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# THE PROTECTION OF RESPECT AND HUMAN RIGHTS: FREEDOM OF CHOICE AND WORLD PUBLIC ORDER\*

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In the fundamental sense with which we are here concerned, respect is defined as an interrelation among individual human beings in which they reciprocally recognize and honor each others' freedom of choice about participation in the value processes of the world community or any of its component parts.<sup>1</sup> Respect includes not only the perspectives or perceptions of worth by which the individual is characterized by himself and others, but also the translation of these perspectives into the operative facts of social process.<sup>2</sup> The

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1. The concepts of freedom and coercion with which we work are: By freedom we mean situations in which persons have many options, with high probabilities of gain and low probabilities of loss. By coercion we mean situations in which participants have few options, with low probabilities of gain and high probabilities of loss. For comparable statements, see Deutsch, *Strategies of Freedom: The Widening of Choices and the Change of Goals*, in LIBERTY 301 (NOMOS IV, C. Friedrich ed. 1962):

[W]e may then define freedom as the range of effective choices open to an actor, such as an individual or a group of persons. The choices of action or policy open to a group eventually can be translated by virtue of their consequences into indirect choices for individuals.

Defined as the effective range of choices for an actor, freedom has at least four major aspects or preconditions:

1. The absence of restraint, emphasized by such classical theorists as John Locke and Adam Smith.

2. The presence of opportunity, stressed by more recent theorists of social reform, such as T.H. Green, Karl Marx, George Bernard Shaw, and Sidney Webb.

3. The capacity to act, stressed by Hegel and by more recent writers on power such as Benito Mussolini.

4. The awareness of the reality without—including both unrestrainedness and opportunity—and of the actor's own capacity. This awareness has been stressed by Greek philosophers from Heraclitus to Socrates, and by modern depth psychologists, such as the school of Sigmund Freud.

*Id.* at 301—02.

Oppenheim sums up freedom of choice in these words:

Whereas social freedom refers to two actors and their respective actions, freedom of choice signifies a relationship between one actor and a series of alternative potential actions.

Oppenheim, *Freedom*, 5 INT'L ENCYC. SOCIAL SCI. 554, 556 (1968).

2. For specification of the detailed content of the values with which we work see

relevant perspectives and operations extend to all the different values sought in social process and to the many distinctive institutional facilitations and deprivations by which freedom of choice is affected.

In more precise specification, respect may be said to entail four particular outcomes:

- 1) a fundamental freedom of choice for all individuals regarding participation in all value processes;
- 2) an equality of opportunity for all individuals to have experiences that enable them to enjoy the widest range of effective choice in their interactions with others and to participate in all value processes in accordance with capability, that is, without discrimination for reasons irrelevant to capability;
- 3) additional rewards in deference to individuals who make preeminent contribution to common interests; and
- 4) an aggregate pattern of social interactions in which all individuals are protected in the utmost freedom of choice and subjected to the least possible governmental and private coercion.

It requires no detailed documentation to show that the various communities of mankind have seldom approximated, and often have not even aspired to, the full achievement of respect in terms of these four specified outcomes. Despite the increasing rhetorical acceptance in modern times of human dignity as the overriding goal for all communities, contemporary world social process continues to exhibit immense disparities between aspiration and achievement in relation to each outcome. The common assumption that slavery is a thing of the past is belied by the facts; slavery and slave-like practices are still pervasive in some parts of the world.<sup>3</sup> In other communities caste systems persist (with remnants of "untouchability" and rigidified discrimination); members of lower castes are denied access to ordinary avenues of mobility and advancement.<sup>4</sup> Apartheid, as imposed in South Africa and Namibia, has become a new form of caste and segregation in which the position and freedoms of individual human beings are stratified and frozen at birth

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H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950); Lasswell & Holmberg, *Toward a General Theory of Directed Value Accumulation and Institutional Development*, in *COMPARATIVE THEORIES OF SOCIAL CHANGE* 12 (H. Peter ed. 1966). Cf. H. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1958); H. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1965); *POLITICS, PERSONALITY, AND SOCIAL SCIENCE IN THE TWENTIETH CENTURY* (A. Rogow ed. 1969).

3. See notes 124—30 & accompanying text *infra*.

4. See notes 371—74 & accompanying text *infra*.

on the basis of race.<sup>5</sup> Even where hardcore deprivations in the form of slavery and caste have decreased or disappeared, there often persists a steady denial of equality on various grounds such as race, sex, religion, culture, political opinion, and alienage.<sup>6</sup> The formal myth of a community may emphasize equality, yet actual conditions of deprivation and disparity may be such as to deny individuals effective choice and to render the aspiration toward equality a mockery. Aside from the ongoing "class struggles" in all mankind's differing communities, the tension generated and exacerbated by racial prejudice and discrimination, in its various manifestations, has transcended national boundaries and become a matter of intense universal concern.<sup>7</sup>

Too often the deliberate bestowal of honor upon individuals is abused and misused. Honor is frequently conferred upon individuals on grounds having nothing to do with actual contribution to common interests. In some communities honor is still ascriptive ("hereditary"), and in others it has become simply an instrument manipulated arbitrarily by power elites for special interests.

The achievement of a comprehensive civic order, in which the aggregate pattern of social interaction accords even a minimum freedom of choice, is still far from reality. In an interdependent world, where high expectations of violence prevail and a universalizing science and technology have enormous impact, both constructive and destructive, the accelerating trend toward totalitarianism, regimentation, governmentalization, centralization, and concentration<sup>8</sup> culminates in many places in patterns of social interaction in which individuals are denied even a basic minimum of choice and

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5. See notes 439—650 & accompanying text *infra*.

6. See notes 651—79 & accompanying text *infra*.

7. See notes 34—337 & accompanying text *infra*.

8. See generally H. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1950); Lasswell, *The Garrison-State Hypothesis Today*, in CHANGING PATTERNS OF MILITARY POLITICS 51 (S. Huntington ed. 1962); Lasswell, *The Major Trends in World Politics*, in THE ETHIC OF POWER: THE INTERPLAY OF RELIGION, PHILOSOPHY, AND POLITICS 343 (H. Lasswell & H. Cleveland eds. 1962); Lasswell, *The World Revolutionary Situation*, in TOTALITARIANISM 360 (C. Friedrich ed. 1954); Lasswell, *The World Revolution of Our Time: A Framework for Basic Policy Research*, in WORLD REVOLUTIONARY ELITES 29 (H. Lasswell & D. Lerner eds. 1965); Lasswell, *Does the Garrison State Threaten Civil Rights?*, 275 ANNALS 111 (1951); Lasswell, *The Garrison State*, 46 AM. J. SOCIOLOGY 455 (1941), reprinted in H. LASSWELL, THE ANALYSIS OF POLITICAL BEHAVIOR 146 (1948); Lasswell, *The Interrelations of World Organization and Society*, 55 YALE L.J. 889 (1946). Cf. Reisman, *Private Armies in a Global War System*, in LAW AND CIVIL WAR IN THE MODERN WORLD 252 (J. Moore ed. 1974).

governmental encroachment into private domains expands extravagantly.

The protection of respect in any community, from the most inclusive to the smallest, is of course a function of the production and distribution of all other values. A value process of particular significance for the protection of respect is, however, that of enlightenment: many of the failures and difficulties in the protection and fulfillment of respect are monuments to sheer intellectual failure. These more particular failures include failure to identify and recognize respect as a distinct value, and failure to clarify the basic content ascribed to respect and to specify the procedures by which such content can be related to specific outcomes. Too often scholars and statesmen indulge in derivational exercises rather than in formulating procedures to facilitate empirical specification of decision in specific instances.<sup>9</sup> Similarly, respect is frequently defined in a negative sense only, with a focus upon the one particular outcome of non-discrimination, rather than in a positive formulation which might foster effective equality and a rich fulfillment of human rights.<sup>10</sup> Even non-discrimination is sometimes viewed so technically and narrowly, as in the European Convention on Human Rights,<sup>11</sup> that it relates only to preexisting legal rights with a truncation of freedoms regarding many values.<sup>12</sup>

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9. A recent example of high indulgence in derivational exercises, without careful location in social process context, is J. RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter cited as J. RAWLS].

10. See, e.g., E. VIERDAG, *THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW* (1973).

11. Convention on Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 1950 Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter cited as European Convention].

12. Article 14 of the European Convention on Human Rights provides:

The enjoyment of *rights and freedoms set forth in this Convention* shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

*Id.* art. 14, 213 U.N.T.S. at 232 (emphasis added).

As shown by the practice of the European Commission on Human Rights, this provision is "auxiliary to" "the rights and freedoms set out" in the Convention, and does not establish "a right to non-discrimination independent of them"; hence, "there can be a breach of Article 14 only if there is a breach of such a provision of the Convention, which is also discriminatory." J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 233-34 (1969). In the same vein, Vallat has observed:

There is a widespread tendency to regard the principle of non-discrimination as elementary, basic, self-evident and universally binding, but a moment's

The most important failure, however, has been that of not recognizing the fundamental importance of respect, when appraised among all values in human motivation.<sup>13</sup> Among the most profound and intensely held demands of human beings in orienting themselves toward the world today is that for respect in the sense of the four outcomes specified above. It is this insistence upon basic respect that conditions people's identifications, demands, and expectations in all other value processes. It is denial of respect which most importantly conditions their willingness to engage in terror and violence to destroy established institutions and practices, and their rejection of peaceful intercourse in the shaping and sharing of wealth, power, and other values. When respect is not protected, other values cannot be securely and abundantly shaped and shared in society.<sup>14</sup>

The most economic route of escape from these inherited intellectual confusions is to be quite explicit, as we have sought to be above, about what is meant by respect in terms of social process outcomes and to relate these outcomes to other value processes in the larger community context of which they are a part.<sup>15</sup> Any rational recommendation of ways to reconstruct the process of authoritative decision the better to protect and foster respect must build upon a careful specification of the different kinds of claims that individuals, in their multifarious capacities, make upon constitutive process for the protection and fulfillment of respect.<sup>16</sup>

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reflection raises serious questions as to the legal nature of the principle or the existence of a general right to be treated without discrimination.

AN INTRODUCTION TO THE STUDY OF HUMAN RIGHTS x (F. Vallat ed. 1972).

13. Cf. Shils, *Reflections on Deference*, in *POLITICS, PERSONALITY, AND SOCIAL SCIENCE IN THE TWENTIETH CENTURY* 297 (A. Rogow ed. 1969).

