supporting the overthrow of the Sandinista regime in Nicaragua, and even worldwide rejection by our friends and others of the invasion as a violation of international law has proved no deterrent. The Congressional critics have been silenced—the foreign critics ignored.

What the authors have demonstrated is that while legal norms in the body of international law have a role to play, it is hardly a substantial impediment when the superpowers pursue their national interests. In domestic law, the situation remains unclear. The attempt by Congress to fill in the constitutional lacunae has not yet had a fair trial, but it has not yet cowed Presidents into abandoning their great role in national security and foreign policy, of which the use of military forces is an obvious part.

A final issue, with which the authors deal inconclusively: Is judicial resolution possible? The lesson drawn from attempts to challenge the Vietnam undeclared war is that courts, or at least most judges, are reluctant to find intelligible constitutional standards to guide the judiciary. The nature of the issue(s) involved suggests the wisdom of abstaining, which leaves to the elected Congress and President the obligation to hammer out reasonable compromises through the give and take of political life.
BOOK NOTES


This is the first volume of a set designed as a tool for both the experienced immigration lawyer and the attorney who only occasionally handles an immigration case. The set provides reference to statutory law, case law, administrative decisions, internal operational guidelines, procedure and practical considerations. While giving careful analysis to most of the issues which might require research in a complex immigration case, this book also emphasizes the practical side: which forms to use, where to file papers, and procedures at different Immigration and Naturalization Service offices. The introduction indicates an intention to provide model forms to illustrate the textual discussion, but these forms are neither included in this volume nor mentioned in the table of contents for the anticipated second volume to be issued in late 1983.

Volume I begins with an analysis of the major statutory developments in immigration law. After discussing the statutory history and history of immigration law, the authors move to a discussion of the non-immigrant categories and procedures for transitory entry into the United States. They examine the application procedures and qualifications necessary to obtain temporary visitor, student and exchange visitor, business and investor (including H-visas for temporary workers), and other non-immigrant category visas.

Permanent resident status is the usual goal of aliens seeking to remain in the United States indefinitely. Again, the complete process for application is described as are the various preference and non-preference categories which go toward determining admissibility. Not only does the text cover the several routes for obtaining permanent resident status, but it also emphasizes the basic methodology of the Immigration Selection System (quotas by country of original nationality). Special immigrant preferences, non-preference investors, job offer preferences, and familial preferences are among the classes given specific attention.

The authors devote an entire chapter to the difficult subject of the labor certification, which is necessary for a job offer preference. The chapter outlines the complex procedures which must be followed to obtain Department of Labor approval for a job offer made to a foreign national and analyzes some of the most difficult substantive questions, such as the
meaning of "unduly restrictive" job requirements and the proper method for determining a "prevailing wage".

This volume concludes with an investigation of the naturalization and citizenship requirements. Topics included are the statutory qualifications, Constitutional aspects, ineligible classes and naturalization procedures. Citizenship at birth, whether by birth taking place within or without the United States, and dual citizenship are also encompassed. A treatment of the loss of citizenship through denaturalization or expatriation ends this first volume.

Volume II will include chapters on exclusion and deportation, refugees and asylum, the rights of aliens and the tax aspects of immigration.

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This book studies equality and discrimination in the international arena. The book contains an introduction and sixteen chapters. The introduction discusses different philosophies which underly equality, inequality and discrimination. It also describes the history of the international treatment of equality prior to World War I.

Chapters I and II cover the post-World War I period and the League of Nations. They discuss the policies toward religious and racial equality and describe the protection of minorities during this period. Chapter III deals with post-World War II peace treaties. Chapters IV and V examine the development of equality under the United Nations Charter, the sub-commission on prevention of discrimination and protection of minorities. These chapters also discuss the definitions of minority protection and discrimination prevention.

Chapters VI through X thoroughly cover the international study of discrimination. The conventions and declarations are examined in depth, with Chapter X focusing on equality of the sexes internationally.

Chapters XII through XIV discuss regional treatment of human rights. Chapter XII looks at the European Convention on Human Rights, the European Commission and Court of Human Rights and their respective proposals. Chapter XIII covers equal protection in the United States and India, while Chapter XIV covers the legal principles of non-discrimination through its standards, norms, and the jus cogens principle of individual equality. Finally, Chapter XVI describes the conclusions drawn by various articles and international conventions.

