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FOREWORD

This inaugural publication reflects a growing interest in international law among men and women of law and policy science. Today, there are momentous changes and challenges on the international scene with vast legal and policy implications. Man's probe of the frontier areas—outer space, and the ocean depths—forces students of law and policy to rethink traditional concepts of order. Protection of human rights, inherent in American law, has become a matter of legal and policy concern on the international scene. Little wonder, then, that scholarship in international law and policy has captured the attention of some of the finest minds. Hopefully, the pages of this publication shall provide a wider audience for the keen thinking of these scholars.

The University of Denver has reacted affirmatively and enthusiastically to the growing interest in international law and policy. Its Graduate School of International Studies has earned a deserved solid reputation for thoughtful research and reflection about the changes and challenges internationally. Concurrently, the College of Law has, within its orbit of interest, provided leadership in teaching, research, and community involvement. With the appointment of Ved P. Nanda to the College of Law faculty in 1964, its interests were given new and exciting dimensions. Each year since 1965, the College has been host to a regional conference of the American Society of International Law. In 1969, the faculty began to require the course in International Law for every first year student. In 1970, the faculty established an International Legal Studies Program here. And last spring, the College offered a course on Transnational Business Transactions, as a part of the continuing legal educational program. Now, with this publication, international law and policy has a voice and forum at the College of Law: a valuable voice and forum for meaningful dialogue on perplexing problems and for student training and research. Indeed, the faculty recognizes the interdependent nature of the world community; it accepts the challenge of making a contribution toward clarifying international legal problems.

It is especially appropriate that this first issue is dedicated to Myres S. McDougal, undisputed authority in international law and policy. With his lifelong devotion to legal teaching and
scholarship, his untiring efforts in promoting human dignity, and his impact upon international legal thought, "Mac" has rightly earned a warm and singularly unique place among his colleagues—scholars, teachers, practitioners, jurists—everywhere. Kudos, respect and gratitude go to him on his sixty-fifth birthday, through these pages.

The faculty of law and administration of the University present, with congratulations to the staff and with pride, this first issue to all concerned with international order in the expectation that it will be used not only as a forum of sharing thoughtful scholarly writing and critical commentary on current international problems, but that it will also offer innovative ideas for promoting and strengthening international order.

ROBERT B. YEGGE
Dean and Professor
College of Law
The Association of *The Denver Journal of International Law and Policy* wishes to express its deep gratitude to the following.

**Jonathon C. Cox**  
**Jeffrey O. Brown**  
**Victor L. Abbo**  
**Robert G. Heiserman**

It was through their dedication that the *Journal* came into existence. They laid the groundwork from which the present Association grew and provided the Association with the concept that they were to evolve a forum for the exchange of ideas on the entire range of international activities for students, practitioners and academics.

Messrs. Cox, Brown, Abbo and Heiserman were instrumental in overcoming the numerous obstacles to the establishment of this *Journal*. Their energy, dedication and hard work in guiding the *Journal* through its infancy have earned them the sincere appreciation of the entire *Journal* Association.

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**From the Editor...**

I once told Professor Nanda, in a moment of despair, that it was unrealistic for the University of Denver to contemplate publishing an international law journal. After all, we had no money allocated for such a venture, we had one already established journal, we did not have a large law school population, and, as we were land-locked for one thousand miles in every direction, the only thing international in the entire state was the airport. Professor Nanda responded by inquiring whether there was an interest in publishing such a journal and whether that interest was substantial enough to continue publishing in the future. As to the former, the proof is evident. As to the latter, who can tell yet? I can only say that since our initial discussion we never doubted what the answers to both would be.

One is tempted in an opportunity such as this to pay some personal debts of gratitude to the people who make a journal a
reality. It somehow seems appropriate to lump everyone together and catch them all in a collective phrase of "thanks" for their individual talents and contributions, but I am going to succumb to the temptation to satisfy a few of those debts. To the people who are inadvertently omitted, I apologize and trust that each realizes how important his role was in producing this journal, whether mentioned here or not.

The other International Law Journals were of tremendous help, information, and encouragement from the very beginning of our endeavor as was the yearly ASILS' (Association of Student International Law Societies) International Law Journal Workshop. Michael Massey, Michael Goldner, and John Davidson, respective editor-in-chiefs of the Denver Law Journal have been invaluable in their advice and cooperation. Many pitfalls were avoided, due to the advice and information received from these gentlemen.

Two contemporary student organizations deserve special note: the SBA (Student Bar Association) under Julian Graza for giving us encouragement and funding at a critical time; and the GSA (Graduate Student Association), under the guidance of Ralph Monteen, for assisting us with funding.

Of similar help and encouragement were a number of professional people in Denver. The Honorable Zack Chayet, John A. Moore, Donald W. Hoagland, and William R. Ross have always been interested in our project as was demonstrated by their devoting time and expertise to us as we needed it. Needless to say, both their stature and their interest buttressed our hopes in the early days of the journal. Frank and Gladys Oppenheimer have been unceasing in their commitment to help in any and all ways, lending both skill and support. Without Edward Goodin this journal could not possibly have become a reality. He provided support and encouragement that was invaluable. Mrs. Genevieve Fiore provided a warmth and encouragement that was so welcome. Dean Robert C. Good of the Graduate School of International Studies has also provided valuable support and encouragement. All these people helped us establish a strong base of professional community interest. Without this kind of interest, I am convinced the ultimate publication of the Journal would have been much more difficult.

To Dean Robert Yegge we owe special gratitude. While it is difficult to assess the contribution of the atmosphere of a law school to a publication such as ours, Dean Yegge created an academic environment in which as students we felt anything
was possible. We never faced problems of tradition or image as obstacles to our progress toward publication—it was only a question of whether we could produce the journal and whether there was enough interest and dedication.

Professor Ved Nanda provided the basis for our entire effort. We simply could not have done it without his help, guidance, and support. We were and are grateful to have him as our faculty advisor, and we only hope we will live up to his expectations.

Finally, a brief word about Professor Myres McDougal from a student's point of view. We searched for a way to distinguish both ourselves and this publication from all others. It was only when we settled upon the idea of dedicating this journal to a man of such awesome intellect and productivity that everything jelled. From that moment our direction and purpose were fixed, and I can honestly say that the rest has been both easy and rewarding. Our hope is to try to do his contribution to International Law justice with this contribution to him and his field.

Jonathan Cox
Former Editor-in-Chief
The Denver Journal
OF INTERNATIONAL LAW AND POLICY

VOLUME I FALL 1971

MYRES SMITH McDOUGAL

The Journal feels it appropriate to initiate its existence by honoring one of international law's most distinguished authorities, Professor Myres S. McDougal. As students we have been greatly influenced by him and his policy-oriented approach. This is reflected by our title, *The Denver Journal of International Law and Policy*.

We can add little to what is said hereinafter; his colleagues amply expound the reasons for our decision to dedicate this issue to Professor McDougal. He exemplifies the innovation and creativity which is part of international legal studies.

This issue is a tribute to Professor McDougal, containing both comments on, and exhibits of, his influence on the work of his students and colleagues. A formal acknowledgement of his academic career follows as an introduction, illustrating well the expanse of his personality and work.

A.B., A.M., LL.B., University of Mississippi, 1927; B.A., B.C.L., Oxford University, England, 1930; J.S.D., Yale University, 1931; Doctor of Humane Letters, Columbia University, 1954. Assistant Professor of Law, University of Illinois, 1931-1934; Associate Professor of Law, Yale University, 1934-1939; Professor of Law, Yale University 1939......; William K. Townsend, Professor of Law, Yale University, 1944-1958; Sterling Professor of Law, Yale University, 1958......; Visiting Professor of Law, Cairo University, Egypt, 1959-1960. Lecturer, Fulbright Conference on American Studies, Cambridge University, 1952; First John A. Sibley Lecturer, University of Georgia, 1964; occasional lectures: The Hague Academy of International Law, The U.S. Naval War College, The National War College, The Army War College, The Air University. Assistant General Counsel, Lend-Lease Administration, 1942; General Counsel, Office of Foreign Relief and Rehabilitation Operations, Department of State, 1943; of counsel to the Government of Saudi Arabia in the Aramco Arbitration, 1955-1956; Member, U.S. Panel, The Permanent Court of Arbitration, 1963......; President, American Society of International Law, 1958; President, Association of American

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SPEECHES AND ADDRESSES


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Myres S. McDougal
Ved P. Nanda*

Myres McDougal is primarily known as a scholar. But those who have actually worked with him are also keenly aware of his qualities as a human being and a teacher, who has continuing concern and sincere interest in his students. I recall that the entry-way to his office was constantly occupied by students anticipating and always sharing part of his otherwise too busy and hectic schedule; indeed, I have learnt a great deal from him about friendship and respect for individuals.

My experience with Professor McDougal as a scholar, involved in interdisciplinary and collaborative methods, is also memorable. For instance, my first course with him—Public Order of the World Community—was taught by an impressive list of scholars, including Harold Lasswell, Leon Lipson and McDougal. In the International Organizations Seminar, Harold Lasswell, Oscar Schachter, Egon Schwebel and McDougal marshalled their varied expertise and wit to the benefit of the seminar group—an event unparalleled in my scholastic career. A similar approach that bears his personal stamp ‘frequently marked other courses; Law, Science and Policy; Sharable and Strategic Resources; Constitutive Process of Authoritative Decision, to mention a few.

The impact of the “New Haven School”, associated with Professors McDougal and Lasswell, is as yet unmeasured. The task of clarifying the problems of world public order and providing viable alternatives is a continuing one. Yet, within this ongoing process Professor McDougal has had distinct and unique impact, challenging, directing and shaping international legal thought.

But perhaps as important, Professor McDougal has touched the lives of so many as teacher, colleague and friend. In fact, few others in legal education anywhere have enjoyed as much affection from their students.

The comments that follow represent the feelings of those close to him; they express some of the magnitude and depth of McDougal’s intellect and personality. They speak for themselves and for all who know him. In view of Professor McDougal’s all pervasive influence, this Journal, as well as the entire field, owes him a great debt.

*Professor, College of Law, University of Denver. Director, International Legal Studies Program.
The vigour of civilized societies is preserved by the widespread sense that high aims are worthwhile.
Whitehead, The Adventure of Ideas (1932) 286.

The launching of the Denver Journal of International Law and Policy is the occasion for rejoicing. As with older student sponsored journals it demonstrates first, that the modern American law student is keenly aware of the fact that many of the critically important problems which require analytical treatment transcend national frontiers, and second, that space limitations prevent orthodox law reviews from coping with the multifaceted theoretical and practical dilemmas which these problems generate. A third point should also be mentioned. Aware that our library shelves already groan with hundreds of journals, a skeptic may well ask, why add to the number? The answer, it is submitted, is not difficult. The subject of international law is so vast and the wealth of student research now devoted to it in seminars across the nations is so extensive that it is a pity to consign able student effort to some professor's file or dusty alcove. The prospect of publication not only heightens the incentive to do high quality work, it is likely also to produce results that add significantly to our store of knowledge. It need hardly be added, of course, that the incentive is spurious and the accretion to knowledge is negligible unless the student effort is measured and screened by exacting standards of scholarly integrity.

The dedication of the "kick off" issue of this Journal to Myres McDougal is particularly appropriate. What scholar of

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* Judge, International Court of Justice; former James Monroe Professor and Dean, University of Virginia Law School.

† I have elaborated on this theme a little more extensively in the initial issue of the Georgia Journal of International and Comparative Law, which is, at this writing, in the process of being published. I recognize that student journals are not confined to student contributions. This suggests that another source of available material lies in the many regional meetings sponsored by the American Society of International Law such as that held at the University of Denver Law School in May, 1969. See, 64 Am. J. Int'l L. 158 (1970).
our time has done more to challenge conventional doctrine, stimulate probing controversy, and generate constructive thought? What man has done more as scholar, teacher, head of professional bodies and lively disputant in professional meetings, to energize an entire discipline? To me the answer is too clear to admit of doubt. And this seems true whether one agrees, either in gross or in detail, with the policy oriented approach, sometimes known as "the gospel according to Harold and Mac."

It was to be expected that the policy oriented approach would arouse vigorous reactions, a consequence attending most pioneering intellectual efforts. Its novelty, its comprehensively syndetic quality, its insistence on the consistent use of many terms unfamiliar to orthodoxy, its employment of insights drawn from other disciplines (notably communication theories), its explicit introduction of "values," its de-emphasis of rules in favor of empirically revealed subjective expectations—these and many other features elicited reactions ranging all the way from dedicated espousal through restrained skepticism to active opposition. And naturally even those who did not merely "react" but who took the time to probe the assumptions underlying the approach and who might be considered sympathetic, yet registered and continue to register reservations on specific aspects. This too was to be expected. The significant point lies elsewhere.

The novelist John Steinbeck, speaking of critics, is credited with the whimsical comment that the quality which best distinguishes a critic as a man of superior discernment and sincerity is his willingness to indulge in unqualified praise. But

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2 Need it be said that the reference is to Professor Harold Lasswell?

3 Despite its formidable title, an able analysis and rebuttal of three prevalent criticisms is to be found in one of Professor Moore's well written and comprehensively documented articles. See, Moore, PROLEGOMENA TO THE JURISPRUDENCE OF MYRES MCDUGAL AND HAROLD LASSWELL, 54 VA. L. REV. 662 (1968). The three criticisms deal with: (a) the special rhetoric employed by the approach, (b) its instrumental quality and value emphasis which may lead to chauvinistic manipulation of law and (c) its allegedly practical unwieldiness. My own reservations are located at a different level. They have to do with a too heavy emphasis on "decision making" as a focus of inquiry and a too heavy reliance on empirically derived data as a clue to meaning and significance. It has been well said that the significance of behavior is not exhausted by observing it. A too heavy emphasis on empirically derived data may tend to suggest that the manifestation of behavior tells its own story whereas the story may be distorted unless subtle mental operations are brought to bear upon it and unless the behavior is located in a frame of reference which may itself elude observation. The problem bothers the historian as well as the jurist. See PHILOSOPHICAL ANALYSIS AND HISTORY 265-96 (Dray ed. 1966). But all this takes us far afield and I am sure Professor Mcdougal would have a ready answer to any doubts of this kind. Several years ago I attempted to search out some of the assumptions underlying the approach. Dillard, The Policy Oriented Approach to Law, 40 VA. Q. REV. 626 (1964).
unqualified praise, however pleasant, rarely serves as a reliable index of influence. This is measured by, among other things, the extent to which the author’s ideas command sustained attention, their capacity to help resolve complex problems and ultimately the degree to which they tend to set fresh thought in motion.

It is a tribute alike to the quality of Professor McDougal’s thought and the respect he commands to suggest that his monumental contributions to our discipline are so well known (even when not altogether understood) that no one can claim to be sophisticated who is not aware of them. In this sense he may be bracketed with Williston or Corbin in the field of Contracts or Scott on Trusts or Powell on Property but, in effect, the comparison is not apt because Professor McDougal’s contributions, as noted above, are in a more protean field and challenge accepted doctrine. Of how many 20th century legal scholars can this be said? Taking the sweep of our own history, Roscoe Pound comes to mind since early in the century he, too, challenged conventional notions about law and the legal and social order. Unfortunately he devoted little attention to international law. Suffice it to suggest, in short, that Professor McDougal has, indeed—to use a trite but nevertheless accurate phrase—become a legend in his own time.

Less well known than his books and articles are his qualities as an executive when called upon to act in that capacity. So far as I can ascertain he is one of only two men (the other being the late Professor Edwin Dickinson), in the long history of both the American Society of International Law and the Association of American Law Schools, to have been elected president of each. This, in itself, is a testimonial to the respect and regard held for him by his colleagues. More to the point, however, is the fact, known especially to those who were then in close association with him, that he brought to each office a quality of energetic and imaginative leadership that was pervasively felt. This was manifested in many ways including his ably articulated espousal of the needs of our discipline which ultimately led to sustained and systematically organized research efforts backed by substantial foundation support. In both his presidencies he exploded the myth that because renowned scholars do not seek executive power and may even disdain it, they are thereby incapable of wielding it.

Shifting our focus, it is soon appreciated by those who do intellectual battle with Professor McDougal, either in live dis-
course or in writing, that they are not opposing a man who takes lightly challenges to his ideas. Sometimes this may lead to the conclusion that he is too forthright in his denunciation of ideas with which he disagrees. But it is to be noted that his rebuttals are never *ad hominem* but always buttressed by reasoned argument and a host of authorities. His strongly held convictions about law as an instrument for human betterment and his disdain for all forms of "black letter" approaches to the solution of complex legal problems are not attended by any kind of petty, personal animus directed against those who may either ignore the true gospel or read it through distorted lenses.

This ushers in a final note which I shall sound even at the risk of appearing too personal. To all who happily have come within the more intimate circle of his influence it is well known that, at the human level, it would be difficult to find a warmer, more generous or more loyal friend. Genially coupled with this quality is still another. Despite his vast contributions to our literature and despite his forthright espousal of his own ideas, there is nothing about him that bespeaks the heavy handed pedant who may be best described as a man who fails to distinguish between taking his work seriously, which is always necessary and taking himself seriously, which is never required. As a non-Yale colleague who has shared with him many common experiences, such as lecturing in Egypt, at The Hague and at Oxford, and who has spent many hours with him not only in professional activities but also in friendly banter and pleasant revelry, I can vouch for the engaging fact that Professor McDougal never equates being serious with being solemn. Not only is he one of the great scholars of our time endowed with a superior mind; he is a very jolly companion graced with a light touch.

The University of Denver College of Law is to be saluted on venturing to publish a new journal. And it does itself honor by honoring Professor McDougal who has done so much to spread the sense that high aims are worthwhile and can be realized.
MYRES S. McDOUGAL: PIONEER FOR THE YEAR 2010

RICHARD A. FALK*

Writing against the bloody mainstream of our history, Myres S. McDougal has dedicated his life to a demonstration of how law might contribute to a more valuable human existence at all levels of political organization. In this brief comment I shall confine myself to his contributions to world order studies, the area wherein Professor McDougal has concentrated his efforts for more than twenty years and a subject matter wherein the relevance of law seems to be persistently put in question by the words and actions of statesmen.

The central endeavor of Professor McDougal, and the impressive array of first-rank scholars who have joined in the enterprise form what might be designated “an intellectual collective” which I have labeled elsewhere as the “New Haven approach,” has been to demonstrate that international law is useful if appropriately conceived and that international law is used, whether wittingly or not, by decision-makers trying to balance assertions of self-interest against probable counter-assertions in a way that is mutually satisfactory. In this respect, the case for normative relevance ultimately rests in our historical period on the universal need to discourage the kind of violence that might generate recourse to nuclear weapons. McDougal’s writings have been sensitive to this overriding consideration, as well as to the conflicting tendencies among principal states for world dominance. In this respect, McDougal’s writings presuppose the beneficial influence exerted by the United States and allied liberal democracies upon foreign societies and the correspondingly detrimental influence exerted by the Sino-Soviet group of actors denominated as “totalitarian.”

As such, the central tension in McDougal’s thinking is between the universalistic criteria of world order and the particularistic criteria of American foreign policy. By historical circumstance,

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1 See R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 342 (1970); Gidon Gottlieb has reached the same kind of judgment under the rubric of “the Yale approach”. G. GOTTLEB, The Conceptual World of the Yale School of International Law, WORLD POLITICS 108 (1968).

2 It is more accurate to conclude that McDougal and his associates have recast the traditional perspectives of “international law” in a more broadly conceived framework of “world public order.”

3 This element in McDougal’s thinking is made particularly clear in McDougal and Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, in McDougal et al. STUDIES IN WORLD PUBLIC ORDER 3-41 (1960).
in part, there is increasing evidence that the course of American foreign policy is not compatible with any adequate conception of world order, even one that is modest in its assertion of constraints. America's involvement in the Indochina War has exposed vividly—what was latent all along—that international struggles could not be divided for normative purposes by reference to the ideological affinities of the contending factions. For one thing, the anti-Communist faction might be repressive and totalitarian; secondly, the Communist faction may derive its strength from nationalism and socialism rather than from the sort of bureaucratic totalism we associate with the Soviet Union and its satellites; thirdly, if the ratio of forces is strongly against the anti-Communist side it prompts highly destructive reliance on a military strategy to reverse a political defeat; fourthly, if the setting of struggle is a low-technology society, then the intervention of high-technology weaponry almost necessarily ravages the country if the Communist-oriented faction has a firm base of popular support. These factors are all present in Indochina and have increasingly led international law critics to shift the discussion from a debate on norms to an inquiry into personal responsibility for the commission of war crimes in a Nuremberg sense. Telford Taylor's book, *Nuremberg and Vietnam: An American Tragedy*, represents a sober but decisive acknowledgement that the American response to Communist challenges in Indochina culminated in a course of conduct, not isolated acts, that was *criminal* and that implicates American decision-makers at the highest levels of civilian and military command. From an international lawyer's perspective such criminality represents a decisive demonstration that American foreign policy—even if oriented toward resisting the expansion of Communist influence—is not necessarily compatible with adherence to minimal imperatives of world order.4

4 The most significant attempt to argue the contrary position has been developed by Professor John Norton Moore, a scholar deeply and visibly influenced by his association with McDougal, in an influential series of articles. For a recent example of his approach see Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT'L L. 38 (1971).