14. For the development of this theme see McDougal & Bebr, *Human Rights in the United Nations*, 58 AM. J. INT'L L. 603 (1964); McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 14 LAW & CONTEMP. PROB. 490 (1949). See also R. SENNETT & J. COBB, *THE HIDDEN INJURIES OF CLASS* (Vintage ed. 1973).

15. Recognition of the need for location in social process is long standing. In the words of Harold Laski:

[T]he idea of liberty depends upon the results of the social process at any given time; and it is against that background that its essential elements require analysis.

Laski, *Liberty*, 9 ENCYC. SOCIAL SCI. 442, 444 (1933).

16. For the development of the concept of the world constitutive process of authoritative decision see McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403 (1967). See also Lasswell & McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions*

The categorization of claims with which we propose to work is as follows:

*A. Claims relating to Outcomes*

1. Claims for a basic degree of respect as individual human beings
  - (a) Fundamental freedom of choice in value participation
  - (b) Elimination of slavery
  - (c) Elimination of caste
  - (d) Elimination of apartheid
2. Claims relating to a basic equality of opportunity in the enjoyment of all values, that is, freedom from discrimination for reasons irrelevant to capability, in terms of:
  - (a) Race (color; national, ethnic or social origin; birth, descent or other status)
  - (b) Sex
  - (c) Religion
  - (d) Political or other opinion
  - (e) Language
  - (f) Alienage
  - (g) Age
  - (h) Other factors
3. Claims for further rewards in respect for meritorious contribution
  - (a) Recognition
  - (b) Honor
  - (c) Reputation
4. Claims relating to the aggregate interest in respect
  - (a) Comprehensive public order
  - (b) Civic order (including privacy)

*B. Claims relating to Participation*

1. Claims in relation to participation in the shaping of respect
  - (a) Governmental deprivations
    - (i) in conformity with law
    - (ii) not in conformity with law
  - (b) Non-governmental deprivations
2. Claims in relation to participation in the sharing of respect
  - (a) Individuals
  - (b) Groups (minority protection)



C. *Claims relating to Perspectives*

1. Claims relating to permissibility or impermissibility of purposes
  - (a) Range of values included within impermissible purposes
  - (b) Relevance of grounds alleged for deprivations to common interests
  - (c) Discriminatory purpose *per se* constituting deprivation
2. Claims to be free to acquire a demand for respect—the opportunity to have experiences that will facilitate capabilities (claims to freedom from indoctrination)
  - (a) Opportunity to discover latent capabilities for participation
  - (b) Opportunity to acquire capabilities
  - (c) Opportunity to exercise capabilities
3. Claims for freedom to establish and change identification
4. Claims for opportunity to achieve realism in expectations

D. *Claims relating to Situations—freedom of access to all social interactions in which respect is shaped and shared*

1. Claims relating to institutions specialized to respect
  - (a) Freedom to initiate and constitute institutions specialized to respect
  - (b) Freedom of access to institutions specialized to respect
  - (c) Prohibition of organizations or institutions inimical to respect (*e.g.*, racist organizations)
2. Claims relating to institutions not specialized to respect (equality in association)—freedom of access to institutions not specialized to respect (access to public accommodations, etc.)
3. Claims relating to geographic separation
4. Claims relating to crisis
  - (a) Impact of crises upon differentiation
  - (b) According respect proportionately despite crises

E. *Claims relating to Base Values*

1. Claims relating to authority—that the process of authorita-

tive decision is available to defend and fulfill respect

- (a) Equality of access to authority (invocation)
  - (b) Impartiality in the application of law (application)
  - (c) Equality in law or legal interests (prescription)
2. Claims relating to control
    - (a) Availability of participation in each of the other value processes to defend and fulfill respect
    - (b) Impartial allocation of participation in value processes<sup>17</sup>
  3. Claims for special assistance to overcome handicaps not attributable to merit ("compensatory differentiation")

#### *F. Claims relating to Strategies*

1. Employment of the diplomatic instrument for affecting respect: enforcing agreements, prohibiting discriminatory agreements, minimizing deprivations, protecting reputation, etc.
2. Claims relating to the use of the ideological instrument for affecting respect
  - (a) Prohibition of race-mongering
  - (b) Education for the enjoyment of equality
3. Claims relating to the management of goods and services for affecting respect
  - (a) Prohibition of slavery, forced labor, imprisonment for debt, etc.
  - (b) Employment of monetary rewards
4. Claims relating to the use of the military instrument for affecting respect
  - (a) Terrorist activities
  - (b) Use of the military instrument for the protection of groups (martial law, etc.)

## II. THE CLARIFICATION OF GENERAL COMMUNITY POLICIES

The commitment we make, and recommend to others, to the particular interactions we have described as respect outcomes is not dependent upon any particular mode of logical or philosophical derivation. For many centuries scholars have debated about the appropriate high level principles and sources of authority from which

outcomes comparable to those we have specified may be derived.<sup>18</sup> From our perspectives the method, style, and purport of derivational exercises are matters of personal choice. The more urgent questions relate to the more detailed specification of preferred outcomes in terms of empirical relations between human beings, and to how people with different modalities of derivation may cooperate in the achievement of postulated outcomes.

It may be emphasized that the most general commitment we recommend in pursuit of shared respect is broader than one of mere non-discrimination. The core reference we make is to freedom of choice, the same core reference that has characterized most historical concepts of human dignity.<sup>19</sup> Even non-discrimination we seek to define in positive terms as opportunities to discover, develop, and exercise full capabilities for constructive participation in all value processes. The rewards in honor of actual contributions to aggregate common interests that we recommend are designed to be integrative, and not incompatible, in the sense that they need not result in reducing access to values by other community members. The aggregate patterns of interaction that we specify as civic order are, further, designed to include not merely the maximum fundamental

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*of Constitutive Process*, 41 GEO. WASH. L. REV. 1 (1972) ; McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

17. In this article we deal only with problems through this particular Claim. For continuing discussion of the general norm of non-discrimination, see McDougal, Lasswell, & Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497 (1975). The remaining claims about the respect process will be discussed in other fora.

18. J. RAWLS, note 9 *supra*, offers some history of this debate. For a summary of Rawls' theories and an indication of the difficulties of applying these theories in specific instances see Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973). For further exposition see R. NOZICK, ANARCHY, STATE, AND UTOPIA 183—231, 344—48 (1974); Hampshire, *A New Philosophy for the Just Society*, N.Y. REV. BOOKS, Feb. 24, 1972, at 34; Nagel, *Rawls on Justice*, 82 PHILOSOPHICAL REV. 220 (1973).

For other surveys see 1 & 2 M. ADLER, THE IDEA OF FREEDOM (1958—61); ASPECTS OF LIBERTY (M. Konvitz & C. Rossiter eds. 1958); C. BAY, THE STRUCTURE OF FREEDOM (1958); I. BERLIN, FOUR ESSAYS ON LIBERTY (1969); M. CRANSTON, FREEDOM: A NEW ANALYSIS (2d ed. 1954); FREEDOM: ITS MEANING (R. Anshen ed. 1940); F. HAYEK, THE CONSTITUTION OF LIBERTY (1960); LIBERTY (NOMOS IV, C. Friedrich ed. 1962); H. MULLER, FREEDOM IN THE MODERN WORLD (1966); R. NEVILLE, THE COSMOLOGY OF FREEDOM (1974); F. OPPENHEIM, DIMENSIONS OF FREEDOM (1961); P. WEIS, MAN'S FREEDOM (1950).

19. For an excellent brief statement on freedom of choice see C. MERRIAM, SYSTEMATIC POLITICS 54—64 (1945) . See also the citations in note 18 *supra*.

freedom and the largest effective opportunity for the maturing of individual capability along with rational distribution of rewards for unique contributions, but also a reserved domain in which all individuals are protected in the utmost private autonomy in uncoerced choices about the value processes in which they participate and the modalities by which they participate.

Our concern extends, as noted, beyond how respect is shared to how it is shaped in the aggregate. What is known as "distributive justice," or sharing, is of course important.<sup>20</sup> No less important, however, is a coordinate policy of fostering a continuing development toward shaping the most ample aggregate outcomes of respect, as of other values, so that what is ultimately available to individuals is optimized.

It is, we assume, inescapable that in relation to respect, as to other values, community policies are projected and clarified in sets of complementary policies.<sup>21</sup> Most inherited prescriptions explicitly recognize the continuing necessity for the accommodation in particular instances of any one person's freedoms with the comparable freedoms of others and with aggregate common interests.<sup>22</sup> An effective method for seeking such accommodation, as has been elaborated and applied elsewhere, is a contextual method that employs adequate principles of content and procedure.<sup>23</sup> The proper employ-

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20. The principal concern of J. RAWLS, note 9 *supra*, is for "distributive justice." The values available for distribution to community members, including "the least advantaged," are of course dependent upon total production.

For varying views see E. CAHN, *THE SENSE OF INJUSTICE* (1964 ed.); JUSTICE (NOMOS VI, C. Friedrich & J. Chapman eds. 1963); C. MERRIAM, *SYSTEMATIC POLITICS* 45—54 (1945); R. POUND, *JUSTICE ACCORDING TO LAW* (1951); R. STAMMLER, *THE THEORY OF JUSTICE* (1925); G. DEL VECCHIO, *JUSTICE: AN HISTORICAL AND PHILOSOPHICAL ESSAY* (A. Campbell ed. 1952).

21. See McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System*, in *THE ETHIC OF POWER: THE INTERPLAY OF RELIGION, PHILOSOPHY, AND POLITICS* 221 (H. Lasswell & H. Cleveland eds. 1962).

22. See McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387 (1974); McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237, 264—69 (1969). The necessity for accommodation was underscored by Laski in these words:

So long as it was conceived as a body of absolute rights inherent in the individual and entitled to be exerted without regard to their social consequences, liberty was divorced from the ideas of both equality and justice. The individual became the antithesis of the state; and liberty itself became, as with Herbert Spencer, a principle of anarchy rather than a body of claims to be read in the context of the social process.

Laski, *Liberty*, 9 ENCYC. SOCIAL SCI. 442, 443 (1933).

23. J. RAWLS, note 9 *supra*, appears to reject the notion of a comprehensive

ment of this method will, it is predicted, reveal that respect outcomes are often not competitive, and can be attained in many situations by genuinely integrating the interests of all.