If there is one prospect for the 1980s on which top executives of many large United States and European companies agree, it is the anticipation of major growth for their organizations outside their own countries. Trying to develop effective global business strategy in a world increasingly conscious of national sovereignty underscores the question of what is involved in operating an international company beyond merely doing business in a foreign country.

This study seeks to define an "international" company in terms of criteria recognized by companies with long and substantial experience in foreign operations. Managerial resources and practices that companies have evolved are described, and questions such as "What defines an international company?" and "How do you achieve an international perspective?" are asked of many companies substantially involved in international business, and the composite answers are analyzed in terms of their implications for successful international performance.

The sample was drawn from a list of 300 U.S.-based corporations with significant operations overseas. This list includes representative manufacturers, banks, and construction, commercial and service companies. In addition, similar information was sought from 300 European companies with comparable international activity. Survey data are supplemented by interviews with top executives from all over the world, with special emphasis on the U.S., Europe, and Latin America.

Ronald E. Berenbeim is a Senior Research Associate at the Conference Board, an independent, not-for-profit research institution which studies management and economics.


In the 1970s, the law of the sea was subjected to a basic review undertaken by the Third United Nations Conference on the Law of the Sea. Deliberations at the Conference were not only exhaustive but also exhausting, and by the end of a decade of meetings, it had become certain that a comprehensive ocean constitution would be adopted for the first time in history.
At its third annual meeting in Kiel, in October 1980, (after the Hague in 1978 and Mexico City in 1979), the Fourteenth Annual Conference of the Law of the Sea Institute tried to present a preview of what the new direction of the law of the sea would be in the 1980s. The presentations and discussions are embodied in these proceedings and are divided into eight major parts: the stage-setting sessions—"Where trends the Law of the Sea?"; "Old Law and New Law: How are They to be Squared?"; "The International Seabed: Prospects for Mining in the 1980s"; "How Will the New Law of the Sea Affect International Organizations?", "Cooperation in the Baltic Sea"; and "The Baltic Straits."

Professor Choon-ho Park of the East-West Center, Honolulu, who edited this volume, is a member of the executive board of the Law of the Sea Institute.

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QUINN, J. AND SLAYTON, P., NON-TARIFF BARRIERS AFTER THE TOKYO ROUND; The Institute of Research and Public Policy, Montreal, Quebec (1982); available in U.S. in paper from Rothman for $17.95; ISBN 0-920380-61-1, XXXIV, 272 p., footnotes, notes on contributors, glossary, and members of the Institute listed along with available publications. The forward and introduction are written in English as well as French. The text is written in English only. This volume is a product of the International Economics Program of the Institute and will be followed by other studies in the area over the next two or three years.

The Tokyo Round of multilateral trade negotiations was initiated formally on September 14, 1973, when ministers from nearly one hundred nations met in Tokyo and approved a declaration calling for renewed efforts to remove obstacles to international trade. The Tokyo Round, over its eight-year staging, produced many agreements on tariff and non-tariff measures. The central achievement is considered to be in the area of non-tariff barriers.

These non-tariff agreements are intended to expand the international trading community's control over the policies and programs of national governments that affect international economic relations. The general aim of the essays which make up this volume is to examine the structure of the General Agreement of Tariffs and Trade (GATT) system for regulation of non-tariff measures, the political and economic goals that underlie the provisions of the new codes, and their prospects for fostering a more liberal economic order.

This volume is a result of a conference held at the University of Western Ontario. It attempts to place a particular Canadian perspective on this important international trade issue. It explores the general economic and political rationale for protectionism in Canada and the United States and each of the codes governing the use of specific non-tariff barriers in turn. While no position is advocated, the essays illuminate the chal-
lenge faced by Canada in this decade in managing its own non-tariff barriers and in dealing with those of its major trading partners, particularly the United States.

Both editors, John Quinn and Philip Slayton, teach at the University of Western Ontario. The former teaches law and economics and the latter teaches international trade law. Quinn has written several articles on international and domestic trade regulation. Slayton is the author of several articles and monographs on legal aspects of Canadian commercial policy.

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This book is an examination of The Andean Legal Order, as it changed and developed under the Cartagena Agreement signed in Bogota, Columbia on May 26, 1969. It also examines the relations to the community legal order and institutions existing in related Latin American countries.

Chapter 1 traces the acts and decisions leading up to the Andean Subregional Integration Agreement, describing the objectives and mechanisms of the Agreement. The chapter also explains the results of the Agreement on the Andean community. Policies and planning for economic development, industrial planning, tariffs, agriculture and livestock policies, competitive commercial practices, savings clauses, and financial decisions contained in the Agreement are described. Special attention is paid to the subregional integration process resulting from the Agreement and other developments within the institutions and laws on the Andean subregion.