5 Neil Sheehan, writing a long essay review in the Sunday *New York Times Review*, concluded that "If you credit as factual only a fraction of the information assembled here about what happened in Vietnam, and if you apply the laws of war to American conduct there, then the leaders of the United States for the past six years including the incumbent President Richard Milhous Nixon, may well be guilty of war crimes." N.Y. Times, Mar. 28, 1971, § 7 (Magazine) at 1, col. 4; for an effort to apply the war crimes reasoning succinctly to the issue of impeachment see R. Falk, *Why Impeachment*, The New Republic, May 1, 1971, at 13.

6 And may not, indeed sustain the integrity of legal process within the domestic polity. The government reliance on vague conspiracy indictments to prosecute anti-war activities is one indication of domestic spill-over from an international course of lawlessness.
I hope that Professor McDougal will feel the need to reformulate some of his analysis in light of the Indochina experience, although it is of greater consequence for a potential biographer than for future students of world order. I find it remarkable that, despite my disagreements with McDougal on levels of policy application, I find his basic orientation to the subject matter of world order studies as valuable as ever. The shortcomings of his analysis involve, in my judgment, errors of historical interpretation both with respect to the values actually animating American foreign policy and as to the world setting, but these shortcomings do not undercut the effort to achieve a comprehensive view of world order, oriented toward the achievement of human dignity and conceived in the dynamic mood of process.

In two crucial respects, I think recent developments have proven McDougal even more correct than earlier: first, shifting attention from the traditional concern with "international law" to the wider domain of "world public order;" secondly, insisting for reasons of pragmatic and ideological necessity that the foreign policy process be governed by a secure normative framework. Both of these achievements have, in my judgment, great consequence for the survival potential of world civilization, and as such, rank among the prime successes of humanistic studies in our times. Suppose we assume that by the year 2010 there exists a world system that has generally overcome the fundamental challenges of war, poverty, pollution, and

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7 In actuality, McDougal has devoted comparatively little of his scholarly energy to supporting his interpretation of the current world political scene. Among the more important examples of scholarship responding to current issues are M. McDOUGAL & N. SCHLEI, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, Studies, supra note 3, 763-843; McDOUGAL, The Soviet Cuban Quarantine and Self-Defense, 57 AM. J. INT'L L. 597 (1963); McDOUGAL & GOODMAN, Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution, 60 AM. J. INT'L L. 671 (1966); McDOUGAL, Foreward in R. HULL & J. NOVOGRAD, LAW AND VIETNAM vii-ix (1968).

8 In contrast to the static mood of structure; of course, a total understanding partakes of both moods, and McDougal’s thinking is sensitive to this necessity.

9 In this sense, McDougal confronts directly the Kennan-Morgenthau-Acheson critique of legalism in international relations. For a recent instance of where this critique has been carried particularly far, presenting an extreme set-off against normative-prescriptive ways of approaching international relations, see M. COPELAND, THE GAME OF NATIONS 19-26 (1969).
oppression. A biographer trying to recreate the intellectual roots of such a positive outcome could hardly do better than to explicate the life and work of Professor McDougal, whose clarity of vision, seriousness of commitment, and extent of impact towered so far above his contemporaries as to be virtually invisible. In this sense, of norm-oriented thinking about the future, without succumbing to the easy diversion of utopianism, McDougal is without peers.

If these dramatic aspirations are not substantially realized by the year 2010, then it is highly likely that processes of decay and distegration will culminate in some planetary catastrophe of an irreversible character long before that date. In This Endangered Planet (1971) I argue that future world order depends on the directions of dominant consciousness that come to prevail in the next few decades, and that the outcome will result in either dramatic improvement or failure. The alternative lines of positive and negative development are outlined in plausible sequence in Chapter IX, 415-437.

Note, however, that the design of credible utopias, especially if accompanied by implementing strategies, is a highly creative and constructive intellectual exercise.
Professor McDougal and I have been able to work together for over thirty years in what must establish a record of sorts for an interdisciplinary team whose members are not shackled together by the love, hate, and duty bonds of matrimony. Collaborating with McDougal has been one of the chief sources of intellectual and personal gratification in my professional life, and I welcome the occasion to comment briefly on some factors that have made it possible.

The essential point is common purpose and shared expectation about what is to be done. The purpose is not, and has never been, modest. The aim is to show how a comprehensive approach to the role of knowledge in society generates a jurisprudence that furthers self-appraisal and innovation in systems of public and civic order. Part of the strategy is to provide a provisional statement of a jurisprudence adequate to the task, to exemplify the approach in selected matters, and to assist in the development of colleagues able to carry on the enterprise.

In one sense our first meeting was “accidental.” McDougal read a review of a new book of mine in The New York Times and sought me out when he was a visiting professor in the law school of the University of Chicago. In another and deeper sense we were almost certain to meet since both of us were involved with interdisciplinary colleagues in the small world of elite universities. For instance, my first participation in an interdisciplinary seminar at Yale was in the early thirties on an occasion organized by former colleagues (Edward Sapin, anthropologist and linguist; John Dollard, psychologist).

As always, timing is a key. We came together at a moment when we were in search of complementary associates. In my case the desire to work with a legal scholar was acute. Political scientists were not at home in the study of “authority.” They were, however, adept at the empirical study of the other component of power, or “control.” The conventional legal scholars were no better; but their technical know-how was indispensable.

McDougal had a doubly negative orientation: he was dissatisfied with traditional jurisprudence; he was disenchanted with American legal realists. He at once perceived the possibilities of a comprehensive, affirmative and empirical method.

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I doubt that in the beginning my colleague was fully cognizant of the time commitments involved. Having watched the largely ineffectual struggle of several legal scholars to get ahead with a similar job, I was prepared for at least a twenty year delay before major results could appear. Whatever his initial expectations may have been, McDougal was not one to be turned aside by an obstacle course. If a mountain persisted in standing in the way, McDougal took his intellectual bulldozer and knocked it down. His furious tenacity left the bones of many “irresistible” objects strewn among the footnotes.

A key to our collaboration was procedural: the interplay of outlines, working papers and nearly final drafts. Scholars differ markedly from one another in working habits. McDougal operates best with exhaustive outlines, critiques of working papers, and final drafts. I am satisfied with less detailed outlines, and find the drafting of working papers a congenial exercise. After vast preparation McDougal writes for the ages. Long premonitory rumblings erupt in dazzling illumination and Homeric rhetoric that flows, cools and shapes a novel landscape.

The besetting problem in a truly configurative approach is to keep the entire map in sight. Traditional methods encourage and reward neglect of context. Neophytes in the law are disciplined to inspect a presumptively authoritative text and to let their fantasies roam in dreaming up all the “meanings” that might be imputed to “it.” They are encouraged to move from one “it”—a written text—to another “it”—another text—and to speculate on how hypothetical meanings can be harmonized, polarized or pushed to one side. They are not invited to go beyond the “it” to the “who” in the classical questions of communication analysis: “Who” says “what” in which “channel” to “whom” with what “effect.” When these questions are interpolated into the analysis of statutes, decisions, or opinions, they emphasize the empirical problem of how “expectations” are to be inferred. A path is cleared for mobilizing all the instruments of modern social scientific research.

We have found ourselves continually impressed by the grip of traditional modes of thought. For McDougal this has been particularly vivid. His initial specialty was legal history, and his grasp of the detail is more profound than his contemporaries. He experienced the questions facing a scholar who tries to become aware of, and to shake himself loose from, the grip of old-style indoctrination. Only such a scholar can understand the formidable ramifications of a novel map, and hack an
escape trail for others to follow. In one perspective much of what had to be done seems obsessively trivial. And yet, unless "trivia" are dealt with, the reinterpretation of "tradition" is deferred another generation.

Much of the fun of collaborating with McDougal comes from his refreshing sense of the ridiculous. When a line of analysis or argument seems unpromising, his inner monitor sounds an alarm. He has learned to recognize the symptoms of confusion and knows how to relieve uncertainty with a wisecrack that opens cracks for wisdom.

Luckily our preferred frames of thought, though complementary, are not the same. McDougal loves verbal combat, especially in the frame of a prescriptive system and an apellate court. So far as I am concerned, most combat is boring and time-wasting. My preference is for inquiry into factual causes and consequences. We are aware of these differences and deliberately exploit the intellectual tensions that result.

In some collaborations the partners keep together by multiplying side-activities. They cultivate big game fishing, yachting, karate, or opera. McDougal and I have been so absorbed in the central tasks that reinforcements have been superfluous. Our collaboration has required no care and feeding after hours.

How long will our collaboration last? As long as we do.
It is an honor and a privilege to participate in this well-deserved tribute to Professor Myres McDougal in connection with the launching of the *Denver Journal of International Law and Policy*. There could not be a more appropriate dedication.

This is not the occasion to attempt to analyze and appraise the theories, policy preferences, and methodology of one of the most influential international legal scholars of our time. Suffice it to say that he and his able collaborators have developed, in a notable series of books and collected essays, a comprehensive framework for dealing seriously with the crucial issues of world order. Within that comprehensive framework is to be found a wealth of valuable information indicative of the immense industry of Professor McDougal and his co-authors.

Professor McDougal's approach is interdisciplinary, drawing valuable insights from all relevant sources of learning, especially the social sciences. Although McDougal has collaborated with a number of distinguished scholars, it is noteworthy that the same approach is to be found in each work. There can be no question of the decisive impact of these works on the thought of his time. All of us have been enriched and stimulated by them.

Not having been one of his students, my knowledge of his skills as a classroom teacher is necessarily second hand. But the many devoted former students who are now making outstanding contributions of their own are eloquent testimony to his effectiveness and widespread influence. I have, however, had the opportunity to observe over many years the time, attention, and interest he has taken in his graduate students, who have similarly, through his help and counsel, taken their place in the company of international lawyers. Finally, somewhat by chance, I learned the hard way of his "comprehensive" approach to class assignments. In the summer of 1955, when circumstances beyond his control prevented him from teaching a course in international law at the University of Chicago, Dean Levi persuaded me to take over Myres' course on 24 hours notice. I found, to my consternation, that he had already assigned the first 200 pages for the first day! Needless to say, I soon managed to adopt a less "comprehensive" approach!

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Nor should his contributions to professional meetings be overlooked. Over the years, he has consistently enlivened the discussions at every meeting which he attended. When there appeared to be a lull, Myres would intervene with his characteristic vigor, usually commencing by characterizing what had previously been said as "unorganized nonsense." He would then proceed to redefine the problem within his own methodology and provide a "proper" answer. His interventions were invariably provocative and stimulating and although, at first blush, might seem somewhat overwhelming and intimidating, were always offered in a friendly spirit and with good humor.

Last but by no means least is his capacity for friendship. His warmth and kindness have won him a host of friends. He once recounted the saying that if you had a Bulgarian as a friend, you didn't need any enemies. To turn the saying around somewhat, if one has Myres as a friend, one learns what friendship can mean.

In closing, may I say that it has been a rare privilege to claim Myres as a friend, and it is a great pleasure to acknowledge my gratitude and express my admiration and affection for him as a scholar and as a man.
What a happy thought — though not at all surprising — for a new student journal of international law to dedicate its inaugural issue to Professor Myres McDougal. As one who has benefited immensely from an intellectual and personal association of long standing with Professor McDougal, I am delighted to find new evidence of the esteem in which he is held and, especially, of the influence of his ideas on students interested in international law.

These ideas are not easy to sum up in a few words — they are, as befits the subjects, complex, subtle and wide-ranging. They incorporate concepts and insights from many disciplines and they demand close and serious study. But one need not master the complexities to appreciate the grand scale of McDougal’s and Lasswell’s intellectual conception of international law as a powerful and realistic instrument for human betterment and to realize why it has stimulated so many international lawyers, of varying background and outlook, to break new ground in their approach to the concrete subjects of the profession.

It has been remarked by Kierkegaard that builders of great systems are like men who erect a great castle and live in a small hut next door. But one cannot think of McDougal as living in a small hut. On the contrary, he has occupied the great castle, rallying to his cause those who share his profound moral concerns and his belief in rational disciplined inquiry. He has invited intellectual battle by vigorously assaulting rival theories and by puncturing the platitudes and undermining the assumptions of established doctrine. His scorn has been meted out equally to the learned technicians who lose sight of important goals and to the idealists who remain on the level of generality and pious hopes.

Appealing as this may seem, it cannot be said that his cause has swept all before it. There are more than a few — both in and outside the profession — who regard his central conception of a “policy oriented” international law as profoundly mistaken, indeed as ‘vain’ and ‘arrogant’. In their view, neither the qualifications of the lawyer nor the structure of international society warrant placing the jurist in a significant and explicit political role. They fear that by stepping outside of a rule-oriented approach and the sanctioned sources of interna-

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tional law, the way is opened for arbitrary or partisan decisions which express the preferences of the decision-maker rather than the policy of the relevant community.

What is most persuasive in McDougal's response to the criticism is his impressive unmasking of the pretensions of traditional rule-oriented analysis as objective and value-free. His voluminous works demonstrate with characteristic vigor and abundant examples the extent to which the jurist in one capacity or another, faces inescapable choices involving alternative 'policy' preferences. To purport to resolve such issues on the basis of semantic analysis or historical precedent is a snare and a delusion. It obscures and often confuses the questions of central concern and it permits arbitrary or subjective preferences to be presented as mandatory objective conclusions. That this may serve, in some measure, professional interests or sustain authority is acknowledged by McDougal but he regards such pseudo-objectivity as transparently misleading and, more important, as obfuscating the process of rational inquiry that should be the essential feature of international decision-making.

The more difficult and challenging task faced by McDougal is to demonstrate in a positive way that the jurist can resolve conflicts of interest and ideology on the basis of manifest "policy" of the community grounded in the expectations and common interests of all of the relevant participants. McDougal is of course aware of the complexity of this task. He knows, as Lasswell has put it, that one cannot assume that universalized rhetoric means universalized conduct or expectations. To determine international policy in the face of conflicting demands and ideologies, one needs to look beyond and beneath the generalities of international rhetoric and the self-serving declarations of national states. Easy formulas are not available but McDougal and Lasswell have done much to show that the process of ascertaining common interests and policy can be pursued realistically through systematic examination of goals, conditions, strategies and consequences. Their massive studies on the oceans, outer space, the use of force, and others show how this might be done. Whether or not one is persuaded by their conclusions in particular cases, the significant aspect is the method of disciplined inquiry and explicit rationality for reaching conclusions.

As one who has in his professional life as an international official been especially sensitive to the dangers of partisan positions being presented as legally objective conclusions, I can warmly applaud the effort to eliminate a covert subjectivism
and to develop a disciplined approach to ascertaining as objectively as possible the priorities and policies of the community of states. The fact that this may not always be possible to do is not a sufficient reason to abandon the effort and resort to hocus-pocus of verbal incantation.

One of the liberating and exhilarating features of the Mc-Dougal-Lasswell approach has been the systematic way in which it has related law, social phenomena and basic values. It has moved international law away (on the one side) from verbal dialectic, and (on the other) from the 'ad hoc' case by case approach which passes for pragmatism. It is an approach which requires relating events to their causes and consequences, the particular case to the general goal, the part to the whole, the rule to its function, the whole process to the basic purposes and values of mankind. This is in sharp contrast to the thinness of legal positivism with its essentially 'status quo' orientation. The McDougal approach enables one to see international legal processes among the major instruments of change, even of fundamental change, and to employ law purposively and rationally to eliminate the constricting effects of a narrow parochialism in the interests of a more just and decent world order.

This, stated far too briefly and crudely, is what I find in the contribution of Myres McDougal and it suggests why I regard him as a towering and inspirational figure in international law. The editors of The Denver Journal of International Law and Policy have every reason to congratulate themselves on their selection.
On an occasion like the present, when an outstanding member of the profession of international law is honored by the dedication of the first issue of the *Denver Journal of International Law and Policy*, it is, perhaps, permitted to introduce one's contribution by a personal note.

One evening in the late forties, my wife and I were traveling by train from London to a beautiful suburb in Hertfordshire to have dinner with a well-known London teacher of international law. Although the Second World War was already over, something akin to a blackout was still a feature of British trains. A gentleman entered our compartment and when we had adjusted to the prevailing darkness we could perceive that the newcomer was a round-faced, youngish, friendly-looking American. We started to talk and found that we were traveling to the same destination. I was then working and have continued to work in the field of the international protection of human rights. When I learned that our fellow traveler was Professor McDougal, I was particularly thrilled and delighted, as he had just published what was then one of the most outstanding pieces of writing in my field, the essay, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*.1

The chance meeting in a dark railroad compartment was the beginning of a binding friendship with McDougal which I treasure highly and from which I have derived inspiration and encouragement through all these years.

To a superficial observer who is inclined to overestimate geographical factors in the development of a person's social, political and philosophical views, it might be a surprise to learn that a man who is among the country's greatest scholarly champions of human rights and human dignity was born in Burtons, Mississippi and grew up in a small farming town, Booneville, Mississippi. He started his academic career by working as an instructor in Greek at the University of Mississippi during his college years and during part of the time he studied for his Master's degree and for his LL.B. at the same Univer-

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1 M. McDougal et al., *Studies in World Public Order* 335 (1960); also in *14 Law & Contemp. Prob.* 490 (1949); and in *59 Yale L. J.* 60 (1949).
sity. From 1927 to 1930 he was a Rhodes scholar at the University of Oxford. This event was an important one in his intellectual life. He studied in Oxford under the great historian of English law, Sir William Holdsworth, who is on record as having stated that Myres McDougal had been his best student. McDougal was greatly influenced by the then Oxford professor of International Law, Brierly, and, later at Yale, by Professor Wesley Sturges.

From 1931 to 1934 McDougal was Assistant Professor of Law at the University of Illinois. Since 1934, he has been on the faculty of the Yale Law School; being named Sterling Professor of Law in 1958. He has also taught as a visiting professor in many parts of the world.

During World War II he served as assistant general counsel of the Lend Lease Administration and as general counsel of Office of Foreign Relief and Rehabilitation Operations of the Department of State. The profession has conferred high honors on him, such as the presidency of the American Society of International Law (1958), and the presidency of the Association of American Law Schools (1966).

In his early career McDougal addressed his scholarship and teaching to municipal law, particularly the law of property; later he became one of the leading scholars in the field of international law. He and Harold D. Lasswell co-founded the New Haven school, a group which adheres to a "policy oriented jurisprudence, postulating as its overriding goal the dignity of man in an increasingly universal public order."

In the present note, I do not propose to deal with the whole system of world public order as propounded by McDougal, but to mention only that part of his work which is devoted directly to the question of human rights. I have already referred to the essay, The Rights of Man in the World Community. McDougal and the co-author, Gertrude C. K. Leighton, were among the first scholars to investigate, contemporarily with Lauterpacht's writings on the subject, the potential of the human rights provisions of the United Nations Charter. They assembled the arguments for more vigorous participating and leadership by the United States in the human rights program of the United Nations. In a period which was to become characterized by the move for the Bricker amendments to the United States Constitution, McDougal and Leighton demolished the arguments presented by spokesmen for the

\[1\] Id.
American Bar Association against the United States becoming a party to international human rights instruments. Theirs was both a work of brilliant scholarship and a call to arms. Well documented and argued pleas by McDougal for "an international law of human dignity" became a substantial part of his comprehensive writings in the fifties and sixties. Recently, McDougal, Lasswell and Lung-chu-Chen prepared "a framework for policy-oriented inquiry" on the subject of human rights and world public order.3 I have no doubt that the "framework" will be filled in the near future, and a great standard work will be placed at the disposal of the profession of international law.

The profession's best wishes to Myres S. McDougal, personally and for his future work, are more than justified.

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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;

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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 1 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.

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, 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.

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.

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, intergroup 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.

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 coarchicial or superarchicial 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 autopunitive 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.

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. 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.

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; nonetheless, they are peremptory norms in international law.

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 unpolicied 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).
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. 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. 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


13 Nullity and Revision, supra note 12, at 637.
in regard to aggression and to human rights matters. 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 DEPT 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 DEPT STATE BULL. 224 (1945). See generally, Schwelb, Crimes Against Humanity, 23 Brit. Y. B. INT'L L. 173, 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 Amt. 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, 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. 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 McDougall, Lasswell and Reisman, Theories about International Law, 3 Va. J. Int'l L. 188, 215 (1968).

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 middle 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-

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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 Ibo (1968).

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. 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.

The multivalue 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 rights and imposed obligations upon all member-states to act jointly and severally

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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).


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..."
RESPONSES TO CRIMES

to achieve realization of those rights as integral to the common pursuit of minimum world order. The point was made again in the Preamble to the Universal Declaration of Human Rights 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, 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. Thus, in the Rhodesian case, the Security Council specified the nexus between the violation of minimum human rights and a threat to the peace.

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.
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,\(^\text{29}\) 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.\(^\text{30}\) 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(1) of 1946\(^\text{31}\) 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.

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.

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.

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

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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.

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, 1963 and the Economic


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. The Convention has been acceded to by five states and ratified by 44 states as of April 30, 1971. It went into effect on March 31, 1969. 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. 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.

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.
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.

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).