The commitment we recommend in relation to fundamental freedom is that of community aspiration toward the widest possible range of choice for all individuals in regard to all value processes.<sup>24</sup> This aspiration is sometimes specified in terms of a basic minimum of freedom or liberty,<sup>25</sup> but the word "minimum" has unfortunate connotations: what we recommend is concern for continuing development toward an optimum shaping and sharing of values in which the participation of each individual will be as ample as possible. We recognize of course, among the necessary constraints upon this aspiration, that the fundamental freedoms protected for any particular individual in any particular instance must perforce be measured against the comparable freedoms of others and the aggregate common interest.

The means by which the measure of this fundamental freedom, or of a basic minimum, can be established, is sometimes debated.<sup>26</sup> This would appear, if what is sought is further high-level abstract content statements, a relatively futile quest.<sup>27</sup> What is needed is the specification of procedures for relating the already abundant high-

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accommodation of values, or integration of interests, in context and to search instead for transcendent principles of justice. He does not, however, make clear by what criteria and procedures he would in particular instances calculate costs and benefits in determining "equality" among community members or in relating "the least advantaged" to other community members. Lasswell, *The Public Interest: Proposing Principles of Content and Procedure*, in *THE PUBLIC INTEREST* 54 (NOMOS V, C. Friedrich ed. 1962); Lasswell, *Clarifying Value Judgment: Principles of Content and Procedure*, 1 *INQUIRY* 87 (1958); McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 *VA. J. INT'L L.* 387, 402-06 (1974).

24. See H. LASSWELL & A. KAPLAN, *Power and Society* (1950); Lasswell & Holmberg, *Toward a General Theory of Directed Value Accumulation and Institutional Development*, in *COMPARATIVE THEORIES OF SOCIAL CHANGE* 12 (H. Peter. ed. 1966); McDougal, *Perspectives for an International Law of Human Dignity*, 1959 *PROCEEDINGS, AM. SOC'Y INT'L L.* 107; McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 *AM. J. INT'L L.* 1 (1959). For a comparable emphasis see Brewster, *So the Poor Little Lambs Won't Lose Their Way*, *N.Y. Times*, Sept. 11, 1974, at 45, col. 1.

25. See, e.g., J. RAWLS, *supra* note 9, at 265, 274-87.

26. See J. RAWLS, *supra* note 9, at 258-332.

27. The "original position" postulated by J. RAWLS, note 9 *supra*, as a basis for his derivations would appear merely an intellectual device designed to minimize the biases and interests of an observer. It may aid objectivity, but it scarcely affords access to transcendent truth.

level statements to the options open in any particular instance of decision. The freedoms that can be secured for any particular individual in any specific instance are a function of the values at stake and of many concomitant variables in an ongoing community process. What can be protected will vary from value to value, from problem to problem even in the same value process, and from context to context. The relevant intellectual quest is for principles of procedure that will facilitate review and assessment of all the pertinent variables.<sup>28</sup>

The traditional philosophical justification for protecting fundamental freedom of choice has been in terms of common humanity, of protecting man as man.<sup>29</sup> The basic thrust of the position is that every individual should be treated as an end in himself, not as an instrument for others.<sup>30</sup> It may be conceded that the image that man has developed of himself as being different from animals and other forms of life has had important and beneficent historical impacts upon the acceptance and cultivation of all the values we cherish as those of human dignity.<sup>31</sup> More contemporary justifications toward the same ends may, however, be grounded in the findings of modern psychology which stress the overriding importance to the individual, and to community process, of affording to every individual opportunities for the participations necessary to the development of a constructive "self," capable of respecting the self and others and therefore of sharing freedom in choice.<sup>32</sup>

It is apparent that all the comprehensive and systematic depriva-

28. See notes 22—23 *supra*.

29. As Bernard Williams puts it:

The factual statement of men's equality was seen, when pressed, to retreat in the direction of merely asserting the equality of men as men; and this was thought to be trivial. It is certainly insufficient, but not, after all, trivial. That all men are human is, if a tautology, a useful one, serving as a reminder that those who belong anatomically to the species *homo sapiens*, and can speak a language, use tools, live in societies, can interbreed despite racial differences, etc., are also alike in certain other respects more likely to be forgotten.

Williams, *The Idea of Equality*, in PHILOSOPHY, POLITICS AND SOCIETY 110, 112 (P. Laslett & W. Runciman eds. 1962).

30. For an excellent testimony to this cosmopolitan perspective, as recorded in various cultures of human history, see UNESCO, BIRTHRIGHT OF MAN (1969).

31. See *id.*

32. See THE SELF IN SOCIAL INTERACTION (C. Gordon & K. Gergen eds. 1968); H. SULLIVAN, CONCEPTIONS OF MODERN PSYCHIATRY (2d ed. 1953); Lasswell, *Person, Personality, Group, Culture*, 2 PSYCHIATRY 5 (1939), reprinted in H. LASSWELL, THE ANALYSIS OF POLITICAL BEHAVIOR 195 (1948).

tions of freedom—slavery, caste, and apartheid—are by definition contrary to our postulated goals of human dignity. Fortunately, the rejection of all these practices, once described, can be made syntactically, as the antitheses of our basic recommendations. Thus slavery, with its complete subjection of the victim to the will of the master, would appear to represent the severest, and most intolerable, restriction of freedom of choice known to contemporary culture.<sup>33</sup> Similarly, caste, with its insistence upon permanent distinctions based upon the accidents of birth, would appear wholly incompatible with demands that individuals be accorded fullest opportunity to discover, mature, and exercise their latent capabilities to the highest levels of excellence for participation in social process.<sup>34</sup> Finally, apartheid, with its grouping and segregation of populations on the basis of race and birth and its rigid prescriptions of differential access to values, would appear to crystallize and institutionalize a system fully comparable to, and equally unacceptable as, that of a caste society.<sup>35</sup>

The members of a community are of course, even in the absence of legally prescribed stratifications, always classifying and reclassifying themselves in relation to one another according to their value positions, potentials, and expectancies, including a system of respect grades.<sup>36</sup> It is when the class system in a society is formalized as a rigidified hierarchy in which the individual is not allowed to alter the status ascribed to him at birth, that it becomes a caste society.<sup>37</sup> In a less rigidified society comprised of different classes in terms of relative positions in relation to different values, though it is obviously more difficult for members of lower classes to move upward, the mobility of people is not predetermined by status at birth, but may depend upon the capability and achievement of individual persons.<sup>38</sup> It is the equality of opportunity for the development of capability and for achievement that is critical.

The equality of opportunity that we specify as the second important outcome in the respect process is to be understood both positively and negatively: positively in terms of opportunities for indi-

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33. See notes 79—354 & accompanying text *infra*.

34. See notes 355—438 & accompanying text *infra*.

35. See notes 439—91 & accompanying text *infra*.

36. See note 357 *infra*.

37. See notes 355—74 & accompanying text *infra*.

38. See note 36 *supra*. See generally THE AMERICAN OCCUPATIONAL STRUCTURE (P. Blau & O. Duncan eds. 1967); S. LIPSET & R. BENDIX, SOCIAL MOBILITY IN INDUSTRIAL SOCIETY (1959); P. SOROKIN, SOCIAL MOBILITY (1927).

viduals to enjoy the widest range of effective choice in their interactions with others, and negatively in terms of access to participation in all value processes without discrimination for reasons irrelevant to capability. The critical importance of a positive formulation was eloquently articulated by R. H. Tawney in his classic study, *Equality*, where he insists that a genuine equality depends

not merely in the absence of disabilities, but on the presence of abilities. It obtains in so far, and only in so far as, each member of a community, whatever his birth, or occupation, or social position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence.<sup>39</sup>

It should be noted that the equality we recommend, whether the formulation be positive or negative, is an equality, not of capabilities and characteristics, but of treatment.<sup>40</sup> It is a commonplace that human beings differ greatly in capabilities and characteristics and in exposure to past experiences and that many such differences are indispensable to an appropriate diversity and pluralism in social process. What cannot be conceded is that some human beings should, alleged on grounds of group differences in capabilities, characteristics, and past experience, be arbitrarily treated differently from others in terms of access to social process for maturing latent talent and contributing to aggregate common interest.

Our complex modern society, with its multiple intersecting and interacting value processes, requires many different roles and performances from individual community members. It is not to be asserted that all individuals have even comparable capabilities for all these different roles and performances. A rational community policy must honor an appropriate differentiation in opportunity, training, and recruitment. A rational policy need not, however,

39. R. TAWNEY, *EQUALITY* 103—04 (1964) .

40. Dobzhansky has eloquently put it this way:

Equality of opportunity neither presupposes nor promotes equality of ability. It only means that every person may, without favor or hindrance, develop whatever socially useful gifts or aptitudes he has and chooses to develop. Civilization fosters a multitude of employments and functions to be filled and served—statesmen and butchers, engineers and policemen, scientists and refuse collectors, musicians and sales clerks. Equality of opportunity stimulates the division of labor rather than sets it aside; it enables, however, a person to choose any occupation for which he is qualified by his abilities and his willingness to strive.

T. DOBZHANSKY, *MANKIND EVOLVING: THE EVOLUTION OF THE HUMAN SPECIES* 243 (1962) [hereinafter cited as T. DOBZHANSKY].



honor differentiations which have no basis in individual capabilities and, hence, become arbitrary discriminations.

The principal thrust of the policy we recommend is, therefore, that individuals should be accorded or denied opportunities for freedom of choice in regard to any value process only upon the basis of individual capabilities and characteristics, and not according to an alleged group capability and characteristic.<sup>41</sup> Permissible differentiations may be made between individuals in terms of the particular capabilities and characteristics appropriate for particular roles, but discrimination grounded upon alleged group characteristics is an abomination only less rigid and irrational than that of caste. All blanket assignments of individuals to allegedly different groupings with different capabilities must be condemned by a legal system whose prescriptions are compatible with human dignity. None of the historical groupings, such as race, color, sex, religion, opinion, and culture, has any invariable and uniform relevance to capability for performing roles in modern society.<sup>42</sup> It is not merely because many alleged group characteristics are beyond the effective control of the individual that we condemn such groupings as bases for permissible differentiation, but because they impose wholly unnecessary deprivations upon both individual development and fulfillment and the creation of community values. The tradition upon which we build has been well summarized by Bell:

The principle of equality of opportunity derives from a fundamental tenet of classic liberalism: That the individual—and not the family, the community, or the state—is the basic unit of society, and that the purpose of societal arrangements is to allow the individual the freedom to fulfill his own purposes—by his labor to gain property, by exchange to satisfy his wants, by upward mobility to achieve a place commensurate with his talents. It was assumed that individuals will differ—in their natural endowments, in their energy, drive, and motivation, in their conception of what is desirable—and that the institutions of society should establish procedures for regulating fairly the competition and exchanges necessary to fulfill these diverse desires and competences.<sup>43</sup>

Our recommendation in reference to honor is that it be employed, not as the heritage of a class or an appendage of effective power, but in deliberate bestowal in recognition for important community

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41. See notes 651—963 & accompanying text *infra*.