Chapter 2 studies the relationship of the Agreement with the pre-existing legal order of LAFTA (Latin American Free Trade Association). The chapter examines the compatibility of the two orders through the problems with incompatible clauses, analogy to similar agreements, conditions for amending the Agreement and the requirements relative to accession. The Chapter describes the transitory nature of the Agreement, execution of new, related agreements, the hierarchical relationship between the legal orders, and other characteristics of the Cartagena Agreement in relation to LAFTA.

Chapter 3 examines the institutional framework created by the Agreement. This framework is composed of a Board and Commission. This chapter also described the Auxiliary, Financial, and Judicial organs' structures and functions, as created by the Agreement. Institutional relations outside the community resulting from the Agreement are examined.
Chapter 4 analyzes the system adopted by the Agreement for attributing normative, executive and implied competences to subregional organs of the order.

Chapters 5 and 6 explore the validity of the subregional acts. Through an examination of the form and effects of the acts, their reception in domestic law, the initiative of the Board to overcome problems associated with the reception and the hierarchy of legal order, the concept of "community law" as developed through the act is developed.

The appendices contain a copy of the Cartagena Agreement as signed in Bogota, Columbia, May 26, 1969, plus the texts of negotiations, additions, supplementary regulations, standards and directives arising from the Agreement. The Author is a professor of law at the University of Miami College of Law.

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TRADEMARKS THROUGHOUT THE WORLD is a quick reference, answering most questions on other countries' trademark laws. It is also an excellent place to begin serious, comprehensive research. TRADEMARKS is a loose-leaf digest edited and updated three times annually by Trade Activities, a division of Clark Boardman Company, Ltd. in New York. The book compiles and categorizes the trademark laws of over 265 countries. The applicable law(s) and citation(s) are listed under the name of the country. Then, for each country, the laws and regulations are broken down into subheadings listing and explaining, for example, conventions, who may apply, procedures, time limits, licenses, opposition and assignment. The appendices tabulate more information for easy reference. Appendix A provides both the International Classification of Goods and Services and the Classification of Goods and Services of particular countries. Appendix B reorders the material in the form of answers to 15 specific questions. Finally, Appendix C explains the settings, purposes and topics dealt with by the major International Trademark conventions. The text from these conventions is also provided.

Anne Marie Greene is an editor in the Trade Activities Division of Clark Boardman.

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WORLD INTELLECTUAL PROPERTY ORGANIZATION, PCT APPLICANT'S GUIDE; World Intellectual Property Organization, [No 432(E) International Bureau WIPA CH-1211 Geneva 20, Switzerland (1978); ISBN 608 W893

The looseleaf publication contains general information on the Patent Cooperation Treaty (PCT) and is intended for those interested in filing international patent applications. The information published is a condensed and interpreted form of the considerably longer official text of the PCT and the regulations under the PCT. Consultation of those texts is indispensable for receiving complete information. The publication is updated periodically, with updates available from the World Intellectual Property Organization.

The publication is divided into two looseleaf binders. The first binder contains a guide, indexes, annexes, and administrative instructions. The guide contains a basic explanation of the PCT. Included are an explanation of the terms of the treaty, the basic operation of the treaty, and the procedure for filing a PCT application. The paragraphs explaining the terms are cross-referenced to the articles of the treaty. The guide is followed by an index to the treaty. The index includes a catchword index for commonly used technical terms. The annexes contain tables of information concerning filing in each of the designated states and forms used by the International Bureau. Finally, the first binder is concluded by the administrative instructions under the Patent Cooperation Treaty.

The second volume contains information on the procedures used by the designated and elected offices. This volume is divided into 20 sections, one section for each of the designated offices. Each section contains a guide as well as an annex. The guide contains a discussion of terms, procedures and interpretations of the PCT used by the office. The guide is cross-referenced to both the PCT and national patent laws. The annex contains samples of various forms used by the designated office and a discussion of such procedures as amendments, translation and fees.

The text stresses the technical nature of patent laws and administration and that the text is a basic guide and not meant to replace either the PCT or the rules of the regional offices required for patent practice.

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CARLSSON, J; SOUTH-SOUTH RELATIONS IN A CHANGING WORLD ORDER; Scandinavian Institute of African Studies, P.O. Box 2126, S-750 02 UPPSALA, Sweden (1982); ISBN # 31-7106-20G-8; LC# K3823.Ap, S62, 1982; 166 pages; 19 tables; end notes after every article, bibliography after most articles; 14th of the Seminar Proceedings from the Scandinavian Institute of African Studies.

