

January 1971

Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination

W. M. Reisman

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

W. M. Reisman, Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination, 1 Denv. J. Int'l L. & Pol'y 29 (1971).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination

Keywords

Crimes, Discrimination, Genocide, Racial Discrimination, Civil War, Sudan, War, Politics, Refugees

RESPONSES TO CRIMES OF DISCRIMINATION AND GENOCIDE: AN APPRAISAL OF THE CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION

W. M. REISMAN*

It is only in the most astigmatic of definitions that international law is considered as the law between states.¹ Viewed comprehensively and realistically it is the process of authoritative decision for events which transcend discrete groups, involving the intense interaction of members of more than one of them.² These transgroup events may entail the deprivations which the municipal lawyer would characterize as criminal delicts were they to occur *within* the group parameters to which he has been conditioned. If the disengaged observer is inclined to use the conventional characterizations of criminal law, he might well label these events as intergroup or international crimes insofar as their commission threatened either the continuing minimum value interchange between the groups or contravened common or coordinated policies of the groups concerned.

From the observer's perspective, a basic indicator of transgroup integration would be the extent to which members of different groups (1) concur over time in the characterization of certain intergroup or intragroup deprivations as crimes;

* Associate Professor, Yale Law School. Drafts of this article were read critically by Professor Myres S. McDougal, and Dr. Lung-chu Chen of the Yale Law School, by Dr. Egon Schwelb of the United Nations Secretariat and by Professor Michael Libonati of the University of Alabama School of Law. A number of their suggestions have been incorporated, but they share no responsibility for the views put forward here. Copyright is retained by the author.

¹ For a general survey of views, see H. BRIGGS, *THE LAW OF NATIONS* 93-98 (2d ed. 1952). Some quasi-official movement away from the classical definition is found in I M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1 (1963).

² For an initial systematic investigation of the rich range of participants in international decision, see McDougal, Lasswell and Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 263-67 (1967). To my knowledge no comparable model has been developed in regard to the international criminal process, in particular, the role of transnational gangs remains comparatively unexamined.

and (2) share an intensity of demand for the imposition of sanctions beyond the mere characterization of these events as criminal. If these patterns of concurrence were arranged on a world map, they would delineate many interlocking communities in dimensional schemes considerably more complex than the conventional political boundaries by which the globe is believed to be divided. Indeed, the premises of political boundaries would be thrown into doubt by such an exercise.³

Consider three wholly mundane examples of events: in the southern Sudan, on the south side of Chicago and in the City, in London. In the Sudan, a Nuer youth steals two cows from a Dinka tribesman. Although the Nilotic political cultures of Dinka and Nuer both have detailed notions of crime,⁴ neither would characterize this event as criminal. It is more an act of "war" or intergroup conflict, *i.e.*, an unexceptional event in a relation of continuing but limited hostility, for which certain traditional strategies are customarily employed.⁵ Yet the same

³ Cartography is popularly viewed as an exercise in tracing political boundaries on the face of the globe; in fact, it is used as a graphic technique for describing or prescribing any number of value activities for which the spatial dimension is significant or critical. Its "[P]rime function is to make possible the analysis of the elements of spatial variation inherent in the distributional qualities of the data under consideration. . . ." Robinson, *Cartography*, 2 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 325, 328 (1968). Unfortunately, relatively few maps have described boundaries or parameters of functional communities, for example, markets, ethnic groups, affection groups, mass audiences which take on the character of communities and so on, without regard to formal political lines. This failure is regrettable for it reinforces misconceptions and fails to exploit a dramatic means of communication for rationalizing and/or changing perspectives. For a provocative exception, see Connor, *Ethnology and the Peace of South Asia*, 22 WORLD POL. 51 (1969).

⁴ For a brief treatment, see E. EVANS-PRITCHARD, THE NUER 162-72 (1940). Cross cultural comparisons through space and through time require, of course, a search not for analogies but for functional and contextual equivalents. A primitive treatment of crime often emphasizes compensation rather than punitive components; in western civilization the priorities are reversed, implying, as it were, that it is not the victim who has suffered but rather the "community" or its abstract set of principles. In this respect, Malinowski is more than vindicated; primitive society is far more "individualistic" than is the *soi disant* "developed" political culture of the West: B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 28-32, 39-62 (1926). Malinowski did not direct his attention to the origins of this difference. In some cases, it seems to have derived from a pattern of elite exploitation; by identifying the community as the major "victim" in cases of delict, specific elites as representatives of the community accepted compensation on behalf of the collectivity. There may also be psychosocial causes; see generally S. RANULF, MORAL INDIGNATION AND MIDDLE CLASS PSYCHOLOGY (1964).

⁵ "The Dinka people are the immemorial enemies of the Nuer. . . . Almost always the Nuer have been the aggressors, and raiding of the Dinka is conceived by them to be a normal state of affairs and a duty, for they have a myth, like that of Esau and Jacob, which explains and justifies it." E. EVANS-PRITCHARD, *supra* note 5, at 125. Intergroup conflict may often be an accepted feature of life, supported rather than condemned by group norms. Anthropological literature is rich in documenting this phenomenon. But one need go no further than any contemporary pluralistic community to perceive the often bizarre coexistence of doctrines of "peace" and

event occurring between only Nuer (or only Dinka) would be characterized as the crime of theft for which specific customary sanctions would be invoked.

If, however, a northern, let us say Moslem, Sudanese, an official of the government in Khartoum who was charged with the administration of a region in which both Dinka and Nuer live, were informed of the event, he would characterize it as a "crime" and invoke the criminal process to which he has been conditioned. A police or para-military force would return the cows to the Dinka herdsman and the Nuer youth would be tried and perhaps imprisoned for a period of time. The Khartoum officials who are responsible for imposing this heteronomic criminal code on the customary conflict between Dinka and Nuer are well aware of the fact that neither of the Nilotic subgroups views the incident as "criminal." The goal of the Khartoum official is to create a new, integrated pattern in which, in this case, respect for property will be transtribal as well as intratribal. It is highly probable that the strategy of trial and imprisonment of offenders will not succeed.⁶

The theft of a bicycle by an Irish youth from an Italian youth, or by a black youth from a white youth on the South side of Chicago, may occasion identical official responses, even though the taker and the victim may not be viewing the events

doctrines of tolerable and limited conflict with members of other groups. Because each community is itself heterogeneous, such conflict may continue even when it engenders net losses because the palpable losses fall only on *certain* members of the community. Where, for example, inter-group conflict is an avenue through which poor but enterprising youths may acquire property, wives, or prestige and power within the tribe, they may insist on the continuation of group conflict, even though older, enfranchised tribal members who will be the targets of inevitable reprisals stand to lose in continuing conflict. The point is discussed in detail in J. EWERS, *THE BLACKFEET*, ch. 7 (1958). Specialists in violence have a similar interest in the continuation of those conditions which make their skills indispensable to the group which they serve or wish to serve. Examples such as these emphasize that group conflict is often an integral cultural trait and that the limitation or eradication of group strife will require radical social changes in many cultural sectors.

⁶ A comparable phenomenon is found in white gangs. See Mueller, *White Gangs* in *MODERN CRIMINALS* 45, 60-62 (J. D. SHORT ed. 1970). See also D. MAURER, *WHIZ MOB: A CORRELATION OF THE TECHNICAL ARGOT OF PICKPOCKETS WITH THEIR BEHAVIOR PATTERN* 9-18 (1964). Maurer's observations relate to professional criminals whose subculture perspective holds imprisonment as an occupational hazard rather than as the imposed shame which the dominant culture would like to see it viewed. These observations apply *a fortiori* to members of different groups which view themselves as discrete and either coarchival or superarchival with other groups; whereas these groups share few or no perspectives with adversary or victim groups, the professional criminal's self-perception is, as Maurer notes, more complex. He shares perspectives with the "suckers" and in certain circumstances or on certain levels of consciousness may identify or wish to be identified with them. The point to be emphasized is that the dominant culture which applies a range of criminal sanctions invariably views the projected effects of these sanctions as if they were applied to individuals who share their own perspectives.

as "crimes." In the American context, as in the African context, there is evidence suggesting that the strategy of the criminal sanction may not succeed in expanding the identifications of the parties and integrating the contending groups to which they belong.⁷ In certain circumstances the application of sanctions may have important if not primary functions as catharsis for the sanctioning group itself; it may vindicate the appropriateness of the exercise of authority by that specific exercise of authority itself.

A third example involves embezzlement by an English executive who thereafter flees to the United States. The peculation took place entirely in England, the company whose funds were taken was entirely English owned, and it was, in turn, insured entirely by an English company. It is obvious that American authorities will aid in the ensuing apprehension and request for extradition of the embezzler. The wholly expected patterns of *de facto* cooperation and *de jure* extradition indicate an intensely shared demand by the governmental elites of both the United States and the United Kingdom regarding the public protection of certain types of property and preferred practices as well as an intense concurrence in the characterization of deviations from those demanded standards as "crimes".⁸ In terms of the multidimensional world criminal law map, there may be a much more intense and effective community between certain socio-economic and even ethnic strata in the United States and the United Kingdom than there is between different socio-economic strata in a single sector of Chicago.

