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## CURRENT DEVELOPMENTS

### EXCHANGE BETWEEN EXPERT PANEL AND REAGAN ADMINISTRATION OFFICIALS ON NON-SEABED-MINING PROVISIONS OF LOS TREATY

#### *United States Policy on the Law of the Sea*

##### 1.

After fifteen years of intensive effort, the nations of the world, with full participation by the United States, produced a comprehensive Convention on the Law of the Sea. In 1982, President Reagan decided that the United States would not become a party to the Convention. But formal abstention from the Convention is hardly a complete national oceans policy for the United States. Indeed, that abstention compels the United States to attend carefully to its posture, in law and policy, toward the Convention itself and to each of its many provisions on matters of major interest to the United States.

The United States dissociated itself from the Convention essentially because of disagreement with a number of its dispositions in respect of mining in the deep seabed. It has not disowned the spirit and import of the Convention as a whole, or any of its other provisions.

We believe that it is in the interest of the United States to recognize the Convention as representing the normative expression by the states of the world reflecting their common or respective interests at the end of the 20th century. Leaving aside the question of deep seabed mining, we believe that the provisions of the Convention achieve a workable regime that would promote order at sea and satisfy the complex of competing interests of different states.

Deep seabed mining is still a distant prospect and is of little present economic value. U.S. reservations as to the regime for deep seabed mining should be the subject of continued negotiation; they should not undermine the profound and wide consensus that has been achieved otherwise. Acceptance by the United States of the Convention, and of its dispositions generally, in fact if not in form, is in the interest of the United States and of mankind.

##### 2.

Until well into this century the law of the sea was stable and generally agreed. Its essential principle was the freedom of the seas, which implied freedom of navigation, both civil and military, and freedom to take the sea's resources, essentially its fish. The exception to freedom for all was a small territorial sea in which coastal states exercised exclusive rights, subject to a right of innocent passage for vessels of other states.

The history of the law of the sea in the past half century is a history of coastal-state expansion. The United States took a large step in that

direction in 1945 when it claimed the mineral resources of the continental shelf and a special interest in fisheries conservation beyond its territorial sea. Ever more firmly, other states began to claim ever larger zones of exclusive fishing rights, sometimes larger zones of exclusive economic rights generally, or even large territorial seas.

The once clear and stable law of the sea became unclear and unstable. Coastal states became less restrained about asserting the right to control more activities of foreign vessels and foreign nationals in areas extending ever farther from their shores. Because the maritime powers themselves took part in this expansionist trend, limiting certain freedoms off their coasts as it suited their interests, it became increasingly difficult for them to explain why any other coastal state could not restrict high seas freedoms of interest to the maritime powers to the extent it suited its interests. It became increasingly difficult to distinguish between a principled assertion of universal legal rights by the maritime powers and an attempt to impose their will, in their own interests, on other coastal states. For the United States, committed to the rule of law, it became increasingly difficult and costly to do more than protest the claims of others adverse to its maritime interests.

Although publicity and prominence were given to the distant prospect of mining the deep seabed, the live issues of the law of the sea have concerned authority in coastal areas. By the end of the 1960s, pressures for change in the law of the sea generated two fundamental questions:

(1) How much authority may a coastal state exercise, how far from its shores, for what purposes, and how much freedom is guaranteed there for other states and their nationals?

(2) How could one achieve stable answers to that question, which would provide a legal foundation for exercising or enforcing rights and which all states are likely to accept and regard as legally binding over time?

### 3.

One important goal of the United States in the Third UN Conference on the Law of the Sea was to restore order and stability to the law of the sea. It sought to achieve this goal by giving primary emphasis to three principles:

(1) The rules of the law of the sea must fairly balance the respective interests of all states, notably the competing coastal and maritime interests, in a manner that is generally acceptable.

(2) Multilateral negotiations on the basis of consensus should replace unilateral claims of right as the principal means for determining that balance.

(3) Compulsory dispute settlement mechanisms should be adopted to interpret, apply and enforce the balance.

The conference succeeded in resolving the fundamental questions of the law of the sea in accordance with these three principles.

## 4.

The most important question of oceans policy facing the United States is whether we will conform our behavior to that consensus. President Reagan, while rejecting the Convention on the Law of the Sea because of its system of regulating deep seabed mining, expressly recognized that the balance of interests achieved in the Convention in respect of coastal areas was in the interests of the United States and the international community as a whole. He announced that the United States would act in the future in a manner consistent with that balance.

It is of paramount importance that the United States scrupulously conform its behavior to the provisions of the Convention. Our rejection of the deep seabed mining portion of the Convention in itself inevitably tempts other states to think in terms of rejecting or making exceptions to other provisions. However, the deep seabed mining system is not relevant as such to the fundamental issues of coastal state rights and high seas freedoms in coastal areas. (Nor is substantial mining beyond the economic zone and continental shelf likely in the near future.) But virtually all of the other provisions of the Convention deal directly or indirectly with those fundamental issues.

If the United States begins to carve out exceptions to those provisions for itself, it may undo the balance and encourage other unilateral exceptions. If the U.S. Government makes exceptions for itself, it will inevitably be less effective in persuading other governments that they may not carve out other exceptions that suit them, and will be increasingly less effective in persuading the American people and America's allies that decisive action is needed to ensure respect for our legal rights off foreign coasts. We will lose both an acceptable balance of rights and duties and a unique opportunity to stabilize that balance around a set of rules worked out by consensus of all the nations of the world. The new opportunity for building a universal "customary law" around the rules described by the Convention will disintegrate. Instead, there will be strong impetus for development of different rules that will entail restriction on freedom of navigation and overflights and the conduct of military activities in vast coastal areas, restrictions which are not in the interest of the United States.

## 5.

The only realistic hope for building a stable and acceptable "customary law" of coastal state rights and duties at this time depends on the United States respecting all the relevant rules of the new Convention and persuading others to do the same. Unless we do so, we will increasingly face three expensive choices with respect to any foreign state's claim of control over our navigation or military activities off its coast:

- (1) *resistance*, with the potential for prejudice to other U.S. interests in that coastal state, for confrontation or violence, and for domestic discord;

(2) *acquiescence*, leading inevitably to a weakening of our position of principle with respect to other coastal states (verbal protests to the contrary notwithstanding) and domestic pressures to emulate the contested claims; or

(3) *bilateral negotiation*, in which we will be expected to offer a political, economic or military quid pro quo in proportion to our interest in navigation and military activities that, under the Convention's rules, can be conducted free of such bilateral concessions. (Bilateral negotiation limited to reciprocal exchange of navigation or military privileges will not succeed since most foreign states do not have the same interest in exercising navigational and military freedoms off our coasts as we have off theirs.)

## 6.

We recommend the following first steps:

(1) The United States should adopt a clear and consistent policy, applicable to all organs of the U.S. Government, of adherence to all of the rules of the Convention, excluding at most only those dealing with the regulation of mining by the International Sea-Bed Authority. The United States need not exercise all its rights (e.g., it need not extend its territorial sea or require consent for scientific research in its economic zone if it prefers not to), but it must scrupulously respect all its duties, including the limitations on its rights.

(2) The United States should encourage and urge other states, including its allies, to do the same.

(3) Means should be sought to make compulsory dispute settlement an effective part of our policy and that of other nations, binding at least on the basic issues of navigation and pollution.

PANEL ON THE LAW OF OCEAN USES\*

June 13, 1984

Dear Louis:

Secretary Weinberger has asked me to respond to your letter of May 25, 1984 with the attached statement from your Panel concerning United States Policy on the Law of the Sea. Several matters are raised by the Panel which I feel merit comment.

The Panel recommends three "first steps":

(1) "The United States should adopt a clear and consistent policy, applicable to all organs of the U.S. Government, of adherence to all

\* The Panel on the Law of Ocean Uses is an independent group of specialists in oceans law and policy sponsored by Citizens for Ocean Law. Its members are: Gordon L. Becker, Jonathan I. Charney, Thomas A. Clingan, Jr., John Lawrence Hargrove, Louis Henkin, Ann L. Hollick, Jon L. Jacobson, Terry L. Leitzell, Edward Miles, J. Daniel Nyhart, Bernard H. Oxman, Giulio Pontecorvo, Horace B. Robertson, Jr., J. T. Smith and Louis B. Sohn. This statement was adopted on April 27, 1984.

of the rules of the Convention, excluding at most only those dealing with the regulation of mining by the International Sea-Bed Authority. The United States need not exercise all its rights (e.g., it need not extend its territorial sea or require consent for scientific research in its economic zone if it prefers not to), but it must scrupulously respect all its duties, including the limitations on its rights."

My comments in this respect are the following:

(a) In our view the President's Ocean Policy Statement of 10 March 1983 is the clearest and most consistent statement of U.S. oceans policy in recent history.

(b) I am unaware of any instance since 10 March 1983 where an element of the Executive Branch has acted at variance with either the letter or the spirit of the President's Ocean Policy Statement or the EEZ Proclamation.

(c) Are you aware of any instance, outside of the deep seabed mining area, where in your view the U.S. Government has acted or reacted differently to a problem under the Presidential Proclamation and Ocean Policy Statement of 10 March 1983 than it would have acted had the United States signed the 1982 Convention in December of 1982? In this connection, it is my understanding that the present U.S. positions on tuna and maritime boundaries are long-standing and the U.S. interpretation of the appropriate LOS Convention articles has always been consistent with those positions.

(2) "The United States should encourage and urge other states, including its allies, to do the same."

I agree concerning navigational issues; and the government is doing so.

(3) "Means should be sought to make compulsory dispute settlement an effective part of our policy and that of other nations, binding at least on the basic issues of navigation and pollution."