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

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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. 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,
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. 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 neofascist groups. On the other hand, when the world has looked toward the U.S. in regard to violently racist organizations, we have pleaded constitutional incapacity.

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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. 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.

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. 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."

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-

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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 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).


mum 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 preamble 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,

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 stereotypic 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 experience 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. 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. 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, the Assembly has a secondary, contingent juris-

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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).

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

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, 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 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. The human rights programs of the International Labor Organization may overlap the Convention in certain circumstances.

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.


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, "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-

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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

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

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, 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, instantial choice will always require detailed contextual analysis including contextual projections of alternate responses to desired decisions. (2) Maximal Authority: where effectiveness is assured,

\footnote{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 threatened. 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.
OLD ORTHODOXIES AMID NEW EXPERIENCES:  
THE SOUTH WEST AFRICA (NAMIBIA) LITIGATION  
AND THE UNCERTAIN JURISPRUDENCE OF THE  
INTERNATIONAL COURT OF JUSTICE

EDWARD GORDON*

The obscurity into which the International Court of Justice seems to have languished brings to mind an observation made not long ago by Richard C. Hottelet, C. B. S. news correspondent writing in mitigation of charges that the United Nations was yielding its destiny by default. Wrote Hottelet:

If the organization and its efforts seem pale, somewhat less than real — even ridiculous or contemptible to those with a craving for dramatic success — that is because it is regarded in the light of what it could have tried and should have done and might have been.¹

Applied to any institutional decision process, such subjunctive criteria presume that there exist relatively stable expectations concerning the nature of the institution, the objectives it ought to be pursuing, and the limits of its capacity to pursue them. Specifically, with respect to the World Court, they presume some qualitative identification of the institution as an adjudicative process, one that derives from an empirically-oriented understanding of the bases of its authority to decide disputes, the sources of decisional criteria it applies, and the interaction constantly taking place between the Court and other institutionalized decision processes, especially the larger political process by which the Court's judgments are transformed into social action.²

Yet, in assessing the Court's apparent predicament, one is struck by the prominence in its jurisprudence of an assumption that courts of law are essentially homogeneous, that the Court is cast in substantially the same mold as courts of law are everywhere, inevitably cast. Arguably, this attitude serves to accommodate the diverse jurisprudential predispositions which the Court as an ecumenical judiciary collects. It does so, however, at the extravagant price of ignoring contextual and phenomenological differences.

1. Dimensions of the Utility of International Adjudication

In the Conditions of Admission case, the late Judge Alvarez wrote that:

² This transformation is the focus of inquiry in W. M. REISMAN, NULLITY AND REVISION (1970).
The fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.\(^3\)

The life of the Court, too, is an ongoing process. Neither the United Nations Charter nor the Court's own Statute\(^4\) reveals any eternal verities about international courts.\(^5\) Each describes —the latter in greater detail—the formal structure of the Court, the more or less technical characteristics of its procedures and proceedings: for all purposes relevant to the present inquiry, its institutional shell. For its substantive character, indeed for that of any adjudicative institution, one must look not only to its conceptual and structural origins, but also to the internal commerce of people and ideas which are its lifeblood and to the interaction with contending social processes which identify its social experiences.

This is not to suggest that courts of law are invariably spontaneous exercises in political imagination, much less that diversity for its own sake is an institutional virtue. Rather, it is to suggest that courts of law are by their very nature social experiments, heterogeneous even when apparently isomorphic, which become and remain justifiable allocations of social decision prerogatives only to the extent that the cumulative effects of their judgments and the values\(^6\) they comprehend conform to the needs and goal-objectives of the communities they serve.\(^7\)

It follows that perceptions of the Court as an institution which are based for the most part upon its terminological identification as a "court," or even as the "principal judicial organ" of the U.N., are mistaken in assuming that its retention of what are thought to be traditional juridical conventions assures its worth to the world community. Seemingly constant or fundamental similarities among dispute settlement modalities identified as judicial ones can establish useful enough starting points or generalized parameters for distinguishing a particular process or its techniques from others. However, it becomes ironic and


\(^4\) Hereinafter the "Charter" and the "Statute," respectively.


\(^6\) The term "value" is used herein to refer to preferred events as a class. See H. Lasswell & A. Kaplan, Power and Society 56–73 (1950); and M. McDougal & Associates, Studies in World Public Order 31–36 (1960).

\(^7\) Compare Reisman, supra note 2, at 221.
self-defeating when such identifying generalities—themselves no more than the sum or average of past and current institutional adaptations to social and political conditions—deprive a contemporary institution such as the Court of the capacity to adapt to the unique social and political conditions with which it is empirically confronted.

The Court's capacity so to adapt depends upon the extent to which its jurisprudential values refer in rational, empirical terms to the needs and goal-objectives of the world community. To that extent, mere conformity to past or supposedly perfect models of juridical performance runs the risk of interfering with the development of a socially useful jurisprudence or, at best, of being no more than coincidental to it.

Jenks, Reisman, and Rosenne, each according to his own analytical style, have surveyed the elements of adjudication which have accorded it certain advantages over other decision modalities in the international arena. From their several approaches and notwithstanding differences in emphasis among them, four summary categories of advantageous qualities seem to emerge: (1) the relative fairness of the process (e.g., disputants tend to be equalized, decision determinants tend to be generalized and applied consistently in like circumstances); (2) its substitution of persuasive strategies for those of raw or coercive force; (3) its restriction of the conflict to a largely symbolic adversarial battleground; and (4) the cathartic effects of its ritualized form of combat. Clearly, these categories are not parallel. Virtually all international litigation achieves the second and third, before it becomes certain whether the first and fourth have also been accomplished. For the Court, achieving all four outcomes appears to be desirable in terms of re-acquiring popular acceptance.

Popular expectations about both the techniques of adjudication and their consequences do not always correspond to the essentials of institutional social utility. For instance, adjudication has now proved its case, so to speak, in so many societal settings that it is sometimes assumed to be an indispensable element of societal development. Rosenne notes that the inte-
igration of the Court into the United Nations political system proceeded from an analogous assumption "that the world organization, already possessed of executive, deliberative and administrative organs, would be incomplete unless it possessed a fully integrated judicial system of its own."12 Whether or not this assumption is supportable historically appears to depend upon the degree of generality with which one defines "judicial system."13 From a contemporary vantage point, if one adheres to the formulation of social utility herein presented, the indispensability of adjudication to the development of an international public order certainly has yet to be proved.

This seems equally true of a host of other assumptions about and popular attitudes towards adjudication, notwithstanding the rear guard contention that the sum of all popular expectations about adjudication, regardless of the empirical validity of each of them, has contributed to the durability of adjudication as a social decision process. Illustrating popular enchantment with non-vital aspects of adjudication, Professor Reisman alludes to the "compelling romanticism attached to a dramatic arena (with an audience) in which individual champions match skills in a duel for high stakes;" with the assumption that "truth will tell" in an adversarial process; and with the depiction of adjudication as the acme of civilized dispute resolution.15 One might add, as a further illustration, the contagious illusion that the rigorous constraints of strict reason, faithfully observed by judges, assures absolutely their neutrality and that of the judgment criteria (i.e., the law) they invoke.16

In terms of consciously enhancing the contemporary worth of the Court, reliance upon essentially irrational attitudes towards adjudication is a doubtful strategy. The spread of scientific inquiry to the social sciences is exposing all of our social institutions to the intolerant glare of systematic, rational scrutiny, exposure to which our legal institutions, for the most part, have not previously been subjected to such a degree. As Rosenne observes,14 attention to realities, harsh though they may be,

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14 Supra note 10, at 6.
15 REISMAN, supra note 2, at 7. As to the last-mentioned of these, compare JENKS, supra note 8, especially ch. 11.
16 Discussed recently in Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court 84 HARV. L. REV. 769 (1971).
cannot spoil an institution of proved and accepted worth. It can, to the contrary, help to rid it of impediments to its continuing social merit.

It is not essential to a rejection of irrationality as a strategy for enhancing the social worth of the Court that one reject all expectations of dubious empirical validity, or even outright misconceptions of the nature of adjudicative techniques, are bound to compromise the integrity of the process or lead to its disintegration once exposed. To begin with, this simply is not the case. It is no longer a novel proposition that bell, book and candle have as legitimate a claim to the history of adjudication as a social decision process as do, say, reason and social justice. Indeed, in our own country's judicial history the generous allocation of decision-making prerogatives to courts of law, although owing in part to the Supreme Court's early and successful appropriation of the power to review the acts of other branches of government for their constitutionality,\(^1\) seems to have its ultimate source in some essentially emotional attitudes toward authority and decisiveness which in our society are transferred in a collective way to judicial tribunals, especially our highest ones. Whether this generosity would have been as lavish if popular attitudes towards adjudication were required to undergo some test of empirical validity is problematical. Nonetheless, if social influence is a proper measure of institutional vigor, then one cannot help but observe, in the spirit of de Tocqueville, that we have become highly accustomed to reducing to legal value symbols and to resolving in judicial combat an imposing variety of social conflicts embracing contending social values.\(^2\)

The point, in any event, is not that all irrational attitudes must be swept away in the name of institutional integrity, regardless of whether the institution expires in the process. It is that any inquiry whose purpose is the redirection of institutional energies to more empirically relevant ends cannot be oblivious to transempirical directives when these are apparent or implicit in the institution's work product. It is, moreover, that such redirection of energies must proceed rationally to be worthwhile.

\[^1\] Cf. A. M. Bickel, The Least Dangerous Branch (1962), especially ch. 1.

2. **Dangers Inherent in Reified Concepts of Institutional Identity**

Reified concepts of the Court's identity, often concepts which assume fixed characteristics about the institution on the basis of its terminological identity alone, usually appear in the form of statements that the Court, because it is a court of law — or the judges, because they are juridical beings — must adhere to some line of reasoning or, in the negative, must not undertake some proposed inquiry or follow some proposed line of reasoning. To do otherwise, so the logic suggests, is to deprive the resulting judgment of its *judicial* character. Taken literally, the norm appears to prohibit inquiry into the decision to which it leads, let alone its policy content. It runs, to borrow Karl Llewellyn's phrase, in deductive form with an air or expression of single-line inevitability.¹⁹ Thus, in the *Case Concerning the Northern Cameroons*, Preliminary Objections, the Court observed:

> There are inherent limitations on the exercise of the judicial function which the Court, as a Court of Justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.²⁰

Because the consequences of "losing" the presumed judicial character are often, as here, left ominously vague, and because that character tends to be identified on an *ad hoc*, rather than a systematic basis, the sentiment expressed in *Northern Cameroons* by the Court easily lends itself to service as euphemistic rationale for decisional preferences which result, consciously or unconsciously, from unidentified policy considerations. One recalls in this vein a comment of the late Judge Lauterpacht—indicative of his judicial perspective although in fact written in 1949 prior to his election to the Court—in which he noted . . . that judicial rules of construction are:

> not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means . . . [T]he very choice of any single rule or of a combination . . . of them is the result of a judgment arrived at independently of any rules of construction, by reference to considerations of good faith, of justice, and of public policy.²¹

Accordingly, there is cause for suspicion when the Court appears to resign itself to purportedly unalterable rules of inquiry. No doubt, there are practical limits beyond which the Court itself, operating within its distinctive political environment, ought to pursue the resolution of a question before it. It is when presumed limits are pronounced in the name of judicial verities, without reference to empirical distinctions among courts, that the Court's submission to the fates of adjudication tends to become illusory self-denial of the existence of judicial choice. The more ambiguous the source or reference of the presumed imperatives, naturally, the more likely it is that a denial of judicial choice serves to conceal—even from the judges themselves—the fact that the judges, not the imperatives, are actually responsible for the results which follow.

The presence of imperatives which conceal judicial volition is most apparent in cases whose outcome promises to be controversial, where the nature of the dispute before them leaves the judges with no real alternative to performing transparently coordinate political functions. Especially for an undecided judge, the illusion of preordained passivity serves to soothe an uneasy conscience and, perhaps, to persuade him to accede to what is apt to be the more unpopular of several possible rulings. Willy-nilly, a judge may reason (or instinctively feel), in merely being a judge he is not doing anything for which it would be proper to hold him personally accountable.

This calls to mind an observation of Justice Holmes, viz:

I think it is important to remember whenever a doubtful case arises, with analogies on one side and other analogies on the other, that what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. . . . When there is doubt the simple tool of logic does not suffice, and even if it is disguised or unconscious, the judges are called upon to exercise the sovereign prerogative of choice.22

In the tradition of legal realism, Justice Holmes' insights seem self-evident. Yet, when competition between social ideas finds its way into the courtroom, courts come under attack for venturing beyond their rightful limits and efforts are made to distinguish judicial functions from political ones. Where constitutional guidelines distribute authority among various branches of government, typically the case in national political systems, the distinction concentrates on the branch of government whose authority the courts are allegedly usurping. However, the U.N.

political system is not possessed of an analogous distribution of political authority and, as Rosenne points out, "while it is frequently possible in the Charter to differentiate between [particular] functions, it is quite another matter when it comes to differentiating either the organs, or the applicable techniques."\(^{23}\) Often, when the Court itself considers whether or not to deal with a particular issue because the issue is intertwined with political considerations, its frame of reference is a reified concept of the Court as a judicial—which is sometimes to say, non-political—institution.\(^{24}\) Justiciability tends to be regarded as an unchanging quality, reified along with the Court's institutional identity.

3. The South West Africa Litigation

What brings these thoughts to mind is the prolonged South West Africa litigation, particularly its two most recent episodes. The litigation, it will be recalled, grew out of the extension by the Republic of South Africa of its domestic racial policies into territory—"South West Africa" or, as it is now called in the U.N., "Namibia"—it administers as the result of a League of Nations mandate (hereinafter the "Mandate"). The original gravamen of the complaint against South Africa was that its administration of the Mandate has been inconsistent with applicable international standards and a violation of its obligations under Article 2 of the Mandate "to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory." South Africa has denied the charges and has maintained that, in any event, with the dissolution of the League of Nations the League's supervisory rights over the administration of the Mandate have lapsed and neither the U.N. nor former members of the League have succeeded to the League's legal rights or interests therein.

The legal issues to which the dispute has been reduced have been overshadowed, by and large, by its political, indeed ideological, content. Legality, as dispensed by the Court, has been a symbol for social propriety, for conformity with the Charter

\(^{23}\) Rosenne, supra note 10, at 3.

\(^{24}\) The present writer has previously had occasion to describe the distinction between judicial and political tasks appearing in the Court's own jurisprudence. Gordon, supra note 3, at 800. He concluded then, as he does now that the Court would one day be drawn to the conclusion that legal and political tasks are not mutually exclusive, that adjudication is a social process which rightly and inherently interacts with all other important institutions and processes of organized society, and that especially for the Court, given its hybrid judicial-diplomatic character—little is accomplished and much is concealed from analysis by any attempt to place the two functional areas in dialectical opposition.
or, to the extent that general principles of international law circumscribe the goal-objectives of the Charter, for conformity with general international law. However, for the Court, the matter has also evoked root questions of its competence to hear and decide a dispute which has been social and political, as well as, above all, controversial.

By 1966 the matter had come before the Court in one context or another on five occasions. In 1950, responding to a request from the General Assembly, the Court handed down an advisory opinion25 to the effect that the Territory was still under international mandate; that South Africa retained her international obligations under the Mandate; that the supervisory powers, particularly the right to receive and examine annual reports from South Africa, previously exercised by the League, were to be exercised by the U.N.; and that South Africa was not competent to modify the international status of the Territory without the U.N.'s consent. In 195526 and 1956,27 in each instance at the request of the General Assembly, the Court handed down further opinions confirming the supervisory role of the U.N. over South Africa's administration of the Mandate.

(a) The South West Africa Cases

The parties to the Statute do not undertake to be bound by the Court's advisory opinions, however, and South Africa not unexpectedly refused to accept the three opinions pertaining to the Mandate. In reaction, the Empire of Ethiopia and the Republic of Liberia, the only African States other than South Africa which had been members of the League, initiated contentious proceedings against South Africa in 1960, attempting thereby to transform the Court's previous opinions into a "binding" judgment which might be enforced by the Security Council under Article 94 of the Charter.28 The applicants asked the Court to confirm its earlier rulings and to declare, in so many

28 Article 94 of the Charter provides as follows:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.
In 1961, South Africa raised certain preliminary objections which, under the Court's procedural rules, had the effect of suspending the proceedings on the merits. The objections were based upon the language of Article 7(2) of the Mandate, which provides that:

if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice.

and Article 37 of the Statute, which states that:

whenever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall be referred to the International Court of Justice.

South Africa contended that the Mandate was not a "treaty or convention in force" within the meaning of Article 37; neither of the applicants could be described as "another member of the League of Nations" as required for locus standi by Article 7(2) of the Mandate; there was no dispute as envisaged by Article 7(2) in that no material interests of the applicants or of their nationals were involved; and the applicants had made no attempt to negotiate a settlement of the dispute with South Africa.

By a vote of eight to seven, the Court dismissed these objections, remarking at one point that:

[T]he manifest scope and purport of the provisions of [Article 7] indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its members.\(^{30}\)

However, in 1966, in the proceedings on the merits—the so-called Second Phase,\(^{31}\)—the Court in effect reversed itself, this time when a seven to seven tie vote was broken, pursuant to the Statute,\(^{32}\) by the casting vote of the President of the Court, Sir Percy Spender. The Court decided that the applicants had not established any legal right or interest in the subject matter of their claim, that is, in the observance by South Africa of its obligations under the Mandate.

To reach this conclusion, the Court chose to review the


\(^{30}\) Id. at 343.


\(^{32}\) Art. 55(2).
entire mandate system, not just the Mandate itself, for it felt that the Mandate enjoyed certain features in common with the other mandates. The substantive provisions of mandates, the Court found, could be divided into two categories: first, those articles defining the mandatory’s obligations in respect of the inhabitants of the territory and toward the League (which the Court labelled “conduct” provisions); and second, articles conferring rights relative to the mandated territory directly upon members of the League as individual States, or in favor of their nationals (which the Court called “special interests” provisions). The Court determined that the dispute before it related solely to the conduct provisions of the Mandate and that these provisions did not confer any legal right or interest in individual members of the League. Not even the subsequent dissolution of the League could have invested its members with legal rights or interests in the conduct provisions, the Court said, inasmuch as the mandatories were agents of the League, not of its members individually, so that it followed that the applicants could not possess after the League’s dissolution rights of intervention they had not possessed while it was still in existence. Therefore, case dismissed.

Professor Dugard subsequently summarized the Court’s explanation of its different treatment in 1966 of the issue, apparently resolved in applicants’ favor in 1962, of their standing to sue:

In brief the Court held that in 1962 it had been faced solely with a question of jurisprudence and that it had not been called upon to decide whether the applicants had an interest in the due performance by South Africa of her obligations under the Mandate (even if it had done so in a ‘provisional’ way). This was a question for determination at the merits stage, irrespective of whether it was classified as a question relating to the merits but of an ‘antecedent character’ or as a question relating to the admissibility of the claim.33

The “antecedent character” of the question demanded its resolution at the outset of the Court’s consideration of the merits of the rival claims, the Court held. To say the least, this priority struck some observers as contrived, result-oriented, and in any event the result of, not the reason for, the majority’s decision to deny applicants’ claim. At the same time, incidentally or not, treating the question as antecedent and deciding it against

33 The reader’s attention is drawn to this concise and lucid summary of the South West Africa litigation through 1966 by Professor John Dugard of the University of Witwatersrand, Johannesburg, which appears under the title, The South West Africa Cases, Second Phase, 1966, 83 S. Afr. L. J. 429, 440 (1966).
the applicants at the outset enabled the court to avoid the gravamen of their complaint.

One auxiliary participant in the litigation, recalling its planned and inadvertent strategies, has likened litigation to a two-person zero-sum game in which plaintiff and defendant stand to win or lose the same precisely defined amount. Even assuming there are only two litigants, matters often do not work out so neatly in practice, especially if one is inclined to regard the court as a third participant in any litigation and the relevant community as a fourth. Yet, to the extent that what were at stake in the South West Africa Cases were, first, a value symbol and, second, an effort to transform a previous judicial allocation of that value symbol into effective social action, South Africa may be said to have “won” and the applicants, for the time being at least, to have “lost.” For this to have happened it was not essential that the Court decide the substantive issues in South Africa’s favor. Even without deciding these issues, the Court left the impression that international law does not forbid what South Africa is doing in the Territory. That this impression is not strictly justified by the logic or specific holding of the decision does not alter the fact that it was widely enough held for South Africa thereafter to adopt a posture of legality for its administration of South West Africa.

It could hardly have escaped notice that one practical explanation for the Court’s change of heart between 1962 and 1966 was the intervening change in the composition of the bench. Judges Badawi and Bustamente, each of whom had voted against South Africa’s preliminary objections, were unable to participate in the merits phase because of ill health (Judge Badawi died during the pendency of the proceedings). Judge Zafrullah Khan, apparently against his own wishes, was persuaded to recuse himself, perhaps because of the partisanship implicit in his having been appointed ad hoc judge by the applicants prior to being elected to the Court as a regular member. Such shifts in the Court’s ideological center of gravity, not surprising in view of the length of the litigation, serve to remind its critics that the Court is not as utterly depoliticized a process.