These examples point up a number of features. First, some, and in certain circumstances, much of what is conventionally called criminal behavior is simply intergroup conflict in an arena which an ascendant group wishes to view as homogenous. Second, calling such behavior "crime" may reinforce the exclusivist and parochial tendencies in each group; these tenden-

⁷ It has been asserted that the inhabitants of America's penal systems do not view themselves as convicts, but rather as prisoners of war. E. CLEAVER, *SOUL ON ICE* 58 (1968). Insofar as this is true, application of the penal sanction will reinforce rather than weaken the sense of disidentification. Other integrative sanction programs should be formulated. It is probable that Cleaver's statement describes only one identificatory trend; coexisting with it may be tendencies of identification of varying intensity, with groups in the dominant culture and consequent auto-punitive responses within the personality system. The plurality of tendencies takes different forms according to circumstance, and suggests different techniques for personality change. We are not, it should be emphasized, addressing ourselves here to the question of whether and toward what value set personalities should be formed or changed.

⁸ The point is discussed and illustrated in Nayak, *Act of State: Exclusion of Penal and Revenue Law, 1967* (unpublished doctoral dissertation, Yale Law School).

cies themselves may be the substratum of intergroup conflict. Third, applying the conventional criminal sanctions to such behavior may further reinforce it.

One challenge to the policy-oriented lawyer is the identification of those areas which should be viewed as intergroup crimes and the formulation of community responses which integrate rather than separate groups and individuals.⁹ The integration of individuals and of groups requires a minimum concurrence in the characterization of "criminal behavior." Indeed one uses the incipient sanction of characterizing as "crime" in order to achieve some degree of social integration. (As has been pointed out, the result is often dysfunctional.) This minimum must include a toleration of the right of existence of the other group and its members. Where this minimum is promulgated in some authoritative form, we encounter the authoritative characterization of crimes of genocide and discrimination. Insofar as policy calls for a continuing balance between integration and the maintenance of discrete group identity, "peace," between groups and between individuals of different groups becomes a process of controlled tension.¹⁰

Training individuals to live in such a system of peace requires that they be equipped with the capacity to identify and recognize this tension in themselves and others without diminishing their own personality systems. It is the sense of self of the individual personality in such a system which is the potential core of group discrimination and genocide. There are numerous examples of international prescriptions—customary and conventional—which insist upon the self-policing of precisely this sort of tension. The demands for minimum standards of humanity during warfare, for example, obviously increase the physical risks of belligerents;¹¹ nonetheless, they are peremptory norms in international law.

⁹ See, in this regard H. SILVING, *CONSTITUENT ELEMENTS OF CRIME* 29-31 (1967).

¹⁰ As long as intergroup peace remains a verbal quest undertaken sporadically for symbolic purposes it can, without harm or benefit, continue to be treated as a fantasy unpoliced by reality. For those, however, who are deeply concerned with minimizing intergroup conflict, it is urgent that the implications of peace be clearly understood. Intergroup peace is not a static situation which, once achieved, continues ad infinitum. It is a process which is sustained by human beings regularly making policy choices. And it is a process which may well involve enormous tensions. The psycho-personal implications of peace were probably never more pithily stated than in the 15th century Gayaneshagowa or Great Law of the Iroquois Confederacy. It admonished its officers to develop a skin "seven spans thick" so that they could withstand criticism and control anger. Cited in F. COHEN, *THE LEGAL CONSCIENCE* 222 (1960).

¹¹ A discussion of this aspect of the laws of war is found in M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 521-30 (1961). See also M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 313-16 (1959).

CRIMINAL CHARACTERIZATION AS A RESPONSE
TO UNDESIRABLE BEHAVIOR

There is a broad spectrum of techniques by which organized groups characterize and respond to patterns of behavior deemed incompatible with social life. The spectrum runs from mild civic order sanctions, such as social disapprobation of "manners" or "etiquette," to intense public order sanctions of behavior characterized as criminal.¹² Many factors enter into the choice of the characterization of undesired behavior, for characterization depends not only on the degree of damage which the undesired behavior causes the community, but also on the extent to which the type of characterization chosen itself contributes to deterrence and even rehabilitation.

On the symbolic level, the characterization "crime" should convey maximum deterrence. Hence it is no surprise that the word "crime" is reserved for that pattern of behavior which is considered either the greatest challenge to elite objectives or most deleterious to group life. Characterizations also depend upon the extent of organized power for dealing with certain behavior patterns. The characterization "crime" implies a public power to deal with it. Where the characterization is made without a power buttress, the potential deterrent power of the symbol is depreciated.¹³ This is not the place to trace the intricate interchanges between symbols and the material bases of effective power. It will suffice to note that there is such an interchange and that, when exploited with a full appreciation of the context, effective power is economically augmented. The point to emphasize is that characterization is itself a potentially effective technique for the control of deviant behavior. Characterizations involve and commit power. If applied with contextual accuracy, they increase community power; if applied poorly, they expend it.

Because of the emotive power of symbols, there is always a tendency to use words such as "crime" as a rhetorical device in private and quasi-official political discourse. But since 1945, there has been increasing international official resort to the strategy of characterizing certain types of transnational behavior as criminal. In particular, the word is now used officially

¹² See generally H. LASSWELL & R. ARENS, IN DEFENSE OF PUBLIC ORDER (1961); W. M. REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 252-58 (1971) [hereinafter cited as NULLITY AND REVISION].

¹³ NULLITY AND REVISION, *supra* note 12, at 637.

in regard to aggression¹⁴ and to human rights matters.¹⁵ This trend seems to be caused both by a "spill-over" from national communities as well as by certain dynamics in transnational interaction. The student of international law is almost constantly confronted with a spill-over phenomenon: implicit political models which are normally associated with a national community are gradually projected onto the international plane as the norm toward which international law is expected to strive. Popular thinking tends to be analogical rather than functional and contextual; as one's attention span broadens, it seems almost natural to project what has worked in the past into new and as

¹⁴ Articles 227 and 228 of the Versailles Treaty provided for the trial of the Kaiser but were not implemented. The Statute of the Nuremberg Tribunal Article 6(a) included crimes against the peace—"[T]he planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties. . ."; "Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis" 13 DEP'T STATE BULL. 222, 224 (1945). These were, of course, implemented. In 1947, the General Assembly referred codification of the Nuremberg principles to the International Law Commission: Res. 177 (II). The result, a Draft Code of Offenses against the Peace and Security of Mankind, is at Ch. IV, 6 U.N. GAOR, Supp. 9, at 10-14, U.N. Doc. A/1858 (1951). Some critics have argued that this innovation in international law was frustrated by the cold war, in that all sides regularly accused each other of crimes against the peace. In fact, the intensity and frequency of the invocation of these symbols may well indicate how deeply they have struck roots in the vocabulary of contemporary politics. On the other hand, this development may be dysfunctional in a number of contexts. It was promulgated on the assumption that there was sufficient global integration to support a universal characterization of a crime and that deviations would be rare enough to reinforce this conviction. In fact, group conflict, as will be seen, continues and is often facilitated by a variety of cultural processes. Where war is regularly characterized as a moral and legal defection, it is harder to secure accommodations and integrative solutions between belligerents.

¹⁵ The third substantive ground of jurisdiction of the Nuremberg Charter concerned "Crimes against Humanity." They were "...[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." 13 DEP'T STATE BULL. 224 (1945). See generally, Schwelb, *Crimes Against Humanity*, 23 BRIT. Y. B. INT'L L. 178, 212 (1946). The prescription was reconfirmed in Article I of the Genocide Convention: "[G]enocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish"; The Convention on the Prevention and Punishment of the Crime of Genocide, Art. 3(1) U.N. GAOR 21 Sept. 12-Dec. 1948, at 174, U.N. Doc. A/810 (1948). This provision may, I believe, be considered universal customary international law, because of the General Assembly's Resolution 96 (I) of December 11, 1946; YEARBOOK OF THE U.N., 1946-47, at 255. In the discussions of the International Law Commission regarding *jus cogens*, Dr. Shabtai Rosenne argued that the crime of genocide had been rendered an international *jus cogens* in the *Reservations to the Genocide Convention* Opinion of the International Court, 1963 I.C.C. Yearbook (I) 74, cited in Schwelb, *Some Aspects of International Jus Cogens as formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 954-55.

yet unexplored sectors of experience. Hence a spill-over of domestic patterns into international law.

A. *Historical Perspective on the Concept of Human Dignity*

There have been periods of human history in which the dignity of the individual was a fundamental cultural postulate,¹⁶ but it was not until the Enlightenment that the essentially Renaissance formulations of the inherent dignity of all human beings became firmly embedded in legitimate social and political myth.¹⁷ Thereafter, whatever content an internal public order system might actually have, the symbols of human dignity were a *sine qua non* of ruling elites. There is, little incongruity in the fact that the despotism fashioned by Bismarck boasted of the most advanced social welfare program of its times. He, as one of the shrewdest elite figures of Europe, clearly perceived that power was most effective in a satisfied polity in which all component members were committed to the order.

But the spill-over of bourgeois demands for human dignity into international law was retarded by a number of factors. Foremost, of course, was the continuing parochialism of European myth systems. The relatively low level of interaction with the non-Western world encouraged the European to think of civilization in terms of white Christendom. This was a pervasive aspect of European order and even Marx and Engels, while attacking colonial capitalism, revealed the strong imprint of racial and ethnic bias characteristic of the world in which they lived.