42. See *id.*

43. Bell, *On Meritocracy and Equality*, 29 THE PUBLIC INTEREST 29, 40 (1972). See also D. BELL, THE COMING OF POST-INDUSTRIAL SOCIETY 425 (1973).

achievement. We recommend that individuals who contribute conspicuously to the common interest receive honor in comparable degree. Though equality of opportunity is indispensable to the nurturing of capability, honor is properly conferred, not upon the basis of capability or potential, but in acknowledgement of actual contribution. A contribution to the common interest is a contribution to social processes where people enjoy, besides fundamental freedom, opportunities to mature their latent capabilities for participation in the shaping and sharing of values. When so conferred, honor can be integrative, not destructive; taking away from none, it may enhance the freedom of all. An incisive summary is offered by Tawney:

[N]o one thinks it inequitable that, when a reasonable provision has been made for all, exceptional responsibilities should be compensated by exceptional rewards, as a recognition of the service performed and an inducement to perform it.<sup>44</sup>

The realization of appropriate respect relationships in any part of the world community depends upon achieving a vigorous civic order to interact with a public order that performs its essential tasks. The civic order we recommend is composed of aggregate patterns in a community process where coercion from any source, governmental or other, is held to a minimum. A civic order of this kind can only be the product of an effectively functioning constitutive process which both reflects human dignity values in its own features and expresses such values in the public order decisions which emanate from it.<sup>45</sup>

The term "civic order" is used for explicit distinction from "public order." By public order we refer to features of the social (value-institution) process which are established and maintained by effective power, authoritative or other, through the imposition of severe sanctions against challengers.<sup>46</sup> By civic order is meant the features of social process that are established and maintained by resorting to relatively mild sanctions, and which afford a maximum of autonomy, creativity, and diversity to the private choice of individuals.

Our postulated, overriding goal of human dignity favors the widest possible freedom of choice and, hence, the fewest possible

44. R. TAWNEY, *EQUALITY* 113 (1964).

45. See H. LASSWELL, *THE FUTURE OF POLITICAL SCIENCE* (1962); H. LASSWELL, *A PRE-VIEW OF POLICY SCIENCES* 1—2, 27—28 (1971).

46. See McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73, 100 n.63 (R. Falk & C. Black eds. 1969); McDougal, *Jurisprudence for a Free Society*, 1 *GA. L. REV.* 1, 1—7 (1966); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 *AM. J. INT'L L.* 1, 6—11 (1959).

coerced choices for individuals. This is part of the great liberal tradition which champions the least possible degree of politicization or governmentalization of social interactions compatible with the achievement of other goals.<sup>47</sup> In a totalitarian polity every sector of society is highly politicized and government swallows up society: government *is* society and society *is* government, with correlative attenuation of all zones of individual autonomy. When all the interactions occurring in a social process are encompassed by the power process, an entire society is politicized.<sup>48</sup> The contrasting anarchistic vision of a commonwealth of free people, in which power decisions have become unnecessary, is obviously a will-of-the-wisp in the contemporary world. It does nevertheless offer an appropriate reminder and caution to the leaders and led of our historic period.<sup>49</sup>

The term "privacy" is sometimes employed, as when made equivalent to "a right to be let alone,"<sup>50</sup> with much the same comprehensive reference that we impute to civic order. It would appear preferable, however, to limit the reference of "privacy" to freedom of individual choice about what is to be communicated to others about oneself, and to perceive this freedom as a single example of the more comprehensive freedoms embraced within a properly functioning civic order.<sup>51</sup> Such a restriction on the term privacy could make easier and render more precise the contextual analysis that must be executed when a decision has to be made whether to limit the presumption in favor of privacy on behalf of the equal rights of others or of the aggregate common interest. Proper procedures relate different freedoms to divergent features of interaction and context.

The degree to which the four outcomes that we have specified as basic realizations of the "respect" value can be achieved in any particular social context must of course depend both upon the characteristics of the respect process and upon the management of formal authority and effective control. It is important to bear in mind the coordination of perspectives and operational behaviors that must be achieved and subsequently sustained if the requirements for shaping and sharing of respect are to be fully realized. There

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47. See, e.g., F. WATKINS, *THE AGE OF IDEOLOGY—POLITICAL THOUGHT, 1750 TO THE PRESENT* (1964); F. WATKINS, *THE POLITICAL TRADITION OF THE WEST* (1948).

48. See H. LASSWELL, *A PRE-VIEW OF POLICY SCIENCES* 28 (1971).

49. Cf. C. JACKER, *THE BLACK FLAG OF ANARCHY* (1968); G. RUNKLE, *ANARCHISM: OLD AND NEW* (1972).

50. See, e.g., Miller, *Privacy in the Corporate State: A Constitutional Value of Dwindling Significance*, 22 J. PUB. L. 3 (1973).

51. See Lasswell, *The Threat to Privacy*, in *CONFLICT OF LOYALTIES* 121 (R. MacIver ed. 1952).

must be an effective process of political socialization (education) that mobilizes and particularizes the objectives and strategies included within the demand for basic human respect. Perspectives must also sustain the policies that keep the doors of opportunity open for the cultivation of individual capacities and confer distinction upon those who make exceptional contributions to common values. Crucial to the functioning of such a society is the successful transmission of demands upon the self and others to receive rewards in a form that protects the integrity of the institutions compatible with respect. For example, it would be generally understood that substantial differences in protected claims to material resources have undermined the vitality of communities whose structure at one time exhibited a high degree of equality in the control of such resources. An effective social order will remain alert to changes in resource control and will sustain effective demands to formulate prescriptions and apply procedures that reward exceptional contributions without endangering genuine access to opportunity. It is probable that forms of reward other than wealth will be emphasized and accepted by the members of a social system that is truly committed to a commonwealth of respect. Historically, it has proved dangerous to devolve titles or ranks from one person to another, especially from parent to child.

A successful program of political socialization will highlight these common problems and mobilize codes of rectitude that give support to those who refrain from attempting to institutionalize what amounts to a group-based claim to unjust enrichment in terms of social status. No specific "once and for all" set of norms can be usefully projected for these, any more than for other, dynamic human relationships. The essential challenge is to sustain a process, and especially a set of context-examining procedures, that confront long range goals with historic, contemporary, and prospective realities. In the pages that immediately follow we propose to consider the strategies available for improving the institutions of the respect process in the world community. Elsewhere we focus on rearrangement of the more comprehensive features of formal and effective power that are especially relevant to the protection of respect and other human rights.<sup>52</sup>

### III. TRENDS IN DECISION AND CONDITIONING FACTORS

#### A. *Claims Relating to Outcomes*

##### 1. Claims for a Basic Degree of Respect as a Human Being

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52. See note 16 *supra*.

*a. Claims for a Fundamental Freedom of Choice in Value Participation*

The overriding importance of freedom of choice in the shaping and sharing of all values is beginning to be articulated and established as authoritative general community expectation in a wide range of formal expressions at both the transnational and national levels. Thus, most importantly, the Charter of the United Nations reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women," and pledges to "promote social progress and better standards of life in larger freedom" and to "employ international machinery for the promotion of the economic and social advancement of all peoples."<sup>53</sup> In particular, Article 55 of the Charter specifies:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.<sup>54</sup>

In similar tenor, the Universal Declaration of Human Rights<sup>55</sup> in its preamble recognizes "the inherent dignity" and "the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world," and proclaims "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want" as "the highest aspiration of the common people" and reiterates man-

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53. U.N. CHARTER, preamble.

54. *Id.* art. 55.

55. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948) [hereinafter cited as Universal Declaration]. A collection of the more important global human rights prescriptions is conveniently offered in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, U.N. Doc. ST/HR/1 (1973). Other useful collections include: BASIC DOCUMENTS ON HUMAN RIGHTS (J. Brownlie ed. 1971); BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS (L. Sohn & T. Buergenthal eds. 1973).

kind's determination "to promote social progress and better standards of life in larger freedom" and "to secure . . . universal and effective recognitions and observance" of fundamental freedoms and rights.<sup>56</sup> The International Covenant on Civil and Political Rights, in its preamble, confirms that

the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.<sup>57</sup>

The same emphasis, with practically identical formulation, is evident throughout the International Covenant on Economic, Social, and Cultural Rights.<sup>58</sup>

Comparable regional expression is found in the preamble of the American Convention on Human Rights which, after stating that "the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human personality," also stresses the centrality of freedom of choice.<sup>59</sup> The European Convention on Human Rights expresses the

profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend . . . .<sup>60</sup>

In a more recent summation, the Proclamation of Teheran,<sup>61</sup> adopted at the International Conference on Human Rights in 1968, solemnly reaffirmed that

The primary aim of the United Nations in the sphere of human rights is the achievement by each individual of the maximum free-

56. *Id.* preamble, U.N. Doc. A/810 at 71—72.

57. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, preamble, G.A. Res. 2200A, 21 U.N. GAOR Supp. 16, at 52—53, U.N. Doc. A/6316 (1966) [hereinafter cited as Covenant on Civil and Political Rights].

58. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter cited as Covenant on Economic Rights].

59. American Convention on Human Rights, *signed* Nov. 22, 1969, preamble, O.A.S. Official Records OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970), *reprinted in* 9 INT'L LEGAL MATERIALS 99, 101 (1970) [hereinafter cited as American Convention].

60. European Convention, *supra* note 11, preamble, 213 U.N.T.S. at 222—24.

61. Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF.32/41 (1968).

dom and dignity. For the realization of this objective, the laws of every country should grant each individual, irrespective of race, language, religion or political belief, freedom of expression, of information, of conscience and of religion, as well as the right to participate in the political, economic, cultural and social life of his country.<sup>62</sup>

It concluded by urging

all peoples and governments to dedicate themselves to the principles enshrined in the Universal Declaration of Human Rights and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare.<sup>63</sup>

It may be recalled, in a more comprehensive search for relevant prescription and application, that the fundamental freedom of choice with which we are here concerned is the central concept of human dignity and forms the core reference of human rights in relation to all values.<sup>64</sup> Thus, in relation to power, its reference is to participate fully as a person in the process both of effective power and of authoritative decision; in relation to enlightenment, the freedom to acquire, use, and communicate knowledge; in relation to well being, the freedom to develop and maintain psychosomatic integrity and a healthy personality; in relation to wealth, freedom of contract and of access to goods and services; in relation to skill, the freedom to discover, mature, and exercise latent talents; in relation to affection, the freedom to establish and enjoy congenial personal relationships; and in relation to rectitude, freedom to form, maintain, and express norms of responsible conduct. This pervasiveness in reference to the central concept of freedom of choice makes relevant to its prescription and application all the more detailed prescriptions and applications about the various specific human rights relating to each of the different value processes.<sup>65</sup> In other words, the degree to which the claim for fundamental freedom of choice, as a generic aspiration, is protected must be confirmed by reference to the whole flow of decisions, prescriptive and other, about human rights.