34 D’Amato, Legal and Political Strategies of the South West Africa Litigation, 4 L. IN TRANS. Q. 8 (1967).

35 When the Security Council later came to reintroduce the matter to the judicial arena, infra, one factor bearing on its decision to do so was a desire to deny this posture to South Africa. See S.W. Africa Plea to World Court, The Times (London), July 31, 1970.

36 Dugard, supra note 33, at 434.
as some abstract theory would have it. Indeed, judicial history everywhere testifies to its interplay with social tensions, however abrasive they may be, however momentous the interests at stake, however reluctant courts may be to become involved in what appears as open competition with other decision-making institutions. If Professor Falk is correct in describing as carelessness the failure of Afro-Asian countries to oppose the election of judges to the Court who held views antithetical to their main concerns, perhaps a contributing factor was a mistaken assumption that courts of law are by their very nature insulated from social and political tensions.

It should be kept in mind that the 1966 decision did not specifically disturb the Court's previous findings, in 1950, to the effect that the U.N. had succeeded to the supervisory functions of the League. The general thrust of the Court's holding in 1966 was that the Court itself was not suited to resolve the question before it, because it is just a court of law. The reasoning was foreshadowed in 1962 in the joint dissenting opinion of Judges Fitzmaurice and Spender, their voice later becoming that of the majority in the Second Phase:

The proper forum for the appreciation and application of a provision of this kind [i.e., Article 2 of the Mandate] is unquestionably a technical or political one, such as (formerly) the Permanent Mandate Commission, or the Council of the League of Nations—or today (as regards Trusteeships), the Trusteeship Council and the Assembly of the United Nations. (Emphasis added.)

Unquestionably? But then what is the source of an unquestionable directive for the Court to eschew the interpretation of an instrument which allegedly gives rise to international legal obligations, a task, the Court regularly declares, which is a distinctly judicial one?

American courts have found that whether or not they are ideally suited in each instance to deal with the disputes they are asked to resolve, there is little likelihood that they will readily be forgiven for attempting to excuse themselves from the task, particularly if in doing so they appear to be deciding the dispute obliquely and arbitrarily, according to some implicit

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partisanship. Courts tend to be judged less by the niceties of their internal logic than by the social consequences of their decisions; thus, for the Court to declare itself unfit to decide a matter which had been before it for five years is to raise grave doubts about its capacity to deal empirically with the content of contemporary international legal disputes.

In citing an unquestionable state of judicial propriety, the Court might have been expected to refer to the Charter, its ultimate constitutive instrument, but it did not. In its Awards of the Administrative Tribunal Opinion, the Court had taken the position that it would be inconsistent with the Charter's expressed aim of advancing the cause of freedom and justice for individuals, and with the preoccupation of the U.N. to promote this aim, for there to be no judicial or arbitral remedy available for the claims of the U.N.'s own staff. In its self-denial of the propriety of a judicial remedy for the inhabitants of the Territory, however, the Court seemed to be unaware or unwilling to concede that it, too, derives its institutional objectives from the Charter. Certainly, the charge that the Territory's inhabitants were being systematically deprived of their individual freedom and justice is as deserving of judicial attention as the grievances which the U.N.'s administrative tribunal is likely to hear.

In fact, the case's humanitarian aspects were so pronounced that the Court felt obliged to explain its refusal to consider them, viz:

Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.

. . . Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set forth. Such considerations do not, however, in themselves amount to rules of law. All States are interested — have an interest — in such

matters. But the existence of an 'interest' does not of itself entail that this interest is specifically juridical in character.\textsuperscript{43}

It has been suggested earlier that transempirical imperatives which stem from reified concepts of the Court's institutional identity are apt to become the sleeves of judicial legerdemain. The preceding excerpt is an example of a jurisprudential habit which has lingered on without any regard for a change in juridical environment. For if one simply accepts its appropriateness in the world community, and if its logic is to be taken at its word, then in the absence of an authoritative legislature of international law even the most widely-shared community expectations—rules, principles, standards, goal-objects—will be unlikely to possess "sufficient expression in legal form," until they have been translated into non-preambular treaty prescriptions. Yet, one knows that the Court does not—under Article 38(1) of its Statute it cannot—ignore custom or general principles of law recognized internationally. The Court's invocation of presumed juridical imperatives thus only serves to conceal how the individual judges go about deciding which community expectations should be judicially supported, which expectations should qualify as sufficiently important or fundamental to be vindicated against what are presumed to be natural limits of the judicial process.\textsuperscript{44}

(b) \textit{The Namibia Opinion}\textsuperscript{45}

Professor Falk has suggested that some members of the Court may have been subconsciously reacting to the experience of the Court's \textit{Certain Expenses} opinion\textsuperscript{46} and decided that it was better for the Court not to decide at all than to decide and then have its decision ignored:

In essence, the Fitzmaurice-Spender view of the ICJ role, which carried the day, opposed entrusting any role to the Court which might make it carry out judicially the will of the political organs of the U.N.; better not to decide at all.\textsuperscript{47}

In any case, following the announcement of the Court's decision, the General Assembly took matters into its own hands, passing a resolution\textsuperscript{48} which declared that:

South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the moral

\textsuperscript{44} Cf. Bickel, supra note 17, at 55.
\textsuperscript{47} Falk, supra note 37, at 317-18.
\textsuperscript{48} G. A. Res. 2145 (XXI); 61 AM. J. INT'L L. 649 (1967).
and material well-being and security of the indigenous inhabitants of South West Africa, and has, in fact, disavowed the Mandate.

and decided that:

the Mandate conferred upon his Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations.

The General Assembly continued to pursue the matter, implementing the foregoing resolution with one establishing a United Nations Council for Namibia to administer the Territory until independence.\(^4^9\)

It is worth recalling that the General Assembly did not ask the Court for assistance in determining the lawfulness of South Africa's administration of the Territory. Professor Dugard noted at the time\(^5^0\) that the General Assembly had refrained from doing so because (1) the Court might have declined to give an opinion in accordance with the ruling in the Eastern Carelia Case\(^5^1\) that its advisory machinery should not be used for obtaining a decision in an actual dispute between States; (2) after the 1966 decision the Assembly was reluctant to send the matter back to the Court at all; (3) advisory opinions are not binding and South Africa had refused to accept the three earlier ones; and (4) an advisory opinion dealing with South Africa's compliance with the Mandate could do no more than augment the judicial guidance the Assembly had already received in the separate opinions of those judges who, in 1966, did direct their attention to the ultimate merits of the dispute. Of the six judges (out of fourteen) who examined the compatibility of South Africa's administration of the Mandate in terms of the obligation "to promote to the utmost" the welfare of the inhabitants of the Territory, only the South African, Judge ad hoc Van Wyk, found in favor of South Africa.\(^5^2\)

The General Assembly, accordingly, arrived at its own findings and enlisted the cooperation of the Security Council, which thereupon proceeded on the basis of the Assembly's resolution. On March 29, 1969, the Council called upon South Africa to immediately withdraw its administration from the


\(^{50}\) Dugard, supra note 38, at 82-83.


Territory; on August 12, 1969, it once again called upon South Africa to withdraw, "in any case before 4 October 1969;" on January 30, 1970, it decided inter alia to establish an ad hoc sub-committee to study, in consultation with the Secretary-General, ways and means by which the relevant resolutions of the Council could be effectively implemented; and, finally, on July 29, 1970, the Council adopted a recommendation of the sub-committee and requested the Court to render an advisory opinion on the question:

What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?

Nearly a year later, on June 21, 1971, the Court handed down an opinion in which it found (1) (by a vote of 13 to 2) that the continued presence of South Africa in the Territory being illegal, South Africa is under an obligation to withdraw its administration therefrom immediately and thus put an end to its occupation of the Territory; (2) (by a vote of 11 to 4) that Members of the U.N. are under an obligation to recognize the illegality of South Africa's presence in the Territory and the invalidity of its acts on behalf of the Territory, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration. The latter conclusion was supplemented with one which found it incumbent upon States which are not members of the U.N. to give assistance, within the scope of the foregoing, in the action which has been taken by the U.N. with regard to the Territory.

Once it decided to render an opinion, the Court was obliged to deal with two substantive issues: first, the competence of the U.N. to supervise the Mandate; and second, the liability of the Mandate to (unilateral) revocation. With respect to the first of these, the Court relied heavily on its 1950 opinion, observing that the well-being and development of the inhabitants of the mandated territories formed a "sacred trust of civilization." The best method of giving practical effect to this

58 In his dissenting opinion, Judge Fitzmaurice writes that in respect of both these issues, "[T]he findings of the Court involve formidable legal difficulties which the Opinion turns rather than meets, and sometimes hardly seems to notice at all."
principle, the Court said, quoting from Article 22 of the Covenant of the League, was for "the tutelage of such peoples . . . [to] be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it. . . ." The acceptance of a mandate on these terms constituted the assumption of a binding legal obligation, the Court found, and the question of quis custodiet ipsos custodes? had been given in terms of the Mandatory's accountability to international organs. Annexation of the mandated territories, towards which the Court felt South Africa was hinting, was deemed fundamentally at odds with the foregoing principles.

South Africa had suggested that if it were maintained the Mandate had lapsed, then she—South Africa—would have the right to administer the Territory by reason of a combination of factors: its original conquest; its long occupation; the continuation of the sacred trust basis agreed to in 1920; and "because its administration is to the benefit of the inhabitants of the Territory and is desired by them."50 This latter point was supported, in effect, by two offers made by South Africa during the hearings. The first of these, deferred by the Court at the time (March, 1971), but subsequently rejected in light of its findings, proposed the holding of a plebiscite in the Territory under the Court's supervision, to determine whether it was the wish of the inhabitants "that the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations."60 The second proposal, disposed of in an identical way by the Court, was for the Court to permit South Africa to present material bearing on the actual state of well-being and development of the inhabitants. In deferring action on the two proposals, the Court had said it did not want to anticipate, or appear to anticipate, its decision.

The problem which the proposals posed for the Court was that either of them would have put it into competition with the General Assembly, since that body had presumably borne in mind the administration of the Mandate in reaching its findings. It will be recalled that the Security Council had not asked the Court to review the Assembly's findings and that the Court's 1966 decision had left the distinct impression that the Court prefers to leave such matters to other organs of the U.N. When the Court ultimately came to reject South Africa's two

60 Id. at 20.
proposals, therefore, it did so on the grounds that it had already determined that the Mandate had been validly terminated by the General Assembly and that "in consequence South Africa's presence in Namibia and its acts on behalf of or concerning Namibia are illegal and invalid."

Several governments had challenged the Assembly's adoption of resolution 2145 on the grounds that it had acted ultra vires. The Court was thus confronted with the problem of whether to assume the validity of the Assembly's action or to subject it to judicial review. The canons of interpretation open to the Court were rife; it could find support for the proposition that, on the one hand, it completely lacked authority to review actions taken by other organs of the U.N. without their specific request to do so or, on the other hand, that judicial review was implicitly authorized in the Security Council's request for an advisory opinion (since it must have foreseen that no legal organ would find legal consequences in action which had been invalid ab initio).

What the Court chose to do was to say one thing and do another; that is, to first declare itself without authority to initiate judicial review, and, having satisfied one and all on that score, to immediately thereupon declare it would undertake such a review in the exercise of its judicial function:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for [this] advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from these resolutions.

In context, "will consider" appears to be a euphemism for "has already decided to reject" and "in the course of its reasoning" seems to mean "in rationalizing conclusions it has arrived at through other determinants." In political terms, the Court was saying that it recognized itself to be without authority to review or act as appellate court from actions taken by other principal organs without their specific request to do so, but that no harm would be done by its undertaking the forbidden review in the instant case. And no harm was done, the Court upholding the validity of both the Assembly's and the Council's actions.

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61 Id. at 57-58.
62 Id. at 45.
The Council's action was relatively easy to identify as being in furtherance of its responsibilities under Chapter V of the Charter. The Assembly's action was held to be a termination of a relationship on account of "a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship." To the contention that, since the Covenant had not explicitly conferred upon the Council of the League the right to terminate a mandate for misconduct of the mandatory, the U.N. could not have succeeded to any such power, the Court responded by invoking a general principle of law that a right to terminate on account of breach must be presumed to exist in all treaties, except—the Court remembered its 1950 finding that South Africa could not unilaterally modify the status of the Territory—as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character. Thus, in the Court's view, the revocability of the mandates by the supervisory power had been envisaged from the outset of the mandate system.

It had been maintained that the Assembly, not being a judicial organ and not having previously referred the matter to such an organ, was not competent to make its findings as to the status of the Mandate. Referring for the only time in its opinion to its 1966 decision, the Court recalled that the applicants had been told in that case that they lacked the right to require the due performance of the sacred trust and that any divergencies of view concerning the conduct of a mandate had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League.

To deny to a political organ of the United Nations which is a successor of the League in that respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.63

That, and little more, is the gist of the opinion. If the Court in 1966 saw fit to deny a judicial remedy, the Court in 1971 was not going to forbid a political one, for such a double denial would amount to denying that the inhabitants of the Territory could be protected under international law; in other words, that their human rights were recognizable as legal ones. Correspondingly, the 1971 opinion should probably be read as putting national sovereigns on record that they are answerable

63 Id. at 49. The Court also rejected an argument that resolution 2145 was invalid as a transfer of territory. Id. at 50.
at law for deprivations of human rights when they are acting in an international fiduciary capacity.

One aspect of the Court's handling of the case certain to be criticized long after the furor of the dispute has subsided is its insensitivity to charges of juridical bias, specifically directed against the Republic of South Africa, its Government and its representatives. Several of the separate opinions went out of their way to commend the presentation of South Africa's case, perhaps in recognition of the sometimes preemptory way in which its various objections and requests were denied. Throughout the history of the Court, and its predecessor, the Permanent Court of International Justice, the fact and appearance of impartiality have been scrupulously maintained by the Court. Article 17(2) of the Statute provides that

> No member [of the Court] may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

Paragraph 3 of Article 17 leaves to the Court the resolution of any doubts as to the applicability of the provision in a given instance, but the substance, clearly, puts a burden of proof on a judge accused of violating the provision. In the South West Africa Cases, as noted, Judge Zafrullah Khan had reluctantly recused himself from sitting, a circumstance which has never been publicly explained, but one nonetheless which hindsight shows to have been decisive in the outcome of the judgment. In Namibia, Zafrullah Khan was the President of the Court.

In Namibia, South Africa had objected to the participation of three of the judges: Zafrullah Khan, Padilla Nervo and Morozov. In each case, the objection was based upon what had allegedly been statements and active participation by the judge in the South West Africa dispute in his former capacity as representative of his government at the U.N. during the pendency of the debates over the dispute. In Judge Morozov's case, these activities allegedly continued through the period in which the General Assembly was taking its substantive action upon which the Security Council's request for an advisory opinion was based. In Judge Zafrullah Kahn's case, attention was also drawn to his having been named as ad hoc judge by Ethiopia and Liberia in the South West Africa Cases, prior to his election as a regular member of the Court.⁶⁴

The Court rejected all three objections, citing its refusal to accede to a similar objection to the composition of the bench by South Africa in the *South West Africa Cases* (but neglecting to point out that the vote to deny South Africa's objection in that instance had been a mere 8 to 6), and also citing four PCIJ "precedents" which, presumably, bear on the point at issue. The Court took no note of Zafrullah Khan's having recused himself in 1966.

The present writer must acknowledge his inability to comprehend the similarity between the situations involved in the precedents and the statements and activities complained of by South Africa *in extensio*. One of the precedents, in fact, turned on a specific finding that the previous functions whose compatibility was in question (the judge himself having asked the Court for guidance) were not objectionable "since they had been exercised before the dispute actually before the Court had arisen." Inasmuch as the Court's opinion in Namibia integrates the General Assembly's action in adopting resolution 2145 with the subsequent Security Council action leading to the request for an advisory opinion, it is difficult to see how the precedent applies, particularly in the case of Judge Morozov.

The Court must have regarded the instances it cited as verification of the principle that service as a representative of one's government does not in itself bring Article 17 into play. However, the judges to whom South Africa had objected were ones who it maintained had played such leading and outspoken roles in the attacks on South Africa as to far exceed the normal bounds of representative advocacy. Indeed, it is difficult to perceive the rational basis on which the Court was able to conclude that previous activities of the three judges did other than cast doubt on the impartiality of the judges themselves and, for that matter, on the bench as a whole. It is possible, of course, that the Court drew upon material not available to the public, in which case it would have been more candid to reveal the existence of such sources than to cite previously decided instances of dubious comparability. It should be noted that five judges expressed serious reservations about the Court's rejection of South Africa's objections to the composition of the bench.

South Africa's request for the appointment of an *ad hoc*
judge was also rejected. From the Court's opinion, it appears that this denial resulted from a finding that the Court was not acting "upon a legal question actually pending between two or more States," these being the words of Rule 83 of the Court's rules of procedure which brings into play Article 31 of the Statute (that being the provision for the appointment of ad hoc judges). South Africa, recalling the 1962 decision, contended that if it had been correctly decided, then the relevant legal question before the Court did indeed relate to an existing dispute between South Africa and other States. The existence of such a dispute was also relevant to South Africa's claim that the Court, in the exercise of its discretion under Article 65(1) of the Charter, ought to decline to give an opinion.

South Africa advanced two sets of factors for the Court to bear in mind in deciding whether or not to entertain the question posed by the Security Council. The first was the immensity of the political pressure to which the Court had been subjected as a result of its 1966 decision and the continuing pressure it was allegedly under to "make amends" by deciding against South Africa in the instant case. The Court replied in the imperative:

It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside interference or interventions whatsoever, in the exercise of the judicial functions entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.

Self-righteous indignation often, as here, is a diversionary tactic, avoiding the question by pretending that it is so preposterous that its mere consideration is an unworthy enterprise. Nevertheless, say what it will, the Court had been put on notice—and publicly, too—that its choice was between coming into harmony with the attitude toward South Africa prevailing in the General Assembly and Security Council, on the one hand, and going out of existence, on the other. The correct response

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68 Order dated 29 January 1971.
69 1970 statement, supra note 64, at 101.
70 Id. at 104 passim.
72 Even in the General Assembly's Sixth Committee (Legal), the Court was under attack. An initiative in that Committee to study ways of enhancing the role of the Court evoked little enthusiasm other than from its twenty initial sponsors, some outright hostility—mostly from the Soviet Union, which maintains that the existing allocation of competence among the U.N.'s organs ought not be reconsidered—and fairly widespread apathy. Sponsors of the initiative were obliged to seek safety in a compromise resolution postponing until the twenty-sixth session of the General Assembly consideration of the question.
for the Court to have given would have consisted of an exami-
nation of its collective predispositions, to determine whether
the circumstances in which the question came before the Court
precluded its impartial adjudication. The statement that courts
of law, by their very nature, act independently of all outside
interference or interventions whatsoever is simply untenable;
they do not always do so, and as South Africa maintained,
ought to decline to hear any case presented in which the judici-
ary's collective impartiality or freedom from outside inter-
ference is seriously in doubt. In the international arena, that
doubt may be resolved in the first instance by the Court itself,
and in the final analysis by the political process which trans-
forms the Court's rulings into social action. The Court, in
effect, chose to leave the matter entirely to the political process.
If you doubt our integrity, it appeared to say, that is too funda-
mental an objection for us to consider ourselves.

South Africa had put forward a second combination of
factors which, it said, compelled the conclusion that, even if
the Court were entitled to render an advisory opinion, it should
as a matter of judicial discretion decline to do so. Article
65(1) of the Statute authorizes the Court—but does not require
it—to give an advisory opinion on "any legal question" asked
of it by an authorized body. South Africa conceded that there
is no precise line between "legal" and "political" questions and
that a "political" question may also be a "legal" one. However,
it felt that the question posed by the Security Council
was so intertwined with political issues and had a political
background in which the Court itself had become so embroiled
that the proper exercise of the Court's judicial functions was
seriously compromised. Moreover, South Africa contended, the
relevant legal dispute related to an existing dispute between
South Africa and other States, a circumstance which the Per-
manent Court, in the Eastern Carelia case, had regarded as ren-
dering the advisory machinery of the Court inappropriate.
Finally, South Africa argued, in order to answer the question
posed by South Africa the Court would have to decide legal
and factual issues which were actually in dispute, a circum-

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of whether to establish an ad hoc committee to study the role of the
Court. Those who maintain hope for the prospects of international
adjudication will seek to enlist enough diplomatic support to establish
the committee, but even now the prospects for any substantive recom-
mendations the committee may ultimately make are regarded as un-
certain. Had the Namibia opinion gone in favor of South Africa, un-
certainty might have become improbability.

73 1970 statement, supra note 64, at 102.
stance which Eastern Carelia also noted as a factor leading to its conclusion not to hear the question therein posed.

In that case, the Council of the League had requested an opinion on whether the Peace Treaty of October 14, 1920 between Finland and Russia and an annexed Declaration thereto by the Russian Delegation regarding the autonomy of Eastern Carelia placed Russia under an obligation to Finland to carry out the Treaty's provisions with respect to that region. Russia, not a Member of the League, had categorically refused to take part in the League's consideration of the dispute and had objected to the Court's hearing the case on the further grounds that it was a matter falling within Russia's own domestic jurisdiction.