The five articles comprising this book were presented as papers at a seminar in 1981 in Kungalv, Sweden. The articles examine relations between developing nations with a heavy emphasis on Brazil-Nigeria relations. The analysis is more macro-economic than political. It is based on
page after page of empirical data. This book has independent value as a source book. Unfortunately, some of this value is lost through numerous errors in spelling and grammar.

This book's primary worth is found in its analysis. It offers another useful, supportable view of the world from a trilateral perspective. The view is unprejudiced by any ideological slant. The only drawback to the analysis is the lack of any significant discussion of the world debt crisis.

For anyone who wants a lucid explanation of the world economy, this is good reading. For anyone who wants to understand the world economy in the next ten years, this is required reading.

Jerker Carlsson is a researcher at the Department of Economic History, University of Goteborg, Sweden.

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GOLDBLAT, J., ARMS CONTROL AGREEMENTS, A HANDBOOK; Praeger Publishers 521 Fifth Avenue, New York, NY 10175 (1983); ISBN 0-03-063709-0; LC 83-2167; xiv, 328 pp.; maps, tables, glossary, index to the Salt II Agreements, Bibliography. This is a revised and abridged version of the book which was originally prepared at the Stockholm International Peace Research Institute (SIPRI) on the occasion of the 1982 U.N. General Assembly Special Session devoted to disarmament.

This edition is intended as a handbook for students, politicians, and other concerned citizens interested in arms control and disarmament. The book deals primarily with bilateral and multilateral arms control agreements reached since World War II.

Chapter 1 is a brief historical survey of the pre-World War II efforts towards disarmament. Chapter 2 covers the activities of the United Nations in the field of arms regulations during the first years following World War II. Special attention is devoted to problems relating to nuclear weapons, proposals for the reduction of armaments, and plans for general and complete disarmament.

Chapter 3 reviews the scope of the obligations undertaken by the parties to the post-war arms control agreements and attempts to assess whether, and to what extent, each agreement has affected the arms race, reduced the likelihood of war or otherwise contributed to the overall goal of disarmament. The agreements have been divided into seven categories, according to the nature and type of the undertakings.

Chapter 4 deals with the verification of compliance and discusses, in particular, the shortcomings of the existing arrangements. Chapter 5 contains the official texts of the relevant documents and Chapter 6 contains a tabular presentation of the status of the implementation of the most important multilateral agreements.

Chapter 7 describes the existing arms control negotiating machinery, while Chapter 8 summarizes the arms control experience gained up until
the spring of 1982.

Josef Goldblat is a senior member of the Research Collegium of the Stockholm International Peace Research Institute (SIPRI). He has been studying the problems of arms control since the 1950s and has been involved in disarmament negotiations in Geneva and New York in different capacities, including service for the United Nations.

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This is a book about the art of international negotiation. It is a text for aspiring diplomats and others on how to negotiate most effectively. By bringing together recent research by scholars and the practical experience of practitioners, the authors have developed a three-stage process for preparing and conducting negotiations.

Their approach rejects the notion that skillful negotiators must have an innate "feel" for negotiations and instead assumes that much of the process can be taught and learned. Their primary teaching tool is a model which identifies the three stages in the process and associates different types of problems and behaviors with each stage: (1) diagnosing the situation and deciding to try negotiations; (2) negotiating a formula or common definition of the conflict in terms amenable to a solution; and (3) negotiating the details to implement the formula on precise points of dispute. Most of the book is spent developing the details of these stages, exploring their implications, and providing insights into the appropriate behaviors for each stage. The authors rely heavily on examples from post-war negotiations to illustrate their points.

At the outset, the book recognizes that no model can fully and accurately describe a process as complex and variable as negotiation—especially in the international context where cultural and language differences create additional complexities. The authors readily acknowledge that their approach has important limitations; it cannot, for example, tell anyone how to win. They have in fact concluded that, in theory, it is impossible to tell anyone how to do best; one can only learn how to do better.

Given this objective, the book tries to give the reader a basic theoretical understanding of the process while at the same time sprinkling the theory with enough practical tips from experienced negotiators to make the book a worthwhile "how to" book as well. Although the authors began their research by focusing on negotiating theory, their end point is a realization that fundamental character traits such as patience, self assurance, and stamina are just as important as a well-thought-out negotiating
strategy.