A second contributing factor was the economics of colonialism. Europe was rapidly transforming itself into bourgeois nation-states, in which the middle classes believed themselves to be the primary beneficiaries of a colonial trade monopoly and of the now enhanced opportunities to acquire elite privileges through the colonial bureaucracies. The prospects of great economic and social gains which they entertained tended to retard their consideration of non-Europeans in terms of human dignity.

A third retarding factor was the continuing notion of the separation of foreign and domestic policy. While a specific issue

¹⁶ See for example, W. WAGAR, *THE CITY OF MAN* (1940) for a survey of visions of a world culture. See also McDougal, Lasswell and Reisman, *Theories about International Law*, 8 VA. J. INT'L L. 188, 215 (1968).

¹⁷ See H. C. BAKER, *THE IMAGE OF MAN: A STUDY OF THE IDEA OF HUMAN DIGNITY IN CLASSICAL ANTIQUITY, THE MIDDLE AGES, AND THE RENAISSANCE* (1947); E. KAHLER, *MAN, THE MEASURE* (1943).

might become a transient *cause célèbre*, the burghers of Western Europe were content, for the most part, to view foreign affairs and the prescription and application of international law as a relatively aristocratic game in which they had no interest. With foreign affairs powers in the hands of an elite and mid-elite group which rather disdained the bourgeois democracy of its own polity, it was not surprising that anachronistic notions of sovereignty and absolute domestic jurisdiction continued.

Of striking significance, however, is the fact that the practitioners of *realpolitik* so frequently appreciated the relation of peace and human rights. The Peace of Westphalia and the numerous humanitarian interventions of the 19th century were based on the premise that in many circumstances, stability could only be purchased by international guarantees of human rights. The leading example of this recurring phenomenon was the collective intervention in Greece resulting in the formation of an independent Greek state.¹⁸

The breakdown of this old order, insulating international affairs and domestic jurisdiction, was hastened by a number of factors. One of the more dramatic and prominent was the emergence of the "Peace Movement." In the latter half of the 19th century, a variety of pacifistic pressure groups in Europe and the United States began agitating for a more stable system of international peace. Motivated in part by high ideals and in part by a crisis mentality, these groups, directing pressure at their respective governments, demanded international prescriptions in favor of peace and human rights.¹⁹ A further impetus was provided by the entrance of the United States, from its relative hemispheric isolation, into the arena of world affairs. American political myth had been strongly characterized by notions of human dignity and individual liberty and these symbols were forged into American foreign policy. The idiosyncratically American rhetoric of Root, Bryan and Wilson became common parlance in international law.

The increase of economic interdependence hastened the process. As economic colonialism ceased to pay, its committed as well as tacit supporters began to reconsider the entire phe-

¹⁸ The documents of this intervention are found in 14 BRITISH AND FOREIGN STATE PAPERS 633 (1826-27). For a detailed study of this and other 19th century interventions, see M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1962). A survey of 20th century interventions is found in Reisman, *Memorandum upon Humanitarian Intervention to Protect the Ibos* (1968).

¹⁹ Historical studies of the peace movement may be found in C. DAVIS, THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE (1962), and D. FLEMING, THE UNITED STATES AND THE WORLD COURT, 1920-1966 (rev. 1968).

nomenon.²⁰ Western trade union movements began to appreciate that low pay and low workers' standards in other countries could drag their own hard-earned standards down. Entrepreneurial groups understood the implications of sharp competition precipitated by radically uneven commercial environments. Finally, the Russian Revolution, itself a result of and a further impetus to this process, challenged the old order by promising "the workers of the world" the dignity which the oppressed sought and which, Lenin alleged, they could never receive in a liberal democracy. The Russian challenge, in turn, impelled the democracies of the West to hasten to the position towards which they had slowly been moving.

The convergence of these many factors after the First World War contributed to the creation of the League of Nations and the formulation of policies supporting minority rights.²¹ The League spanned a twilight period, in which notions of state sovereignty were still forwarded, but in which increasing demand was made in the name of international protection of human rights. The League was particularly active in attempting to control slavery, prostitution, and drugs, and the International Labor Organization laid the groundwork of a process for policing international standards for labor.²²

The multivalued deprivatory conditions which spawned the bizarre political creations leading to the Second World War were the ultimate demonstration of the nexus between peace and an international system of human rights. In response, the United Nations Charter, in its Preamble, stated with clarity the interdependence of peace and human rights²³ and imposed obligations upon all member-states to act jointly and severally

²⁰ The illusory economic benefits of colonialism to the metropolitan power were emphasized, of course, long before the 20th century. In 1793, for example, Jeremy Bentham in his address to the National Convention of France said "Emancipate your Colonies . . . because you get nothing by governing them, because you cannot keep them, because the expense of trying to keep them would be ruinous. . . ." 4 WORKS OF JEREMY BENTHAM 417 (J. Bowring ed. 1843). The major contemporary impetus came from such works as N. ANGELL, *THE GREAT ILLUSION* (1908).

²¹ See generally, J. STONE, *INTERNATIONAL GUARANTEES OF MINORITY RIGHTS: PROCEDURE OF THE COUNCIL OF THE LEAGUE OF NATIONS IN THEORY AND PRACTICE* (1932); Feinberg, *La Jurisdiction et la jurisprudence de la cour permanente de justice en matiere de mandat et de minorities*, 59 R.A.D.I. 587 (1931); J. Robinson et al, *WERE THE MINORITIES TREATIES A FAILURE?* (1943).

²² E. HAAS, *BEYOND THE NATION-STATE* (1964); E. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF ILO EXPERIENCE* (1966).

²³ Thus, the first preambular paragraph states a determination "[T]o save succeeding generations from the scourge of war . . ." and then follows with the determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"

to achieve realization of those rights as integral to the common pursuit of minimum world order.²⁴ The point was made again in the Preamble to the Universal Declaration of Human Rights²⁵ and is implicit in the Genocide Convention. Nor is the "domestic jurisdiction" clause of the Charter a bar preventing the Organization from effecting its mandate in human rights,²⁶ for the Charter conception is premised on a link between peace and minimum security and human rights. A persistent deprivation of human rights is a threat to the peace and hence a matter of international concern transcending domestic jurisdiction.²⁷ Thus, in the Rhodesian case, the Security Council specified the nexus between the violation of minimum human rights and a threat to the peace.²⁸

B. *Nexus Between Human Rights and Peace*

There is, then, a profound logic in the prominence which has been given to the international protection of human rights in the contemporary international organizational structure. The United Nations is primarily a security organization, committed to maintaining minimum world public order. But the maintenance of order in an economic and sustained manner is not a police operation; it involves rather the structuring of a system of public order which promises its individual citizens the protection and development of their most intense personal demands and, as a result, arouses a spontaneous loyalty. A civilized community maintains itself by the commitment of its citizens to it, and not by policing and terror and, as we shall see, the promise of basic human rights is crucial to the security of any pluralistic community.

Early commentators of the Charter criticized that instrument as a confusing hybrid, which indiscriminately mixed essential security matters with provisions guaranteeing human and economic and social rights. They were in error. Peace,

²⁴ See U.N. CHARTER arts. 55 and 56.

²⁵ The first preambular paragraph of the Universal Declaration (General Assembly Resolution 217A (III), December 10, 1948) provides that "... [R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ..."; YEARBOOK OF THE U.N., 1948-49, at 535.

²⁶ U.N. CHARTER art. 2(7).

²⁷ Thus, the late Judge Lauterpacht: "... [H]uman rights and freedoms having become the subject of a solemn international obligation and of one of the fundamental purposes of the Charter, are no longer a matter which is essentially within the domestic jurisdiction of the Members of the United Nations. ..." H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 178 (1950); see also footnote 33 *infra*.

²⁸ Security Council Resolution 217 (1965), Nov. 20, 1965: Resolutions and Decisions of the Security Council, 20 U.N. SCOR, 1265th meeting 8 (1965).

in the sense of continuing expectations shared by all peoples that public order will be maintained by noncoercive means and that the structures of public order will be responsive to the legitimate demands of human beings, necessarily rests on a coordinate expectation: that public order structures seek the inherent worth and dignity of all men and are animated to secure the realization of these values. The conditions of peace require a lofty conception of civilized comportment. This comportment can be forthcoming only if the processes to which individuals are asked to commit themselves are unequivocally devoted to a comparably high conception of humanity. Human rights are the necessary condition of peace.

There is an equally profound if considerably more subtle nexus between human rights deprivations and international crimes: *delicta juris gentium*. The conception of "crimes against humanity" as international crimes, established by the framers of the London Charter,²⁹ was more logical than the framers themselves may have realized. In any group, elites will characterize certain types of behavior as delictual or criminal and, hence, subject to community supervision or sanction, insofar as they believe that such characterizations maximize their own aims. Many such characterizations may have some coherence and logic in terms of the cultural calculus of that system. But objectively, the only characterizations of crime which are rational are those which do, in fact, sustain order and improve group life.³⁰ Because of the inseverable link between the establishment of human rights and the maintenance of minimum world order, it is now much more urgent to characterize human rights deprivations as international crimes than, for example, piracy as a *delictum juris gentium*.