Article 14 of the Covenant of the League, in effect at the time of the Eastern Carelia case, authorized the Permanent Court to render an advisory opinion on "any dispute or question referred to it" by an authorized organ. The difference in language between this Article 14 and Article 65 of the Statute has had the effect, inter alia, of encouraging the Court to emphasize that treaty interpretation, for example, is a distinctly judicial task; however, as South Africa rightly maintained in its Statement, this did not mean that the interpretation of an international instrument was invariably a task the Court ought to undertake.

In Eastern Carelia, the Court had declined to give an advisory opinion on several grounds, the first being that the opinion bore upon an actual dispute between Finland and Russia and that

It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement. In addition, the Permanent Court had felt it inexpedient to attempt to deal with the question because it turned upon a determination of factual issues which the Court, in the absence of Russia's cooperation, would be at a disadvantage in making. In dicta for which the case has become noted, the Court then said:

The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Fin-

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74 See Gordon, supra note 3, at 800.
75 1970 statement, supra note 64, at 101.
land and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court.77

Distinguishing Eastern Carelia, the Court in Namibia pointed out, inter alia, that South Africa had been a Member of the United Nations, had been bound by the decision of its competent organ to request an advisory opinion, and had actually appeared before the Court and addressed itself to the merits. The Security Council's request did not relate to a legal dispute actually pending between two or more States (or, for that matter, between South Africa and the U.N.):

It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks advice from the Court on the consequences and implications of these decisions.78

Some fact-finding is inherent in all advisory opinions, the Court noted, adding that this had been true of the three previous advisory opinions on South West Africa in which South Africa had not seen fit to question the propriety of the Court's giving Recalling its Genocide Convention opinion,79 the Court ob-

an opinion.

Recalling its Genocide Convention opinion,79 the Court observed that a “reply to a request for an Opinion should not, in principle, be refused.”80 It found no compelling reasons to refuse to do so in the instant case:

Moreover, [the Court] feels that by replying to the request it would not only 'remain faithful to the requirements of its judicial character' . . . , but [would] also discharge its functions as 'the principal judicial organ of the United Nations'. . . .81

The point the Court chose not to stress, once again, was that the international law prevailing in the days of the Eastern Carelia case (1923) was sovereignty-oriented, that the Per-

manent Court's dicta grew out of the notion that it could not compel Russia to reach a pacific settlement. In other parts of its Namibia opinion, the Court gave a detailed account of the

77 Id. at 29.
81 Id. The reference to remaining faithful to the requirements of its judicial character alludes to the Court's Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Consultative Organization, [1960] I.C.J. Rep. at 150.
changes in international law since the Mandate's origin, observing at one point that

its interpretation [of the Mandate] cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. . . . In this domain, as elsewhere, the corpus juris gentium has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.\textsuperscript{62}

In Namibia, unlike the South West Africa Cases, the Court saw as its duty, or perhaps as its only life-sustaining choice, following the political lead of the General Assembly and the Security Council. From the standpoint of institutional wisdom the Court's conclusion was understandable. Whether or not it will serve the Court in the long run, however, remains to be seen, for the Court is not apt to be judged favorably, in Hottelet's terms of reference, for merely surviving.

Nor, after the current anti-South Africa sentiment has gone its historical way, is the Court's too avid rejection of that government's every claim likely to impress future analysts of the principal judicial organ. Denunciation of South Africa's racial policies may indeed be called for and one may not reasonably doubt that the Mandate has been abused in this respect. That the Court accepted as its own concurrent responsibility such denunciation may be laudable in its own right, but does not entirely redeem an otherwise uninspired judicial performance.

**Some Concluding Observations**

The South West Africa litigation presented the Court with prodigious problems, not so much because of the nature of the dispute, as is often maintained, but because the dispute's history attaches to two distinct periods in the modern development of international law, periods which have been accompanied by corresponding changes in the nature of adjudication generally, and the adjudicative process of the Court in particular. What distinguishes the South West Africa Cases from the Namibia opinion, as much as the specific holdings themselves, are the divergent expectations concerning the nature of the Court as a decision-making process, the juridical relevance of the objectives of the Charter and the social outcome of the Court's judgments, and the role the Court should play within the larger political process of which its decision-making is a part. These divergent attitudes must be inferred; neither of the two judgments pauses to consider them rationally.

Were the judges to have adopted an attitude of existential responsibility for developing the institution in accordance with the requirements of international life, then the troublesome litigation discussed herein by now would have served the purpose of enhancing the potential utility of the Court to the world community. However, beset by a decline in popular enchantment with international adjudication as a dispute settlement modality, the judges have instead chosen to cling publicly to outworn jurisprudential banners and to accept the verity of reified concepts which, for the most part, are alienated from rational and empirical judicial analysis. Dancing to rhythms the band is no longer playing, the Court remains inelegantly out of step, its latest judgment more popular than its earlier one, but no less an attempt to vindicate old orthodoxies in the face of new experiences.
The principle of freedom of exploration and use is a fundamental principle of the law of outer space. It was enunciated and unanimously approved by the United Nations and has become a key provision in the Outer Space Treaty. Even a cursory glance at this vital freedom suggests a number of significant questions. Who may exercise this freedom? What is its scope and meaning? What does exploration and use involve? What limitations are placed upon this freedom? Who must observe its limitations?

I. WHO MAY EXERCISE THE FREEDOM?

The Outer Space Treaty provides that outer space, including the moon and other celestial bodies, shall be free for exploration and use. One of the initial questions that comes to
mind relates to the right to exercise this freedom. Who is entitled to it: the signatory states or other states as well? The language of the provision refers to "all" states and, for this reason, there can be little doubt concerning the intention of the parties.°

A further question concerns entities other than states, such as international governmental organizations, nongovernmental organizations and individuals. Does the reference to all "states" preclude the exercise of this circumscribed freedom by international organizations? The answer to this question appears to be in the negative. Had it been the intention of the drafters to preclude entities other than states they could have inserted the word "only" to make the phrase read "only by states." Even then the effect of such stipulation would remain somewhat uncertain unless international governmental organizations were also made parties to the Treaty. The conclusion, that international governmental organizations are not precluded from the exercise of this limited freedom is also reinforced by the Treaty provision that when activities are carried on in outer space, including the moon and celestial bodies, by an international organization, responsibility for compliance with the Treaty is to be borne both by the international organization and by the states parties to the Treaty participating in such organization.°

The next question is whether or not nongovernmental organizations and individuals could invoke and benefit from the principle and whether the restrictive connotations which are spelled out in relation to states would be binding on them. The fact that there is no "right of adventure" assured in the Treaty for individuals is perhaps a negative expression of the intention of the drafters. The inclusion of such a right would likely have gone well beyond the desires of those who regard private initiative and enterprise as an important potential contributor to the exploration and development of celestial bodies. While some of the restrictions which limit the freedom of exploration and use are clearly applicable only to states, the stipulation that states bear international responsibility for national activities of nongovernmental entities underscores the idea of continued jurisdiction of states over nongovernmental entities, including individuals and organizations.° Hence, the states

5 Treaty, Art. I.
6 Id., Art. VI.
7 Id.
would be entitled to regulate extraterrestrial national activities and exact from individuals and private organizations such attitudes which they regard as essential and which correspond to their Treaty obligations.

II. SCOPE AND MEANING OF FREEDOM

Another initial but equally basic question which may be raised in relation to freedom of exploration and use is whether this freedom includes the option or choice not to exercise it. In other words, could any state refrain from participating in the exploration and use of outer space and thereby not avail itself of this freedom? This question is not entirely hypothetical inasmuch as the Treaty stipulates that the parties "shall carry on" activities in the exploration and use of outer space in accordance with international law. The quoted phrase "shall carry on" could be interpreted in two different ways. It may mean simply that the activities of the signatories, whenever undertaken, must be in accordance with international law, or possibly, it could mean that all parties to the Treaty pledge themselves to carry on such activities in the described manner. In the second case the parties would in fact obligate themselves to carry on such exploratory activities and would not be free not to engage in exploration and use. While the language of the Treaty could have been phrased in such a way as to exclude the second interpretation simply by stating that activities in the exploration and use of outer space must be carried on in accordance with international law, the first interpretation is to be preferred since many signatories — at least for some time to come — will not have the technological capability of engaging in extraterrestrial exploration and use.

III. EXPLORATION AND USE

A. SCOPE OF CONCEPT

The first question that comes to mind with respect to the phrase "exploration and use" relates to its coverage and scope. How broad a concept is exploration and use? Is it possible to visualize any human behavior in relation to celestial bodies or other parts of outer space which would not constitute some form of exploration or use? Could there be such a thing as discovery of some fact which would not necessarily constitute exploration and use? Perhaps not strictly speaking, because even a perfunctory glance at the stars may involve some meas-
ure of exploration, very much like dreaming about the moon may involve some indirect use in a very broad sense of the term. However, in a more legalistic vein, exploration and use would involve something more than mere gazing at the stars or dreaming about the moon since the latter could hardly be regarded as having to be carried out for the benefit of all countries. Also, such processes as thinking or dreaming would not, by reasonable interpretation, be regarded as exploration or use.

A further question relating to scope and coverage is whether or not every exploration and use necessarily involves "activities." This is important inasmuch as Article I of the Treaty speaks of "exploration and use," whereas Article IV refers to "activities in the exploration and use." Since different terms were used, the question arises whether different meanings are to be attached to the respective terms and, if so, how they are to be differentiated. If there is no difference between "exploration and use" and "activities in the exploration and use" why were different terms used? The question is of some importance since, for instance, "exploration and use" must be "for the benefit and in the interests of all countries," "without discrimination of any kind," and "on a basis of equality" whereas "activities in the exploration and use" must be carried on "in the interest of maintaining international peace and security and promoting international cooperation and understanding."10

Furthermore, does the word "activities" have both the positive and negative connotations? Is a negative "act" a negative "activity"? If negative act refers to what is commonly known as an "omission," could such a negative act be equated with negative "activity"? If Article III is interpreted as a mandatory obligation on all parties to carry on activities in exploration and use, then the question of negative meaning in relation to the word "activity" could not even arise. However, since such interpretation could not reasonably find much support, the question of interpreting activities in a negative sense would still come up.

Upon reflection, it would appear that exploration and use could hardly be visualized in terms of negative activities. If the term "activity" has only positive connotations, can exploration and use take place without such positive activity? It would seem that all exploration and use, by the very meaning of

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9 Id., Art. I.
10 Id., Art. III.
these terms, carries with it the implication of some activity or activities. This line of reasoning would suggest a lack of precision by the drafters or a distinction almost without meaning. However, it could possibly be argued that exploration and use intended to cover the total human effort, or outcome involved, whereas “activities” was referring more to the individual sequences of acts making up the total results. Thus the drafters may have intended to refer not to the whole broad area of exploration but to the independent components. Should this line of thought be correct, it could be argued that the independent components described by the word “activities” would not necessarily have to be for the benefit and in the interests of all countries and that the requirement of nondiscrimination and equality would not be applicable to them. While this construction is admittedly somewhat artificial it may serve to explain the use of a nomenclature which otherwise would be hard to justify.

Does exploration and use constitute a singular concept or does it mean to convey two separate ideas, distinct from one another? Must use be preceded by exploration or must exploration be followed by use to be subject to the limitation that it must be for the benefit of all countries? If exploration and use denotes a single concept, then exploration without use, or use without exploration would not have to be carried out for the benefit and in the interests of all countries. However, by reasonable interpretation, it does not appear that the Treaty intended to create a single concept. Therefore, both “exploration” and “use,” even if they do not go hand in hand, must be carried out for the benefit and in the interests of all countries.

B. MEANING OF EXPLORATION AND USE

Does “exploration” mean the same thing as the word “use”? If exploration and use were to mean the same thing, their joint use in the given context would be redundant. If exploration and use mean two different things it would be possible to engage in exploration without use or in use without exploration. The manner and way in which this can be done must be clarified further with respect to the meanings of exploration and use.

What does exploration mean? Does a casual sighting and observation constitute exploration? Does anything else apart from sighting constitute exploration? Does exploration refer to
exploration by men or to exploration by instruments? In answer to these questions it would seem that exploration covers a wide range of human activities irrespective of whether such activities are carried out directly by man or indirectly through the use of his instruments. Exploration includes any purposeful inquiry or observation whether by seeing, hearing, or by other senses whether done directly by a person or through the use of his instruments, or by a combination of both.

In addition to the question of the meaning of exploration, there is also the question of the meaning of the term “use.” The term “use” in the legal sense refers to the enjoyment of property which usually results from the occupancy, employment, or exercise of such property. Usually also there is an element of profit, benefit, or some other measure of advantage accompanying the use. It may be assumed that the word “use” in the Treaty denotes a legal concept rather than an everyday expression and should be interpreted in that light.

Does the term “use” mean any type of use, including a temporary or casual use, or does it only refer to use of a more permanent nature? It is reasonable to assume that there will be many types of uses of the moon and other celestial bodies and other parts of outer space much the same as there are many different uses of the earthly environment. Such uses may cover a wide range of activities including economic, scientific, military, propaganda, and other political activities. Some of these activities or uses are specifically outlawed, while others are specifically “not prohibited.”

Does use mean direct or indirect use? If, for instance, the rays of the sun are used to illuminate a celestial body, does this mean a use of outer space in the sense that the sunrays are used for the purpose of seeing? The same question could also be asked with respect to the use of the void for purposes of travel and communications. Would it be too much of an insistence on literal interpretation of the Treaty to say that radio messages sent

11 Thus, for instance, any use amounting to national appropriation or the establishment of military bases, installations and fortifications on the moon and other celestial bodies is prohibited. Also, there is a pledge by the parties not to place in orbit around the earth any objects carrying nuclear weapons or any other kind of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

On the other hand, the use of military personnel for scientific research or for any other peaceful purposes is not prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies is also not prohibited. Id., Arts. II and IV.

through outer space or the movements of man-made objects must be for the benefit and in the interest of all countries?

It is doubtful that the outer space Treaty's reference to "use" was intended to include the use of the sunrays for everyday seeing. However, it is likely that the more specific or direct use of the sun's energy in outer space, especially in spatial travel or experiments, such as for propulsion, heating, etc. would constitute use in the sense of the Treaty.

A further question with respect to the meaning of exploration and use is whether or not the concept involves exploration and use of outer space only in outer space or also on earth. In other words should the location of the investigator or the investigating instrument make a difference? Does the manufacture of space rockets on earth or a telescopic exploration of outer space from the earth constitute activities in the exploration and use of outer space under the Treaty?

If one looked at the purpose of the activity, it would not be illogical to say that such activities may refer to activities either in outer space or on earth. However, inasmuch as the Treaty speaks of activities "in" and not "for" the exploration and use of outer space, it seems reasonable to conclude that the manufacture of space rockets on earth is not within the meaning of the discussed provision. But, what if the rocket is sent into outer space but explodes in the airspace? Is this such an activity? From Article VII which provides for international liability of the state that launches or procures the launching of an object into outer space for damage to another party to the Treaty by such object on the earth, in the airspace, or in outer space, it could be argued that once an object is launched, it is considered an activity in the exploration and use of outer space.

The question whether or not the activities in the exploration and use would have to be conducted in outer space is also significant inasmuch as a negative answer to it would impose a duty on all telescopic investigations and studies conducted here on the earth to be in the interests of all countries. It is doubtful that such a result was either intended or envisioned by the Treaty. This is not to say, however, that observation from the earth is of no relevance in the context of the Treaty. In fact, the Treaty stipulates that the signatories must consider on a basis of equality any requests by other parties to be afforded an opportunity to observe the flight of their space objects.\textsuperscript{12} The nature of such an opportunity for observation

\textsuperscript{12} Id., Art. X, Para. 1.
and the conditions under which it could be afforded must be
determined by agreement between the states concerned.\textsuperscript{13}

IV. LIMITATIONS ON FREEDOM OF EXPLORATION AND USE

The principal of freedom of exploration and use in the
Outer Space Treaty is a general principle, the application of
which is limited by a number of both general as well as
specific provisions. The former include the requirements that
the exploration and use must be carried out “for the benefit
and in the interests of all countries,” “without discrimination
of any kind,” “on a basis of equality,” “in accordance with in-
ternational law” and that it shall be “the province of all man-
kind.”\textsuperscript{14} The latter involve, for instance, the prohibition of
national appropriation,\textsuperscript{15} limitations on military uses\textsuperscript{16} and
avoidance of harmful contamination.\textsuperscript{17} Within the context of
our inquiry and by way of example we shall now scrutinize the
first and perhaps most importation limitation, namely the re-
quirement that the exploration and use of outer space must
be carried out “for the benefit and in the interests of all coun-
tries.”

A. BENEFIT AND INTERESTS

1. SINGENESS V. DUALITY

The exploration and use of the moon and other celestial
bodies, much as that of outer space, must be carried out “for
the benefit and in the interests of all countries.”\textsuperscript{18} The Treaty
contains no clue as to what constitutes “benefit” and “interest.”
Presumably the two terms are not identical in their meanings.
If they were, a repeated reference to the same term would be
clearly redundant. Also, it is unlikely that a joint concept of
“benefit and interest” was meant, that is, that “benefit and in-
terest” would mean something different from either “benefit”
or “interest” alone. This is apparent from the fact that the
word “interest” is used in the plural and from the additional
fact that it is separated from the word “benefit” by the words
“and in the.” If the terms “benefit” and “interests” mean two
different things, what connotations can be assigned to each of
these phrases?

\textsuperscript{13} Id., Art. X. Para. 2.
\textsuperscript{14} Id., Art. I.
\textsuperscript{15} Id., Art. II.
\textsuperscript{16} Id., Art. IV.
\textsuperscript{17} Id., Art. IX.
\textsuperscript{18} Id., Art. I.
2. Meaning

“Benefit” normally refers to some advantage or indulgence, as opposed to detriment or deprivation. While the word “interest” has similar connotations, it has been defined as a pattern of demands and its supporting expectations.\(^\text{19}\) Normally, something that is in line with a nation’s demands and expectations would be expected to convey some benefit to that nation. Such benefit may involve not only actual but also potential benefit, that is, a chance for some future benefit.

The quantity of benefit required may give rise to certain questions. Would an infinitesimal benefit be sufficient? It could be argued that the word “benefit” means something more than the words “some benefit.” Perhaps it does not require as much, however, as the words “full benefit.” So long as there is some tangible or substantial benefit, it appears that the requirement has been satisfied. There is no indication that the benefit must be either material or direct. An indirect benefit may be sufficient.

The phrase “for the benefit” does not have the same meaning as “not for the detriment.” The latter phrase carries a negative implication, whereas the former phrase has definitely positive connotations. Therefore, it is insufficient that the particular exploration and use be not for the detriment of other peoples. On the contrary, such exploration and use must be constructively beneficial.

Furthermore, the exploration and use must be in the “interests” of all countries. The plural term “interests” seem to indicate that more may be involved than just the vague, general “interest” of all countries. In a sense the plural phrase may perhaps be regarded as a victory for the less developed countries which entertained strong hopes of receiving benefits from man’s exploration and use of outer space.

What is or is not to the benefit and in the interests of all countries may not always lend itself to an easy determination. Something which is thought to be of benefit to a country on the basis of available information and criteria today, may be regarded on the basis of new information and criteria detrimental tomorrow. Also, who is going to determine whether or not a particular exploration and use is in a given case for the benefit of all nations? Since there is no provision in the Treaty for the settlement of disputes, it is likely that each state — short of an amicable disposition of the issue — would insist on its

\(^{19}\) H. Lasswell & A. Kaplan, Power and Society 23 (1950).
own interpretation with respect to the question of whether or not the exploration and use is for the benefit and in the interests of all countries.

The Treaty does not specify the types of benefit that must inure to all countries from the exploration and use of outer space but it seems safe to assume that they may include material, political, psychological, propaganda, military and other benefits and interests. A related question is what kinds of exploration and use or results derived therefrom would be beneficial to all countries? It could be pointed out that if the exploration and use furthers the maintenance of international peace and security and promoted international cooperation and understanding — something which the signatories are pledged to do anyway in all their spatial activities — it would be for the benefit and in the interests of all countries. Perhaps another way in which the exploration and use could be carried out for the benefit of all countries would be to release information regarding such exploration and use. However, it may not be easy to determine what constitutes a benefit in any given situation. Does the keeping of a fact as a secret from the rest of the world constitute a benefit to all countries or would the disclosure of any fact be beneficial to all nations? It may depend on the facts and circumstances of the particular case.

Whether or not only the "exploration and use" must be beneficial to all countries or also the "results," that is, the benefits derived from such exploration and use, is a further very important question. While this distinction may seem somewhat artificial, it points up the fact that such a distinction is possible. If so, the results of exploration and use would not necessarily have to be for the benefit of all countries, inasmuch as the Treaty speaks only about "exploration and use." On the other hand, how exploration and use, in and by itself (without the results of such exploration and use), could be of benefit, is rather difficult to see.