I. William Zartman is a professor of international politics at the School for Advanced International Studies, the Johns Hopkins University.

Maureen R. Berman is executive director of the International League for Human Rights.

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China's 1978 announcement of its ambitious modernization program, the "Four Modernizations", met with immediate foreign euphoria as Western businessmen envisioned development of "The Great Mall" along the Great Wall. Such premature euphoria has acceded to reality: China's economic plans call for a slower, balanced development with emphasis on agriculture and light industry as well as the development of its energy resources and resolving its massive infrastructure problems.

China Trade: Prospects and Perspectives offers resourceful reading for the academic and practical information for the student of Chinese trade and the entrepreneur attempting to enter China's market.

The book is divided into four parts, each containing several chapters and each chapter containing numerous sub-chapters. In Part I, "Background for Trade: China's Economy, Politics and People", Chapters 1, 2, and 3 are presented. These chapters cover the history and future of China's trade, political trends in China and their implications for foreign trade and an overview of diplomatic dealing with the Chinese.

Chapters 4 through 8 are presented in Part II of the book. The section covers selected market sectors. Chapter 4 discusses the current status and future prospects of agricultural and related imports. The geology, reserves, technology and policies of China's petroleum industry are introduced in Chapter 5. Chapter 6 presents the mineral and metal mining industries of China. Chapter 7 covers China's machine tool industry. Finally, this section closes with a discussion of the role of China's transport in industrial modernization in Chapter 8.

Case studies of China's international competition are the portions presented in Part III with Chapters 9 through 14. Chapter 9 is a summary of economic and legal data of Sino-German trade. Chapter 10 asks whether there are lessons for American traders in a discussion of Sino-Japanese trade. Chapter 11 presents a case study of Kaiser Engineering Co. Chapters 12, 13 and 14 present case studies of Pullman Kellogg, Sum- mit Industries Limited and American International Companies.

Part IV presents the practical considerations of trading in China.
These are discussed in Chapters 15 through 18. Chapter 15 covers entering the Chinese market. Chapter 16 addresses contracts with Chinese merchants and Chapter 17 presents the China differential and the legal framework of trade between the United States and the People's Republic of China. Chapter 18 covers the available financing for trade with China.

David C. Buxbaum, a member of the New York and California bars, practices law in those states and in his offices in Guangzhou, PRC. A former professor of law, he has contributed to many books and periodicals on Chinese law. He also compiled the Chinese law digest in the Martin-dale-Hubbel Law Directory.

Paul Reynolds is an Associate Professor of Law at Texas Tech University. In addition to articles on U.S. trade law, international banking and doing business in Mexico and China, Reynolds has authored two books, including his latest, *China's International Banking and Financial System*.

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This volume not only presents an up-to-date survey of the implementation of the European Human Rights Convention in each of the twenty-one member-states of the Council of Europe. It also synthesizes the thirty-year history of the Convention in order to draw conclusions as to its vitality.

Part I gives a thorough descriptive explanation of what Drzemczewski calls "the most effective and advanced international system for the protection of human rights in existence today"—the European Human Rights Commission and its supervisory organs. The author underlines the *sui generis* nature of the Convention as a "unique precedent in international law".

Part II is a detailed, comparative study of the domestic status of the Convention in each of the twenty-one member states. Clearly the permeation of the Convention into domestic law varies a great deal among the contracting states. Only seventeen of them have recognized the European Human Rights Commission's competence to receive petitions from individuals complaining of violations of a right guaranteed by the Convention of their governments. Moreover, the European Human Rights Court's decisions do not necessarily have the force of law in the legal systems of contracting states.

Part III focuses on three specific topics which may illustrate, at least in some of the countries, the Convention's expanding penetration into the
domestic courts of member states: 1) the use by domestic courts of the Convention as a kind of European standard not only for governmental action but also for relations between individuals; 2) the possible adoption by domestic courts of the ten member states of the European Community of at least some of the Convention's provisions as forming part of the "corpus" of European Community law; and 3) the Convention's influence in court decisions in those states in which the Convention has the status of domestic law, as compared with its impact in states where it is not domestic law. One interesting conclusion is that "[t]he role played by the European Court of Human Rights cannot, unfortunately, be equated with that of the Luxembourg Court[,] whose directly enforceable decisions on certain questions of European Community law prevail over all conflicting domestic law."