Even if a policy choice were made to adopt this approach, does your Panel have any suggestions as to how this might be effectively accomplished in a technical sense?

Again, thank you for forwarding the Panel's statement. It is always interesting to hear from such a highly respected group of specialists.

FRED C. IKLÉ

*Under Secretary of Defense*

June 29, 1984

Dear Professor Henkin:

I have been asked to respond to your letters of May 25, 1984 to the President and to the Secretary of State forwarding the statement of the Panel on the Law of Ocean Uses of the Citizens for Ocean Law. I welcome the views of the Panel and appreciate your support of U.S. ocean policy.

Having read Under Secretary of Defense Fred Iklé's letter in response to your Report, I must say that I strongly concur with his views. In

particular, I believe that the first step recommended by the Panel has already been fully accomplished by the President's Ocean Policy Statement and Exclusive Economic Zone Proclamation of 10 March 1983. The second step recommended by the Panel—that of encouraging other States to adopt corresponding policies—is being actively pursued.

With respect to the third step recommended by the Panel, I would reiterate the question posed by Dr. Iklé: in a technical sense, how might compulsory dispute settlement with respect to navigation and pollution be accomplished should there be a policy decision to adopt such an approach?

Once again, I appreciate receiving the thoughtful views of the Panel on the Law of Ocean Uses and thank you for bringing these views to my attention.

JAMES L. MALONE  
*Special Representative of the President for the Law of the Sea*  
*U.S. Department of State*

August 17, 1984

Dear Fred:

I was pleased to receive your letter of June 13, 1984 about our Panel Statement on U.S. Policy on the Law of the Sea. We had intended the statement as an encouragement to the administration in its decision to accept the rules of the 1982 Law of the Sea Convention (excluding those on deep seabed mining).

Our concerns lie with the future. We fear that our failure to sign the Convention has left the impression in some quarters that U.S. actions need not consider the Convention. We view our April 27 statement as a blueprint for future action, which we believe—and you confirm—is consistent with administration policy.

Here are some of the reasons for our concerns and some examples of potential danger:

(1) The President's Proclamation of March 10, 1983 and his accompanying statement do not explicitly commit the United States to consistency with the Convention in all areas of oceans policy. The statement refers explicitly only to navigation and overflight and is vague with respect to other nonseabed issues. We believe that the Proclamation and statement *should* be read as meaning that U.S. policy should be consistent with the Convention in all respects (except with respect to deep seabed mining). It would be desirable that that be made clear and explicit in an appropriate memorandum or directive addressed to all concerned.

(2) The legislation introduced in Congress on March 10 and March 11, 1983 to implement an exclusive economic zone, etc. (S. 750/H.R. 2061) was not fully consistent with the LOS Convention provisions on the subjects covered, nor with the President's Proclamation and oceans policy statement.

(3) The notice of jurisdiction on the outer continental shelf (ocs) in the Federal Register on December 8, 1982 (Vol. 47, 236), by the Minerals Management Service of the Department of the Interior,



addressed an issue of policy prior to consideration and agreement among U.S. Government agencies. The definition of the outer limit of the ocs in the DOI notice was based on the 1958 Geneva Convention on the Continental Shelf, not on the 1982 LOS Convention. To my knowledge, there has been no clear enunciation of U.S. policy that the legal ocs extends to 200 n.m.

(4) The U.S. Government has successfully argued that courts should not void drug-smuggling arrests on the high seas on the ground that they violated the law of the sea. See, e.g., *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979). Although that case antecedes the conclusion of the Convention, it seems that the Coast Guard and the Drug Enforcement Administration continue to make arrests in violation of the law of the sea, and the Department of Justice would continue to argue that the 1982 Convention is not law in the United States to be honored by the courts.

(5) It is difficult to square the administration's policy on tuna and on anadromous species with the provisions of the 1982 Convention. That our policy may be long-standing does not seem relevant; if we are to act consistently with the Convention, we may have to change some old policies, as we would have had to do if we had formally adhered to the Convention. Similarly, our 1978 Port Safety and Tank Vessel Safety Act may not be fully consistent with what is in effect the LOS Convention's requirement that coastal state regulations conform to MARPOL, the IMO Convention for the Prevention of Pollution from Ships.

What is needed, we believe, is a firm and clear presidential directive to all departments and agencies, and a firm and clear communication by the President to Congress, that it is U.S. policy to conform to the Convention in all respects (other than deep seabed mining). The President should assure that the review of relevant legislation and regulations, which I understand is now in progress, will lead to any amendments necessary to assure conformity with the Convention. The United States should also be encouraging other states to abide by the Convention in all respects (other than deep seabed mining) so as to support and develop its status as reflecting customary law. We would welcome the initiative and cooperation of DOD to those ends.

Our panel is exploring means to effect compulsory dispute settlement apart from the Convention and will be happy to share our thoughts with you as our work progresses. The panel is also preparing policy papers on specific issues—on navigation, overflight and other high seas freedoms in the exclusive economic zone, on the continental shelf and deep seabed mining, and on the need of a coordinated national oceans policy.

LOUIS HENKIN

*Chairman, Panel on the Law of Ocean Uses*

September 10, 1984

Dear Louis:

Thank you for your follow-on letter of August 17, 1984, which highlights a position that we both share: the need for a consistent oceans

policy, based on the principles of law articulated in the non-seabed mining provisions of the 1982 Law of the Sea Convention.

As I'm sure you are aware, the recent N.A.C.O.A. report on the Exclusive Economic Zone reemphasized this need for consistency. DoD input to that report echoed that theme.

We are all working for the same objective—maritime stability—and we are in full agreement that the best way to achieve that objective is to reinforce the customary international law status of the Convention's non-seabed mining provisions. As President Reagan stated in July of 1982, the careful balance of coastal and flag state rights reflected in those provisions serves well the interests of all nations.

I look forward to receiving copies of your Panel's policy papers as they become available.

FRED C. IKLÉ

#### LINKAGES BETWEEN INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW

While many law schools now offer separate courses or seminars on international human rights law, the number of students exposed to such specialized study remains relatively small.<sup>1</sup> Human rights law is relevant to many other segments of the law school curriculum—in particular, to courses on constitutional law and individual rights—although little scholarly attention has been devoted to date to integrating appropriate human rights issues into the “bread and butter” courses that all law students take. To begin to address this lacuna, the Procedural Aspects of International Law (PAIL) Institute has undertaken to develop a human rights component or module designed to supplement leading constitutional law course books and present methods of teaching constitutional law.

Draft materials prepared by the Institute and the general topic of “Linkages between International Human Rights and U.S. Constitutional Law” were discussed at a small conference of constitutional and international law course-book editors and professors held in Washington, D.C., on September 23–24, 1983.<sup>2</sup>

The first of three sessions considered the role of international human rights law in domestic courts from both a contemporary and a historical perspective. One of the undersigned, Richard B. Lillich, offered an overview of the contemporary status of international law in United States courts, referring to the treaty power set forth in Article VI, section 2 of the U.S. Constitution and the place of customary international law (the content and impact of which were topics of discussion throughout the

<sup>1</sup> See Lillich, *The Teaching of International Human Rights Law in U.S. Law Schools*, 77 AJIL 863 (1983).

<sup>2</sup> The preparation of the materials and convening of the conference were made possible by grants to the Institute from the Ford Foundation, the Jacob Blaustein Institute for the Advancement of Human Rights, the Exxon Education Fund and the Dana Fund for International and Comparative Legal Studies.

conference). He noted that not only were the self-executing provisions of ratified treaties binding on the courts, but also customary international law.<sup>3</sup> In addition, international human rights norms of both types could be used as persuasive evidence to inform or influence the definition of U.S. constitutional norms.<sup>4</sup>

Bert B. Lockwood, Jr., then presented a paper on "The United Nations Charter and the Courts," which considered the impact of the Charter on seminal U.S. decisions of the late 1940s and early 1950s.<sup>5</sup> On the basis of research into briefs and arguments in such cases as *Oyama v. California*,<sup>6</sup> *Takahashi v. Fish & Game Commission*,<sup>7</sup> *Shelley v. Kraemer*<sup>8</sup> and *Bolling v. Sharpe*,<sup>9</sup> and other sources, Lockwood concluded that the Charter had a significant impact on the interpretation of constitutional provisions by federal and state courts, even though it was rarely cited in their decisions. The failure to rely explicitly on the Charter was explained by judicial reluctance to admit a greater role for international law, which was to some extent beyond the control of the United States, as well as then prevalent U.S. political realities such as isolationism and the defense of racial segregation.

These presentations engendered a lively debate about the actual and appropriate role of international law in constitutional decision making. Not all participants believed that even the early influence of the Charter had been sufficiently proved, and some participants questioned whether utilization of international human rights norms necessarily would result in greater protection for individual rights. In the area of freedom of speech, for example, it was generally agreed that U.S. constitutional rights were broader than similar protections provided under international law. On the other hand, it was noted that *Reid v. Covert*<sup>10</sup> established the principle that constitutional rights could not be diminished by treaty, so that international law would be used to expand protections or fill gaps left in U.S. law rather than to restrict existing rights.

It was suggested that international human rights norms might be relevant in litigation that has an impact on international concerns, such as cases involving aliens, but that they were less likely to be helpful in cases involving only domestic concerns. While explicit constitutional norms such as equal protection and due process might be informed by international law, one participant thought it inappropriate either to fill constitutional "gaps" or to develop less well defined rights (such as under the Ninth

<sup>3</sup> Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOKLYN J. INT'L L. 289 (1982).

<sup>4</sup> See Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983); Christenson, *The Use of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981).

<sup>5</sup> The final version of his paper has been published as Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

<sup>6</sup> 332 U.S. 633 (1948).