C. Racial Discrimination and Genocide

The first human rights declaration after the framing of the Charter was the General Assembly's Resolution 96(I) of 1946³¹ on genocide. The resolution was stimulated by the Nazi holocaust; significantly it was the recrudescence of antisemitism in the winter of 1959 in Europe and especially Latin America which moved the General Assembly to an urgent consideration of the international prevention of racial discrimination. The Genocide Resolution is of crucial importance to an understanding of the

²⁹ The Statute of the Nuremberg Tribunal, Article 6(c), 13 DEP'T STATE BULL. 224 (1945). For historical parallels see 1 DROST, THE CRIME OF STATE 223 (1959).

³⁰ H. SILVING, *supra* note 3, at 6.

³¹ G.A. Res. 96, YEARBOOK OF THE U.N., 1946-47 at 255 (1947).

Convention on the Elimination of All Forms of Racial Discrimination, for genocide is not only the ultimate denial of human rights, it is, in the deepest sense, the logical outcome of discrimination. As such the United Nations' authoritative condemnation of genocide forms the subliminal basis and essential authority for the Convention on Discrimination. The 1946 Resolution stated in part that

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. . . . The punishment of the crime of genocide is a matter of international concern.³²

Genocide does not just happen. It is the destructive outcome of a process which may have begun in seemingly innocent and mundane attitudes and behavior. Part of it is normal personality development in which the individual ego distinguishes itself from the "other." This process is facilitated by ritualized community indications of the legitimate "other." But once the "other," an alien group, is identified, the precondition of genocide has been fulfilled; for genocide cannot even be conceived without a cultural definition of the target group.³³ One of the more terrifying revelations of the most cursory examination of the problem of genocide is how frequently this precondition is fulfilled.

When we examine the world historical scene, we may note that many times, in many countries, bureaucracies have

³² *Id.*

³³ A predominantly sociological rather than psychosocial explanation of the etiology of intolerance is found in E. RAAB & S. LIPSET, *PREJUDICE AND SOCIETY* 28 (1959). Lipset seems to incline to the view that patterns of prejudice are simply learned from social models, without any crucial regard to the psychological development of the individual. A different approach may be found in T. ADORNO, FRANKEL *et al*, *THE AUTHORITARIAN PERSONALITY* (1950) and B. BETTELHEIM & JANOWITZ, *DYNAMICS OF PREJUDICE: A PSYCHOLOGICAL AND SOCIOLOGICAL STUDY OF VETERANS* (1950). A useful comparative survey of theories of the nature of prejudice is found in G. ALLPORT, *THE NATURE OF PREJUDICE* (1954). His conclusions of the etiology of prejudice are generously tolerant, for he views prejudice as a complex phenomenon which is caused by different stimuli in different contexts. Hence all theories—sociocultural, situational, psychodynamic and phenomenological—are right some of the time. The view developed here is that these diverse theories relate to exacerbating events rather than to the cause or, perhaps more accurately, to the capacity for prejudicial discrimination. Discrimination is a malignancy of that process which our culture is pleased to call normal personality development. Insofar as we continue to demand this form of personality development, we will produce individuals who are prejudice-prone. Short of reevaluating preferred personality models, there is no "cure" for prejudice, but only a stabilization through self-understanding. This analysis reveals a number of implications about the treatment of prejudice as a crime.

launched the opening phases of a destruction process. . . . Very often, seemingly harmless bureaucratic activities—such as the definition of a particular group and the exclusion of its members from office—contain the seeds of administrative continuity. Potentially, these measures are stepping stones to a killing operation, but as a rule insurmountable barriers from without and within arrest and disrupt the destructive development. Externally, the opposition of the victims may bring the process to a halt; internally, administrative and psychological obstacles may bar the way. The discriminatory systems of many countries are the leftovers of such disrupted destruction processes.³⁴

Where the genocide process stops short of group destruction, we encounter discrimination, a form of intense human deprivation. It does not necessarily follow from this that the normal processes of ego formation must be suppressed. It does mean that any pluralistic community must set bounds of legitimacy to the identification and cultural characterization of other groups. And not only when the juggernaut is spinning to conclusion, when the threat of genocide against a specific group has materialized, but as an integral part of the legal toleration of cultural differentiation.

Striking a balance between a sense of discrete individuality and the sense of integral identity with increasingly inclusive groups and ultimately with a single ecosocial process is, of course, an ongoing problem in organized group life and a continuing concern for the policy scientist. Our species characterizes itself by the inculcation of a tendency toward self-awareness which we currently style "ego"; our civilization is quite inconceivable without such conditioning. Yet when self-awareness extends to a sense of discreteness, the individual may act in such a way as to precipitate grievous damage on others and on the biosphere without appreciating the very real self-destruction which is involved. While specific historical cases of racial discrimination may be a response to a variety of unique stimuli, the latent capacity for such discrimination is a part of personality growth—at least, as we currently nurture it. Like most recurrent crime, the international crimes of racial discrimination and genocide must be treated, not in retrospective sequences of punishment, but in prospective sequences of identification and prevention. Like most recurrent crime, this, in turn, involves a careful appraisal of ourselves and our own value-institutions, the very coordinate points by which we characterize the behavior of others as deviant and delictual.

³⁴ R. HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 639 (1961).

The reasons for the characterization of racial discrimination as a form of deviance from an international norm can thus be seen as both the culmination of historical trends and, equally, as a rather logical response to the needs of an organizing global community. Historically, a variety of metaphysical and divine-transempirical ethical systems in almost all cultures and civilizations have posited the fundamental human dignity of the individual. As a matter of logical response to environmental conditions, it has become increasingly clear that an interdependent global community cannot sustain itself tolerably once it has acquired the technological capacity to destroy itself, if the coin of common exchange is genocide and discrimination. Hence the unequivocal statements of international principle outlawing genocide and discrimination. A question for the policy scientist is whether the techniques adopted in the Convention, to date, are the optimum approach to this type of social control problem. For the answer, we must consider the pending international response to racial discrimination.

THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The history of the Convention can be recounted briefly. In January of 1960, the Subcommission on Prevention of Discrimination and Protection of Minorities condemned renewed manifestations of antisemitism in Europe and Latin America and delegated the collection of factual information on the etiology of racial discrimination.³⁵ On the basis of this information, the Subcommission recommended that the General Assembly prepare an international convention.³⁶ At the 17th session of the General Assembly in 1962, plans for much broader conventions were formulated; one on racial discrimination, which was to be given priority, and one on religious intolerance. The Declaration on the Elimination of All Forms of Racial Discrimination was adopted in November, 1963³⁷ and the Economic

³⁵ A detailed history of the background of the convention and *travaux* is found in Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L. Q. 996 (1966). For a survey of the work of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, see Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. 869 (1968).

³⁶ Report of the 12th Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, U.N. Doc. E/CN.4/800, para. 163 (1960).

³⁷ Report of the 13th Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, U.N. Doc. E/CN.4/815, para. 176 (1961).

and Social Council's Commission on Human Rights began the formulation of a convention. The draft was completed in 1964, was considered by the Third Committee of the General Assembly in 1965, and was adopted, on December 21 by the plenary General Assembly.³⁸ The Convention has been acceded to by five states and ratified by 44 states as of April 30, 1971.³⁹ It went into effect on March 31, 1969.⁴⁰ The United States has signed but has not ratified the Convention.

The convention is structured in three parts: substantive, procedural and technical, and jurisdictional matters. Let us review each of these parts briefly, relating them to the totality conceived by the drafters. Practice may fall short of this comprehensive picture, for states may adhere to the Convention but make reservations in regard to specific sections.⁴¹ Article 20 obliges the Secretary General of the United Nations to circulate reservations at the time of accession or ratification. Any state which has already adhered may inform the Secretary General that it does not accept the reservation. Article 20(2) provides that

A reservation incompatible with the object and purpose of this Convention shall not be permitted nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.

On its face, this provision seems to import that no reservation to the enforcement procedures of Part II of the Convention will be tolerated, with the exception of the secondary jurisdiction of the International Court of Justice. Reservations may, however, be made to the substantive provisions of Part I, if they are not incompatible with the object and purpose of the Convention and if less than two-thirds of the other parties object.⁴²

³⁸ G.A. Res. 1904 (XVIII), 18 U.N. GAOR Supp. 15, at 35-37, U.N. Doc. A/5515 (1964).

³⁹ G.A. Res. 2106A (XX), 20 U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6014 (1966).

⁴⁰ The Convention was in force as of January 4, 1969, thirty days after deposit of the 27th ratification. But because a number of states had attached reservations to their accessions or ratifications, a ninety-day protest period had to elapse during which other signatories might object to the reservations which had been submitted. When this article was written, the procedures of implementation called for by the Convention had been formulated, but not yet promulgated.

⁴¹ International Convention on the Elimination of All Forms of Racial Discrimination, Art. 20, para. 2, 1965, YEARBOOK OF THE U.N., at 440, 445-46.

⁴² The basic principles regarding reservations are found in the International Court's *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. [1951] I.C.J. Report 15. The principles have been codified in Articles 19-23 of the Vienna Convention on the Law of Treaties, A/Conf. 39/27, 23 May 1969.