Though clearly an advocate of extending the power of the European Human Rights Court and the impact of the Convention, Drzemczewski has no illusions as to their real influence, as he concludes:

In short, although it is most certainly valid to claim that the [Convention] mechanism departs from reliance upon the traditional concepts in international law of "nationality" and "reciprocity" in order to protect individual rights, the facultative status of the right of individual petition, as well as of the Court's compulsory jurisdiction, unduly restricts and weakens the role played by the supervisory organs established under the Convention, and relegates this mechanism prima facie to that of a subsidiary or supplementary means of redress available to a limited number of individuals.

This book is an updated version of the thesis which Drzemczewski submitted in 1980 for his Ph.D. degree at the University of London.

Andrew Z. Drzemczewski is currently Senior Lecturer in Law at the Polytechnic of North London.

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This book is a collection of six essays which expound on a central theme: ethnicity is a significant force in world politics because it frequently operates independently of the activities of formal nation-states. The impact of this force of ethnicity thus is described as being "transnational."

The first essay establishes a framework for the subsequent essays and analyses ethnicity on three levels: intersocietal, state and global. This essay also briefly explores various themes which arise in the later pieces: the
structural inequities between advanced industrial states and developing countries, worldwide communication and transportation networks, and the interplay of ethnic groups at various levels.

The second essay discusses the impact of the Greek lobby on American foreign policy showing how foreign policy decision-making has been a primary object of ethnic-group politics. The essay also shows how states can give ethnic groups more transnational power than they can achieve themselves.

North African workers in France is the subject of the third essay, which documents the political and economic tensions inherent in relations between France and its former colonies. The article specifically highlights the economic dependence of Western Europeans on the immigrant poor from their former colonies. It shows the negative impact of such importation during periods of economic stagnation or recession.

The fourth essay explores two themes: "transnational tactics" proved useful to the Sardis in building political legitimacy and nationalistic aspirations and transnational appeals by the Sardis have proven effective in galvanizing political power Middle East politics.

Brazilian economic and technological dependence on the U.S. accelerating the black protest movement in Brazil is the subject of the fifth essay. The essay demonstrates the transnational character of the black ethnic experience. The thesis is asserted on the basis that the importation of America’s mass-produced culture through movies and music has raised the racial and political awareness of Brazilian blacks, despite the fact that the Brazilian culture inhibits black politicization.

The final essay illustrates how ethnicity intrudes into world politics through world sporting events. The essay suggests that world sports figures symbolically or explicitly may project local concerns into a domestic, regional and/or global arena, thereby operating in transnational communication.

The editor (and author of the first essay) is assistant professor of political science and director of ethnic studies at Florida International University. He is author of INTERNATIONAL CONFLICT IN AN AMERICAN CITY; BOSTON'S IRISH, ITALIANS AND JEWS, 1935-1944 (Westport, Ct: Greenwood Press, 1979). He is working on a study of transnationalism within the framework of contemporary North-South relations.

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KAVASS, I.I., SPRUDZS, ADOLPH, A GUIDE TO THE UNITED STATES TREATIES IN FORCE; William S. Hein Company, Buffalo, NY; $38.68 (paper); ISBN 0-89941-189-4; ISSN 0736-5713; x, 376 pp; explanatory introduction, key to abbreviations, numerical list of bilateral and multilateral treaties and agreements of the United States in force on January 1, 1982 divided into the following subcategories: Treaty Series (1776-1945), Executive Agree-
ment Series (1929-1945), Addenda—Unnumbered Treaties and Agreements of the United States (Pre-1950 and 1950-1981); Subject Reference Index; Part I of two parts.

The GUIDE TO THE UNITED STATES TREATIES IN FORCE provides access to currently operative bilateral and multilateral agreements of the United States from a variety of perspectives. The GUIDE is arranged in two parts. Part I consists of two sections: a Numerical List and a Subject Reference Index. Part II will deal exclusively with multilateral treaties and agreements currently in force. Its major features will be a chronological index of the individual agreements and an index to treaties and agreements by country, giving all treaties and agreements to which specific countries and the United States are contracting parties. The GUIDE is expected to be updated annually as new editions of TREATIES IN FORCE appear from the Department of State.

The Numerical List of treaties and agreements in Part I is given in straight numerical order, regardless of whether they are bilateral or multilateral. It is further divided into the different publication series (Treaty Series, Executive Agreement Series, and Treaties and Other International Acts Series) with addenda for the unnumbered treaties and agreements appearing in TREATIES IN FORCE.