<sup>7</sup> 334 U.S. 410 (1948).

<sup>8</sup> 334 U.S. 1 (1948).

<sup>9</sup> 347 U.S. 497 (1954).

<sup>10</sup> 354 U.S. 1 (1957).

Amendment) with international concepts. In response, it was suggested that discrimination on the grounds of race, sex or alienage did involve the international image and obligations of the United States and that developing international human rights law could be most helpful in interpreting dynamic constitutional rights.

Several participants noted that the courts still were reluctant to utilize international law in a significant manner. In two recent cases concerning discrimination in the provision of free elementary education to undocumented alien children<sup>11</sup> and racial discrimination by tax-exempt religious schools,<sup>12</sup> the U.S. Supreme Court had not considered international law, though international norms were relevant. On the other hand, international human rights norms were applied by lower courts in the cases of *Filartiga v. Pena-Irala*<sup>13</sup> and *Rodriguez-Fernandez v. Wilkinson*.<sup>14</sup>

Discussions during the second session continued to focus on the substantive and procedural relationship between international human rights and constitutional law. The *Filartiga* and *Rodriguez-Fernandez* cases were examined, and the suggestion made that a clearer distinction needed to be drawn between the binding and informative roles of international law. Gordon A. Christenson summarized his thesis<sup>15</sup> that international norms might be particularly relevant to equal protection analyses, as courts attempt to decide the appropriate level of scrutiny that should be applied to allegedly unconstitutional discrimination.

It was stated that *Rodriguez-Fernandez* could be distinguished as a case involving a person theoretically outside the jurisdiction of the United States, which made the use of international law appropriate. There was no statutory provision squarely in point and, even under the reasoning of the district court, international law did not override federal law but rather took precedence over an executive order for the plaintiff's continued detention.

Concern was expressed by some participants over the supposedly vague nature of international human rights law, in particular, customary international law norms. It was agreed that proving customary international law was a difficult task. An examination of state practice and *opinio juris* was necessary,<sup>16</sup> and customary international law was probably less important than suggested by some human rights advocates. Reference was made to Tentative Draft No. 3 of the *Restatement of the Foreign Relations Law of the United States (Revised)*, which identifies genocide, slavery, prolonged arbitrary detention, causing the murder or disappearance of individuals,

<sup>11</sup> *Plyler v. Doe*, 476 U.S. 202 (1982).

<sup>12</sup> *Bob Jones Univ. v. United States*, 103 S.Ct. 2017 (1983).

<sup>13</sup> 630 F.2d 876 (2d Cir. 1980). Compare *Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C. 1981), *aff'd per curiam*, 726 F.2d 774 (D.C. Cir. 1984).

<sup>14</sup> *Fernandez v. Wilkinson*, 505 F.Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

<sup>15</sup> Developed in his two articles cited in note 4 *supra*.

<sup>16</sup> See, e.g., Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 635 (1983).

torture or other cruel, inhuman or degrading treatment or punishment, systematic racial discrimination and consistent patterns of gross violations of internationally recognized human rights as violations of customary international law.<sup>17</sup> Other possible violations of international human rights law such as sex discrimination were not thought to rise to the level of customary international law, although there was disagreement as to whether the draft *Restatement* could be considered authoritative on this issue.

The self-executing nature of human rights treaties, few of which have been ratified by the United States, also was discussed. The shift in modern treaties from narrowly focused bilateral treaties concerned with external affairs to much broader multilateral instruments with domestic impact was noted. One participant stated that the latter almost always are regarded as non-self-executing.<sup>18</sup> The wide-ranging nature of these treaties also gives rise to numerous reservations, in order not to disturb the domestic order unduly. Nevertheless, ratification still retains symbolic significance and entails international obligations. Other participants thought that ratified human rights treaties should be as easily enforceable in U.S. courts as other international agreements.

While the participants disagreed about the present impact and binding effect of international human rights law on individual rights litigation in the United States, there was greater agreement on the helpful comparative role that it could play in both teaching and submissions to courts. It was observed that Canadian courts were much more likely to look at international law from a comparative perspective, i.e., to consider how other national courts have interpreted the same or similar provisions. The greater impact of European human rights jurisprudence, which is often more legalistic and reasoned than the decisions of other international bodies, also was noted.

The third and final session was devoted to specific pedagogical issues raised by the introduction of international human rights law into the existing constitutional framework. There was a general consensus that the major obstacles to the introduction or integration of international materials are (1) a lack of time (several participants noted that the basic constitutional law course already excludes many important issues and that it would be difficult to add new material); (2) the lack of direct or demonstrated relevance of international human rights law to decision making by the Supreme Court, which is the almost exclusive focus of most constitutional law courses; and (3) the difficulty of preparing materials narrow enough to be useful with respect to a particular issue (e.g., freedom of speech), yet comprehensive enough to enable constitutional law professors to feel reasonably comfortable with their own knowledge of the topic.

<sup>17</sup> RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §702 (Tent. Draft No. 3, 1982).

<sup>18</sup> Cf. *United States v. Postal*, 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979); *People of Saipan ex rel. Guerrero v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975). See Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AJIL 892 (1980).

Several participants noted that they did use international materials and examples in their own constitutional law courses, but that they did so out of personal interest and expertise, which mitigated at least the third problem mentioned above. Other participants emphasized the time problem, noting that even broad areas such as the treaty power under the Constitution receive at best cursory treatment. One participant questioned whether allotting more time to international human rights would not overemphasize its significance.

Most participants believed that a comparative approach that considered only a few substantive rights in some detail was pedagogically preferable to the more general and comprehensive draft materials prepared by the institute for the conference. Among the specific suggestions for materials that would be most helpful were the preparation of excerpts of major European cases that could be compared with corresponding U.S. cases; the focusing of materials on the substantive areas of the First Amendment, the right to privacy and equal protection; and the development of materials appropriate to interdisciplinary or undergraduate courses.

Other recommendations for education in this area were to offer a 3- to 6-week summer workshop on international law for constitutional law professors, perhaps also with some student participation; to provide more effective and active clinical programs in international human rights law; and to reinforce the teaching of private international law as a means of dealing with some of the issues related to treaties.

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Despite the international implications of many recent federal court cases,<sup>19</sup> the growth of the international law of human rights, and the Supreme Court's celebrated injunction that "international law is part of our law,"<sup>20</sup> the PAIL Institute conference highlights the gap that remains between international and constitutional scholars. There seems to be strong intellectual interest in bridging this gap, particularly among those participants who specialize in individual rights. At the same time, candor requires internationalists to recognize that international human rights law has not yet become a significant (or indeed, more than a marginal) factor in constitutional decision making in the minds of most constitutional lawyers, although the number of practitioners employing international law arguments in the courts is steadily increasing.

The two major barriers to a fuller integration of international human rights law into constitutional law courses are lack of knowledge and time. The conference itself and the revised materials subsequently prepared by the Institute and now available for classroom use<sup>21</sup> have begun to address

<sup>19</sup> See, e.g., *Plyler v. Doe*, 476 U.S. 202 (1982); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Haig v. Agee*, 453 U.S. 289 (1981).

<sup>20</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>21</sup> The revised materials have been published as *Materials on International Human Rights and U.S. Constitutional Law* (H. Hannum ed. 1985). Included are extracts from significant decisions of the European Commission and Court of Human Rights, the Inter-American

the former, and several participants indicated that some of the human rights issues raised during the two days of discussions would be likely to appear in some form in their own courses. While time pressures may prevent more than passing reference to international human rights law in most constitutional law courses, closing the knowledge gap should contribute significantly to the insertion of international concerns by individual professors according to their own particular interests. Whether these concerns are addressed comparatively or in the context of defining substantive constitutional rights, the intellectual and legal perspective gained may broaden the too often narrow presentation of constitutional law and rights now received by many students.

RICHARD B. LILlich AND HURST HANNUM\*

#### THE MOON TREATY ENTERS INTO FORCE

On July 11, 1984, the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies<sup>1</sup> entered into force following the deposit with the Secretary-General of the United Nations of the fifth instrument of ratification. The Agreement, following its adoption by the General Assembly, was opened for signature on December 18, 1979. In the intervening years, it has been signed by Austria, Chile, France, Guatemala, India, Morocco, the Netherlands, Peru, the Philippines, Romania and Uruguay. The fifth state to deposit its ratification was Austria, which followed Chile, the Philippines, Uruguay and the Netherlands.

Unlike the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies<sup>2</sup> and the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space,<sup>3</sup> the Moon Agreement did not require acceptance by the United States, the Soviet Union and the United Kingdom in order to enter into force.

The long delay and the limited number of ratifying states contrast sharply with the status of the other international space law agreements produced at the United Nations. At present, with China's accession in 1983 to the 1967 Principles Treaty, there are 85 states bound by that agreement, 78 by the Rescue and Return Agreement, 69 by the 1972 Convention on the International Liability for Damage Caused by Space

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Commission on Human Rights and the UN Human Rights Committee. They are available at cost from the PAIL Institute, 1346 Connecticut Avenue, N.W., Suite 1027, Washington, D.C. 20036.

\* Of the Board of Editors, and Executive Director, Procedural Aspects of International Law Institute, respectively.

<sup>1</sup> GA Res. 34/68 (Dec. 5, 1979), *reprinted in* 18 ILM 1434 (1979).

<sup>2</sup> *Done* Jan. 27, 1967, 18 UST 2410, TIAS No. 6347, 610 UNTS 205.

<sup>3</sup> *Done* Apr. 22, 1968, 19 UST 7570, TIAS No. 6599, 672 UNTS 119.