A. *The Substantive Provisions*

Article 1(1) of the Convention defines "racial discrimination" as

. . . any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The range of this seemingly broad provision points up immediately a conceptual defect of the Convention. The threat to minimum global order and the challenge to an emerging world community is not *racial* discrimination, but discrimination in general. Discrimination on the basis of criteria such as class, sex, interest or skill group affiliation, personality, mode of sexual expression, or physical or psychic "abnormality" may, in some contexts, be as threatening to world order and just as contrary to human dignity as is racial discrimination. Because the empirical reference of "race" is so ambiguous, many instances of social discrimination which are generally referred to as racial in character have actually entailed discrimination on the basis of many of these other factors. The erroneous assumption that racial discrimination is *de maximis* and urgently requires political consideration runs, unfortunately, throughout the Convention.⁴³

Even within the self-determined purview of Article 1, there are some peculiar and politically significant gaps. The specific rights guaranteed and protected by the Convention are set out in detail in Article 5. The basic policy of Article 1 applies to noncitizens with ambiguity (paragraph 2), nor does it affect domestic provisions of nationality, citizenship, or naturalization as long as they do not discriminate against a particular nationality (paragraph 3).

Article 1(4), an extremely significant provision, reads:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not

⁴³ As noted earlier, the framers of the Convention purposely shifted the focus from religious to racial discrimination, assuming that other forms of discrimination would be treated in other instruments. The problem of religious discrimination is on the General Assembly's agenda; the Declaration on the Elimination of Discrimination against Women was adopted by the General Assembly in Res. 2263 (XXII). This writer discerns a trend in international organizational affairs to give these other discriminatory practices less attention and less innovative procedural routes for implementation.

be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This developmental exclusion, which is reiterated in Article 2(1) (e), Article 2(2), and Article 7, is a crucial and realistic part of the program; it seeks to go beyond the outward manifestations of racial discrimination and to create a society of genuine equality for all individuals. It is one of the most important and problematical parts of the Convention and will be treated in greater detail below.

When Article 1(1) is balanced with Article 1(4), the predominant conception of racial discrimination continues to be one of severe repression of the vigorous demands of a subjugated group. Discrimination may start in this manner, but at some point it becomes a reciprocal process. The great wound of continuing discrimination is its internalization in the target; the discriminated person who has, after years and perhaps generations of alien acculturation, begun to adopt the image the discriminators hold of him and to doubt his own and his group's worth will always lack sufficient self-awareness and self-confidence to avail himself of the formal rights and prerogatives which the law purports to offer him.⁴⁴ One of the most arduous and delicate challenges of the elimination of racial discrimination will be the elimination of internalized or self-discrimination. This process may well involve violence to established structures and cultural values within the discriminated group, for the elite of a discriminated group has often reached an accommodation with the surrounding society of discrimination and may view any change as a threat to its own, limited ascendancy.⁴⁵ The various claims which will inevitably be

⁴⁴ The apparently suicidal doctrines of violence of a number of minority groups which are attempting to emancipate themselves from self-discrimination can only be understood in this framework. Fanon's counsel of violence and Gandhi's counsel of non-violence (and violence!) are essentially strategies by which members of suppressed groups challenge the encompassing authority perspectives which they have internalized within themselves and which they must necessarily repudiate on the psycho-personal level in order to achieve a greater degree of freedom. "In rebel groups not strong enough to overthrow a state, terrorism may be a technique—in some cases a ritual—which is part of their strategy to repudiate and remain independent of the authority system." E. WALTER, *TERROR AND RESISTANCE: A STUDY OF POLITICAL VIOLENCE* 7 (1969). See also B. CROZIER, *THE REBELS: A STUDY OF POST-WAR INSURRECTIONS* (1960).

⁴⁵ Consider, for example, the apparent enthusiasm with which tribal chieftains in Rhodesia have supported the Smith regime despite its gross racist character. In these circumstances, the active political awakening of tribal members will involve destruction of traditional tribal structures of authority. If models of social alternatives are not readily available, grave personal disintegration may ensue. Comparable struggles may be ob-

raised in a program of elimination of racial discrimination under international auspices will be much more realistically handled if those authorized to apply the Convention operate with a grasp of the enormity and complexity of the problems confronting them.

There are other more specific drafting and policy problems. The language of Article 1(2) opens the way for discrimination against noncitizens, which in some contexts may constitute *de facto* racial discrimination. If the noncitizens are stateless and without hope of diplomatic protection, they are the most helpless creatures in international law. Much of East African racial discrimination against Indians is probably not covered by the Convention. On the other hand, Article 1(3), which excludes from the convention domestic provisions of nationality, citizenship, or naturalization as long as they do not discriminate against a particular nationality, may be formulated too broadly. A significant number of ethnic states practice preferential immigration and naturalization as a means of maintaining their existence, and it is not clear whether the intention of paragraph 3 was to challenge the lawfulness of this practice.⁴⁶

Articles 2 to 7 of the Convention set out the substantive obligations of contracting parties. This section is not tightly organized and close examination reveals some redundancy. Three basic undertakings which are scattered through the five articles emerge. These are, first, a governmental obligation to

served in the American Negro community between militants and conservatives. It is urgent that social planners accept the fact of the intense integration of socially dysfunctional and even suicidal behavioral patterns and appreciate, as a result, that change will require more than the promulgation of a single law or resort to a single type of strategy. Dr. Karsten observes on the suicidal warfare among the Jibaro Indians: "The wars, the blood feuds within the tribes, and the wars of extermination between the different tribes are continuous, being nourished by their superstitious belief in witchcraft. These wars are the greatest curse of the Jibaros and are felt to be so even by themselves, at least so far as the feuds within the tribes are concerned. On the other hand, the wars are to such a degree one with their whole life and essence that only powerful pressure from outside or radical change of their whole character and moral views could make them abstain from them." Karsten, *Blood Revenge and War Among the Jibaro Indians of Eastern Ecuador* in P. BOHANNAN, *WAR AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 304 (1967).

⁴⁶ One paradox of the contemporary program for the extension of the international protection of human rights is that it is carried out under the auspices of nation-states; yet a plenary international regime of human rights imports a drastic diminution of the power of state elites. Full human rights, for example, involve the freedom of the individual to identify with as many territorial communities as he wishes; on the macrogroup level, it involves the free movement of people, without political impediment, to those global sectors in which they can maximize the values which they pursue. Many of the ambivalences which are observable in human rights conventions can be traced to elite desires (or accession to the desires of others) to acquire control over the symbols of human rights, but not to grant so many that they thereby attenuate or obliterate their own political power.

eliminate, within official processes, all racial discrimination; second, a governmental obligation to eliminate discrimination by individuals and organizations within the state; and, finally, an obligation to undertake a developmental program. Let us consider each of them briefly.

The first undertaking is a formal obligation of parties to the Convention to prohibit discrimination by public authorities and institutions at all levels of government. It is introduced in Article 2(1)(a). In implementation, parties are obliged to bring domestic legislation into line with the international standards of the Convention.

Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

The so-called "federal clause" doctrine of treaty laws is clearly excluded from these undertakings.⁴⁷ If a federated state adheres to the convention and one of the public authorities or institutions of its component states or provinces does not enforce the basic rights guaranteed by the convention, the central or federal government is responsible to the deprived citizen *under international law*. Thus, when the United States ratifies the Convention, if the courts or executives of Mississippi or Alabama persist in practicing segregation (a complex of human rights deprivations), Negroes in these states could petition the federal government for remedies. The federal government would be obliged under international law to supply them, for Article 6 of the Convention states that

States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 4 sets out the ramifications of the protection and remedies available:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of,

⁴⁷ See Vienna Convention on the Law of Treaties, art. 27; A/conf. 39/27, May 23, 1969.

such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention. . . .

The Article proceeds to spell out these obligations in three subsections of which the first and second are most important.

States Parties

(a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

(b) Shall declare illegal and prohibit organizations and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law.

U.S. Apprehensions

The specter of a conflict of these provisions with U.S. constitutional liberties has been raised in certain quarters. The words "with due regard to the principles embodied in the Universal Declaration of Human Rights" in the opening paragraph of Article 4 were inserted in order to permit an accommodation of the obligations of the Convention with the constitutional principle of freedom of expression.⁴⁸ There may be a very serious evasion involved here. One can read Articles 2 and 4 as obliging states to do everything permitted within their constitutional structures to combat discrimination. But this interpretation tends to suppress the fact that in many cases the elimination may require elemental constitutional changes. Or one can read these provisions as obliging states to change their constitutional structures in order to achieve a more effective balance between the freedom of expression and the freedom to live in a society without racial discrimination.

The U.S. Government has tried to balance the competing policies in ratifying other treaties. In some of the peace treaties after the Second World War, the U.S. inserted provisions guaranteeing freedom of expression, but outlawing fascist or neo-fascist groups.⁴⁹ On the other hand, when the world has looked toward the U.S. in regard to violently racist organizations, we have pleaded constitutional incapacity.

⁴⁸ Schwelb, *supra* note 35, at 1024.

⁴⁹ See for example, Peace Treaty with Hungary, Feb. 10, 1947, arts. 2, 4, 41 U.N.T.S. 168, 172, 174; for other treaties, with comparable provisions, see Schwelb *supra* note 35, at 1022.