Assuming then for a moment that the "results" of exploration and use were meant, the question arises whether or not "all" such results or benefits were intended and, if so, must all such results be "shared" in order to constitute a benefit to all countries? Thus, for instance, could a nation derive exclusive propaganda benefits from landing a man on Mars or another celestial body? Furthermore, how could the actual benefits be measured? Could propaganda and prestige benefits

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20 Treaty, Art. VI.
21 Id., Art. 1.
be equated with material benefits, or on what basis should the conversion take place? Assuming that a nation shares more than fifty percent of the benefits derived from its exploration and use of outer space, would this satisfy the requirement that such exploration and use must be for the benefit of all countries? Suppose a nation takes 500 close-up pictures of a celestial body in the course of its exploration, the release of which would benefit all nations. If the exploring nation releases only 50 pictures, would such release satisfy the requirement?

In connection with the sharing of information the Treaty specifically requires that all signatories conducting activities in outer space inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations, and results of such activities.\textsuperscript{22} While this provision requires that such information be given to the "greatest extent," it qualifies this by the words "feasible" and "practicable." Thus the obligation to provide information seems broad enough to be open for circumvention. For one thing, there is no indication in the Treaty who would determine the feasibility and practicability of providing information, that is whose standards of practicability and feasibility would apply. Will the standards be applied by the United Nations, a few powerful countries or the exploring nation? Most likely by the last one. In this connection, it should be borne in mind that feasibility and practicability may involve questions of cost. Also, political and security considerations may enter the picture, if interpreted by the body which is required to submit the information.

Furthermore, it is not entirely clear from the text whether the phrase "to the greatest extent feasible and practicable" refers to the degree of dissemination of information or to the degree to which the information has to be detailed. Thus, for instance, an exploring nation may report that it engaged in a human exploration of the far side of the moon conducted by three of its astronauts and report that the results of the exploring activities were successful. Would such a brief report without giving details regarding the more precise nature, conduct, locations, and results of exploratory activities or other activities involving use be regarded as sufficient to satisfy the above requirements? Under a reasonable interpretation, the phrase "to the greatest extent feasible and practicable" should not be permitted to be circumvented by providing scanty in-

\textsuperscript{22} Id., Art. XI.
formation regarding the nature, conduct, location and results of space activities. At the same time, it would also appear that—even under a strict interpretation—the exploring states would not be obligated to release all information and results of their space activities for the simple reason that the Treaty does not specifically require them to do so. Under the current practice of the space powers there has been no full sharing or exchange of information and it is unlikely that this situation will change in the foreseeable future.\footnote{On the limited nature of US-USSR cooperation in space activities, see Hearings before the Senate Committee on Aeronautical and Space Sciences. 92nd Cong., 1st Sess., 30 (1971).} Furthermore, it may be pointed out that a state could take the position that release of certain information resulting from its spatial exploration would not be to its benefit, in which case it would not have to share the results of its exploration since such sharing would not be then for the benefit of "all" countries. Also, it would seem impossible to share propaganda benefits with all nations, unless all nations have participated or contributed in some form to the particular space exploration. Even then the nations which contributed the smallest effort to the success would likely gain the least propaganda benefits. In other words, an equal sharing of such benefits would more or less presuppose equal effort and participation on the part of all nations, an eventuality which is hard to visualize under present world conditions. In sum, it does not appear that a strict interpretation could be given to the effect that propaganda or prestige benefits derived from spatial exploration and use must inure to all nations.

The problem of distribution of benefits and implementation of a "share and share alike" policy will become particularly troublesome if valuable minerals and other natural resources are found on the moon and other celestial bodies. Thus it would appear that appropriate international agreements would have to be concluded before equal enjoyment of benefits could be regarded as more than a broad statement of general policy.

B. "ALL" COUNTRIES

The exploration and use of the moon and other celestial bodies for the benefit and in the interests of "all" countries—making it a "province of all mankind"—in a sense presupposes the ideological if not also the political unity of mankind, a condition which is likely to remain an all too distant goal for some time to come. Undoubtedly, the drafters of the Treaty were motivated by the lofty desire to move from the rift which sep-
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arates one corner of the earth from another toward unity in the spatial arena.

Strictly interpreted, the phrase "all" countries would include all states irrespective of whether such territory is recognized by another nation or is a member of the United Nations or is involved in a war, including the Korean or Vietnamese conflicts and the Cold War. Furthermore, the phrase would seem to include not only a state party to the Treaty but also any other nation. While universality appears clearly the aim, the reference to "all" countries should be viewed as a general statement of policy rather than a specifically enforceable obligation. Similarly, the phrase referring to the "province of all mankind" is presently more of an expression of hope than that of actual content. The provision as it stands seems to be a compromise between the interests of the underdeveloped nations and those of the space powers. The phrase "for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development" seems to have been in line with the aspirations of underdeveloped nations because of its specificity, while reference to the "province of all mankind" appears to have suited the space powers because of its vagueness. The initial reading of the phrase "irrespective of their degree of economic scientific development" may convey the idea that the benefits must accrue to the undeveloped or underdeveloped countries who otherwise may not reap any benefits. The wording may also suggest that other nations would have to bear no part of the expense and that such benefits are free for the asking, even though some states may well be able to bear part of the expense of spatial exploration and use. However, the word "irrespective" of the "degree of economic or scientific development" would exclude no countries, not even a highly developed country which would be as much entitled to the benefits as the most underdeveloped nation.

Of course, one may wonder the wisdom of including the phrase as an indirect qualifying sentence, following the general obligation that the exploration and use of outer space must be for the benefit and in the interests of all nations. Specifically, one may ask the question whether the phrase should also have included a reference to "political or military development," in addition to "scientific and economic development"? Furthermore, one could also have referred to friendliness or cooperation and a number of other criteria. Does the singling out of "economic or scientific development" mean to imply that
in relation to such development there can be no differentiation with respect to the benefits to be derived, whereas in relation to other types of development such differentiation can be made? It is doubtful that the Treaty intended such a result and the inclusion of the reference to "economic or scientific development" should in no applicable way alter the general obligation that the exploration and use of outer space must be carried out for the benefit and in the interests of all countries.

V. Who Is Obligated?

If an astronaut or future space traveler lands on the moon or another celestial body, is he required to use it for the benefit and interests of all countries? Could John Doe, A.T.&T. or an international organization use them in any manner which would not necessarily be beneficial to all countries? In other words, does the limitation that the exploration and use must be for the benefit of all countries apply only to states or to private and public organizations other than states and to individuals as well? The sweeping language of the Treaty appears to make this obligation a general duty. However, it is somewhat difficult to see how the Treaty could impose obligations on international organizations without their consent. Also, with respect to individuals it is difficult to see how any individual exploration or use could be required to be for the benefit of all countries. While the Outer Space Treaty does not make any exceptions in relation to certain types of uses, the stipulation that the exploration and use must be carried out for the benefit of all countries appears to be a limitation primarily on states and only secondarily on private individuals, corporations or international organizations. Were the provisions interpreted and enforced more strictly, it could seriously undercut individual incentive and hamper further space explorations. On the other hand, since the states parties bear international responsibility for all national activities in outer space, including the activities of nongovernmental entities and for assuring that such activities are carried out in conformity with the Treaty provisions and inasmuch as such activities require authorization and continuing supervision by the state concerned, it could be argued that the states would be required to enforce the provision with respect to individuals.\(^\text{24}\)

By the same logic, since the Treaty provisions are applicable to the activities of all states parties to the Treaty even if they are carried on within the framework of international inter-

\(^{24}\) Treaty, Art. VI.
governmental organizations and since responsibility for compliance with the Treaty is borne both by the international organization and by the states parties to the Treaty participating in such organization, it could be argued that both would be required to enforce the provision in question. While this argument is sound, it does not necessarily resolve the question of whether the provision was meant to be applied to individuals and international organizations.

VI. CONCLUSION

The purpose of the preceding analysis of the principle of freedom of exploration and use in the Outer Space Treaty has been to subject it to a rather close scrutiny in an attempt to clarify its meaning and focus on some of its legal implications. Obviously, a great deal more could be added in further refinement of some of the comment and ideas incorporated in this inquiry, particularly as they relate to the whole gamut of international and national decision making in the emerging earth-space arena. But enough has been said in a brief article to indicate the great many questions which may arise out of the implementation of what at first sight appears to be a relatively simple, though admittedly cardinal principle. It is hoped that the present reappraisal will be of some assistance toward further clarification of the concept and its meaningful and rational interpretation.

25 Id.
THE RIGHT TO MOVEMENT AND TRAVEL ABROAD: SOME OBSERVATIONS ON THE U.N. DELIBERATIONS*

VED P. NANDA**

The U.N. Commission on Human Rights has again postponed, until its 28th Session in 1972, the consideration of the item pertaining to "discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country."1 It should, however, be noted that for several years now such postponement has become a routine practice with the Commission,2 for almost eight years have lapsed since the major U.N. study on the subject was completed.3 This study had offered specific proposals for national and international action to ensure freedom and nondiscrimination to an individual in the enjoyment of his right to movement and travel abroad.4 In addition, the study had proposed a draft declaration of principles "which could exercise persuasive force and moral authority by virtue of their adoption by a competent organ of the United Nations."5

Since no U.N. action has yet been taken to study and implement these proposals, this lack of enthusiasm demonstrates that the right to travel abroad is not a top priority item. Nonetheless, it is one of those basic human rights, the universal recognition of which is likely to be a major accomplishment in accepting the importance of the individual as a subject of international law. Moreover, its importance is not confined merely to theoretical formulation and studies, for in various real life settings, the extent to which the right is recognized, as well as the nature of state limitations upon it, might have a pro-

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4 Id., at 67-70.

5 Id., at 64-67.
found impact upon individuals and groups. For instance, recent alleged Soviet restrictions on the Jews wishing to emigrate from the U.S.S.R., and the subsequent demonstrations and mass meetings in several countries with claims and counter-claims on the existence and the recognition of said right, point to the seriousness of the situation.

Thus despite previous inaction the subject is of such significance so as not to be dismissed or even slighted. As such, this paper will briefly examine (1) the nature of the right as enunciated in the U.N. instruments; (2) the scope and implications of this right; (3) major problems likely to be encountered in the implementation of the right; and (4) state practices in recognizing and limiting the right. The paper will conclude with a section on appraisal and recommendations.

I. THE NATURE OF THE RIGHT AS RECOGNIZED IN THE U.N. INSTRUMENTS

The Universal Declaration of Human Rights, promulgated on December 10, 1948, enunciates the right in article 13(2): "the right of everyone to leave any country, including his own, and to return to his country." This right, in fact, can be read as an extension of the right enunciated earlier: "Everyone has the right to freedom of movement and residence within the borders of each state." Several other articles of the Declaration have an important bearing on this right. For instance, article 9 provides that "no one shall be subjected to arbitrary arrest, detention or exile." Article 14(1) provides that everyone has the right "to seek and to enjoy in other countries asylum from persecution." Article 15(1) provides that everyone has the right to a nationality and article 15(2) provides: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." One could, of course, argue that the principles set forth in the Universal Declaration reflect merely the "oughtness"

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8 Id., Article 13(1).

9 See Ingles report, at 9-12.

10 Universal Declaration, supra note 7, at 35.

11 Id.

12 Id., at 36.

13 Id.
and are not enforceable. But with the adoption by the General Assembly on December 16, 1966, of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the Covenant on Civil and Political Rights, these principles have been transformed into enforceable international obligations. Article 12, paragraphs 2 and 4 of the Covenant on Civil and Political Rights affirm the right to travel: "... 2. Everyone shall be free to leave any country, including his own. ... 4. No one shall be arbitrarily deprived of the right to enter his own country."

As early as 1952, however, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights initiated a study on the right set forth in article 13(2) of the Universal Declaration. Subsequently approved by the U.N. Commission on Human Rights and the Economic and Social Council, the Sub-Commission conducted a global study "with respect to all the grounds of discrimination [in respect of the right of everyone as provided in article 13(2) of the Universal Declaration] condemned by the Universal Declaration of Human Rights. . . ." The study, which was carried out by Jose Ingles as the Special Rapporteur of the Sub-Commission, took three years to complete (1960 to 1963), and contains valuable information on pertinent state practices. It also contains specific recommendations to ensure the "full enjoyment" of this right. As mentioned earlier, the Commission has not had occasion thus far to study the proposals and recommendations contained in the Ingles report.

However, in 1963, a U.N. Conference on International Travel and Tourism, which met in Rome (from August 21, 1963 to September 5, 1963) and was attended by 87 states and several inter-governmental and non-governmental international organizations, considered the question pertaining to freedom of movement in the light of the Ingles report. While the Conference noted the suggestion that "freedom of travel from country to country should be the inalienable right of all,"

14 But see id., at 12-32.
16 Ingles' report, at 74.
17 Id., at 75.
and recognized "however, that such a rule could not apply uni-
versally at the present stage," it nevertheless added that "its
implementation should be the aim of all countries, and the
Conference recommends that governments should, wherever
possible, avoid any kind of activity hostile to tourism and based
on arguments of a religious, racial or political nature. The Con-
ference asked that its opinion on that point be communicated
to the United Nations Commission on Human Rights."\[19\]

The general resolution by the Conference affirmed the ideal,
expressed in the Universal Declaration of Human Rights, that
everyone has the right to freedom of movement, including
freedom of transit, and takes note of the report by the Com-
mission on Human Rights, Sub-Commission on Prevention of
Discrimination and Protection of Minorities, on the right of
everyone to leave any country, including his own, and to re-
turn to his country.\[20\]

It recommended that governments should "prevent, in the field
of tourism, any campaign of denigration or discrimination based
on religious, racial or political grounds."\[21\] The Conference fur-
ther recommended that "travel for educational, scientific, cul-
tural or official purposes should be specifically encouraged and
facilitated."\[22\]

A notable recognition of the right is contained in article 5
of the 1967 International Convention on the Elimination of All
Forms of Racial Discrimination which obligates states parties
to guarantee the right of everyone, without distinction as to
race, color or national or ethnic origin, to equality before the
law, notably in the enjoyment of the right to leave any country,
including one's own, and to return to one's country.

In addition, several international instruments have recog-
nized these rights.\[23\] The most noteworthy in this context are:
(1) the 1951 Convention Relating to the Status of Refugees;
(2) the 1954 Convention Relating to the Status of Stateless
Persons; and (3) the 1961 U.N. Convention on the Elimination
or Reduction of Future Statelessness. The following provisions
of these conventions have a direct bearing on the right under
consideration: article 28 of the 1951 Convention on Refugees
obligates contracting parties to issue travel documents to refu-
gees within their territory, especially to the ones who are un-
able to secure such documents from the state of their lawful
residence; article 28 of the 1954 Convention on Stateless Persons

\[19\] Id.
\[20\] Id., at 20.
\[21\] Id.
\[22\] Id.
\[23\] See generally Ingles report, at 5-7.
similarly obligates the contracting parties to issue travel documents to stateless persons lawfully within their territory, while paragraph 13 of the Schedule to the Convention entitles a stateless person who is the recipient of a travel document under article 28 to re-enter the territory of the issuing state at any time during the period of the validity of the document; the 1961 Convention contains several provisions to ensure that departing nationals do not lose their nationality on racial, ethnic, religious or political grounds, unless they have in the meantime acquired another nationality.

It should be also mentioned that both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations contain special provisions allowing persons enjoying diplomatic and consular privileges and immunities respectively and members of their families to leave the territory of the receiving state, even when armed conflict is in progress.

Finally, various regional and bilateral arrangements aimed at easing border requirements and facilitating international travel are also in existence. Of special note are articles 2-4 of the Protocol No. 4 to the European Convention on Human Rights which embody, inter alia, the principles that everyone is free to leave any country, including his own, and that no one is to be deprived of the right to return to his country.

II. Scope and Implications

The right to movement and travel abroad as expressed in article 13(2) of the Universal Declaration of Human Rights is fairly comprehensive. It encompasses such diverse groups as tourists, refugees, immigrants and emigrants and stateless persons as well as those citizens within a state who are forced to remain there due to discriminatory practices. But while the right is broad, its scope in the light of past and present applications appears to be severely restricted.

Limitations are inherent, due to the stated exceptions (national security, public health and morals, safety, legal and military obligations and the public order) and the reaction of nation states to what they might perceive to be an infringement upon matters within their domestice jurisdiction. Notwithstanding some serious challenges to the sovereigny of the nation state, a state's right and power to control its internal affairs is

still widely accepted. Thus while the individual claims the right to international movement, the state claims the right to impose certain restrictions.

Accepted state restrictions include such activities as limiting travel to members of subversive organizations, immigration policies seeking "skilled" employees, and the imposition of medical and health qualifications. However, if the right were to be interpreted literally, cause might exist for increased concern over its possible application to population shifts.

This concern is already being expressed with regard to social tension that urban areas have experienced in connection with immigration policies. Thus in deciding future application of 13(2) it is important that a balance be achieved in immigration policies between the social costs incurred and the profits received in both developing and developed nations. Beyond this economic balance are also problems of national identity. A homogeneous population is desired by many states as a means of achieving identity and reducing cultural tensions. But, while the ideal of homogeniety is appealing, its feasibility is not great, especially in the developing countries of Asia and Africa. The legal and technical problems beyond the moral, sociological and cultural problems of shifting borders and populations to achieve a homogeneous population place the ideal far beyond practicality.

Still, given the above considerations, it can be argued that a state cannot impose restrictions aimed specifically at a group, race, nationality, etc., with a view to denying them the right to move freely among countries on a discriminatory basis.

It must be noted here that the problems being dealt with are not unique to 13(2). They affect all human rights. Discrimination is an illusive concept. First, it is difficult to define since it must depend in large part upon the situation in which it occurs. Second, once it is defined such discrimination is often difficult to "prove." Perceptions of situations differ greatly. And since discrimination is a social, cultural, or as some say an innate pattern of behavior, a listing of basic human rights can only deal with the manifestations of discrimination. Actual discrimination cannot be dealt with by international covenants. But these covenants can lessen the areas in which the mani-

festations of discrimination are acceptable. The problems of determining discriminatory behavior are then alike for all human rights.

A state's denial to its citizens of access to other countries and its refusal to accept citizens of other states within its borders, may not in and of itself be discriminatory. Imposing restrictions such as visas, health controls, monetary payments, etc., can be appropriate in one situation and perhaps discriminatory in another. Promotion of trade and travel and the ensuing economic benefits are a part of this picture as are travel regulations for refugees, migratory laborers and stateless persons. What are appropriate formalities and requirements? Are there time limitations? What are the grounds for rejection? Once issued, can a state refuse to honor such documents? Can a state, after permitting travel, deny re-entry? Do the same rules apply to citizens and foreigners or resident aliens? Should treatment accorded individuals be different from that accorded groups? If so, in what way? How should one view this freedom in terms of population growth? What is the relation to economic viability?

These factors and considerations, social, economic, political, must be part of the input into a discussion on the implementation of the right of movement and travel abroad. Each situation puts forth a myriad of complex and sometimes contradictory aspects. But implementation, to be successful, must be viewed in the broadest of contexts. The scope here is all encompassing within the perspective of restrictive measures whose purpose is to effectuate discriminatory policies.

III. DIFFICULTIES IN THE IMPLEMENTATION OF THE RIGHT

It is this broad and rather illusive perspective, and its variety of credible and varying interpretations which tend to make this right appear ambiguous and, therefore, difficult if not impossible to implement. This, together with the differing criteria a state may apply to determine the nature and extent of these rights—that of a national to leave his country and that of a foreigner to leave the country of his sojourn—and that it might treat both these rights differently from the right of its national to return to his country reinforce the difficulties of implementation. Another equally important problem is the existence of direct and indirect state limitations on the enjoyment of this right, limitations which are hard to substantiate because administrative procedures granting, denying or restricting this right might be so discretionary as to allow little or no recourse
to further appeal or judicial review. Thus a de jure existence of the right would certainly not imply that it does exist de facto as well. Furthermore, a state might couch its discriminatory practices in legalistic framework. Therefore, although the state practice would amount in fact to "discrimination" in the enjoyment of the right as provided in articles 2 and 29(2) of the Universal Declaration, it would be hard to prove, due to indirect restrictions administered under regulations and procedures which provide for nondiscriminatory application but are in reality administered in a discriminatory fashion.

It is appropriate at this point to note that article 2 of the Declaration provides in its relevant part: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 29(2) provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

While article 2(1) of the International Covenant on Civil and Political Rights is identical in content to article 2 of the Declaration, article 12(3) of the Covenant provides:

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Of note are the additions of national security, ordre public and public health in article 12(3) of the Covenant to the limitations already mentioned in article 29(2) of the Declaration, and the deletion therefrom of the concept of "general welfare." The civil law concept of ordre public is generally considered broader in scope and more flexible than its counterpart in common law, public order; while the former is closer to public policy, the latter means absence of disorder.

Thus, while the right encompassed in article 12 of the Covenant is to be enjoyed without any distinction based on "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," there is ample

30 Universal Declaration, supra note 7, at 34.
31 Id., at 38.
32 See supra note 24.
reason to believe that any one or more of the bases of distinction enumerated here could be used by a state to prevent a national from leaving his own country, to prevent a foreigner from leaving the country of his sojourn, or to prevent a national from returning to his own country.\footnote{See generally Ingles report, at 20–35.} For instance, passport facilities could be denied to persons belonging to an ethnic group or to a political party as has been the case in South Africa. Similarly, restrictions could be imposed on persons for various reasons, such as some special status—that of a married woman or a divorcesee—or on linguistic, religious or political grounds—for example, alleged restrictions on Jews in the Soviet Union—or for reasons of national or social origin—for instance, restrictions on American citizens of Japanese descent during World War II—or on considerations based on property, birth, or other status.