The Numerical List is not intended to replace TREATIES IN FORCE. Rather it is a reference tool to be used in conjunction with the State Department's publication, augmenting the information provided in TREATIES IN FORCE in some cases and giving easier access to individual agreements.

The Subject Reference Index provides a simple listing of the subject categories utilized by TREATIES IN FORCE with the individual multilateral and bilateral agreements given under each heading.

Igor I. Kavass is a professor of law at Vanderbilt University Law School and Adolf Sprudz is a professor of law at the University of Chicago Law School.

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This book is aimed at improving the negotiating skills of the seller of a house, closer of a business deal, divorce lawyer, labor lawyer or treaty negotiator. This is a sophisticated self-help book emphasizing problems and situations where all parties involved can achieve beneficial results through the skills the author aims to develop.

"This book is concerned with situations in which two or more parties recognize that differences of interest and values exist among them and in
which they want (or in which they are compelled to seek a compromise agreement through negotiation." The author's aim is to explain some of the scientific theories of others, as well as his own, in a context of art to show how science and art can interact in a complementary fashion. Science involves a systematic analysis of a problem, while art involves interpersonal skills, including the abilities to convince and be convinced, and the ability to use a number of bargaining tools and the wisdom to know when and how to use them.

This is not a book addressed primarily to analysts and academics; it neither introduces a new nor enhances an old theory of the negotiation process. Rather, it is addressed to practitioners of negotiation—and they are legion. It publicizes a need and an opportunity for them to think more systematically and consciously, and in a more conceptually integrated fashion, about the dynamics of negotiation. The principal theme of the book is that analysis is an invaluable tool in the negotiation process.

Howard Raiffa, who is a professor at the Harvard Business School and Kennedy School of Government, also plays a prominent role in the Harvard Negotiation Workshop. He helped create the International Institute for Applied Systems Analysis, located outside Vienna, and was its first director, which involved him in negotiations with scientists from sixteen countries from East and West. Although his disciplinary roots lie in mathematical analysis and game theory, he has a reputation for making conceptual and logical intricacies simple and accessible, gained through years of teaching business and public policy to students, managers, military officers and executives.

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FIRESTONE, C. H., INTERNATIONAL SATELLITE TELEVISION: RESOURCE MANUAL FOR THE THIRD BIENNIAL COMMUNICATIONS LAW SYMPOSIUM; U.C.L.A., Department C, P.O. Box 24607, Los Angeles, CA 90024 (1983); $50.00 paperback only; LC # KF 2840.A75 U2 1983; 377 pp; footnotes, bibliography, glossary, tables, maps; part of a special series.

This collection of materials is designed to address some of the key technological, political and legal issues surrounding the concept of international television, and is a useful analysis of those issues. It includes articles, charts and documents placing the concept of global television in historical and technological perspective, facts relating to world market prospect, descriptions of the world’s telecommunications regulatory framework, and legal resources for resolving international disputes. There is emphasis on domestic decisions of the United States and a few other countries where it is particularly illustrative of a point in issue.

Introductory materials by Joseph Pelton place satellite television in a broader global and historical perspective.

One section examines existing and future markets and some of the
legal concepts and decisions affecting those markets, including a closer look at the United States, United Kingdom and Canadian and Australian systems. This includes excerpts from the recent American decisions on orbital slot deployment and transponder sales. 

Also included are transponder sales and service contracts and a discussion of satellite insurance.

The materials provide a framework for analyzing suggestions for reconciling the interest of a nation to control its own airspace with the free flow of information. They also focus on the great amount of international attention placed on the issue of satellite broadcasting across international borders.

The editors look at the prospects for direct international broadcasting by examining the interim policy of the United States for regulation of the Direct Broadcast Services service. A variety of items are brought together relating to the unauthorized use of satellite video signals. Materials applicable to both copyright infringement and other forms of unauthorized uses are included.

Charles M. Firestone is the Director of the UCLA Communications Law Program and Adjunct Professor of Law at UCLA. He was assisted in this project by Penelope Glass and Michael Morris, the 1979 Law Student Coordinators.

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John Perkins argues that international law rests no less on practical and political logic than on moral grounds and that therefore law must be recognized as the only successful strategy ever devised for the resolution of conflict. He sees the balance of power not as an alternative to international law, but as a part of the structure of law; supportive of it and supported by it. Specific illustrations from history demonstrate the political logic of international law. Applying this perspective to sensitive areas of emerging law, the right of self-determination, the rule of non-intervention, international rights in strategic areas and international rights of access to resources, the prudence of a foreign policy vis-a-vis the rules of law is tested. The basic issue is not whether international law is enforceable but whether a foreign policy not based on a commitment to law can be effective in serving the national interest.