Objects<sup>4</sup> and 34 by the 1975 Convention on Registration of Objects Launched into Outer Space.<sup>5</sup>

The 1979 Moon Agreement, which was comprehensively negotiated between 1970 and 1979, reemphasizes some of the basic provisions contained in the 1967 Principles Treaty. It also augments that agreement in several instances, such as by defining the moon to include orbits around or other trajectories to or around it. The demilitarization provisions of the Principles Treaty are enlarged by providing, for example, that threats or use of force may not take place on the moon relating to the Earth, the moon, spacecraft, the personnel of spacecraft or man-made objects. Wider prohibitions against the use of nuclear weapons or weapons of mass destruction than appear in the 1967 Treaty were adopted.

Freedom of scientific investigation is emphasized in several articles. Explorers are specifically authorized to collect and remove from the moon samples of minerals and other substances. Moon rocks and other substances may be used in quantities appropriate to the support of national missions. International scientific preserves are contemplated.

Space stations may be established on the moon. The states parties retain jurisdiction and control over their personnel and physical objects and are required to provide notice of accidents in certain circumstances. Moon activities may be engaged in by juridical and natural persons, including "non-governmental" entities.

Inspections by all states parties to the Agreement, following advance notice of projected visits, are authorized. The Agreement encourages consultations among parties and sets forth procedures for dispute settlement. It also permits international intergovernmental organizations to become parties. The rights and duties conferred by the Agreement are limited to the parties. Finally, review procedures are established.

Several reasons have been advanced for the delay in the entry into force of the Agreement. The Third World forces that influenced some of the terms of the 1982 Law of the Sea Convention were heard from during the Moon Agreement debates as well. For example, at one time, representatives of developing countries urged the imposition of a moratorium on the exploration, exploitation and use of the moon's resources. This proposal was deflected by incorporating the principle of *res communis* into Article 11 of the Agreement. This article also allows the harvesting of the natural resources of the moon through their removal from their "in place" location. Paragraph 2 of Article 11, like the Principles Treaty, provides that "[t]he moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means."

Article 11, while accepting the *res communis* principle, looks beyond this approach. A unique provision, which seeks to distance the common heritage of mankind principle of Article 11 from the same expression in Article 136 of the Law of the Sea Convention, states that "[t]he moon

<sup>4</sup> Done Mar. 29, 1972, 24 UST 2389, TIAS No. 7762.

<sup>5</sup> Done Jan. 14, 1975, 28 UST 695, TIAS No. 8480.



and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article." This latter formulation was duly noted by the International Law Section of the American Bar Association (ABA) in 1981 when it stressed that the ocean and space uses of the expression were not the same. The members of the section concluded that the formulation of the Moon Agreement was unique and could not be used or interpreted "in any other context."<sup>6</sup>

To secure the ultimate implementation of the common heritage principle,<sup>7</sup> paragraph 5 of Article 11 and Article 18 authorize states parties to the Agreement to establish "an international régime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible."

Paragraph 7 of Article 11 identifies the main purposes of the proposed international regime. They include the orderly and safe development of the natural resources of the moon, the rational management of those resources and the expansion of opportunities in the use of those resources. A further purpose that caused some debate calls for "[a]n equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration." Much was made of the fact during the negotiations, and subsequently, that this provision requires an "equitable," but not an "equal," sharing of potential benefits.

The opponents of the Moon Agreement have suggested that the common heritage provision might be inconsistent with the critical terms of Article 1 of the 1967 Principles Treaty, which provides that the space environment (outer space per se, the moon and other celestial bodies) and its natural resources may be freely and equally explored, exploited and used by all states and that they are to have free access to these areas and resources. The International Law Section has responded that the common heritage principle was adopted in concert with the recognition that

(i) all States have equal rights to explore and use the Moon and its natural resources, and (ii) that no State or other entity has an exclusive right of ownership, property, or appropriation over the Moon, over any area of the surface or subsurface of the Moon, or over its natural resources in place.<sup>8</sup>

Opponents have also suggested that the common heritage principle might cause a state to lose jurisdiction and control over national space

<sup>6</sup> Section of International Law, Report to the ABA House of Delegates 10 (1980) [hereinafter cited as International Law Section Report], reprinted in *The Moon Treaty: Hearings Before the Subcomm. on Science, Technology and Space of the Senate Comm. on Commerce, Science and Transportation* [hereinafter cited as *Senate Hearings*], 96th Cong., 2d Sess. 76, 78 (1980).

<sup>7</sup> Article 18 of the Agreement characterizes the common heritage of mankind as a principle.

<sup>8</sup> International Law Section Report, *supra* note 6, at 76.

objects and personnel while in space, despite contrary language in Article 8 of the 1967 Principles Treaty. The International Law Section replied to this fear by citing Articles 12 and 15 of the Moon Agreement, which state that the presence of national space objects and personnel on the moon does not affect the jurisdiction, control and ownership of the state in question.<sup>9</sup>

These doubts of the critics stemmed from their basic argument that the Agreement made inroads on the free enterprise system. Yet both the language and the negotiating history of the Agreement are consonant with and protective of the interests of private entrepreneurs. For this reason, the members of the section concluded that the Agreement assures that the parties to it "retain exclusive jurisdiction and control over their facilities, stations and installations on the Moon, and that other States Parties are obligated to avoid interference with normal operations of such facilities."<sup>10</sup> The present *res communis* rights of those who are able to engage in the exploration, exploitation and use of the area and its resources are fully recognized.

The ABA's Section of Natural Resources Law initially raised objections about the terms and purpose of the Moon Agreement. Its members feared that acceptance of the common heritage principle might prejudice the then current negotiations on the law of the sea, as well as the future of Antarctica. They believed that the provisions of Article 11(5), relating to a future international legal regime and appropriate procedures for implementing it, would impose unacceptable "control [on] U.S. space investigations."<sup>11</sup> The section also urged that "a moratorium on exploration and exploitation of space resources is inherent in the Moon Treaty, pending establishment of machinery to govern such activities under the control of the international regime."<sup>12</sup> This proposition was contrary to the position taken by the United States during the negotiations. The United States had indicated that the Agreement "places no moratorium upon the exploitation of the natural resources on celestial bodies, pending the establishment of an international regime."<sup>13</sup> In an immediate response, the Soviet representative raised no objections to the interpretation put forward by the United States.<sup>14</sup>

In 1981 leaders of the ABA sections prepared a consolidated recommendation to the ABA House of Delegates.<sup>15</sup> They accepted the views

<sup>9</sup> *Id.* at 80.

<sup>10</sup> *Id.* at 76.

<sup>11</sup> Section of Natural Resources Law, Report with Recommendation to the ABA House of Delegates, reprinted in *Senate Hearings*, *supra* note 6, at 82, 85.

<sup>12</sup> *Id.*

<sup>13</sup> UN Doc. A/AC.105/PV.203, at 23-25 (1979).

<sup>14</sup> *Id.* at 43-45. For an assessment of the unsuccessful efforts of the less-developed countries to obtain support for their moratorium proposals, see Christol, *The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 14 INT'L LAW. 429, 466-74 (1980).

<sup>15</sup> Recommendation to the House of Delegates (1982), reprinted in Christol, *The American Bar Association and the Moon Treaty*, 9 J. SPACE L. 77, 90 (1981).

contained in the report of the International Law Section, with modest changes in terminology, and deferred to the Natural Resource Law Section's concern about the meaning to be accorded to the common heritage principle. Thus, while the sections recognized that the moon and its natural resources are the common heritage of mankind, they concluded that

- (i) all States have the rights to explore and use the Moon and its natural resources, and (ii) that no State or other entity has an exclusive right of ownership over the Moon, over any area of the surface or subsurface of the Moon, or over its natural resources which have not been, or are not actually in the process of being, extracted or used by actual development activities on the Moon.<sup>16</sup>

This language was intended to make certain that property rights appertain to any juridical or natural person that comes into possession of a moon-based natural resource by removing that resource from its original "in place" position. The statement was designed to ensure that the common heritage principle would not thwart the free enterprise opportunities of firms prior to the time, undoubtedly remote, when the international regime and the "appropriate procedures" provisions of Article 11(5) were implemented. That such exploitation was considered by the framers of the Agreement to be a distant event was evidenced by the phrase in Article 11(5) "as such exploitation is about to become feasible."

Although Soviet experts have speculated recently whether the "appropriate procedures" clause might lead to the formation of a supranational governmental body, it is clear that despite early criticisms of the Agreement by Soviet negotiators, it was accepted and endorsed by the Soviet Union. Further, since only the parties to the Agreement will have a hand in creating the new moon organization, it will be up to them to identify its powers and duties. Only after they have done so will it be possible to determine whether the new institution is endowed with the traditional functions of international intergovernmental organizations, or whether the moon organization is quite unique.

The Agreement provides for an orderly transition from the limited resource exploitation of recent years to something more grandiose at a future date. At the moment, the rule is that of freedom of exploitation by all pursuant to the *res communis* principle. When exploitation on a large-scale basis is feasible, an international legal regime will become necessary; it will be created by the parties to the Agreement to support the newly activated common heritage principle. Only they will be allowed to effect distributions of benefits on an equitable basis, taking into account the interests and needs of the less-developed countries, as well as the efforts of the states engaged in space exploitation.

While the novelty of the common heritage principle may have produced some concerns in the United States, undoubtedly much influenced by present uncertainties about how the sharing of benefits may work out in

<sup>16</sup> *Id.* at 91.

practice, no such concerns were expressed by one group of experts whose members are not based in less-developed countries. In 1982 the Space Law Committee of the International Law Association urged the early ratification of the Agreement.<sup>17</sup>

Although both nations supported the Agreement at the United Nations in 1979, neither the Soviet Union nor the United States has formally approved it. By contrast, both are parties to the four other UN-negotiated international space law agreements. Perhaps the 1979 Agreement, like other international agreements designed to serve the reciprocal necessities of these two states, has become a casualty of the important differences that now separate the countries. These differences are most noticeable in the areas of arms control and disarmament, and the Moon Agreement does contain an important limitation on the threat or use of force on and around the moon.