Without slighting the worth of free speech nor gainsaying the fragility of the doctrine, our constitutional lawyers must face the problem squarely. Liberty of speech is no more dear a freedom than the liberty to be a member of a group without shame and without constant insecurity. And this is especially so in a society composed of many diverse groups.⁵⁰ This is not to suggest the spasmodic enactment of statutes automatically outlawing verbal racism. No policy should be applied without considering the manifold effects its implementation may precipitate in present and projected contexts. Indeed, ill-considered application of such statutes in the past seems to have done little more than provide a platform and opportunity for increased dissemination of racism.⁵¹

The thrust of the Convention seems to require the re-establishment of a balance between the liberty of expression and responsibility for the effects of that expression. This balance in turn will involve a new evaluation of the normative distinction between expression and action, on which the judicial development of the First Amendment seems to have been premised.⁵² When the United States ratifies the Convention, a number of institutional changes will follow. This should not cause consternation. In urging ratification of the Genocide Convention, Chief Justice Warren said: ". . . men and their institutions do not stand still in the face of great changes. We are not so uncertain of ourselves and our future that we cannot make our institutions conform to our needs as a progressive people."⁵³ Libertarian movements in the West have frequently ranged themselves against official governmental processes; this recurring adversarial posture has led many to identify official power *per se* as a threat to liberty. The real question is, however, who uses power, for what purposes and with what effects. Power can be used to establish the conditions of freedom. Clearly the reduction of discrimination and the attendant threat to mini-

⁵⁰ A candid and illuminating discussion of these problems is found in Ferguson, *The United Nations Convention on Racial Discrimination: Civil Rights by Treaty*, 1 *LAW IN TRANSITION* Q. 61 (1964). Working with an earlier draft of the Convention, Dean Ferguson concludes that incitement to racial discrimination which might lead to overt acts could possibly fall under the classic Holmesian doctrines and be lawfully proscribed in conformity with Justice Holmes' notion of the First Amendment. The article is extremely useful in pointing up the difficulties involved in applying the Convention in the American constitutional context.

⁵¹ See generally Riesman, *Democracy and Defamation: Control of Group Libel*, 42 *COLUM. L. REV.* 727 (1942).

⁵² T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 16 (1966).

⁵³ Address by Chief Justice Earl Warren, Conference on Continuing Action for Human Rights, Dec. 4, 1963, Washington, D.C. at 5.

num and optimum public order will require the judicious use of power.

The second undertaking obliges each adherent "not to sponsor, defend or support racial discrimination by any persons or organizations." Coordinate with this undertaking is the obligation set out in Article 2(1)(d) to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization." Article 4, which we have considered, spells this out in greater detail.

What comprises "sponsorship, defense or support"? In its narrowest reading, the provision prohibits governmental sponsorship of an S.S. or S.A. type of organization, but this phenomenon would be covered by Article 2(1)(a) and it is more reasonable to suppose that the words refer to a broader range of governmental support and succor. The granting of tax exempt status to an organization which preached or practiced discrimination would, to my mind, be prohibited by this section of the Convention. One might, for example, enjoin IRS from allowing tax exemption to a Church or nonprofit school or camp which practiced discrimination or the Department of Agriculture from giving such organizations food and so on. In short, Article 2 conceals a broad sanction potential, whose effective realization will depend upon accommodation of the provision with other domestic constitutional policies.

B. The Developmental Program

The third major undertaking of Part I of the Convention is what we have referred to as the developmental program. The elimination of discrimination is not an end in itself, but is a means to an end. That end—the establishment of a world public order of human dignity—is emphasized in the preambular statement of the Convention, as well as in numerous places in the Charter. Racial discrimination is a major bar to the achievement of such a world system. Discrimination, as we have noted, does not just happen; it is the product of a complex process in which discriminator and discriminatee are affected. Specific programs to combat discrimination must ultimately conform to a preferred conception of the total human being, or, in the conventional legal formulation, to a comprehensive conception of human rights.

The term "human rights" manifests the circularity so characteristic of legal formulation. It imports that certain privileges attach as of right to human beings, but does not indicate

their notional content, procedures for their ascertainment, procedures for their application, or the type of context which must be fostered if they are to flourish. It is necessary to clarify the goal image of the human being which we wish to develop as the optimum realization of his own potential and the individual most capable of participating in and sustaining world peace and the strategies by which this can be accomplished.⁵⁴

Given a conception of the inherent worth and dignity of every individual, a feasible configurative approach to the problem of international human rights requires an extended temporal conception of man from birth through his various life cycles, interacting in a variety of groups from the most inclusive to the nuclear, and an extended value conception of man as a creature pursuing all values in all institutional processes. There can be, then, no artificial starting point for the law of human rights. It begins with birth and possibly even with the prenatal conditions necessary for the development of a healthy fetus, includes the critical "socialization" procedures of the infant and the child, includes education of the young, inculcation of the capacity to adapt to new environmental demands as man passes through his congeries of life cycles, and concludes with the social protection of the old.

The temporal span of human rights must be emphasized, for it is insufficiently appreciated. The most elaborate system of human rights protection cannot avail fetal man in Biafra, Bengal or Appalachia whose undernourished mother produces a physically or psychologically damaged child. The most elaborate system of human rights protection cannot avail the respect-deprived child in Mississippi or Rhodesia who will never develop sufficient ego to make demands in his own name as an autonomous human being. The most elaborate system of human rights protection will not avail the child in the urban slums reproduced throughout the globe who grows in a distintegrating family circle and who emerges as an irreparable cripple in the process of giving and receiving affection. The most elaborate system of human rights cannot avail the youth who has never acquired sufficient enlightenment and skill to participate fully in power, wealth, and other value processes. The most elaborate system of human rights protection will neither avail nor command the loyalty of the worker who, in a changing environment,

⁵⁴ A brilliant programmatic outline of such a conception may be found in McDougal, Lasswell and Lung-chu Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1969). See also M. MOSKOWITZ, *THE POLITICS AND DYNAMICS OF HUMAN RIGHTS* 98-100 (1968).

knows that he will be abandoned once his hard-acquired skills and his health have obsolesced. In short, the conception of human rights, if it is to be effective, must be coterminous with the life of man.

Similarly, an effective system of human rights protection must extend to every value process. Living within a peace rather than a war system requires a totally integrated personality capable of resolving personal and inter-personal conflicts without the easy recourse to rage and violence. A human rights system able to create and sustain such individuals must be one which, through its noncoercive structures, promises and effectively secures the conditions of unimpeded self-realization in every institutional process. Human rights, then, must be understood in terms of full participation in the shaping and sharing of power, wealth, enlightenment, skill, well-being, affection, respect and rectitude. The persistent deprivation of any of these values for any group or any individual cannot only be recorded as an infringement of human rights: by generating the frustrations that drive men to violence, it is a direct threat to global peace.

The Convention on the Elimination of Discrimination is quite clearly committed to this comprehensive conception of human rights. Articles 1(4), 2(1)(e) and 2(2) make detailed references to an ongoing program aimed at the elimination of discrimination. These provisions could not, of course, specify content. The implementation of the development program will be a complex task, carried out for the most part on the municipal and local level and varying enormously from state to state and even from region to region and city to city within one state. It will incorporate what have traditionally been considered criminal and civil techniques. Influenced as it will be by local conditions, one can, nevertheless, indicate certain general patterns. First, programs must be directed at both the discriminated and the discriminators. Article 7 is directed primarily to the latter group.

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture, and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Discrimination is not, of course, a one-way flow. Where stereotypical racial identifications are culturally tolerated, it is a recip-

rocal process. Many of the Chinese minority in Indonesia despise the Indonesian majority with an intensity equal to that directed at them, as do many Indians in East Africa and Negroes in America. Racism is emotionally maiming, under any circumstances, but the urgent target for education in each case is the majority.

The success of a campaign to eliminate racial discrimination will turn ultimately upon programs for those groups which have traditionally been deprived. Selective preferences aimed at giving these groups opportunities of which they have been deprived are not considered discriminatory under the Convention. They are an express obligation. Articles 2(2) provides

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Programs under this provision must not aim at the mere elimination or assimilation of races or groups, but rather at countering the conditions which have held individuals in subjection and have ultimately eroded their own ego systems. Assimilation is a patronizing term, negating the legitimacy of minority groups and minority cultures and implying an inferiority in the cultural potential of a group. It is a term which reflects a discriminatory cast of mind and its application can only engender more discrimination. Majority groups must grasp, as Camus would put it, the essential equality of all human experience⁵⁵ and must supply the opportunities for members of discriminated groups to clarify, value and appreciate, without apology, the uniqueness of their own cultural experience. What is involved is not guidelines, but the environmental conditions which have been the natural birthright of many a majority group child. In the final analysis, there is no emancipation other than autoemancipation; the possibility for genuine integration exists only among emancipated individuals.

⁵⁵ If social pluralism is a recurring feature of interaction, its acceptance as policy preference does not involve a value neutralism. Those committed to a pluralistic order may readily concede that all available models of social order are choices, yet insist that orders which seriously affect them take account of their own preferences. The existential insight which is at the core of a pluralistic conception must, thus, continue to animate it at every moment.

C. *Jurisdictional Possibilities*

Because of the enormous variations in the conditions and types of discrimination throughout the world, the primary instance of implementation of the Convention, is at the state and the national level. Problems such as implementing legislation, insofar as it is necessary, policy choices of how to deal with particular problems and especially to what extent to allocate jurisdiction to public or civic order processes will be dealt with initially on a national basis. Presumably, the principle of exhaustion of local remedies will apply.⁵⁶ Persistent deviations on the national level will, however, be susceptible to invocation in a series of organized international processes.