The Covenant allows a state to impose limitations on the right of everyone to leave any country, including his own, and to return to his country, if such limitations are "provided by law" and are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedom of others. In his study Ingles discusses passport and visa restrictions based on state interest, especially public emergency; legal incapacity; nonperformance of legal obligations and professional skill.\footnote{See id., at 41–46.} Among indirect limitations, Ingles discusses economic measures such as forbidding or restricting the exportation of currency as well as the high cost of obtaining travel documents.\footnote{Id., at 47–49.} Also, in some states, the procedures and conditions for obtaining a passport might be so complex as to render the exercise of the right to leave the country extremely difficult.\footnote{Id., at 49–51.} In addition, the exercise of the right to travel would be affected by (1) administrative and legislative remedies available to an aggrieved national who claims that his rights have been unduly restricted, \footnote{Id., at 51–53.} and (2) the imposition of penal or other sanctions upon the persons who might be found to have violated the state requirements on international travel.\footnote{Id., at 53–55.} As noted previously in Section II problems of implementing sanctions on discriminatory actions are not unique here. Implementation can at best be directed toward outward manifestations of discrimination.
IV. Trends as Reflected by States' Practices in Recognizing and Limiting the Right

The 1963 Ingles study was prepared on the basis of an extensive survey resulting in responses from 90 countries as well as information on 22 additional countries. Thus the study takes into account as many as 112 states. In addition information was solicited from selected non-governmental organizations in consultative status and specialized agencies. The responses show that about one-third of the countries explicitly recognize the right in question. It is appropriate to cite the report:

(a) The right of a national to leave his country. In twenty-four countries the right is formally recognized in constitutional texts or laws and in twelve countries by judicial interpretation. Fifty countries do not expressly recognize the right in their legislation.

(b) The right of a national to return to his country. In twenty-four countries the right is formally recognized in constitutional texts or laws and in twelve countries by judicial interpretation. Forty-nine countries do not expressly recognize the right in their legislation.

(c) The right of a non-national to leave the country of his sojourn. In twenty countries the right is formally recognized in constitutional texts or laws and in four countries by judicial interpretation. Fifty-six countries do not expressly recognize the right in their legislation.

Of course, the conclusion is not warranted that the absence of legal recognition negates the existence of the right, or conversely that formal recognition ensures its enjoyment. For while a number of countries

which do not have any constitutional or legislative provision or judicial precedent governing this question have stated that they recognize it "in principle," "as a rule of law," "in general practice," "according to regulations," "as an enforceable right," "always," or that "there is no authority for denial." This is particularly true as regards the right of a national to return to his

39 The Secretary-General had in April 1960 sent a circular letter to all governments of states members of the U.N. and members of specialized agencies seeking their assistance in the preparation of the study, and adding that the Special Rapporteur would appreciate "having any relevant material, including the texts of laws, administrative arrangements, judicial decisions and statistical data," (Ingles report, at 77-78) as well as information on specific points sought by the Special Rapporteur. Two more circular letters, one in 1961 and the second in 1962, were sent by the Secretary-General to all governments which had not responded to the inquiry. The Director of the Division of Human Rights had in April 1960 made a similar request for assistance to 117 selected nongovernmental organizations (Ingles report, at 76); this was followed by another letter in March 1962 to those organizations which had not responded to the first.

40 Ingles report, at 4. In 4 countries on point a, in 5 countries on point b, and in 10 countries on point c no information available.
country, which has thus been informally recognized by sixteen additional countries.\footnote{Id., at 5.}

Since the report had not been considered by the Commission in several years, in June 1970, the Secretary-General, pursuant to a request by the Sub-Commission, sent a note verbale to governments of member states \"requesting them to furnish information on new developments in fields covered by the study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country.\"\footnote{1970 Note by the Secretary-General, supra note 2, at 6.}

Of the replies received from 27 states until February 1971,\footnote{See 1970 Note by the Secretary-General, Annex [hereinafter cited as Annex]; Note by the Secretary-General, Addendum, U.N. Doc. E/CN.4/1042/Add. 1, 25 Jan. 1971 [hereinafter cited as Add. 1]; and Note by the Secretary-General, Addendum, U.N. Doc. E/CN.4/Add. 2, 15 February, 1971 [hereinafter cited as Add. 2].} 12 (Cyprus,\footnote{Annex, at 2.} France,\footnote{Add. 1, at 7.} Guatemala,\footnote{Annex, at 3.} Jamaica,\footnote{Add. 1, at 7.} Lebanon,\footnote{Annex, at 5.} Nicaragua,\footnote{Id., at 6.} Nigeria,\footnote{Id., at 7.} Poland,\footnote{Add. 1, at 8.} Sierra Leone,\footnote{Annex, at 7.} Singapore,\footnote{Id.} Syria,\footnote{Add. 1, at 8.} and Turkey\footnote{Id.} indicated that no new developments had occurred since their earlier communications. Among others, Austria\footnote{Annex, at 7.} and Luxembourg\footnote{Id.} referred to their ratification of Protocol 4 to the European Convention on Human Rights; Argentina\footnote{Add. 1, at 7.} to its ratification of the 1967 International Convention on the Elimination of All Forms of Racial Discrimination; and Madagascar\footnote{Id., at 1.} to its accession to the 1966 Covenant on Civil and Political Rights. Obviously, all these countries were stressing the fact that since they were parties to the aforementioned conventions, they had therefore obligated themselves to the granting of the right.

Several countries referred to their constitutional provisions
guaranteeing the right. They include Barbados,\textsuperscript{60} Iraq,\textsuperscript{61} Kenya,\textsuperscript{62} Malta,\textsuperscript{63} and Mauritius,\textsuperscript{64} Afghanistan\textsuperscript{65} and Swaziland\textsuperscript{66} referred to their laws providing this right. Denmark\textsuperscript{67} is the only country that reported some added restrictions on travel in the case of national servicemen who could be liable to be called up in case of mobilization, while Austria,\textsuperscript{68} Italy\textsuperscript{69} and Sweden\textsuperscript{70} reported special provisions for granting passports to aliens without travel documents and to stateless persons.

Iraq\textsuperscript{71} and Italy\textsuperscript{72} mentioned "exceptional grounds" and "exceptional circumstances" respectively among the limitations on the right to travel abroad; in the former case, the limitation is on leaving the country, while in the latter, the limitation is on the right to be issued a passport. In Afghanistan,\textsuperscript{73} the qualifications to a foreigner's right to enter Afghanistan, travel in the country and leave it are stated thus: "[e]xceptions apply only to undesirable persons in accordance with the law. The principle of reciprocity, in accordance with international law, is recognized." In Sierra Leone,\textsuperscript{74} the right to leave the country is not included in the constitutional right guaranteeing freedom of movement, although it was reported that "there has been no judicial declaration on such a right" based on the constitutional provision granting freedom of movement.\textsuperscript{75}

V. APPRAISAL AND RECOMMENDATIONS

State practice is varied in respect to granting the right, ensuring its enjoyment, imposing limitations on it and providing remedies.\textsuperscript{76} It would certainly be desirable if some uniformity were achieved in setting standards and providing remedies. Of

\textsuperscript{60} Id., at 3-5.
\textsuperscript{61} Annex, at 3-4.
\textsuperscript{62} Id., at 4.
\textsuperscript{63} Id., at 5.
\textsuperscript{64} Id., at 6.
\textsuperscript{65} Add. 1, at 2.
\textsuperscript{66} Annex, at 8.
\textsuperscript{67} Add. 1, at 6.
\textsuperscript{68} Id., at 2-3.
\textsuperscript{69} Add. 2, at 3-5.
\textsuperscript{70} Annex, at 8.
\textsuperscript{71} Article 6 of the Passport Law. See Annex, at 4.
\textsuperscript{72} Add. 2, at 3.
\textsuperscript{73} Add. 1, at 2.
\textsuperscript{74} Annex, at 7.
\textsuperscript{75} Id.
course, the objective would be to move toward recognition of the right by every state as well as adoption by states of means for an effective implementation of the right.

It is realized that if the International Covenant on Civil and Political Rights were to come into force and were ratified by a vast majority of states, the right would ipso facto be recognized by the states ratifying the Covenant. However, not only are the states slow in their ratification, but even were the Covenant to be ratified universally and the right to movement and travel be internationally recognized, the mere recognition of the right might remain meaningless rhetoric, unless it were to be accompanied by specific standards, criteria and remedies for implementation.

The following international measures are proposed as necessary first steps in implementation. (1) The Human Rights Commission should find time at its next session in 1972 to consider the Ingles report and the more recent developments since the publication of the report in 1963. (2) A declaration of principles should be recommended by the Commission to be adopted later by the Economic and Social Council and finally by the General Assembly. Such a declaration would offer a comparative set of standards to every state and would provide an impetus to bring a state's practice in line with the internationally agreed principles.

Such standards could be compiled through the gathering of relevant statistics and an examination of at least formal governmental practices indicating customs procedures, costs of exit and entry documents, length of time required to obtain such papers, and information sought in such forms. A compilation of requirements representing the lowest common denominator should be offered as a model for initial state compliance. (3) Dissemination of information on the nature of the right by the utilization of all the U.N. resources and machinery, especially through its advisory services and regional seminars, would be

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77 Pursuant to article 27 of the Covenant on Economic, Social and Cultural Rights and article 49 of the Covenant on Civil and Political Rights respectively, each of the two covenants will come into force three months after the thirty-fifth instrument of ratification or accession has been deposited. As of December 1971, Bulgaria, Columbia, Costa Rica, Cyprus, Ecuador, Libya, Syria, Tunisia and Uruguay were the 9 states that had either ratified or acceded to both these covenants. See Multilateral Treaties in Respect of which the Secretary-General Performs Depository Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1970, U.N. Doc. ST/LEG/SER.D/4 (1971), at 78-82. On January 25, 1971, Iraq ratified the Covenants, becoming the 10th country to be a party to the two covenants. See 7 UN Monthly Chronicle, No. 2, Feb. 1971, at 23.

78 Id.
useful in encouraging the exercise of the right. Similarly, periodic state reporting to the Human Rights Commission pertaining to the enjoyment of the right would be desirable. Use of this information should be made in the compilation of data on population patterns and growth of tourism, enumerating purposes and lengths of international travel and movement and problems encountered as a result.

(4) Finally, a draft convention on the subject should be drawn up by the Commission, which could later be adopted by the General Assembly. Similarly, regional and bilateral conventions facilitating international travel and movement should be encouraged.

Though tacitly no country acknowledges discriminatory practices of this nature the persistent denial by South Africa of passports to blacks wishing to leave for study and travel should not be ignored, nor can Soviet actions with regard to her Jewish citizens. But both states have reacted to world pressures and protests. This reaction indicates that pressure and opinion can have significant effects and should be exploited for the purposes of implementation.

At this point, no international machinery is envisaged to compel a state to grant this right to the individual. The encouragement of voluntary compliance by a state with the established standards should be the primary focus. The importance of the right to movement and travel abroad should be given urgent and immediate consideration at the United Nations as well as at regional and national levels.
One of the major international developments since the founding of the United Nations in 1945 has been the phenomenal increase in the number of nation-states. Most of these new members belong to the Third World, and most have subscribed to the global normative system which is centered in the Charter of the United Nations. It is generally recognized, however, that the entry of developing nations into the mainstream of the legal process of the international community has been followed by the feeling on their part that they have not enjoyed a proportionate share in the shaping of this process, which is so vital to their interests, and instead their role has been one of accession to norms written by the developed countries.

It is encouraging to note, therefore, the indications of a growing input by the developing countries into the evolving normative structure of the community. One such indication is evident in the decision process relating to arms control which has been going on under the aegis of the United Nations, and, in particular, in the evolvement of the Treaty on the Nonproliferation of Nuclear Weapons which was opened for signature under the auspices of the United States, the Soviet Union and the United Kingdom on July 1, 1968.¹

In his statement on the Revised Draft of the Treaty on the Nonproliferation of Nuclear Weapons which was presented jointly by the United States and the Soviet Union to the

*Professor of Law, University of Baltimore. Copyright is retained by the author.

¹ T.I.A.S. No. 6839, 21 U.S.T. 483; done at Washington, London and Moscow, July 1, 1968; entered into force March 5, 1970. Articles I and II contain the following operative clauses:

**Article I**

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

**Article II**

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.
Eighteen Nation Disarmament Committee in Geneva on January 18, 1968, President Lyndon Johnson alluded to this influence with the acknowledgement that:

We have worked long and hard in an effort to draft a text that reflects the views of other nations. I believe the draft presented today represents a major accomplishment in meeting these legitimate needs.

The views of other nations which the American President referred to would seem to include those expressed in the Joint Memorandum on Nonproliferation of Nuclear Weapons. This document made reference to Resolution 2028(XX) which was adopted by the General Assembly of the United Nations on November 19, 1965, in which Resolution the Assembly “noted with satisfaction the efforts of the eight delegations to achieve the solution of the problem as contained in their Joint Memorandum” which had previously been submitted by them on September 15, 1965 to the ENDC. The later Joint Memorandum (August 19, 1966) referred to the fact that the General Assembly in its resolution calling upon the ENDC to negotiate a nonproliferation treaty, laid down the principles inter alia that such a treaty “should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers . . .” and “should be a step towards the achievement of general and complete disarmament and, more particu-

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2 The development of the Eighteen Nation Committee on Disarmament (hereinafter referred to as ENDC) was as follows: As early as September 7, 1959, the foreign ministers of the United States, France, the United Kingdom and the Soviet Union announced in a joint communique (U.N. Doc. D.C./144, Sept. 8, 1959) their agreement to seek establishment of a ten nation committee for the general consideration of disarmament with the intention of making reports to the General Assembly and the Security Council. Proposal for an enlarged forum was made on December 31, 1961 by the Soviet Union and the United States jointly in a draft resolution (A/C. 1/PV. 1218 at 4-12) presented in the First Committee of the General Assembly—to include eight new members. This resolution was approved by the General Assembly on December 20, 1961 (G.A. Res. 1722 (XVI)) with the recommendation that the Committee seek agreement on general disarmament under international control. On March 14, 1962, the Eighteen Nation Disarmament Committee opened discussions in Geneva with a membership comprising France, the United Kingdom, the Soviet Union, Bulgaria, Canada, Czechoslovakia, Italy, Poland, Roumania, Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden and the United Arab Republic (ENDC/PV. 1, March 14, 1962). France has since been generally inactive. Now with an enlarged membership, the Geneva body is currently referred to as the Conference of the Committee on Disarmament.


4 Joint Memorandum on Non-Proliferation of Nuclear Weapons, presented to the ENDC on August 19, 1966, by the eight national delegations of Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden, and the United Arab Republic. U.N. Doc. ENDC/178.

5 U.N. ENDC/158.
larly, nuclear disarmament . . ." Whereupon the Joint Memorandum stated:

The eight delegations note with satisfaction that during the discussions which have since taken place in the Eighteen Nation Committee on Disarmament, mainly on the draft treaties presented by the United States (ENDC/152 adn ENDC/152, add. 1) and the Soviet Union (ENDC/164) the above mentioned principles have received further substantial support. . . .

Referring to the above quoted principles in the General Assembly’s resolution, the same Joint Memorandum added that:

The eight delegations consider the applications of the principles . . . to be of importance to all countries but particularly to non-nuclear weapon countries which, through a treaty on nonproliferation will have to refrain from the acquisition of such weapons.

And that:

The eight delegations further trust that in connection with an agreement on nonproliferation of nuclear weapons, intentions be explicitly stated that assistance to developing countries should be increased in order to help accelerate their programmes of development of atomic energy for peaceful purposes . . . also express the hope that adequate steps will be taken to envisage channelling important resources, freed by measures of disarmament, to the social and economic development of countries hitherto less developed.

The influence of the non-nuclear states, and in particular of those of the Third World, on the production of the Nonproliferation Treaty continued to be felt in the decision making that transpired between the submission of the Joint American-Soviet Revised Draft Treaty in January 18, 1968 and the ceremonies for the signature of the finalized Treaty on July 1, 1968. This influence is observable in a partial comparison of the January and July texts. Similarly, incremental concern for imple-

6 Thus Article IV, paragraph 2 reflects, in its revision, a progressive recognition of the rights of the developing nations. The earlier text had read:

2. All Parties to the Treaty have the right to participate in the fullest possible exchange of scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty.

The final revision reads:

2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.
mentation of the rights of non-nuclear states is visible within the development of Article V.7

Comparison of the two sets of versions discloses that the later text of Article IV includes provision not only for the exchange of information but for the exchange of equipment and materials, and makes explicit reference to “consideration for the needs of the developing areas of the world.” The later text of Article V adds implementive content to the earlier one by providing that negotiations to actualize the right of non-nuclear states to obtain benefits from the peaceful applications of nuclear explosions, pursuant to a special international agreement through an international body, should commence as soon as possible after the treaty’s entry into force.

In his comment on these textual changes as previewed in the First Committee of the General Assembly on May 31, 1968, Soviet First Deputy Foreign Minister Kuznetsov, noted that many representatives have quite rightly pointed to the particular interest of developing countries in the peaceful uses of nuclear energy for accelerating their economic development and improving the standard of living of their peoples. From this point of view a considerable amount of work has been done to supplement the treaty on non-proliferation . . . by including

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7 The earlier revision had read:

Article V

Each Party to this Treaty undertakes to co-operate to insure that potential benefits from any peaceful applications of nuclear explosions will be made available through appropriate international procedures to non-nuclear-weapon States Party to this Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for reasearch and development. It is understood that non-nuclear-weapon States Party to this Treaty so desiring may, pursuant to a special agreement or agreements, obtain any such benefits on a bilateral basis or through an appropriate international body with adequate representation of non-nuclear-weapon States.

The final revision reads:

Article V

Each Party to the Treaty undertakes to take appropriate measures to ensure that, in accordance with this Treaty, under appropriate international observation and through appropriate international procedures, potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States Party to the Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development, non-nuclear-weapon States Party to the Treaty shall be able to obtain such benefits, pursuant to a special international agreement or agreements, through an appropriate international body with adequate representation of non-nuclear-weapon States. Negotiations on this subject shall commence as soon as possible after the Treaty enters into force. Non-nuclear-weapon States Party to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements.
corresponding provisions that would accommodate the desires of the non-nuclear states.8

A specific instance of the input of a developing state in the decision process culminating in the Nonproliferation Treaty is that of Nigeria. In its “Working Paper Submitted to the Eighteen Nation Disarmament Committee: Additions and Amendments for Inclusion in the Draft Nonproliferation Treaty,” dated February 28, 1968 as revised March 14, 1968,9 Nigeria asked for a change in the wording of Article IV. Referring to the January wording, Nigeria argued that the “words ‘undertake to facilitate’ should be substituted for the words ‘have the right to participate in.’” The final text was changed to reflect this demand. It reads: “Undertake to facilitate, and have the right to participate in. . . .”

In seeking the motives leading the nuclear nations to accommodate the developing nations in their bid to participate in the international decision process in its arms control phase, one might tend to look first to considerations of physical power. Though the discrepancy between the power positions of the two groups of states would seem vast enough to argue against the need for such accommodation in material considerations, one possible explanation of the motivation is the remote prospect of a developing nation’s acquiring possession of nuclear weaponry with its threat to the security of the nuclear states themselves.

It is submitted, however, that an important part of the explanation is the ethical thrust of the demand of the developing nations to participate in public decision making which is going to affect their interests and which is going to entail sacrifices on their part which will not be required of the nuclear states. Under the Nonproliferation Treaty, for example, it is the non-nuclear signatory states which will be obliged to forego the nuclear testing which would enable them to develop their

8 A/C.1/PV. 1577, at 62-73. See also Brewer, U.N. Atomic Draft Revised to Aid Smaller Countries, N.Y. Times, June 1, 1968 at 1, col. 2: UNITED NATIONS, N.Y. May 31 - The United States and the Soviet Union bowed today to pressure from smaller countries and announced a series of changes in their proposed nuclear treaty, which would halt the spread of nuclear weapons to countries that do not now have them.
In essence the changes do the following:
Give stronger guarantees to the small countries that will benefit through the peaceful uses of nuclear power.
Give the smaller countries a promise of more urgent efforts by the big powers to end the world arms race.
Provide an agreement to reinforce the authority of the United Nations charter against the use of force in general.

own nuclear independence, while the nuclear states will continue to have the right to conduct detonations. The ban on acquisition does not apply to the latter under this treaty, nor are they prohibited from conducting underground testing by the Partial Test Ban Treaty.\textsuperscript{10} The moral posture of the non-nuclear group vis-a-vis the nuclear group was well summed up in the ENDC by delegates of three different countries. Representative Obi of Nigeria saw the issue:

A universal approach to the problem is not only essential but desirable and inescapable. After all, the treaty on non-proliferation, should we achieve one, would impose heavier obligations on the non-nuclear Powers than on the nuclear Powers.\textsuperscript{11}

Representative Burns of Canada pointed out that:

... we have all made it clear that there should be reciprocal obligations of the nuclear powers and the States not possessing nuclear weapons.\textsuperscript{12}

And finally Representative Azeredo da Silveira of Brazil stressed the right of all members of the community to share in the power of decision:

For such is the kind of treaty to which we are looking forward: not a text agreed privately between the super-Powers and destined to massive accession by the rest of the nations. ... \textsuperscript{13}

As the community of nations continue to weigh the great decisions about arms control: decisions about underground nuclear testing, about chemical and bacteriological warfare, about the peaceful use of the sea bed and ocean floor, about the arms race and safeguards to guarantee the effectiveness of control agreements, and about the diversion of resources to develop-


\textsuperscript{13} U.N. Doc. ENDC PV. 310, July 4, 1967 at 5.
ment, the moral issue will be ever present.\textsuperscript{14} And the voice of the emerging consciousness of the developing countries will continue to be heard. Their claims are not about to cease.