Part One examines how the conflict-solving strategy of law is already interwoven in U.S. foreign policy and argues that an effective foreign policy for this country must be grounded in law. Part Two tests the idea that emerging law may provide rules suitable for a realistic foreign policy and evaluates the viability of the key principles of emerging law. Part Three
considers what prudent initiative toward law might be taken by the
United States unilaterally if need be, and sets forth a proposal to provide
direction and momentum for the forces that can move the world toward
law. Part Four attempts to define the kind of choice the United States
must now face.

The Author is a partner in the Boston law firm of Palmer and Dodge.
Mr. Perkins was a graduate researcher at University College, Oxford in
1978.

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McWhinney, E., Conflict and Compromise: International Law and
World Order in a Revolutionary Age; Holmes & Meier Publishers,
Inc., 30 Irving Pl., New York, NY 10003 (1981); ISBN 0-8410-0694-7, 0-
8419-0696-3 (pbk), LC 341 M257 co; 16 pp.; includes Table of Cases and
Selected Bibliography. Updated expansion of an earlier book, Interna-
tional Law and World Revolution.

This book raises questions about the development of international
law in light of the rapid changes taking place throughout the world. After
identifying four major revolutions of our time, McWhinney explores the
ramifications of each revolution.

The first great revolution was the October Revolution of 1917, which
overthrew the Czarist regime in Russia. The second great revolution of
our time was an ideological one—the cold war conflict of the late 1940s
and 1950s culminating in the developing Russian-Chinese schism in 1959.
The third revolution is in economic science and its impact on developing
third world development. The most current revolution is in science and
technology, with special impact on the world community resulting from
large-scale nuclear weapons capability, the space age, and international
telecommunications.

The author looks at these revolutions in light of their relationship
with international problem-solving. The first method of problem-solving
is that of the United Nations. This is broken down into these themes: the
inclination of the superpowers to bypass the UN, the effect of the UN
and developing countries, the challenge of changing a big-power domi-
nated and regulated world community to a more genuinely pluralistic one
with a variety of groups involved in decision-making is addressed.

Other questions are asked: What will a more equitable, more inclu-
sive world economic and public order system look like? How will groups
resolve their differences, particularly the conflict resolution required be-
tween the Soviets and the United States? How will international law be
utilized to create a new international economic order, to internationalize
the oceans economic resources and support the principles of self-determi-
nation of peoples and non-intervention in the internal, domestic affairs of
a state? This book provides an historical framework for addressing these
difficult questions in a difficult, rapidly changing time.

The author, Dr. Edward McWhinney, Q.C., is a Professor of International Law and Relations at Simon Fraser University in British Columbia. He has been a consultant to the UN, the U.S. Naval War College and the Japanese Cabinet Commission on the Constitution. His books, articles and editorials have been widely published.

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Ralph Pettman describes his book as an objective approach to the understanding of human behavior. This approach presumes that human social behavior is, to some degree, genetically determined. In short, for every society or culture there exists a gene pool which includes genes marked with traits relating to human values, morals and behavior. Thus, the objective approach would understand values to be genetic as opposed to learned. The text of the book is primarily an application of that premise applied to specific socio-political issues. These issues include racial and sexual discrimination, individual (American) versus collective (Soviet) ethics, and the concept of liberty, exploring (and perhaps predicting) the complexity of international values and policies. Pettman’s analysis includes comparisons of theories of human nature and their impact on particular cultures’ attitudes and behavior. He reviews current biological research in genetic engineering and the consequences that might result for society and politics. He also addresses questions of whether we are innately selfish in social affairs, exploring the genetics of altruism and whether the truth as we know it has a future. He reviews evidence of the importance of adequate nutrition in the context of freedom from biological deprivation and the effect of deprivation of capacity to make choices, such as our freedom to construct cultures and change them at will.

Ralph Pettman is currently a visiting associate professor in the Department of Politics at Princeton University. He has in the past been a Senior Research Fellow for the Institute of Advanced Studies at the Australia National University, Canberra. His work includes: STATE AND CLASS: A SOCIOLOGY OF INTERNATIONAL AFFAIRS; MORAL CLAIMS IN WORLD AFFAIRS (an edited collection); and HUMAN BEHAVIOR AND WORLD POLITICS: A TRANSDISCIPLINARY INTRODUCTION.

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