The Convention incorporates five potential jurisdictions, only one of which is a new creation. It does not expressly incorporate private organizations. The new creation, a Committee on the Elimination of Racial Discrimination, may prove to be a remarkably flexible instrument, not only for eliminating discrimination, but also as an impetus for adherence to the Convention and formal recognition of its standards. Because of the complexity of the Committee's composition and procedure, it will be considered last, after a brief survey of the existing decision processes which have been incorporated.

1. The Security Council. Insofar as a persistent deprivation of human rights constitutes a threat to the peace, the plenary jurisdiction and sanctioning powers of the Security Council are activated. The Rhodesian case is a sound precedent for the principle that racial discrimination may, under certain circumstances, constitute a threat to the peace and bring the enforcement powers of Charter Chapter VII into operation.⁵⁷ Hence persistent deviations from the standards set in the Convention on the Elimination of Racial Discrimination as well as peremptory rights assured in other international documents may permit invocation of the Security Council. In the light of the Rhodesian case, note should be taken of the fact that the offending state need not be a member of the United Nations nor party to the Convention in question in order to perfect the jurisdiction of the Council.

2. The General Assembly. Under the Uniting for Peace Resolution,⁵⁸ the Assembly has a secondary, contingent juris-

⁵⁶ For a detailed discussion, see NULLITY AND REVISION, *supra* note 12, at 359-75.

⁵⁷ For a detailed discussion of this point and a consideration of doctrinal views, see McDougal and Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

⁵⁸ G.A. Res. 337 (V); 5 U.N. GAOR Supp. 20, at 10-12, U.N. Doc. A/1775 (1950).

diction for security matters: it comes into operation when the Security Council is unable to function because of its unique and often paralyzing decision dynamics. Additionally, the Assembly enjoys a primary jurisdiction in regard to many matters covered by the Convention on the Elimination of Discrimination. Charter Article 11(2) provides in part that

The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member and [with some restrictions] . . . may make recommendations with regard to any such questions to the state or states concerned

Article 13 authorizes the Assembly to initiate studies and make recommendations for the purpose of

promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 14 authorizes the Assembly, if the Security Council is not seized of the matter, to

. . . recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Although the Assembly may encounter budgetary problems in mounting a large-scale program, it has nonetheless authorized concrete actions and they have, at times, been significant determinants in international relations. Each of these jurisdictional bases of the Assembly has direct application to the substantive provisions of the Convention on the Elimination of Discrimination.

3. The International Court. The Council, the Assembly, and any other agency which has been accorded a general right pursuant to Article 96(2) of the Charter may request an advisory opinion of the Court on a matter pertaining to the Convention on the Elimination of Discrimination, if the requesting agency itself enjoys a jurisdiction over the matter.⁵⁹ As early as the Eastern Carelia case,⁶⁰ the Permanent Court of International Justice made it clear that it would not entertain under its advisory jurisdiction cases which were actually contentious. Yet it is tactically possible to abstract a claim of nonapplication of standards set in the Convention and to request an advisory opinion, thereby adding to the compulsion of a general

⁵⁹ Current advisory jurisdiction is set out in [1966-1967] I.C.J.Y.B. 39.

⁶⁰ Status of Eastern Carelia [1921-1926] P.C.I.J. ser. B, No. 5 at 7 (1923).

international decision the authority of the International Court. In addition to this pervasive ground of jurisdiction, the Court may also acquire full contentious jurisdiction in regard to a matter covered by the Convention, if the defendant and the claimant state have adhered to Article 36 of the Statute of the Court *without regard to any formal incorporation of the Convention in their general adherence*. Since activation of the implementative machinery of the Convention may be an *actio popularis*, the crucial question will often actually be whether the defendant has adhered; any other party to the Convention may bring the case. Much of the effectiveness of this strategy will depend upon how the Court interprets "interest" in Article 62 of its Statute. In the *South West Africa Cases*,⁶¹ the Court deprived itself of jurisdiction by innovating an extremely narrow definition of this term.

In addition to the Court's jurisdiction which derives from general international law, the Convention also creates a second ground of jurisdiction in Article 22.

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Ordinarily, one would expect reservations to drain a jurisdictional clause such as this of all relevance. But in the case of the Convention on the Elimination of Racial Discrimination, other factors may counteract the persistent reluctance of states to submit themselves to the jurisdiction of the International Court of Justice. The diversity of jurisdictions offered by the Convention, each of which manifests a different decision structure in which different groups and ideologies may be paramount, opens the way for forum shopping. For many states, the International Court, structured as it is, may be preferred over the Committee on the Elimination of Racial Discrimination. Although the doctrine of *lis alibi pendens* is still somewhat ambiguous in international law, adherence to the Statute of the Court may allow states the option of moving a claim under the Convention directly to The Hague.⁶²

⁶¹ Southwest African cases, [1966] I.C.J. See also, N.Y. Times, June 28, 1971, at 1, col. 6.

⁶² Insofar as the Connally Amendment is interpreted as extending across the board to all U.S. general adherences to the Court (Declaration of 14 August 1946; deposited 26 August 1946), the United States is precluded from participating in this strategy. The point underscores the real defect of the United States' reservation: insofar as the reservation operates, it

4. A number of other United Nations organs and agencies may exercise a jurisdiction which assimilates the standards of the Convention on the Elimination of Racial Discrimination to the web of instruments composing their own jurisdictional base. The Economic and Social Council and, in particular, the Commission on Human Rights, have a general jurisdiction in this area, even without the substantive particularizations of the Discrimination Convention; the norms of highest generality from which the Convention's provisions are drawn are stated in the United Nations' Charter and, at a lower level of generality, in the specification of the Charter's principles found in the Universal Declaration of Human Rights.⁶³ The human rights programs of the International Labor Organization may overlap the Convention in certain circumstances.⁶⁴ In addition to these instances, the Discrimination Convention, in Article 15, explicitly incorporates the United Nations processes available to the peoples of colonial countries which have not yet achieved independence. Conversely, the Committee on the Elimination of Racial Discrimination established by the Convention may refer data which it has collected to other bodies of the United Nations which may have a firmer jurisdiction or readier access to the relevant parties.

5. The unique creation of the Convention is the Committee on the Elimination of Racial Discrimination; its composition and procedure are detailed in Part II of the Convention, in Articles 8 to 16. The Committee is to be composed of 18 members, representing a broad international diversity, nominated and elected by the parties to the Convention; the members are to serve four-year terms. The complex schizophrenic character of these members follows the usual international pattern; they are obliged to be impartial, yet they are state members in the sense that if a member should resign or die his state appoints a succeeding member. The Committee will adopt its own rules

prevents the United States from resorting to a potentially effective diplomatic instrument.

⁶³ In this regard, mention must be made of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, a sub-commission of the Commission on Human Rights of the Economic and Social Council. See Claude, *The Nature and Status of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* 5 INT'L ORG. 300 (1951); Hiscocks, *The Work of the United Nations for the Prevention of Discrimination*, DIE MODERNE DEMOKRATIE UND IHR RECHT 713 (1966); Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. 869 (1968).

⁶⁴ For one rather clear example, see International Labor Organization Governing Body, Report of the Committee on Discrimination, GB 154/4/29 (1963) at p. 3. See also E. HAAS, *supra* note 22, at 353-55.

of procedure,⁶⁵ elect its own officers and meet at the United Nations headquarters. The Secretary-General will provide Secretariat personnel for the Committee, a procedure which may raise some operational difficulties. The communication of administrative and legislative details, which is mandatory upon parties to the Convention, is made through the Secretary-General.

The first function of the Committee is continuous appraisal of "the legislative, judicial, administrative or other measures" which have been adopted within states to give effect to the Convention. Each party is obliged to render a biannual report and the Committee is authorized to request further information if necessary. The Committee's reports, conclusions and recommendations are transmitted to the Secretary-General who reports them to the General Assembly annually. This Committee function of appraisal and recommendation should not be underestimated. If it is carried forward impartially, a total public picture of trends in regard to the elimination of racial discrimination will be available. Trouble spots will be highlighted and publicized and priorities and tactics for action can be determined by official and private international organizations operating beyond the formal confines of the Committee. The threat of international exposure may stimulate some states to take more active measures to combat racial discrimination. Much, of course, will depend upon the composition of the Committee and the independence of its members. If there is political horse-trading within the Committee and the Committee itself manifests a racial bias or a selective geographical blindness, its purpose will be frustrated.

The second function of the Committee involves decision (in its broadest sense) in regard to a claim brought by one state party that another state is not giving effect to the provisions of the Convention. Article 11 authorizes *any* state party to do this. When the claim has been lodged, the Committee transmits it to the "defendant" state, which must submit, within three months, written explanations clarifying the matter and the remedy (if any) taken. If the matter has not been satisfactorily adjusted within six months, either state may refer the matter to the Committee once again. The Committee then perfects its jurisdiction by ascertaining either exhaustion of domestic reme-

⁶⁵ A proposed draft of rules for the Committee on the Elimination of Racial Discrimination has been prepared at the Boalt Hall School of Law. See, *Rules of Procedure for the New Tribunal: A Proposed Draft*, 56 CALIF. L. REV. 1569 (1968). Since this article was written, rules of procedure have been put into effect.

dies or the inapplicability of the rule. It may also request further information. The actual procedure of the Committee will depend upon the formulation of its own rules. But Article 11, in providing for agents, suggests the possibility that an adjudicative or quasi-adjudicative procedure may evolve.