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62. *Id.* at 4.

63. *Id.* at 6.

64. See notes 1—52 & accompanying text *supra*.

65. This point has been documented by a series of U.N. studies on non-discrimination. See, e.g., J. INGLES, STUDY OF DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN 9—12, U.N. Doc. E/CN.4/Sub.2/220/Rev.1 (1963); H. SANTA CRUZ, STUDY OF DISCRIMINATION IN THE MATTER OF POLITICAL RIGHTS 15—25, U.N. Doc. E/CN.4/Sub.2/213/Rev.1 (1962).

The basic thrust in global community expectations toward protecting individual freedom of choice in all value processes is greatly fortified by the long history of developments within the constitutive processes of the different national communities. The continued insistence by so many peoples in different communities and cultures that authority can rightfully come only from the people is a direct expression of demand for freedom of choice in the power processes that affect all other processes.<sup>66</sup> It is this demand for freedom of choice, secure from arbitrary coercion, which underlies the whole historic panorama of constitutional reforms beginning with Greek and Roman liberalism and extending through the English, American, French, and Russian revolutions to the present era of the emancipation of former colonial peoples.<sup>67</sup> The significance of the incorporation, especially after the eighteenth century, of the long cherished doctrines of the basic human rights in formal constitutive charters has been well noted by Lauterpacht:

The notion of human nature as a source and standard of political rights is older than the end of the eighteenth century. What was new was the formal incorporation of these rights as part of the constitutional law of States and the possibility of their consequent protection not only against the tyranny of kings but also against the intolerance of democratic majorities.<sup>68</sup>

The demand to clarify and enhance the protection of the fundamental freedom of the individual in the broad sense we have specified, however much aspiration may sometimes beg achievement, may be observed in every feature of contemporary national constitutive processes. For brief, synoptic illustration, reference may be made: to provision for individual as distinguished from group participation; to specification that decisions be taken by criteria of common interest, with some prescriptions—such as a “bill of rights”—being accorded priority over other prescriptions;<sup>69</sup> to the

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66. Article 21(3) of the Universal Declaration of Human Rights expresses this crystallized expectation: “The will of the people shall be the basis of the authority of government . . . .” Universal Declaration, *supra* note 55, art. 21(3), U.N. Doc. A/810 at 75.

67. For an excellent summary see Friedrich, *Constitutions and Constitutionalism*, 3 INT’L ENCYC. SOCIAL SCI. 318 (1968). See also K. LOEWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS* (1957), Hamilton, *Constitutionalism*, 4 ENCYC. SOCIAL SCI. 255 (1931).

68. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 88—89 (1950) [hereinafter cited as H. LAUTERPACHT, *INTERNATIONAL LAW*].

69. See C. McILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* 14, 87 (rev. ed. 1947); G. SABINE, *A HISTORY OF POLITICAL THEORY* 451—54 (3d ed. 1961) .



balancing of power, in a differentiation of competence for decision, between different branches of the government and different geographic regions;<sup>70</sup> to the subjection of all individuals, including officials, to authoritative decision and the pluralistic distribution of both authority and control; and to the requirement of authorized, uniform procedures in all types of decision with opportunity to challenge decisions allegedly incompatible with authority.<sup>71</sup> This broad sweep of contemporary demand upon constitutive processes has been well summarized by Friedrich, who finds that "the political function of a constitution," "the core objective," is "that of safeguarding each member of the political community" as "a person":<sup>72</sup>

Each man is supposed to possess a sphere of genuine autonomy. The constitution is meant to protect the *self*; for the self is believed to be the (primary and ultimate) value . . . . Hence the function of a constitution may also be said to be the defining and maintaining of human rights. The constitution is to protect the individual member of the political community against interference in his personal sphere.<sup>73</sup>

The pervasive contemporary emphasis upon "constitutionalism" as a set of preferred prescriptions, though quite inadequate as description of the whole of constitutive process,<sup>74</sup> is nonetheless an eloquent and rational affirmation of the more fundamental policies which have historically underlain such process.

The special importance, in establishing transnational prescription for the protection of fundamental freedom, of the developments in national constitutive processes derives from the fact that "general principles of law" are a recognized authoritative source of international law. It is provided in a well-worn article of its statute that the International Court of Justice shall apply "the general principles of law, recognized by civilized nations,"<sup>75</sup> and, despite the provincialism of the wording,<sup>76</sup> those who apply international law habitually

70. See G. SABINE, *A HISTORY OF POLITICAL THEORY* 551-60 (3d ed. 1961); M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967).

71. See K. LOEWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS* 123-63, 315-43 (1957); Lasswell & McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 *GEO. WASH. L. REV.* 1 (1972).

72. C. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 8 (4th ed. 1968).

73. *Id.*

74. See Lasswell & McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 *GEO. WASH. L. REV.* 1 (1972).

75. I.C.J. STAT. art. 38(1)(c).

76. The reference of "civilized" nations in the ICJ Statute, resented as it is by

seek guidance for determining transnational perspectives from uniformities in national prescriptions and applications. The cumulative massing of prescriptions designed to protect the fundamental freedom of the individual in national constitutive processes must contribute significantly to the continued crystallization of global expectations that such freedom is to be protected.<sup>77</sup> Conversely, it may be noted that, in interaction as beneficent as cumulative, the shaping of global expectations in turn will have an important effect on the shaping of national expectations. This is most vividly illustrated in the widespread incorporation of provisions from the Universal Declaration of Human Rights in the constitutive charters of many newly independent states.<sup>78</sup>

## b. *Claims for Elimination of Slavery*

### i. *Factual background*

Slavery, in all its many manifestations, and equivalences, represents the most extreme deprivations of freedom of choice about participation in value processes. Though a slave may physically participate in the shaping and sharing of values, the modality of participation is completely dictated by others. For access to and enjoyment of value processes, the slave may be in total and continuous servitude to the will of a master. His participation in community power processes will, of course, be minimal. Biologically the slave is a human being, but legally he may not be recognized as a person, and may be denied any access to processes of authoritative decision.<sup>79</sup> He may be totally without rights or powers, or accorded participation and protection only in minor degree.

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members of the African-Asian community, is a reminder that early international law was shaped largely by the European Powers.

77. See H. LAUTERPACHT, *INTERNATIONAL LAW*, *supra* note 68, at 73—93.

78. See UNITED NATIONS, *THE UNITED NATIONS AND HUMAN RIGHTS* 13—15 (1973); *Measures Taken Within the United Nations in the Field of Human Rights* 28—30, U.N. Doc. A/Conf.32/5 (1967) (study prepared by the Secretary-General).

The modalities and importance of prescription in global constitutive process are indicated in McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 139—42 (R. Falk & E. Black eds. 1969). The crystallization of community expectation into authoritative policy is indispensable to the effective performance of other decision functions.

It is sometimes tragic that lawyers engaged in litigation within national constitutive processes overlook the applicability of transnational prescriptions which could be presented as the internal law of the land.

79. See, e.g., 1 & 2 J. HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* (1968 ed.).

Himself an object of ownership and trade, a thing rather than a person,<sup>80</sup> the slave's principal participation in wealth processes is in the coerced contribution of labor and services to others. He may be sold or otherwise disposed of, either separately as a chattel (chattel slavery),<sup>81</sup> or together with a piece of land under an exploitative system of land tenure (serfdom, peonage).<sup>82</sup> He may be traded locally or transnationally.<sup>83</sup> He may be compelled to work for creditors practically for life because of indebtedness (debt bondage).<sup>84</sup> When he dies, the debt and bondage may even pass on to his heirs.<sup>85</sup> Members of his kin group may sometimes be taken as security for debt. He may be condemned to forced labor for the payment of debt or other reason. He may be denied the right to own property and he may have no competence to enter into any contract, for "neither his

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80. See, e.g., W. BUCKLAND, *The Slave as Res*, in THE ROMAN LAW OF SLAVERY 10 (1908) [hereinafter cited as W. BUCKLAND, ROMAN LAW]. In the words of Chief Justice Taney in the *Dred Scott* decision:

[The slave] was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.

*Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857).

Similarly, Davis has written:

As laws governing chattle property evolved from the earliest civilizations, it was almost universally agreed that a slave could be bought, sold, traded, leased, mortgaged, bequeathed, presented as a gift, pledged for a debt, included in a dowry, or seized in a bankruptcy.

D. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 32 (1966) [hereinafter cited as D. DAVIS, WESTERN CULTURE].

81. See C. GREENIDGE, SLAVERY 36—48 (1958) [hereinafter cited as C. GREENIDGE].

82. See *id.* at 74—93; McBride, *Peonage*, 12 ENCYC. SOCIAL SCI. 69 (1934). See generally J. BLUM, LORD AND PEASANT IN RUSSIA (1961).

83. On the history of the slave trade see E. ALPERS, THE EAST AFRICAN SLAVE TRADE (1967); L. BETHELL, THE ABOLITION OF THE BRAZILIAN SLAVE TRADE (1970); B. DAVIDSON, BLACK MOTHER: THE YEARS OF THE AFRICAN SLAVE TRADE (1961); C. GREENIDGE, *supra* note 81, at 49—57; S. O'CALLAGHAN, THE SLAVE TRADE TODAY (1961); Schakleton, *The Slave Trade Today*, in SLAVERY: A COMPARATIVE PERSPECTIVE 188 (R. Winks ed. 1972); Umdzurike, *The African Slave Trade and the Attitudes of International Law Towards It*, 16 HOW. L.J. 334 (1971). For a powerful description of the profound trauma visited upon victims of the slave trade see P. Murray, *Roots of the Racial Crisis: Prologue to Policy* 227—43 (June, 1965) (unpublished J.S.D. dissertation in Yale Law School Library) [hereinafter cited as P. Murray].