Aside from the detriment to the national interests of the United States caused by the absence of a truly effective and verifiable general system of arms control and disarmament, can the nonratification of the Moon Agreement cause injury to the commercial interests of this country? The parties to the Agreement are accorded basic exploitative rights that are not accorded to nonparties. While only France, among the present parties, can be considered as having space capabilities, such capabilities are not necessary for a state to be able to profit from adoption of the Agreement. National entrepreneurs are already looking for flag-of-convenience countries as bases for communications and remote sensing activities.

One of the parties to the Agreement could conceivably enter into arrangements with a foreign private firm that has launch and operational capabilities. While such arrangements may not be made soon, or at all, the entry into force of the Moon Agreement may still indicate that the United States would be well-advised to make a hardheaded appraisal of what may be gained or lost from not ratifying it.

CARL Q. CHRISTOL\*

#### THE 1984 UN SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

This past August, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities welcomed 17 newly elected experts. In part, because of the large number of new members on the Sub-Commission, the session did not produce many major initiatives.

The 26 members of the Sub-Commission are elected by the Commission on Human Rights every three years, with due respect given to geographic

<sup>17</sup> INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE, 1982, at 12 (1983).

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representation.<sup>1</sup> This year, for the first time, the alternate for each expert was elected together with the expert, which represented a major reform over the previous practice. Formerly, elected experts could designate their alternates; the alternate would frequently be a government official in Geneva of the same nationality as the expert.<sup>2</sup> Nineteen alternates were elected by the Commission,<sup>3</sup> and several actively participated in this year's session.<sup>4</sup> Procedures are needed, however, to ensure that no team of experts has an extra opportunity to intervene on a particular agenda item simply because both the expert and the alternate happen to be present.<sup>5</sup>

### *Violations of Human Rights in Specific Countries*

The Sub-Commission considers instances of human rights violations in specific countries in three ways: (1) under the procedure established by Economic and Social Council (ECOSOC) Resolution 1503;<sup>6</sup> (2) under the specific agenda item authorized by ECOSOC Resolution 1235;<sup>7</sup> and (3) under a general agenda item where violations in a specific country are used to illustrate or highlight a problem covered by the agenda item.

The Working Group on Communications, established pursuant to ECOSOC Resolution 1503, considered hundreds of petitions submitted to the United Nations alleging human rights violations in specific countries.<sup>8</sup> Because the working group, Sub-Commission and Commission consider

<sup>1</sup> In general, member countries of the United Nations are divided into the following five geographic areas: (1) Africa, (2) Asia, (3) Eastern Europe, (4) Latin America, and (5) Western Europe, the United States, Canada, Australia and New Zealand. On the Sub-Commission there are seven African experts, five Asian experts, three Eastern European experts, five Latin American experts and six experts from Western Europe and other countries. On each of the Sub-Commission's working groups, there is one expert from each of the geographic areas. UN Doc. E/CN.4/Sub.2/1984/Misc.2.

<sup>2</sup> See, e.g., Gardéniers, Hannum & Kruger, *The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Recent Developments*, 4 HUM. RTS. Q. 353, 357 n.20 (1982).

<sup>3</sup> A country nominating an expert to serve on the Sub-Commission was not required to nominate an alternate. See UN Doc. E/CN.4/Sub.2/1984/Misc.2.

<sup>4</sup> The alternate from Argentina replaced the expert nominated by his country for the entire session, served as rapporteur for the Sub-Commission, participated actively in the session and was assigned to prepare two reports. Other alternates who participated frequently were those from the United States and the Soviet Union.

<sup>5</sup> Under one agenda item at this year's session, the alternate for the Soviet Union took the floor after the expert from the Soviet Union had already intervened under the same item. A number of experts protested, but no formal resolution of the issue was reached.

<sup>6</sup> ESC Res. 1503 (XLVIII), 48 UN ESCOR Supp. (No. 1A) at 8, UN Doc. E/4832/Add.1 (1970). For a description of the 1503 procedures, see GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 60-67 (H. Hannum ed. 1984) [hereinafter cited as GUIDE].

<sup>7</sup> ESC Res. 1235 (XLII), 42 UN ESCOR Supp. (No. 1) at 17, UN Doc. E/4393 (1967). For a discussion of the procedures for intervening under Resolution 1235, see GUIDE, *supra* note 6, at 186-99.

<sup>8</sup> The Secretary-General is authorized to provide members of the Commission with communications or petitions alleging human rights violations pursuant to ESC Res. 728F (XXVIII), UN Doc. E/3290 (1959). The 1503 procedure was established as a means of coordinating the consideration of petitions filed with the United Nations.

1503-related matters in closed sessions, the only public source of information on these matters is the statement by the head of the Commission prior to its public debate. At its last session, the Commission named 11 countries as gross violators of human rights and dismissed three from consideration.<sup>9</sup> Of the three countries dismissed, it can be assumed that petitions pertaining to Pakistan and Malaysia were later considered by the working group and the Sub-Commission. In light of the situation in these countries—particularly in Pakistan—it will be interesting to see whether the Sub-Commission forwarded either country to the Commission, and, if so, how the Commission will react.

Pursuant to ECOSOC Resolution 1235, the Sub-Commission annually devotes an agenda item to violations of human rights and fundamental freedoms. This agenda item has evolved to the point where it provides a flexible and public forum for publicizing human rights violations in specific countries. At this year's session, there was an attempt by the expert from the Soviet Union to restrict the mention of specific countries by Sub-Commission members;<sup>10</sup> however, as in the past, both Sub-Commission members and nongovernmental organizations (NGOs)<sup>11</sup> detailed instances of violations of human rights in specific countries under this agenda item. Although dozens of countries from every region of the world were mentioned, among those receiving considerable attention were Guatemala, Indonesia (with respect to East Timor), South Africa, Sri Lanka, the Sudan and Uruguay.

At one point, members of the Sub-Commission attempted to question the Indonesian observer with respect to East Timor, following Indonesia's exercise of the right of reply.<sup>12</sup> After considerable wrangling over the propriety of permitting questions to be posed to a government observer,<sup>13</sup> the Sub-Commission decided to permit the Indonesian observer to "clarify" his remarks in response to the questions posed. The observer, however, declined to respond, contending that the questions went beyond the scope of the Sub-Commission's authority.

<sup>9</sup> See UN Doc. E/CN.4/1984/77, at 151.

<sup>10</sup> The Soviet expert contended that when he arrived at the Sub-Commission 3 years ago there was a policy—articulated by the experts from the United States and the United Kingdom—that experts would not name specific countries as human rights violators. See UN Press Release HR/1583, Aug. 25, 1984, at 4. However, a review of the Sub-Commission's summary records failed to disclose any such policy or discussion.

<sup>11</sup> Only NGOs with consultative status with the United Nations pursuant to ESC Res. 1296 (XLIV), 44 UN ESCOR Supp. (No. 1) at 21, UN Doc. E/4548 (1968), are permitted to participate actively—i.e., through oral and written interventions—in the Sub-Commission's sessions. Over the years, the practice of permitting NGOs to raise instances of human rights violations in specific countries has developed. See, e.g., Gardéniers, Hannum & Kruger, *supra* note 2, at 358.

<sup>12</sup> The experts from the United Kingdom, Greece and Cuba all posed pointed questions to the Indonesian observers regarding Indonesia's recognition of various UN resolutions concerning self-determination for East Timor.

<sup>13</sup> The experts from the Soviet Union and China objected to the "cross-examination" procedure as unprecedented.

In another exchange, the Soviet expert took the floor shortly after the expert from the United States had commented on the human rights situation in the Soviet Union, specifically mentioning the case of Andrei Sakharov and the situation of Soviet Jews, as typified by the case of Iosif Begun, a Hebrew teacher convicted in 1983 of slandering the Soviet state and sentenced to a 12-year prison term. In his 45-minute intervention,<sup>14</sup> the Soviet expert first characterized the intervention by Dr. Sakharov's son-in-law on behalf of the International League for Human Rights as a sham. He then proceeded to catalog the human rights violations in the United States, mentioning in particular the case of Leonard Peltier, a Native American.<sup>15</sup>

Sub-Commission members and NGO representatives alike discussed violations by specific countries under general agenda items. Under the agenda item covering the elimination of all forms of racial discrimination, although other countries were mentioned,<sup>16</sup> emphasis was placed on the situation in South Africa. The Sub-Commission considered an updated report by Ahmad Khalifa, which purported to identify all banks, transnational corporations and other organizations "whose activities constitute assistance to the colonial and racist regime in Southern Africa."<sup>17</sup> Although the report—which lists close to four thousand organizations—appears comprehensive, at least two experts from Western countries criticized its failure to name organizations in non-Western countries that carry on trade with South Africa.<sup>18</sup>

Under the agenda item covering the human rights of the mentally ill, reference was made to the situation in Japanese mental hospitals. The following day, the pertinent NGO intervention was front-page news in almost every major Japanese newspaper and, within weeks, legislation was introduced to regulate the admission and treatment of mental hospital patients.<sup>19</sup> Although Japan represents a somewhat atypical example, it illustrates how the publicity given to violations of human rights in certain countries by the Sub-Commission can provide the impetus for the improvement of a specific situation.<sup>20</sup>

<sup>14</sup> Prior to the debate under the agenda item concerning Resolution 1235, the Sub-Commission agreed that the intervention of each expert would be limited to 15 minutes. Despite two reminders from the chair, the Soviet expert continued his presentation.