Once the information is collected, the Chairman of the Committee appoints an *ad hoc* Conciliation Commission of five members. Its personnel need not be members of the Committee, but they must receive the unanimous consent of the parties to the dispute and, deviating from arbitral procedure, they may not be nationals of the disputants. If the parties are unable to choose five members for the Commission, the Committee will elect them by secret ballot. Through its good offices, the Commission is to seek to secure an amicable solution of the dispute in conformity with the standards of the Convention. The expenses of the Commission will ultimately rest upon the disputants, but while the matter is pending, the Commission members will be paid by the Secretary-General.

If the Commission is unable to arrange an amicable solution, it transmits its factual conclusions and recommendations to the Committee. The chairman then communicates the report to the disputants. Within three months, the disputants must report whether or not they accept the conclusion. Finally the chairman notifies all parties to the Convention of the final outcome of the matter.

There are many obvious weaknesses and defects in this involved procedure. But given the contemporary international context, the magnitude of the achievement must be appreciated. The nucleus of an enforcement system has been created, and it has been done in a way which may extend realization of the Convention. Because a decision organ of some authority has been created and because it will play a decisive role in the clarification of the general substantive provisions of the Convention, there is an impetus to states to adhere to the Convention in order to play some role in the illumination of international standards of racial equality through the process of customary prescription. When the bare minimum of 27 states adhered to the Convention, international law regarding discrimination for every state in the world began to be prescribed by these 27 states.⁶⁶

The *actio popularis* character of Article 11 is susceptible to abuse. Given the prevalence of racial discrimination and the

⁶⁶ See, in this regard, Newman, *The New International Tribunal*, 56 CALIF. L. REV. 1559 (1968).

possibilities for retaliatory invocation of the Convention, there may be a strong motive to "judge not that ye be not judged" Invocation of the Committee may also be used as a diplomatic instrument to secure other ends. The creation of a United Nations Commissioner on Human Rights and his integration within the Convention's implementive machinery may resolve this problem. On the other hand, we need not fear "escalation", if it involves bringing more and more cases of discrimination before international jurisdictions.

The fact that neither the Committee nor the Commission are authorized to take "binding decisions" is a relatively minor point. The compulsive consequences of any decision do not rest upon a piece of paper but upon the conjunction of authority and control upon which the decision process in question operates. Authority and control are matters which must be manipulated by the Committee with full regard to the context of each case which comes before it.⁶⁷

Article 14 of the Convention provides a final optional jurisdictional ground. A party to the Convention may declare that it recognizes the competence of the Committee to hear petitions from individuals within its jurisdiction who claim to be victims of discrimination as set forth in the Convention. It may also create a special instance within its jurisdiction to hear claims which have gone through the conventional domestic processes, before the claim moves to the international level. The Committee will then bring these claims anonymously to the attention of the State in question. The state must reply within three months and indicate what remedy, if any, it has taken. The Committee's competence to entertain individual petitions will come into effect only when 10 states have made voluntary declarations.

6. Private Organizations: Traditional theories of international law have tended to overlook the very real participation of non-official and non-state entities in authoritative transnational decisions. Private entities have been particularly critical participants in the international protection of human rights and insofar as the peculiar structuring of the global power arena continues, the effectiveness of international human rights, particularly in crisis, may well depend on them. At a number of points, the United Nations structure permits the participation of non-state entities. It is particularly unfortunate that the Convention on the Elimination of Racial Discrimination has not

⁶⁷ For discussion of this point, see Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1 (1969).

followed that precedent and made express provision for direct non-official participation in the Convention's regime.

D. *Evaluation of Jurisdictional Diversity*

From the municipal criminal law standpoint, the array of available and in many cases coarchical instances for supervision of the Convention and for policing infractions of it may seem perplexing and problematical. On the municipal level, competing jurisdictions are usually associated with conflicts of law and keen forum shopping; preferred jurisdiction in conventional textbook terms, is exclusive and effective. In fact, the range of instances for the Convention is probably beneficial from the standpoint of the integration of the global community. There are, moreover, contextual equivalencies for this sort of spectrum of application agencies in municipal systems.

In any complex territorial community, the problems of securing conformity with social norms and policing deviation are seldom the province of a single agency. The courts and the implementing machinery which they initiate and supervise loom largest in the perspective of the lawyer. In fact, the family, the school, the church, the employer or trade union, the army are involved, at different stages, in inculcating predispositions to comply and in policing them. In many instances, court enforcement integrates these other social institutions. A parole or conditional release may integrate school authorities, parents or siblings, employers and so on. In other instances, authoritative agencies of the community enforce the criminal law by a complete bypass of the courts. Charges will not be pressed if X "leaves town" or joins the army and so on. Thus the systematic presentation of international instances for the control of discrimination indicates no qualitative difference between international and national law.

The availability of diverse instances of coarchical jurisdiction means that choices are available and are often necessary. While guiding principles for jurisdictional choices have been developed in detail elsewhere,⁶⁸ a number of guidelines can be made specific in this context. (1) Effectiveness: the choice of an international arena should be based on considerations of the maximum effectiveness of the projected decision. Since no single arena can be maximally effective for all cases, instancial choice will always require detailed contextual analysis including contextual projections of alternate responses to desired decisions. (2) Maximal Authority: where effectiveness is assured,

⁶⁸ NULLITY AND REVISION, *supra* note 12, at 241-62, 277.

choose arenas which represent the maximal authority for all participants concerned. (3) Optimal Participation: give preference to arenas which are structured to allow for widest participation. (4) Integration: where possible, forge instantial combinations which themselves represent prescriptions for the international protection of human rights.

CONCLUSIONS

Recent history has emphasized that no nation, no region, no city can flourish, perhaps even survive, unless it fashions an equitable solution to racial conflict and, more generally, to discrimination. Because the technological revolution has shrunk the world, the entire community of man is presented with the same challenge. Discrimination is a matter of international concern; its elimination is intertwined with the prospects of international survival. New creations in international law are often invested with an extreme promise which they cannot fulfill. It is important to emphasize the magnitude of the problem with which we are faced. The tendencies toward racism or ethnicism or any other form of social choice predicated on identification with a particular group run deep in the socializing procedures of the young and they are reinforced by a continuing sense of global crisis.

Until we are willing to undertake radical revision of the preferred conception of the human person and personality, and are willing to socialize our young to a perception of their equal integrality with, rather than superior discreteness from, the environment, the learned technique of disidentifying with others in order to increase self-identification will continuously pave the way for variant forms of discrimination. For extended periods there may be no examples of discrimination but the tendencies will be activated by crises in which the integrality of the extended or nuclear self is perceived as threatend. The cultural artifact as opposed to the biological reference of race which was originally used to create a certain type of personality system and a group political system is then reinvoked to secure its continuation.

Because tacitly authorized discrimination is such a powerful instrument of personal and group organization, those power elites who are the primary beneficiaries of this organization can be expected to be somewhat ambivalent about its eradication. There is no reason to affect surprise over the Convention's equation of discrimination with racial discrimination or over the fine legal exclusions of certain national practices which

were traded, balanced and carefully written into the Convention. For most of the elite groups involved in framing the Convention, a public stand in terms of these symbols promised the greatest political dividend. The phenomenon of elites concerning themselves first with matters of their own special interest is, of course, an inseparable aspect of elite systems. The dynamics of this system are such that an intense myth of human dignity can be extended and exploited without being put into effective and sustained practice. This may be the fate of the Convention on the Elimination of Racial Discrimination.

It requires no stretch of the imagination to conceive of a global or near global system in which contending territorial elites stabilize their common public order at "tolerable" levels of oppression. Each elite allows the other a relatively unimpeded prerogative of discrimination over certain internal groups. Claims of unlawful discrimination on the international level are ritualized in rhetoric, serving a stabilizing function *within* domestic public order systems by distracting local attention from abuses at home and, at the same time, sustaining an expectation of global crisis which justifies in the public mind an otherwise intolerable level of discrimination and oppression.

The Convention on the Elimination of Racial Discrimination makes no attempt to attack discrimination at its roots and, indeed, the thrust of the entire Convention is toward the symptoms rather than the etiology of racism. Symptomatic treatment can be beneficial in alerting members of the world community to the prevalence of racism, to its incompatibility with a common conception of humanity and, ultimately, to its threat to world security.

The express identification and denigration of racism can aid the target group of racism in a number of ways. It communicates to the object of racism that his lowered position is not the result of his own inferiority, as he himself often comes to believe, but to external influences which are imposed on him; with this realization, the first step toward combatting the pathological condition is possible. The aggregating effect of these different trends may facilitate a radical reappraisal of some of our most basic cultural postulates, but the machinery proposed by the Convention is hardly capable of itself undertaking such a massive intellectually challenging and emotionally volatile program. The conditions for crimes of discrimination and genocide will unfortunately continue; with the Convention, the opportunities for anticipating the crimes and preventing or limiting them may increase.