84. See C. GREENIDGE, *supra* note 81, at 66—73; *Forms of Involuntary Servitude in Asia, Oceania and Australia*, U.N. Doc. E/AC.33/R.11 (1951); Gullick, *Debt-Bondage in Malaya*, in SLAVERY: A COMPARATIVE PERSPECTIVE 51—57 (R. Winks ed. 1972).

85. See, e.g., N.Y. Times, Oct. 5, 1973, at 10, col. 1; *id.*, Dec. 8, 1968, at 7, col. 1.

word nor his bond has any standing in law."<sup>86</sup>

Although their minimum health needs may be served for the security of investment, slaves may have few or no rights to well-being and personal security.<sup>87</sup> He may be subjected to all kinds of physical abuse and torture, including castration,<sup>88</sup> female circumcision, branding with identification marks,<sup>89</sup> other types of mutilation, and sexual molestation. The effects of enslavement have been appropriately likened to those of death.<sup>90</sup>

The victims of servitude are commonly denied opportunity to discover, develop, and exercise their latent skills for social expression; they may be kept in a state of relative ignorance. They are often conditioned to be content with their plight—to "love their chains"—not to demand freedom to participate equally and fully in the shaping and sharing of values.<sup>91</sup> Denied opportunities to acquire and exercise a range of socially useful skills, they are thus condemned to manual labor.

Slaves may be denied access to the affection value and be given little opportunity to develop congenial personal relationships. They may not be permitted to mate according to their choice; although informal relationships may be tolerated, these may not be protected by the laws of marriage, parentage, and kinship.<sup>92</sup> Their family life, if any, is often broken and completely at the mercy of their masters who can arbitrarily separate husband from wife, children from par-

86. C. SILBERMAN, *CRISIS IN BLACK AND WHITE* 89 (1964) [hereinafter cited as C. SILBERMAN].

87. In the words of Kardiner and Ovesey:

The relation of a man to a slave is quite the same as to a horse, and yet there are important differences. It is the same, insofar as the prime objective is to exploit the utility value of the slave, and to perpetuate the conditions which favor his maximum utility.

A. KARDINER & L. OVESEY, *THE MARK OF OPPRESSION* 42 (1951).

88. See C. GREENIDGE, *supra* note 81, at 27.

89. Slave branding provided a mark of identification, facilitated the recovery of fugitives, and satisfied the satanic claim that Negroes were less than human.

D. DUMOND, *ANTISLAVERY* 10 (1961).

90. W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 72 (1964 ed.).

91. As Degler has put it:

In the minds of many modern Americans, the Negro is pictured as a man who was once a slave and one, moreover, who was essentially content in that status.

C. DEGLER, *OUT OF OUR PAST* 168 (1959). This portrayal is, of course, but another aspect of denial of freedom to participate equally and fully in the shaping and sharing of values.

92. C. SILBERMAN, *supra* note 86, at 89.

ents.<sup>93</sup> Lonely and friendless, slaves may even be forced to breed like cattle in order to supply more slave labor. Children may find themselves slaves because of their parentage. They may be sold during childhood in the guise of adoption.<sup>94</sup> They may become subject to "child marriage" under arrangements such as *Mu-tsai*.<sup>95</sup> They may be sold in the guise of marriage as concubines, or in exchange for a "bride price" (dowry, lobolo, or boxadi).<sup>96</sup> Abuses of the bride-price system lead to "prostitution, sterility and depopulation."<sup>97</sup>

The slave, "humbled to the condition of brutes,"<sup>98</sup> is deprived even of his sense of right. He is denied opportunity to develop appropriate norms of responsible conduct. In the words of Malinowski, "even his [the slave's] conscience is not his own."<sup>99</sup> Gustavus Vassa, an eighteenth century slave, summed up his enslaved experiences this way:

When you make men slaves you deprive them of half their virtue, you set them in your own conduct, an example of fraud, rapine, and cruelty, and compel them to live with you in a state of war.<sup>100</sup>

The cumulative impact of enslavement is to deprive its victims of their fundamental respect for themselves as human beings. Elkins, employing insights into the behavioral patterns of prisoners in the concentration camps, suggests a comparable disintegration of adult personality in slaves.<sup>101</sup> Thus, he says that the slave's "relationship with his master was one of utter dependence and childlike attachment: it was indeed this childlike quality that was the very key to his being."<sup>102</sup> Under such conditions of infantile dependency,

93. This is a consequence of paramount importance of "utility" attached to the slave.

Neither paternity nor permanent marriage could be recognized, for this would interfere with the free mobility of the slave for sale purposes.

A. KARDINER & L. OVESEY, *THE MARK OF OPPRESSION* 43 (1951).

94. See C. GREENIDGE, *supra* note 81, at 105—06.

95. *Mu-tsai*, meaning "little sister," has become a popular usage among Europeans, especially in the British colony of Hong Kong, though it has been known in China in various other names such as "ya-tow." It was particularly prevalent in East and Southeast Asia. See C. GREENIDGE, *supra* note 81, at 105—16; J. GULLICK, *DEBT BONDAGE IN MALAYA* (1958). In Taiwan, it is called *sim-pua*, "little daughter-in-law." Cf. M. WOLF, *WOMEN AND THE FAMILY IN RURAL TAIWAN* (1972).

96. See C. GREENIDGE, *supra* note 81, at 94—104.

97. *Id.* at 100.

98. P. Murray, *supra* note 83, at 131 (quoting Gustavus Vassa).

99. C. GREENIDGE, *supra* note 81, at 21.

100. P. Murray, *supra* note 83, at 131.

101. See S. ELKINS, *SLAVERY* 81—139 (2d ed. 1968).

102. *Id.* at 82.

respect in the sense we have specified (self-esteem and deferential characterization by others) is not possible. As Kardiner and Ovesey have aptly put it, the individual's "self-esteem suffers because he is constantly receiving an unpleasant image of himself from the behavior of others to him."<sup>103</sup> His own sense of worth is utterly destroyed.<sup>104</sup>

Historically, slavery in the sense outlined above extends back to very ancient times and has existed in many cultures and many countries, with many variations in institutional manifestations and varying degrees of approximation to our description.<sup>105</sup> The slowness of mankind's movement toward fundamental freedom is but a mirror reflection of the prevalence of slavery in its various forms. Although its origins are still controverted, it appears that slavery first emerged when tribes moved from the hunting to the pastoral stage.<sup>106</sup> Slavery was early associated with warfare. In the ancient Near East, captives were first killed but later spared to serve their captors. Slavery, it is said, became established in the Sumerian culture of the Babylonian area in the fourth millennium B.C.<sup>107</sup> In

103. C. SILBERMAN, *supra* note 86, at 109 (quoting A. Kardiner).

104. *Id.* at 115.

105. The literature on slavery is vast. It has expanded significantly in recent years because of the contemporary interest, scholarly and other, in this subject. We are indebted to our colleague, Robert M. Cover, for assistance in guiding us through this literature. C. GREENIDGE, note 81 *supra*, is particularly useful for our present purposes. For recent outstanding historical studies on slavery see R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770—1823* (1975); D. DAVIS, *WESTERN CULTURE*, note 80 *supra*; R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS* (1974); E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974).

Of a growing list of anthologies, *SLAVERY: A COMPARATIVE PERSPECTIVE* (R. Winks ed. 1972) is especially recommended. Two concise accounts appear in: Finley, *Slavery*, 14 *INT'L ENCYC. SOCIAL SCI.* 307 (1968); *Slavery*, 20 *ENCYC. BRITANNICA* 628 (1969) [hereinafter cited as *Slavery*]. Other useful background readings include: E. COPLEY, *A HISTORY OF SLAVERY AND ITS ABOLITION* (1969); *SLAVERY IN THE NEW WORLD* (L. Foner & E. Genovese eds. 1969); J. FRANKLIN, *FROM SLAVERY TO FREEDOM* (2d ed. 1956); E. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY* (1965); J. HARRIS, *SLAVERY OR "SACRED TRUST"?* (1926); W. JORDAN, *WHITE OVER BLACK* (1968); H. KLEIN, *SLAVERY IN THE AMERICAS* (1967); L. LITWACK, *NORTH OF SLAVERY* (1961); E. McMANUS, *BLACK BONDAGE IN THE NORTH* (1973); H. NIEBOR, *SLAVERY AS AN INDUSTRIAL SYSTEM* (2d ed. 1910); *AMERICAN NEGRO SLAVERY: A MODERN READER* (A. Weinstein & F. Gatell eds. 1973); E. WILLIAMS, *CAPITALISM & SLAVERY* (1966); *Slavery, Colonialism, and Racism*, *DAEDALUS* (Spring 1974); Woodward, *The Jolly Institution*, *N.Y. REV. BOOKS*, May 2, 1974, at 3—6.

106. See *Slavery*, *supra* note 105, at 629.

107. Westermann, *Slavery: Ancient*, 14 *ENCYC. SOCIAL SCI.* 74 (1934).

addition to capture in war, slave sale and purchase gradually became a source of supply, with victims extending to include even non-foreigners. In Egypt slavery existed from the earliest dynastic period under the pharaohs.<sup>108</sup>

In ancient Greece slave ownership was recognized at the time of Homer.<sup>109</sup> Subsequently, Aristotle, defining a slave as "a living possession," considered slavery a natural component of society in which the domination-submission relationship persists.<sup>110</sup> As wars were frequent and piracy was rife during the Hellenistic period (323—30 B.C.), increasing numbers of captives in war fell victims of slavery. The close connection between slavery and warfare became more pronounced with the rise of the Roman Empire. As Rome's wars of conquest unfolded, large numbers of "barbarian" captives from Africa, Spain, Gaul, Greece, and Asia Minor were put upon the market.<sup>111</sup> The slave population of Rome increased so rapidly that by the middle of the first century it practically equalled the free population,<sup>112</sup> with the potential threat of insurrection. Hence, the Romans made a fine art of slavery with most elaborate and detailed legal regulation.<sup>113</sup> The institution of slavery became an integral part of the social structure of the Roman Empire.<sup>114</sup> Meanwhile, in China, India, and other parts of the East, various forms of human servitude were also widely prevalent.<sup>115</sup>

With the fall of the Roman Empire, slavery declined sharply but did not disappear. Throughout the Middle Ages, slavery existed in many parts of Europe, although the conditions of slavery were ameliorated by the same Christian influence. Chattel slavery seems to

108. See A. BAKIR, *SLAVERY IN PHARANOIC EGYPT* (1952); I. MENDELSON, *SLAVERY IN THE ANCIENT NEAR EAST* (1949).

109. Westermann, *Slavery: Ancient*, 14 *ENCYC. SOCIAL SCI.* 74, 75 (1934).

110. See *THE POLITICS OF ARISTOTLE* 8—18 (E. Barker ed. & transl. 1958). Cf. G. MORROW, *PLATO'S LAW OF SLAVERY IN ITS RELATIONS TO GREEK LAW* (1939).