For the poor nations have a moral hold on powerful nations that profess ethical ideals. Their voices can be ignored only at a heavy cost in credibility. Such is the political weight of the moral factor.

\textsuperscript{14} Cf. the Joint Memorandum of Sept. 15, 1965 (ENDC/158):

The eight delegations are convinced that measures to prohibit the spread of nuclear weapons should, therefore, be coupled with or followed by tangible steps to halt the nuclear arms race . . . .

See also the statement of Lord Chalfont of the U.K., U.N. Doc. ENDC/PV. 299, May 25, 1967, in part as follows:

\ldots I see the non-proliferation treaty as simply the first but vital element in a broad and comprehensive strategy—a strategy for arms control, for disarmament and for international security, and for the international control of nuclear energy for the uses of peace. Certainly the treaty will not last, nor will it deserve to last, if it is used simply as a device to preserve the existing order of things, to perpetuate the oligopoly of the nuclear club. If we are to progress, as we should, from a non-proliferation treaty gradually to a more intelligent system of international security than the one we have at present it will be necessary for the nuclear Powers to accept two simple and incontrovertible facts.

The first of those facts is that they cannot expect the non-nuclear Powers of the world to deny themselves the option of possessing the most powerful military weapon the world has ever seen unless they, the nuclear Powers, are prepared themselves to engage in serious and specific measures of nuclear disarmament. . . .

\ldots if a non-proliferation treaty is not followed by serious attempts amongst the nuclear Powers to dismantle some of their own vast nuclear armoury, then the treaty will not last, however precise its language may be. There is in my mind no doubt that, if the non-nuclear Powers are to be asked to sign a binding non-proliferation treaty, it must contain the necessary provisions and machinery to ensure that the nuclear Powers too take their proper share of the balance of obligation.
BOOK REVIEW

INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE.


The post World War II period, which marked the end of colonialism, has also brought to the fore concomitant problems; one such problem results from the nationalization of alien property. Claims and counter-claims between the capital exporting countries and the countries taking over foreign properties have been settled by different means, the most frequent of which at present is that of lump sum settlements, reached under bilateral agreements. France, among other Western powers, has in this manner settled the claims of her property interests “damaged, destroyed or divested by nationalization, and other deprivative measures”\(^2\) undertaken by other countries (among these are several East European states, Cuba and Egypt). In each instance, the French government established a claims settlement commission to compensate the affected French property interests. It is these commissions and their decisions that Professor Weston studies and analyzes in his work.

The study is unique, for this is the first serious attempt to inquire into this important subject. But in this reviewer's opinion, the significance of the study is further enhanced by Professor Weston’s technique in analyzing the French practice. He provides a policy-oriented framework to bring order to this otherwise unwieldy and highly confusing maze of commissions' decisions.

This technique offers Professor Weston the use of an appropriate methodology to sift the material, treat it systematically and present it in such a fashion as to assist a researcher and scholar as well as a decision maker in drawing useful comparisons over time, and thereby contributing to the development of the “Law of International Claims.” Additionally, it facilitates the performance of the essential intellectual tasks as enumerated by the “New Haven School”: clarification of the goals of decision; description of the trends; analysis of the conditioning factors; projection of probable future development; and

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appraisal and recommendation of alternatives and strategies that contribute to the realization of preferred goals. More specifically, this approach allows Professor Weston to analyze the commissions' decisions in the context of the claimant's objectives, base-values, strategies, situations affecting claimant eligibility, and outcomes of the claims.

Apparently an argument can be made that the uninitiated might find it hard to follow the contents of the work, because of what the editor of the Procedural Aspects of International Law (PAIL) series, Professor Richard Lillich refers to as the "possible hazards of specialized language and innovative organization." But if the reader takes the necessary time with the book (and it is no Love Story, nor was it conceived to be read in one sitting), he will find the merit in Professor Weston's deliberate choice in (1) using functional, precise and relatively norm-free terminology, thereby avoiding the ambiguities inherent in traditional legal vocabulary (although he almost always refers to traditional terminology as well); and (2) parting with the traditional organization, which would have imposed serious constraints on the author, especially in view of the disorganized nature of his material.

Professors McDougal and Lasswell, the co-founders of the New Haven School have in a recent article eloquently articulated the need for "a more configurative, hence viable, jurisprudence of international law." This suggests a more contextual and multi-method framework for studying international legal problems. A careful reading of Professor Weston's book should reveal the usefulness of following their recommendations. It provides a sharper focus for discussing pertinent issues such as: what transpired; under what circumstances, why, with what immediate outcome and the long range effects on international legal order; and what alternatives should be recommended to strengthen this order.

Professor Weston was handicapped in collecting the pertinent data for the book. There was an initial difficulty caused

3 For a recent articulation, see McDougal, Lasswell and Reisman, Theories About International Law: Prologue to a Configurative Jurisprudence, 8 VA. J. Int'l L. 188, 197 (1968).
4 WESTON at 95-147.
5 Id. at 156-57.
6 Id. at 158-59.
7 Id. at 147-56.
8 Id. at 159-92.
9 Id. at viii.
10 McDougal, Lasswell and Reisman, supra note 3, at 188.
11 Id. at 298-99.
by the policy of the French government not to publish the commissions' decisions. To this was added the non-accessibility to the author of "a number of probative documents" on file with the French Foreign Ministry.\footnote{Weston at 6.} However, these hurdles seem to have been overcome by the author's painstaking research extending over a period of three years, including two summers in France, during which time he translated thousands of commissions' unpublished decisions and interviewed a large number of key figures, both government officials and private practitioners. It seems that the author's hope of having caught "sufficiently the spirit of French commission practice"\footnote{Id.} has been amply fulfilled.

At the outset Professor Weston provides the necessary historical background,\footnote{Id. at 9-38.} followed by a discussion of the enabling legislation establishing the commission, the "Statutory Instruments," and the rules of procedure of each commission,\footnote{Id. at 39-69.} and finally, a thorough analysis of the commissions' decisions.\footnote{Id. at 71-182.} The texts of the various lump sum agreements which are pertinent to the study are translated and conveniently contained in the Appendix.\footnote{Id. at 191-224.}

Professor Weston's analysis leads him to the conclusion that the commissions have performed "most of their basic missions generally with distinction,"\footnote{Id. at 187.} that they have displayed a "generally unparochial perspective,"\footnote{Id. at 189.} that their decisions are remarkably uniform\footnote{Id. at 178.} and have been consistent with "customary international law, as well as with the comparative American and British practice."\footnote{Id. at 188.} He convincingly makes the point that while these commissions obviously have been "instruments of the French legal order," they nevertheless should be regarded as "decision-making agents of the international legal order"\footnote{Id. at 189.} as well. In fact, it is primarily the latter function which prompts us to pay special attention to these commissions and other similar national or domestic instruments, whose decisions when placed "side by side . . . from country to country,
help form over time that synthesis which is in large measure what we today call international law.”

Professor Weston's criticism of the French practice mainly concerns the commissions' procedures, specifically their emphasis on secrecy with the resulting lack of public accountability and their slow administration causing prolonged delays. However, this reviewer would have liked to see Professor Weston include in his appraisal an examination of how these commissions' decisions are likely to affect the world community expectations on the standard for compensation which traditionally has been that of prompt, adequate, and effective payment. He would have also preferred more extensive comparisons and further recommendations, with the author exploring in his own words "the world order policy implications" of such recommendations. But perhaps this is beyond the scope of the present work; hopefully, the author has saved such comparisons and recommendations for the next study, which he has promised us.

Most appropriately, this study, as volume 9 of the PAIL series forms part of a broader project, which in the words of its able director, Professor Richard Lillich, "involves a definitive examination of the lump sum compensation agreements settling claims for the taking of private property rights which have been included by Eastern and Western countries since World War II. . . ." Works already completed and published directly on this point include Professor Lillich's analysis of the post-war British practice, and those forthcoming include one by Professor Isi Foighel surveying the post-war Danish practice, one by Professor Lillich on the practice of the Foreign Claims Settlement Commission of the United States, and one co-authored by Professors Lillich and Weston, entitled International Claims: Their Settlement by Lump Sum Agreements.

23 Id. at 4.
24 Id. at 184-85.
25 Id. at 185-86.
26 However, see id. at 30-33 for Weston's discussion of the extent to which the decisions of the French claims commissions conform to the traditional standard.
27 However, see, e.g., id. at 14-16, 39, 83, 89-90, 129, 177 for Weston's comparisons of the French practice with similar practices of Great Britain and the United States.
28 Infra, note 33 and the text accompanying it.
31 Mentioned in Weston at 5 note 13.
32 Mentioned in id. at 5 note 11.
33 Mentioned in id. at 38 note 134.
The book is written in a clear style and given the tedious nature of the material, it is no mean achievement that the work is quite readable. This study, which Professor Lillich has aptly described as being “so rich in material and so rewarding in insights,”\(^\text{34}\) is a worthy addition to the growing literature of both the New Haven School and the Procedural Aspects of International Law Series.

Ved P. Nanda

\(^{34}\) *Supra* note 9.
BOOK NOTES

FIFTEEN MEN ON A POWDER KEG: A HISTORY OF THE U.N. SECURITY COUNCIL. Andrew Boyd. New York: Stein and Day, 1971. 383 pp. $8.95. Andrew Boyd takes the reader on a fantastic voyage through the channels and reefs of the ocean of power within the United Nations, the mysterious Security Council. One begins to understand the apparent ambiguities of the actions of the various members of the august body, the seemingly illogical changes of position, the ever-moving balance of power. Beyond this, there is an exceptional analysis of U.N. action and inaction in the major and minor crises of the last two decades, and perceptive insights on the possible course of the planet and its "governing" body in the coming years.

POWDER KEG must be considered a primary reference point for anyone professionally affected by the U.N. and a primer for anyone interested in the politics and diplomacy of multinational existence.

REVOLUTION THROUGH PEACE. Dom Helder Camara, A. McLean translation. New York: Harper and Row, 1971. xix, 149 pp. $5.95. This book is one in the series—World Perspectives. The series is dedicated to defining the essential nature of man by developing a new consciousness which will enable man to direct his evolution toward fulfillment rather than destruction. Contemporary problems are studied in an effort to contribute to an awakening and understanding of the interrelationship between man's knowledge and his existence.

This volume is a message by Archbishop Helder Camara which calls for a peaceful revolution through reform of existing social structures in Latin America and the International Community. His goal is human dignity in both the spiritual and temporal order. A special call is pronounced urging youth to commit themselves to the brotherhood of man, and to free humanity from the madness of war and the madness that widens the gulf between the developed and the underdeveloped worlds.

Although the phraseology is consistently Christian, this writing is not a religious book. It carries a Christian philosophy but more than that, it offers specific and definitive objectives pursuant to the goal of an integrated and developed Latin America.

confined to the highly technological Western nations, but rather has assumed global dimensions. Nor is technology the only threat to the world. Mr. Falk enumerates four principal threats to the planet Earth: (1) The war system; (2) Overpopulation; (2) The depletion of natural resources; and (4) The deterioration of the entire environment, so that it is approaching the point where it will no longer be life-sustaining.

The author, in recapitulating several of his earlier theories concerning stability in international affairs, calls for an "ecological politics" in which "man in nature" will replace the image of "man versus nature", which has motivated and encouraged our abuse of the Earth.

Two alternate images of the future are presented to support the need for radical changes in philosophical, economic and political systems. One foresees a continuation of present values and practices, in which we descend from "The Politics of Despair" through "The Politics of Catastrophe" to "The Twenty-First Century—An Era of Annihilation." The other image, predicated upon a world which has come to grips with the present crises, foresees decades of "Awareness," "Mobilization," and "Transformation" leading to "The 21st Century—The Era of World Harmony".

**CRIMES OF WAR.** Richard A. Falk, Gabriel Kolko, and Robert Jay Lifton, editors. New York: Random House, Inc., 1971. xvi, 575 pp. $10.00. This volume is a multifaceted exposure to the element of responsibility in war crimes. The editors have presented the legal framework, the political setting, and the psychological and ethical context of the Vietnam War Crimes. The book lends itself not to acceptance, but rather to an understanding of contemporary atrocities. It significantly probes present realities that most often are viewed as history.

The section on legal framework covers treaties and documentation on prohibitions of war crimes dating from Petersburg, 1868 to Vietnam, 1970. Political documents focus primarily on atrocities committed in Vietnam both in combat and prison settings. The psychological and ethical context includes contributions by prestigious writers and concerns itself largely with an examination of societal guilt and the agonizing experience of atrocity.

The editors of this book have gathered an impressive collection of documents and sensitive writings (many firsthand experiences) to illustrate the void of idealism and the senseless struggle of the Vietnam War. It is in toto a plea for an intelli-
gent commitment to humane government: but in relating so vividly the crimes it decries, the reader is often benumbed by the experience. However, it may well be necessary to experience the impact of the problem as being the first step in the solution.

The Future of the Oceans. Wolfgang Friedmann. New York: George Braziller, Inc., 1971. 132 pp. $5.95 (hard cover), $2.45 (paperbound). Seventy-one percent of the earth's surface lies under the oceans. In the water, and on and beneath the ocean floor there exists resources of food, oil, natural gas, and minerals in quantities to stagger the imagination. The U.N. General Assembly has resolved that these shall be the common heritage of mankind and has called for an international regime to administer the area. The Future of the Oceans presents basic concepts and data pertinent to this sea world, and in readable fashion, surveys recent developments as nations reach out to exploit these resources. The author, believing that "freedom of the seas cannot remain a laissez-faire freedom" urges prompt action to reverse the current trend toward offshore appropriation by coastal nations. The work is an excellent checklist in preparation for the 1973 U.N. Conference on the Law of the Sea, and includes a discussion of the draft convention submitted by the United States to the United Nations Seabed Committee in August 1970.

The Law Relating to Activities of Man in Space. S. Houston Lay and Howard J. Taubenfeld. Chicago: The University of Chicago Press, 1970. 333 pp. $17.50. The burgeoning space activities within the last decade have precipitated much interest in the law of outer space. This study, written with the assistance of the American Bar Association and the National Aeronautics and Space Administration, analyzes the present law controlling man's activities in outer space and on the celestial bodies. Although not intended as a draft code of law governing space activities, it is a comprehensive look at the subject. Particularly useful is the chapter on "Natural Resources, Pollution, and the Law of Activities in Space", which should have considerable effect on future policy making. The book is well organized and should serve as a valuable reference on the law of outer space.

The Art of the Possible: Diplomatic Alternatives in the Middle East. M. Reisman. Princeton, New Jersey: Princeton University Press, 1970. 158 pp. $1.95. Professor Reisman reviews briefly but with keen understanding the innumerable complexi-
ties which beset the entire Middle East. He presents us with a highly readable and extremely challenging analysis of the present situation, setting out of his four-fold proposals for achieving the minimum order so vital for the establishment of peace. In the past, diplomacy has failed. But now, "within the limits of feasibility and possibility, there is . . . room for creative diplomacy. If the rewards for success are not great, the penalty for failure may be enormous." The world today is far too interdependent for any political conflagration to be confined to a particular region, and a confrontation or collision in the Middle East could easily destroy the whole world. Professor Reisman's approach is fresh and innovative; his alternatives challenging and provocative.

INTERNATIONAL LAW. Charles S. Rhyne. Washington, D.C.: CLB Publishers, 656 pp. $22.50. The review of a legal text is difficult at best, and even more so when the subject is international law. Anyone who has ever endured such a course has little desire to ever again see such a tome, and professors either prefer to write their own texts or find fault with any text in print. However, please accept the heartfelt enthusiasm which follows.

To list the degrees and accomplishments of Professor Rhyne would require several pages; instead his work in preparing this text is eloquent testimony. The format follows the citation system found in most state codes, forcing the neophyte to think as a lawyer and permitting the professional to employ the text efficiently. Without belaboring the point, the text covers fully the historical context so essential in international law and gets on to the present state of the art, covering in sufficient depth the major treaties, documents, agencies, and trends affecting international law today.

INTERNATIONAL LAW must be considered imperative as a text and important as a tool.

THE PENTAGON PAPERS. Neil Sheehan, Hedrick Smith, E. W. Kenworthy and Fox Butterfield. New York: The New York Times and Bantam Books, Inc., 1971. 677 pp. $2.95 (paperback). In mid-1967, Robert S. McNamara, then Secretary of Defense, commissioned the Pentagon papers. A massive top-secret history of the United States' involvement in Indochina, the Pentagon papers have been the subject of much controversy both as to the actual content, and as to the legality of their printing.

The 47-volume study attempts to encompass American involvement in Indochina from World War II to the start of the Paris peace talks in May, 1968.

On June 30, 1971, the U.S. Supreme Court freed the news-
papers to continue the publication of these papers, which had been labeled by the Government as harmful and irreparably injurious to the nation’s defense and security.

Written by a team of anonymous government historians, this compilation of the memoranda, cablegrams, and orders of the principal actors shows the four-administration commitment to a non-Communist Vietnam and an ultimate frustration in doing so.

The history project was to be “encyclopedic and objective” according to Mr. McNamara but the actual candid form which evolved renders it most readable. The organization of this compilation is chronological but lacks consistency and an overall conclusion. Perhaps one must read The Pentagon Papers in the encyclopedic manner for it is based on documentary records and not a unified, cohesive story which would result from combining interviews to fill the gaps in the documents. But this also allows the documents to be revealed without the embarrassed rationalizations and interpretations so ever-present in government policy matters.

This compilation obtained by The New York Times does lack the four volumes on the secret diplomacy of the Johnson administration. But despite this limitation it does in its printed form disclose a vast amount of information concerning the American commitment to South Vietnam and the manner of operation of the United States government. The Pentagon account stated that at various times the highest administration officials not only kept information about their real purposes from the press and Congress, but at times actually misled the public media on grounds of the necessity for secrecy and expediency.

As an inside view of the decision-making process this work merits considerable attention, but the approach of the various chapters differs as the individual authors vary in style and analysis. Although fragmentary, the effect is to give the public a new source of information. In this respect it is more complete and informative than any information the public has to date.

Of Law and Man. Shlomo Shoham editor. New York: Sabra Books, 1971. 387 pp. $8.95. This work is a compilation of writings in tribute to Justice Haim H. Cohn, an Israeli Supreme Court Justice whose respect for law and human rights has earned him international acclaim. The subject matter of the selections varies from the philosophical or religious to the legal particulars involved in international, civil, and criminal problems. There is an underlying directive throughout the book
which encourages better and more humane legal systems. From the readings a great deal can be gleaned about the rules of law and the practices of law which are employed by different nations (especially Israel). Most often the essays treat the subject matter in an analytical fashion and for this reason are of interest to those who are concerned with learning more about international relations and politics as well as those who are professional legalists.

Aggression: Our Asian Disaster. W. L. Standard. New York: Random House, Inc., 1971. 228 pp. $6.95. The illegality of the United States' involvement in the war in Vietnam is developed clearly and logically with the documentation of United States' violations under the U.N. Charter, the SEATO Treaty, the Nuremberg Principles, and the United States' own Federal Constitution and with numerous quotations and excerpts from public pronouncements and writings. Included also is a brief survey of campus unrest, domestic disapproval and the United States world-wide military complex. With great forthrightness Mr. Standard presents the view that the war in Vietnam can only be endlessly protracted and that its only solution is the total withdrawal of the United States from Indochina. The writing is fresh and vigorous with a keenly aware factual analysis.

The James Earl Ray Extradition File. U.S. Dept of State. New York: The Lemma Publishing Corp., 1971. 134 pp. $17.50. Collected in this volume are the documents used by the U.S. State Department to effect the extradition of James Earl Ray, who was sought in the United States to stand trial for the murder of Dr. Martin Luther King, Jr.

The petitioning process is traced from Shelby County, Tennessee to Great Britain where Ray had fled. Included are 34 petitions, documents, and depositions developed to show sufficient cause for Ray's extradition. Affidavits from F.B.I. experts, statements of Memphis police officers, and eyewitness statements, are supplemented by technical depositions taken from the physician who performed the autopsy on Dr. King and from a surveyor who mapped the bullet's trajectory. Also included are the drawings, diagrams and photographs which were appended to the various affidavits.

While much of the text consists of repetitious statements and dry certifications, as might be expected from such a collection of documents, the publisher correctly points out that since Ray pleaded guilty to the murder charge and therefore no testimony was heard, the book represents "the most complete file of evidence against him [Ray] published to date".