<sup>15</sup> Leonard Peltier's April 1977 conviction for killing two FBI agents on an Indian reservation in 1975 is currently under review before a U.S. district court in South Dakota.

<sup>16</sup> For example, the situation of the Korean and Barakumin minorities in Japan. See UN Press Release HR/1570, Aug. 14, 1984, at 3.

<sup>17</sup> UN Doc. E/CN.4/Sub.2/1984/8 and Add. 1-2.

<sup>18</sup> See UN Press Release HR/1569, Aug. 13, 1984, at 3. See also Draft Decision, UN Doc. E/CN.4/Sub.2/1984/L.5, asking the special rapporteur to strive for geographic completeness.

<sup>19</sup> The International League for Human Rights made the oral intervention. See *Japan's Psychiatric System*, Asahi Shimbun Evening News [English newspaper], Aug. 20, 1984; and *Psychiatry and the Breach of the International Covenant on Human Rights*, Manichi Shinbun, Aug. 19, 1984 (trans. supplied by International League for Human Rights).

<sup>20</sup> Japan has consistently responded swiftly to complaints about domestic human rights violations when raised by Western NGOs. For example, in 1980 the International Human

*Indigenous Populations*

The Working Group on Indigenous Populations was established in 1982. Its mandate was to develop standards pertaining to rights of indigenous populations and to review recent developments affecting indigenous populations.<sup>21</sup> In its first 2 years, under the chairmanship of Asbjorn Eide, the working group adopted a flexible procedure that permitted the representatives of indigenous populations—including those without consultative status with ECOSOC<sup>22</sup>—to participate actively in the meetings of the working group.<sup>23</sup>

This year's working group once again provided indigenous groups from many parts of the world with an opportunity to bring to the attention of a United Nations organ the specific problems facing particular indigenous peoples. Also of note was the active participation of a number of observers from governments with large indigenous populations.<sup>24</sup> After reviewing the report of the working group, the Sub-Commission adopted a lengthy resolution requesting that the working group consider drafting a body of principles on indigenous rights, beginning at its next session.<sup>25</sup>

The Sub-Commission also approved a proposal for the establishment of a voluntary fund to be used to facilitate the participation of representatives of indigenous groups in the deliberations of the working group.<sup>26</sup> The proposal would establish a five-person board of trustees, including at least one member of a widely recognized organization of indigenous people.<sup>27</sup> If established as proposed,<sup>28</sup> the fund would represent a step, albeit a minor one, in recognizing a representative of an indigenous group as an active participant in a UN-controlled body.

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Rights Law Group submitted a 1503 communication concerning the Korean minority in Japan. Following the intervention, the Law Group was assured that steps would be taken to remedy the situation legislatively.

<sup>21</sup> ESC Res. 1982/34, UN Doc. E/CN.4/Sub.2/1982/33, at 3.

<sup>22</sup> See note 11 *supra*.

<sup>23</sup> See, e.g., reports of the Working Group on Indigenous Populations from the past 2 years. UN Docs. E/CN.4/Sub.2/1982/33, and E/CN.4/Sub.2/1983/22.

<sup>24</sup> Of particular note was the address to the working group by Clyde Holding, Australian Minister for Aboriginal Affairs. Other government representatives who participated actively in the sessions were the Canadian, Norwegian, Peruvian and Brazilian observers.

<sup>25</sup> See Res. 1984/35, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.1, at 8.

<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.*

<sup>28</sup> The establishment of the fund must still be approved by the Commission on Human Rights and ECOSOC. The Commission authorized the Sub-Commission to consider its feasibility. See Commission on Human Rights Res. 1984/32, UN Doc. E/CN.4/1984/77, at 68. However, it remains to be seen whether the Sub-Commission's proposal, which represented a compromise between the position of indigenous groups seeking greater control of the fund and that of government representatives objecting to any acknowledgment of indigenous groups as entities recognized by the United Nations, will be adopted in its present form at the Commission's next session.



*Slavery*

The Slavery Working Group was established in 1974.<sup>29</sup> At this year's session, as in past years, NGOs dominated the working group's meetings, publicizing specific instances of slavery or slavery-like practices throughout the world.

Although no major initiatives emanated from the working group this session, its effectiveness was illustrated by the mission sent in January 1984 to investigate the practice of slavery in Mauritania and measures that might be taken to eradicate it.<sup>30</sup> The mission was the result of an intervention by the Anti-Slavery Society at a 1981 working group session. In his report, Marc Bossuyt, the expert designated by the Sub-Commission, concluded that the Government of Mauritania was taking steps to eliminate slavery but should be encouraged nonetheless to increase its activities in this area.<sup>31</sup> He also suggested a number of concrete steps that the Government should implement to assist former slaves and others who continue living in slave-like conditions.<sup>32</sup>

*States of Emergency*

Last year, pursuant to a decision of the Commission on Human Rights, the Working Group on Detention was asked to prepare a list of countries in which a state of emergency had been declared or terminated.<sup>33</sup> A list supplied by the United Nations Centre for Human Rights contained only countries that had informed the United Nations that they had derogated from their obligations under the International Covenant for Civil and Political Rights.<sup>34</sup> Some members of the working group expressed uncertainty about the standards that could be used to draw up a list based on less objective criteria.

The working group proposed, and the Sub-Commission agreed, that the expert from Argentina should prepare an explanatory paper on the ways and means for the future preparation of such a list.<sup>35</sup> To avoid further delay, it is hoped that the expert will also provide specific examples of countries where states of emergency are currently in effect.

<sup>29</sup> Res. 11 (XXVII) (1974), authorized by ESC Dec. 17 (LVI) (1974).

<sup>30</sup> UN Doc. E/CN.4/Sub.2/1984/23, at 2.

<sup>31</sup> See UN Doc. E/CN.4/Sub.2/1984/CRP.1/Add.10, at 3.

<sup>32</sup> UN Doc. E/CN.4/Sub.2/1984/23, at 17. For example, the expert proposed that Mauritania ratify international human rights instruments, establish an antislavery body to which victims might apply, involve former slaves to a greater extent, make greater use of the media to inform victims of their alternatives, inform the public of penalties for slave owning, and provide loans to former slaves.

<sup>33</sup> Commission on Human Rights Dec. 1984/104, UN Doc. E/CN.4/1984/77, at 104. The development of such a list was included as one of the major recommendations in the study on states of emergency prepared for the Sub-Commission by the then expert from France, Nicole Questiaux.

<sup>34</sup> UN Doc. E/CN.4/Sub.2/1984/WG.1/CRP.2.

<sup>35</sup> Res. 1984/27, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.1, at 5-6.

*Instruments*

The Working Group on Universal Acceptance of Human Rights Instruments was established in 1979 to encourage acceptance of international human rights instruments.<sup>36</sup> It was authorized to call upon governments that have not ratified various human rights instruments to explain their inaction.<sup>37</sup> Unfortunately, few governments have participated in the working group's sessions.

On the basis of the working group's report,<sup>38</sup> the Sub-Commission requested that the Secretary-General consider the possibility of offering technical assistance and designating regional advisers to facilitate the adoption of human rights instruments by more countries.<sup>39</sup> The Sub-Commission also decided to suspend the working group, and instead to appoint a member of the Sub-Commission to prepare a status report.<sup>40</sup> In view of the inability of the working group to involve more governments in its work, this decision is a positive one.

*Studies and Reports*

This year only one completed report was presented to the Sub-Commission: the Study of the Problem of Discrimination against Indigenous Populations by Mr. Martínez Cobo.<sup>41</sup> The report, which includes several volumes, took 11 years to complete. Most of the report had been presented to the Sub-Commission in previous years, but this year the "Conclusions, Proposals and Recommendations" section was presented for the first time.<sup>42</sup>

In preparing the study, Mr. Cobo, together with United Nations staff personnel, visited 37 countries to conduct on-site interviews with government officials and representatives of indigenous populations.<sup>43</sup> The Cobo study thus provides a wealth of information on indigenous populations in various countries. The conclusions, proposals and recommendations should prove useful to the Working Group on Indigenous Populations in drafting a proposed declaration or convention on the rights of indigenous populations.

The impact of the Cobo study will be limited, however, unless an edited version is prepared to facilitate its broad dissemination and use by United Nations bodies and member countries. A Sub-Commission resolution recommends that ECOSOC authorize the UN Secretary-General to prepare an edited and condensed version of the study.<sup>44</sup>

<sup>36</sup> Res. 1979/1B (XXXII), UN Doc. E/CN.4/Sub.2/1979/L.716.

<sup>37</sup> See generally Weissbrodt, *A New United Nations Mechanism for Encouraging the Ratification of Human Rights Treaties*, 76 AJIL 418 (1982).

<sup>38</sup> UN Doc. E/CN.4/Sub.2/1984/26, at 2.

<sup>39</sup> Res. 1984/36, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 11.

<sup>40</sup> *Id.* at 12.

<sup>41</sup> UN Docs. E/CN.4/Sub.2/476 and Add.1-6, E/CN.4/Sub.2 and Add.1-7, E/CN.4/Sub.2/1983/21 and Add.1-8.

<sup>42</sup> UN Doc. E/CN.4/Sub.2/1983/2/Add.8. <sup>43</sup> *Id.*

<sup>44</sup> Res. 1984/35, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 7.