111. See *Slavery*, *supra* note 105, at 632.

112. See C. GREENIDGE, *supra* note 81, at 16. For a discussion of the sources and numbers of slaves in Rome see W. WESTERMANN, *THE SLAVE SYSTEMS OF GREEK AND ROMAN ANTIQUITY* 84—90 (1955) [hereinafter cited as W. WESTERMANN, *SLAVE SYSTEMS*]. See also R. BARROW, *SLAVERY IN THE ROMAN EMPIRE* 20—21 (1968 ed.).

113. See W. BUCKLAND, *ROMAN LAW*, note 80 *supra*.

114. See R. BARROW, *SLAVERY IN THE ROMAN EMPIRE* (1968 ed.); W. BUCKLAND, *ROMAN LAW*, note 80 *supra*; W. WESTERMANN, *SLAVE SYSTEMS*, note 112 *supra*.

115. See D. CHANANA, *SLAVERY IN ANCIENT INDIA* (1960); L. HOBHOUSE, *MORALS IN EVOLUTION* 289—95 (1915); E. SCHAFFER, *THE GOLDEN PEACHES OF SAMARKAND: A STUDY OF T'ANG EXOTICS* 43—47 (1963); C. WILBUR, *SLAVERY IN CHINA DURING THE FORMER HAN DYNASTY* (1967); Pulleyblank, *The Origins and Nature of Chattel Slavery in China*, 1 *J. ECON. & SOCIAL HIST. OF THE ORIENT* 201 (1958).

have disappeared in Western and Central Europe in the late 13th century, only to be replaced by serfdom under the feudal system.<sup>116</sup> In Southern Europe and the Middle East, slavery continued under the Byzantine Empire and flourished with the rise of Islam.<sup>117</sup> The Crusades resulted in a substantial increase in the slave trade, both in Muslim lands and in Christian Europe. In the Iberian peninsula, slavery survived not only the Arabic or Moorish domination, but also the Christian reconquest of the peninsula in the fifteenth century. Having reduced the defeated Muslims to slavery, the Portuguese proceeded to import slaves from Africa beginning in 1444, and to set up slave trading posts on the coast of Guinea.<sup>118</sup> The Spaniards soon followed suit. As the Portuguese dominions extended to the East Indies and other areas, many of the natives of these regions became new victims of slavery.<sup>119</sup>

The discovery of the New World ushered in a further epoch into the history of slavery. In the Hispanic colonies of the New World, slavery was initially confined to the aborigines (Indians). Later, Indian slaves became less significant when Negro slaves from Africa were imported on a large scale to meet the labor need of the growing plantation economy.<sup>120</sup> Following the Portuguese and Spaniards, the Dutch, French, and British also undertook to engage in the slave trade; all these groups scrambled for spheres of influence on the African coast, with the British playing the dominant role.<sup>121</sup> Of the

116. See W. BROWNLOW, *SLAVERY AND SERFDOM IN EUROPE* 42—86 (1969). In the words of Davis:

If the French serf was protected by local custom and if there was little incentive to exploit his labor for commercial or industrial profit, he enjoyed few legal rights not possessed by Roman slaves of the late Empire.

D. DAVIS, *WESTERN CULTURE*, *supra* note 80, at 38.

117. For the perspective of Islam toward slavery see C. GREENIDGE, *supra* note 81, at 58—65.

118. See *Slavery*, *supra* note 105, at 634. See also D. DAVIS, *WESTERN CULTURE*, *supra* note 80, at 41—46.

119. See G. MACMUNN, *SLAVERY THROUGH THE AGES* 83—178 (1938).

120. See E. WILLIAMS, *CAPITALISM & SLAVERY* (1966). A significant interpretation is offered in E. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY* (1965). *Contra*, J. GRATUS, *THE GREAT WHITE LIE* (1973); U. PHILLIPS, *AMERICAN NEGRO SLAVERY* (1918). On the controversial issue of the profitability of slavery see *DID SLAVERY PAY?: READINGS IN THE ECONOMICS OF BLACK SLAVERY IN THE UNITED STATES* (H. Aitken ed. 1971); K. STAMPP, *THE PECULIAR INSTITUTION* 383—418 (1956); Conrad & Meyer, *The Economics of Slavery in the Ante Bellum South*, 66 *J. POL. ECON.* 95 (1958); Genovese, *The Slave South: An Interpretation*, 25 *SCI. & SOC'Y* 320 (1961); Woodman, *The Profitability of Slavery: A Historical Perspective*, 29 *J. SOUTHERN HIST.* 303 (1963).

121. See G. MACMUNN, *SLAVERY THROUGH THE AGES* 83—178 (1938).



millions of African slaves transported to America, a large number were sold in Brazil, the West Indies, and the United States.<sup>122</sup> The traumatic impacts of this wholesale enslavement of peoples are still being felt both within the United States and other bodies politic.<sup>123</sup>

It is not, unhappily, to be assumed that slavery, in all its manifestations, is a mere relic of the past. In relatively recent times most states have, through their national laws, as will be described below,<sup>124</sup> succeeded in formally proscribing at least technical or "chattel" slavery. Yet even this most onerous form of servitude and many of its approximations—such as peonage, debt bondage, bride price, sham adoptions, and forced labor—continue to persist in many parts of the world. Thus, Cassin has recently observed:

Even now, after nearly two centuries of international agreements and even civil wars, the scourge of slavery has not yet been completely eradicated, and, unfortunately, millions of human beings—men, women and children—are literally still slaves, reduced to the condition of objects, or merchandise, or subjected to a regime very much like slavery.<sup>125</sup>

The report of the United Nations Special Rapporteur on Slavery in 1970, drawing upon a non-governmental source, adds detail:

. . . chattel slavery, serfdom, debt bondage, the sale of children and

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122. See generally P. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS* (1969); *DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE TO AMERICA* (E. Donnan ed. 1930—35) (4 vols.); W. DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638—1870* (1896); D. MANNIX & M. COWLEY, *BLACK CARGOES: A HISTORY OF THE ATLANTIC SLAVE TRADE, 1518—1865* (1962); O. RANSFORD, *THE SLAVE TRADE* (1971).

123. Originally the fate of slavery was not confined to any particular race or ethnic group, but during the era of the European colonial expansion, the fact of the slave trade and the servile exploitation of "fellow men" from Africa appeared difficult to reconcile with the professed Christian ideal that all men are born equal before God. Hence, racism asserted itself as a new justification: the black people were condemned to slavery because of their inherent inferiority. The age-worn elitist doctrine was thus wedded to the concept of "race," the damaging impacts of which are still being felt today. This point has been repeatedly emphasized in the recent works in the field of black studies. For profound and detailed analyses see S. ELKINS, *SLAVERY* (2d ed. 1968); W. JORDAN, *THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* (1974); G. MYRDAL, *AN AMERICAN DILEMMA* (1944); P. Murray, note 83 *supra*. See also M. BANTON, *RACE RELATIONS* (1967); Pollak, *Law and Liberty: The American Constitution and the Doctrine that All Men Are Created Equal*, 2 *HUMAN RIGHTS* 1 (1972).

124. See notes 206—30 & accompanying text *infra*.

125. Cassin, *From the Ten Commandments to the Rights of Man*, in *OF LAW AND MAN* 13, 19 (S. Shoham ed. 1971).

servile forms of marriage survive today to the extent that they constitute a recognizable element in the pattern of society in seventeen African countries, fifteen Asian countries and six Latin American countries.<sup>126</sup>

The same report elsewhere summarizes:

A recent ILO report indicated that thousands of farm workers still live under systems of tenure entailing conditions akin to serfdom, especially in Latin America but also in other parts of the world.<sup>127</sup>

The Rapporteur's more elaborate *Report on Slavery* of 1966<sup>128</sup> offers country-by-country documentation. Greenidge provides a pertinent summary of the contemporary problem:

The slavery that arose from war, and subsequently from raiding, trading and dealing, and from birth, was what is known as 'classic' or chattel slavery, in which the slave was a piece of property. While this form still survives in Arabia, elsewhere slavery exists, as an exploitation of the weaker members of society by the stronger, and frequently maintained by social sanction, in less straightforward guises. Debt-bondage, by which a debtor may enslave himself voluntarily, or someone under his control, as security for a debt is a major cause of practical enslavement; while the system of land tenure in several parts of the world keeps millions of people in a state of near slavery under such euphemistic terms as peonage. Finally, under the pressure of economic conditions there have developed such practices as the sale of daughters into marriage without their consent, an example of which is the vexed question of the African 'bride price', and the selling or giving of children to others who desire to exploit their labour under the guise of adoption, a practice particularly prevalent in the Far East.<sup>129</sup>

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126. *Question of Slavery and the Slave Trade in All Their Practices and Manifestations, Including the Slavery-like Practices of Apartheid and Colonialism*, U.N. Doc. E/CN.4/Sub.2/312, at 43 (1970) (Progress report submitted by the Special Rapporteur, Mr. Mohamed Awad) [hereinafter cited as *Awad's 1970 Progress Report*].

127. *Id.* at 17.

128. M. AWAD, REPORT ON SLAVERY, U.N. Doc. E/4168/Rev. 1 (1966) [hereinafter cited as AWAD'S REPORT ON SLAVERY].

129. C. GREENIDGE, *supra* note 81, at 20. Other documentations of the continued existence of slavery include: Montgomery, *Slavery*, in HUMAN RIGHTS 59—67 (U.K. Comm. for Human Rights Year ed. 1967); *The Changing Face of Slavery*, 1973 INT'L ASSOCIATIONS 550; *Slavery Still Plagues the Earth*, SATURDAY REVIEW, May 6, 1967, at 24; WORLD, Dec. 19, 1972, at 4; N.Y. Times, Jan. 21, 1974, at 1, col. 7 (Paraguay); *id.*, Oct. 26, 1973, at 3, col. 1 (India); *id.*, Oct. 5, 1973, at 10, col. 1 (India); *id.*, Dec. 8, 1968, at 7, col. 1 (India); *id.*, Mar. 28, 1967, at 16, col. 3 (Saudi Arabia); *id.*, Mar. 22, 1967, at 6, col. 4 (Human Rights Comm'n).