A preliminary report on amnesty laws was discussed in great detail by the Sub-Commission.<sup>45</sup> The report is designed to provide a frame of reference for those endeavoring to promote amnesty in particular countries, primarily for political offenses. In addition to presenting the history, evolution and typology of amnesty laws, the report presents proposals for dealing with specific problems. The report concludes by noting that the amnesty process can only be effective if it is coupled with social, economic and political measures, such as the lifting of a state of emergency and the holding of free and genuine elections.<sup>46</sup> A final version of the report on amnesty will be submitted to the Sub-Commission at its next session.

The study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers will be presented to the Sub-Commission next year.<sup>47</sup> Many members expressed concern over the delay in completing the study on this important subject.

The Sub-Commission also reviewed a half-dozen other preliminary reports and approved the initiation of several additional studies, including one on an optional protocol aiming at the abolition of the death penalty.<sup>48</sup> The number of these reports and studies is cause for some concern. Although they are the product of each individual expert, their presentation to the Sub-Commission provides an opportunity for a discussion that often will improve their quality and their chances of acceptability to the entire group. This process facilitates building on the recommendations included in a report and preparing a draft declaration and convention on the subject in question. As the number of reports requested by the Sub-Commission grows, less time is available to examine each one. The result is that, after a report is approved, there is little follow-up activity, even if the report contains specific recommendations.<sup>49</sup>

### *Resolutions*

Of the substantive resolutions approved by the Sub-Commission, perhaps the most significant was the one that condemns amputations as a form of cruel and degrading treatment.<sup>50</sup> The resolution, which was opposed by

<sup>45</sup> UN Doc. E/CN.4/Sub.2/1984/15.

<sup>46</sup> *Id.* at 15.

<sup>47</sup> Res. 1984/11, UN Doc. E/CN.4/Sub.2/1984/CRP.2, at 12.

<sup>48</sup> Res. 1984/7, *id.* at 7. The expert from Belgium, Marc Bossuyt, was invited to undertake this study. The subject aroused a great deal of controversy when it was discussed, as a number of countries objected to the notion of considering a protocol outlawing capital punishment when so many countries continued to permit it. See UN Press Release HR/1574, Aug. 15, 1984, at 4.

<sup>49</sup> The fate of the recommendation included in the Questiaux report, note 33 *supra*, highlights this phenomenon. The purpose of Sub-Commission studies has been questioned by India before the Commission on Human Rights. UN Press Release HR/1503, Feb. 20, 1984, at 7-8.

<sup>50</sup> Res. 1984/22, UN Doc. E/CN.4/Sub.2/1984/CRP.2, at 22-23. The resolution as initially proposed focused on the growing practice of amputation in the Sudan. After a charged debate, the resolution was revoked and reference to the Sudan was dropped. However, the adopted resolution has broader implications than the previous country-specific resolution could have had.

experts from Islamic countries, calls on countries that have legislation or practices entailing amputation as punishment to take the necessary steps to provide for alternate, more humane forms of punishment.<sup>51</sup>

Concern was expressed in resolutions regarding the human rights situation in the following countries: Afghanistan and Pakistan,<sup>52</sup> Chile,<sup>53</sup> El Salvador,<sup>54</sup> Guatemala,<sup>55</sup> Iran,<sup>56</sup> Paraguay,<sup>57</sup> South Africa,<sup>58</sup> Sri Lanka<sup>59</sup> and Uruguay.<sup>60</sup> Most of the country-specific resolutions involve countries that are the subject of Commission resolutions.<sup>61</sup> This year, however; three country-specific resolutions initiated by the Sub-Commission were approved.<sup>62</sup>

The most controversial of the country-specific resolutions involved Sri Lanka. At its previous session, the Sub-Commission had adopted a resolution calling on Sri Lanka to submit information to the Commission on Human Rights regarding the communal violence of July 1983.<sup>63</sup> The Sri Lankan Government prepared a formal submission for the Commission and, following an energetic lobbying effort by the Sri Lankan representatives, the Commission decided that further consideration of the issue was unnecessary.<sup>64</sup> This year's Sub-Commission resolution, which followed on the heels of renewed communal violence, was weaker than the previous one, as it merely called upon the Government to report to the next meeting of the Commission on the progress made in its investigation into violent incidents and its efforts to rectify the situation.<sup>65</sup>

The experts from the United States and the Soviet Union each introduced three resolutions that the Sub-Commission found too controversial to consider. The resolutions concerned the plights of Andrei Sakharov,<sup>66</sup> Raoul Wallenberg,<sup>67</sup> Jews in the Soviet Union,<sup>68</sup> Leonard Peltier<sup>69</sup> and the citizens of Northern Ireland,<sup>70</sup> and President Reagan's remarks on the

<sup>51</sup> *Id.* at 26.

<sup>52</sup> Res. 1984/6, *id.* at 7.

<sup>53</sup> Res. 1984/29, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.1, at 7-8.

<sup>54</sup> Res. 1984/26, *id.* at 3-4.

<sup>55</sup> Res. 1984/4, UN Doc. E/CN.4/Sub.2/1984/CRP.2, at 4-5.

<sup>56</sup> Res. 1984/14, *id.* at 17-18.

<sup>57</sup> Res. 1984/9, *id.* at 10.

<sup>58</sup> Res. 1984/4, *id.* at 10; Res. 1984/34, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 4-6.

<sup>59</sup> Res. 1984/32, *id.* at 1.

<sup>60</sup> Res. 1984/27, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.1, at 5-6.

<sup>61</sup> See, e.g., the following resolutions of the Commission: Res. 1984/4, UN Doc. E/CN.4/1984/77, at 25-27; Res. 1984/5, *id.* at 27-28; Res. 1984/10, *id.* at 35-36; Res. 1984/53, *id.* at 90-92; Res. 1984/54, *id.* at 92-93; Res. 1984/55, *id.* at 94; and Res. 1984/63, *id.* at 100-01.

<sup>62</sup> The resolutions pertaining to Paraguay, Sri Lanka and Uruguay were initiated by the Sub-Commission. At its previous session, the Sub-Commission initiated fewer resolutions. Whether this marks a trend and how the Commission will react remain to be seen.

<sup>63</sup> Res. 1983/16, UN Doc. E/CN.4/Sub.2/1983/43, at 83-84.

<sup>64</sup> Commission on Human Rights Dec. 1984/111, UN Doc. E/CN.4/1984/77, at 106. The Sri Lankan submission can be found in UN Doc. E/CN.4/1984/10.

<sup>65</sup> Res. 1984/32, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 1.

<sup>66</sup> UN Doc. E/CN.4/Sub.2/1984/L.13.

<sup>67</sup> UN Doc. E/CN.4/Sub.2/1984/L.12.

<sup>68</sup> UN Doc. E/CN.4/Sub.2/1984/L.42.

<sup>69</sup> UN Doc. E/CN.4/Sub.2/1984/L.28.

<sup>70</sup> UN Doc. E/CN.4/Sub.2/1984/L.31

launching of a nuclear attack.<sup>71</sup> The Sub-Commission avoided debate on these resolutions by characterizing them as "political." It decided that they would be considered only after all the others and then ran out of time before debate could begin on the political resolutions.

The decision to characterize resolutions as "political" because of the countries named in them ensures that certain powerful countries will never be the subject of resolutions. If a rule were adopted that required a resolution to have a minimum number of sponsors before it could be considered by the Sub-Commission, resolutions supported by only one or two experts would not result in lengthy and, most likely, polemical debates.<sup>72</sup>

#### *Participation by Nongovernmental Organizations*

As in past years, NGOs contributed significantly to the work of the Sub-Commission. In addition to providing its members with information pertaining to the human rights situation in specific countries through oral interventions, written statements and informal discussions, NGO representatives lobbied for the adoption of specific resolutions, at times taking a major hand in drafting the resolutions, and fulfilled a significant role in the working group sessions. For example, the efforts of Amnesty International, first in presenting a dramatic intervention on the practice of amputation,<sup>73</sup> and then by following the presentation with a lobbying effort, had considerable influence on the ensuing resolution on amputation.

With respect to oral interventions, the trend in favor of permitting NGOs to discuss specific countries where human rights were being violated continued.<sup>74</sup> A number of individuals presented stark, first-person and eyewitness accounts of human rights violations.<sup>75</sup> Government observers responded to the allegations presented by the NGOs, occasionally impugning the motives and sources of the NGOs presenting the information.<sup>76</sup>

NGOs faced some difficulties in having their written statements circulated at this year's session. The UN Human Rights Centre, which supervises the circulation of written statements, relied on ECOSOC Resolution 1919<sup>77</sup> in refusing to circulate NGO statements that referred to one

<sup>71</sup> UN Doc. E/CN.4/Sub.2/1984/L.29.

<sup>72</sup> However, it should be noted that, this year, a number of resolutions that initially had only two sponsors were circulated and ultimately adopted. See, e.g., Res. 1984/1-36, UN Docs. E/CN.4/Sub.2/1984/CRP.2 and Adds. 1-2. Thus, the basis for declaring resolutions political at this year's session was not their lack of sponsors.

<sup>73</sup> The representative from Amnesty International read a Sudanese newspaper article describing an amputation that took place within the last year in the Sudan.

<sup>74</sup> The trend began in 1976. See note 11 *supra*.

<sup>75</sup> For example, a woman from Turkey described the torture she suffered in a Turkish prison. An Ahamadiyya Muslim described the persecution of his sect by the Pakistani Government.

<sup>76</sup> For example, the Sri Lankan observer unequivocally denied several NGO statements. The Guatemalan observer dismissed every NGO statement as totally without foundation.

<sup>77</sup> UN Doc. E/1652, at 8 (1975).

country only or included language deemed inappropriate. Representatives of the Centre explained that they were merely reestablishing the policy that existed until 3 years ago.<sup>78</sup> Although the NGOs will have to give more attention to complying with the specifics included in the Centre's guidelines, they should be able to circulate the same type of information.<sup>79</sup>

### *General Observations*

This year's session raised once again the question of the appropriate role for the Sub-Commission: should it be a forum for publicizing violations of human rights or should it devote its efforts to developing substantive human rights norms?<sup>80</sup> Most human rights activists hope that the Sub-Commission can fulfill both roles, and frequently it does. However, there are times when the use of the Sub-Commission as a forum for publicizing human rights violations in certain countries results in polemical exchanges, which makes it more difficult to reach consensus on other important issues. The status of the Sub-Commission as a body composed of individual experts frequently is lost during these exchanges.

As was mentioned above, the Sakharov matter, and other allegations of human rights violations in the Soviet Union, contributed to the polemics at this year's session, yet ignoring Sakharov's situation would have been troubling in view of his active defense of human rights over the years in his country and elsewhere.<sup>81</sup> In the end, the resolution on Sakharov was not even debated. Most of the experts from Western Europe and Latin America, while undoubtedly sympathetic to his plight, believed that the resolution was unlikely to pass and that the time spent debating it could be better spent on other matters.<sup>82</sup>

The fate of the Sakharov resolution highlights another concern raised by some of the experts and government observers: why are certain countries the subjects of condemnatory resolutions, while other countries,

<sup>78</sup> The criteria for circulating a written statement as explained by representatives of the Centre are consistent, for example, with those described in the article, prepared in 1982, on direct intervention at the United Nations. See Kamminga & Rodley, *Direct Intervention at the U.N.: NGO Participation in the Commission on Human Rights and its Sub-Commission*, in GUIDE, *supra* note 6, at 186.

<sup>79</sup> In particular, the guidelines provide: (1) the statements must be in reference to a human rights item on the agenda; (2) the submitting organization must have special competence in the subject matter of the statement; and (3) a statement containing allegations of human rights violations in a particular country may not be circulated as a UN document except in exceptional instances. A copy of the guidelines, as circulated by the Centre, is on file with the International Human Rights Law Group.

<sup>80</sup> Other observers of the Sub-Commission have asked similar or identical questions following previous sessions. See, e.g., Hantke, *The 1982 Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 77 AJIL 651, 662 (1983); Gardeniers, Hannum & Kruger, *supra* note 2, at 367, 369-70; Hannum, *Human Rights and the United Nations: Progress at the 1980 Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 3 HUM. RTS. Q. 1, 1, 9-14, 16-17 (1981).

<sup>81</sup> In 1975, Sakharov won the Nobel Peace Prize for his work as a human rights advocate.

<sup>82</sup> Guest, *U.N. Human Rights Panel Spurns Sakharov Case*, Int'l Herald Trib., Sept. 3, 1984, at 5, col. 1.

with equally poor human rights records, are ignored? The answer resides in the fact that the experts, although in theory independent, too often reflect the views of their home country's government. Thus, the countries with few friends—e.g., Chile, El Salvador and Guatemala—are most likely to be the subject of condemnatory resolutions.

In other instances, a country may be the subject of a resolution if a number of experts believe that passage of a resolution would embarrass it into improving its internal situation. For example, while Sri Lanka may not be among the worst violators of human rights in the world, many experts believe that it will respond to adverse publicity about its human rights record.

Similarly, the report on the mission to Mauritania, though criticized off the record for not being sufficiently hard-hitting and for having avoided the particular plight of women altogether, marked the opening of an important channel for assistance on a serious matter between a UN human rights organ and a member country.<sup>83</sup> Perhaps other countries will follow Mauritania's example and look to the United Nations for assistance on serious domestic problems relating to human rights.

It will be interesting to see how the Commission on Human Rights reacts to the polemical nature of this year's Sub-Commission in its annual review of the work of the Sub-Commission. Assuming the Commission does not unduly restrict the Sub-Commission's activities, next year's session may be quite productive because it will mark the second year of the members' 3-year terms.<sup>84</sup> By that time, the members will have gained the experience of having worked with one another the previous year, but they will probably not be as concerned about their reelection to the Sub-Commission as in the third year of their terms.

Next year, the Sub-Commission will have before it a number of completed studies.<sup>85</sup> Two of the Sub-Commission working groups should complete their work on draft guidelines for the mentally ill and on a draft declaration on unacknowledged detentions.<sup>86</sup> Also next year, the Sub-Commission for the first time will have separate agenda items on the rights of women and children,<sup>87</sup> permitting more detailed study of these

<sup>83</sup> See Res. 1984/28, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 7.

<sup>84</sup> On the productivity of the second year of the term, see Gardeniers, Hannum & Kruger, *supra* note 2.

<sup>85</sup> It is expected that studies on the following subjects will be completed in time for consideration by the Sub-Commission at its next session: Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights (see Res. 1984/11, UN Doc. E/CN.4/Sub.2/1984/CRP.2, at 12-13); Status of the Individual and Contemporary International Law (see Res. 1984/2, *id.* at 2-3); The Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Human Rights and Fundamental Freedoms (see Res. 1984/3, *id.* at 3-4); Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers (see Res. 1984/11, *id.* at 12-13); Prevention and Punishment of the Crime of Genocide (Res. 1984/1, *id.* at 2); The Right to Adequate Food (see Res. 1984/15, *id.* at 18).

<sup>86</sup> The draft declaration is designed to deal with the problems of disappearances and the mistreatment of prisoners.

<sup>87</sup> Res. 1984/33, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 2-4.

subjects. Moreover, the Sub-Commission will have before it a draft definition of the term "minority,"<sup>88</sup> a question that undoubtedly will be the subject of considerable debate.

As the Sub-Commission confronts this crowded list of important initiatives, the debate over its role is certain to continue.

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### THE XIII INTERNATIONAL CONGRESS ON PENAL LAW

The International Association of Penal Law holds an international congress every five years in a different country. The 13th congress was held on October 1-7, 1984 in Cairo, Egypt, under the auspices of President Hosni Mubarak.

The congress was attended by some 650 participants from 37 countries. The opening ceremony was attended by more than nine hundred persons. Among the personalities attending this ceremony were the Egyptian Prime Minister, Kamal Hassan Aly, the Deputy Prime Minister, the Minister of Higher Education, the Minister of Justice, the Minister of Social Affairs, the Minister of Youth, the Minister of Economics and the Speaker of the House. The Egyptian judiciary was represented by the Chief Justice of the Supreme Court, the Chief Justice of the Constitutional Court, the Chief Justice of the Council of State, the Procurator General, the Solicitor General, the Administrative Procurator General, the Chief Judge of the Court of Appeals and approximately 50 members of the judiciary. Among the foreign dignitaries were the Attorney General of Sweden, the former Minister of Justice of Finland, the Chairman of the Judiciary Committee of the Italian Senate, the former Chief Justice of the Supreme Court of France, the Chief Justice of the Supreme Court of Norway, the former Chief Justice of the Supreme Court of the Ivory Coast, the Procurator General of Senegal, the President of the International Society for Social Defense and the President of the International Penal and Penitentiary Foundation. The United Nations was represented by the Director of the UN Crime Prevention Branch, and the Council of Europe by the Director of the Division of Foreign Relations. Several countries sent official delegations from their Ministries of Justice, including Argentina, Austria, Belgium, Bulgaria, Canada, the People's Republic of China, Czechoslovakia, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Italy, Jordan, the Netherlands, Poland, Romania, Sweden, Switzerland, Tunisia, the USSR and Yugoslavia.

<sup>88</sup> See UN Doc. E/CN.4/Sub.2/1984/CRP.1/Add.9, at 2.

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At the opening ceremonies, Prime Minister Kamal Hassan Aly delivered President Mubarak's speech, which emphasized the supremacy of the rule of law and the preservation of democratic principles in a free society.

The week-long congress dealt with four topics: crimes of omission, economic and business criminality, diversion and mediation as an alternative to criminal proceedings, and judicial assistance and cooperation in international matters. Each one of these four topics was the object of a special preparatory colloquium held in the 2 years preceding the congress and attended by a national reporter for each national section of the Association. The scientific work produced by these preparatory sessions was then published in one of the issues of the *Revue Internationale de Droit Pénal* and distributed to all members of the Association prior to the congress.

At the conclusion of the 5 days of discussion on these four topics, a series of resolutions was adopted that will surely have a significant impact on the criminal justice policy of a number of countries.

The Association is one of the oldest and most prestigious scholarly organizations in the world. Founded in 1889 and reorganized in 1924, it now has over three thousand members and associates in 68 countries. Its quarterly, the *Revue Internationale de Droit Pénal*, is in its 55th year of publication and is subscribed to by some 1,300 law libraries and institutions throughout the world.

In 1972 the Association established the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, which every year now conducts approximately eight conferences, seminars and meetings of committees of experts for the United Nations and the Council of Europe. The annual attendance at these activities amounts to some six hundred persons (law professors, judges, prosecutors, government officials, practitioners and researchers). In the last 10 years, the Institute has hosted 66 programs attended by more than four thousand participants from 71 countries, including professors from 193 universities. The Institute publishes some of its proceedings and has issued 37 publications relating to its programs. It has collaborated with 17 international organizations and its activities have been covered extensively by the Italian as well as the international media.<sup>1</sup>

The author has been Secretary-General of the Association since 1974; he had served as Deputy Secretary-General for the previous 2 years. The first American to have been elected to that post since the organization was created, he was reelected unanimously and by acclamation at the Cairo congress for another 5-year term. He is also Dean of the International Institute of Higher Studies in Criminal Sciences and the coeditor in chief of the *Revue Internationale de Droit Pénal*.

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<sup>1</sup> In 10 years, there have been over seven hundred articles about the Institute in some 34 newspapers and magazines as well as a number of radio and television programs.

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