Hence, it can be no cause of surprise that the larger community of mankind continues to exhibit concern for the complete eradication both of chattel slavery and of all its approximations.<sup>130</sup>

*ii. Basic community policies*

It has already been observed that slavery in all its manifestations and approximations is the antithesis of the freedom of choice essential to human dignity.<sup>131</sup> "The inherent contradictions of slavery," as the historian David Brion Davis has put it, resides "not in its cruelty or economic exploitation, but in the underlying conception of man as a conveyable possession with no more autonomy of will and consciousness than a domestic animal."<sup>132</sup> Fortunately, most of the world's great religions and secular moralities have, despite occasional tergiversations toward elitism in theory and recommendation, come to this same conclusion.<sup>133</sup>

The ill consequences of slavery, ramifying out from its individual victims through all the communities in which they interact with others, have long been recognized as transnational in reach. Lincoln's dictum that a society cannot endure half slave and half free is widely, and rationally, regarded as applying equally to world society. Quoting Camus' comment, "we are all condemned to live together," Silberman observes that "man cannot deny the humanity of his fellow man without ultimately destroying his own."<sup>134</sup> It is not the mere amelioration of the conditions of slavery, but rather its total abolition, which is the overriding objective of general community policy today.<sup>135</sup>

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130. For contemporary efforts toward the elimination of slavery in all its forms see notes 184—334 & accompanying text *infra*.

131. See text accompanying note 33 *supra*.

132. D. DAVIS, *WESTERN CULTURE*, *supra* note 80, at 62.

133. For a collection of antislavery arguments see *THE ANTISLAVERY ARGUMENT* (W. Pease & J. Pease eds. 1965).

134. C. SILBERMAN, *supra* note 86, at 16. Slavery is, as Greenidge has put it, bad for the slave because it tends to make him harsh, sensual and cruel, and to grow to despise the work in which he is engaged, and to shirk it. It is bad for the master because the habit of absolute rule is corrupting. It offers constant facilities for libertinism, and the morality of the slave-owner and his sons is undermined by intimate contact with a despised and degraded class. Cruelty and lust have been its shadows wherever it has existed.

C. GREENIDGE, *supra* note 81, at 35.

135. The words contained in the 1848 Abolition Decree of France are worth quoting:

Whereas slavery is an affront to human dignity, inasmuch as in destroying the free will of man it destroys the natural principles of right and duty;

### iii. Trends in decision

In the ancient world, slavery was not generally regarded as unlawful under either community or trans-community perspectives of authority.<sup>136</sup> The conditions of slavery were for a long time harsh and relatively unchanging. "For more than three thousand years," observes Davis, the "legal characteristics of bondage changed very little."<sup>137</sup> There was, however, a slow movement toward amelioration. Thus, although describing the slave "as property and economic asset rather than as human being,"<sup>138</sup> the Hammurabi Code accorded considerable rights to slaves. Among those rights were "the right of intermarriage with free women, the right to engage in business and to acquire property, and protection of slave concubines when they had given birth to children."<sup>139</sup> Similarly, under the Hebrew law a slave of Hebrew origin could be released after six years of servitude, and any slave, Hebrew or not, was granted manumission upon a permanent injury by maltreatment.<sup>140</sup>

In ancient Greek law the slave was viewed on one hand as "a legal object" and on the other as "a legal subject"—as "a man as well as a thing."<sup>141</sup> Thus a slave was partly free. Establishing an elaborate set of legal regulations, the Roman law did not admit different degrees of slavery, but maintained that human beings were either free or slaves.<sup>142</sup> While slavery was not regarded as being in contravention of the *ius gentium*,<sup>143</sup> provision was made for the protection of slaves and the amelioration of their conditions. Thus, masters

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whereas slavery is a flagrant violation of the republican maxims of Liberty, Equality, and Fraternity . . . slavery shall be totally abolished in all French colonies and possessions.

H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 100 n.10 (1945) (quoting the Decree) [hereinafter cited as H. LAUTERPACHT, AN INTERNATIONAL BILL].

136. See generally L. HOBHOUSE, *MORALS IN EVOLUTION* 270—317 (1915); *SLAVERY IN CLASSICAL ANTIQUITY* (Finley ed. 1968); W. WESTERMANN, *SLAVE SYSTEMS*, note 112 *supra*; Finley, *Between Slavery and Freedom*, 6 *COMP. STUDIES IN SOC'Y & HIST.* 233 (1964).

137. D. DAVIS, *WESTERN CULTURE*, *supra* note 80, at 32.

138. Westermann, *Slavery: Ancient*, 14 *ENCYC. SOCIAL SCI.* 74, 75 (1939).

139. *Id.*

140. *Id.*

141. *Id.* at 76. See also G. MORROW, *PLATO'S LAW OF SLAVERY IN ITS RELATION TO GREEK LAW* (1939); W. WESTERMANN, *SLAVE SYSTEMS*, *supra* note 112, at 1—57.

142. See W. BUCKLAND, *ROMAN LAW*, *supra* note 80, at 1; W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 65—67 (1964 ed.).

143. See *Slavery*, *supra* note 105, at 631; D. DAVIS, *supra* note 80, at 83; W. WESTERMANN, *SLAVE SYSTEMS*, *supra* note 112, at 57.

were forbidden to "punish slaves by making them fight with beasts;"<sup>144</sup> a sick slave would become "free and a Latin" upon abandonment by his master;<sup>145</sup> masters were forbidden to "kill slaves without magisterial sanction;"<sup>146</sup> a slave, if cruelly treated, could "take sanctuary at a temple or the statue of the Emperor;"<sup>147</sup> and in the case of proven cruelty, the slave was not to be returned or sold to his old master.<sup>148</sup>

The most important amelioration related to the manumission of individual slaves. In ancient Greece, the practice of manumission was widespread, resulting in what Westermann called the "inconstancy of status and fluidity of movement from slavery to freedom."<sup>149</sup> Mass manumission was made possible through state and individual actions. The slave was given a manumission price, which the master could not reject.<sup>150</sup> Special funds, contributed by free persons, were set up so that slaves could borrow, without interest, to redeem themselves.<sup>151</sup> For the purpose of redemption, slaves were also allowed to work part-time for third parties to accumulate funds. And after a slave gained his freedom, no stigma was attached to him.<sup>152</sup> Through a long history, in deference to natural law notions of equality, Roman law afforded procedures for facilitating manumission in large numbers.<sup>153</sup> Talented freedmen were commonly accepted into the "political and economic life" of the Roman community "without any manifestations of prejudice arising from their former status."<sup>154</sup> The liberality of Roman law set a pattern for the Middle Ages. "[I]n the Western world," Davis indicates, "it was the Roman law that gave a systematic and enduring form to the rights of masters and slaves."<sup>155</sup> In more recent times, manumission

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144. W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 64 (1964 ed.).

145. *Id.*

146. *Id.* at 64—65.

147. *Id.* at 65.

148. *Id.*

149. W. WESTERMANN, *SLAVE SYSTEMS*, *supra* note 112, at 18.

150. *See* M. KONVITZ & T. LESKES, *A CENTURY OF CIVIL RIGHTS* 22 (1961).

151. W. WESTERMANN, *SLAVE SYSTEMS*, *supra* note 112, at 23.

152. *See* R. BARROW, *SLAVERY IN THE ROMAN EMPIRE* 173—207 (1968 ed.); W. BUCKLAND, *ROMAN LAW*, *supra* note 80, at 437—597.

153. W. WESTERMANN, *SLAVE SYSTEMS*, *supra* note 112, at 34—36.

154. *Id.* at 79.

155. D. DAVIS, *WESTERN CULTURE*, *supra* note 80, at 32. "By a remarkable coincidence," Davis has noted, "a variety of laws designed to protect slaves appeared at about the same time in China, India, Ptolemaic Egypt, and Rome." D. DAVIS, *WESTERN CULTURE*, *supra* note 80, at 83 n.63. *See also* note 115 *supra*.

was apparently made relatively easy in Latin America,<sup>156</sup> while in the southern states of the United States "everything was done to place obstacles in the way of manumission."<sup>157</sup>

Because of the historic difficulties in securing the abolition of slavery and the slow progress toward amelioration of its incidents, international efforts at the turn of the nineteenth century were directed principally toward prohibiting the slave trade so as to reduce the number of slaves.<sup>158</sup> Thus, in 1807, Great Britain forbade the slave trade in all its colonies.<sup>159</sup> In 1814, Britain and France undertook joint endeavors, through the Treaty of Paris, to suppress the slave trade.<sup>160</sup> This joint effort was soon translated into an eight-power declaration at the Congress of Vienna in 1815.<sup>161</sup> The Vienna Declaration characterized the slave trade "as repugnant to the principles of humanity and universal morality,"<sup>162</sup> and as "a scourge which has so long desolated Africa, degraded Europe, and afflicted

156. See M. KONVITZ & T. LESKES, *A CENTURY OF CIVIL RIGHTS* 25—36 (1961).

157. *Id.* at 33. "[T]o the Negro in Brazil, slavery was an open system; to the Negro in the South, slavery was a closed system." *Id.* Cf. C. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* (1971); S. ELKINS, *SLAVERY* 239—53 (2d ed. 1968); H. KLEIN, *SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA* (1967); F. TANNENBAUM, *SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS* (1946); P. MURRAY, *supra* note 83, at 252—84.

158. The anti-slavery movement at the turn of the nineteenth century was most powerful in Great Britain where William Wilberforce was the acknowledged leader. See generally R. COUPLAND, *THE BRITISH ANTI-SLAVERY MOVEMENT* (1933); R. COUPLAND, *WILBERFORCE: A NARRATIVE* (1923); J. HARRIS, *A CENTURY OF EMANCIPATION* 1—52 (1933); F. KLINGBERG, *THE ANTI-SLAVERY MOVEMENT IN ENGLAND* (1968 ed.); O. SHERRARD, *FREEDOM FROM FEAR: THE SLAVE AND HIS EMANCIPATION* (1959).

For a concise and useful account of international efforts to suppress slavery and the slave trade see UNITED NATIONS, *THE SUPPRESSION OF SLAVERY*, U.N. Doc. ST/SO/A/4 (1951) (Memorandum submitted by the Secretary-General) [hereinafter cited as U.N. MEMORANDUM ON SLAVERY]. See also M. GANJI, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 87—112 (1962); C. GREENIDGE, *supra* note 81, at 171—200; Nanda & Bassiouni, *Slavery and Slave Trade: Steps Toward Eradication*, 12 *SANTA CLARA LAWYER* 424 (1972).

159. A. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 15 (1972).

160. See 1 E. HERTSLET, *THE MAP OF EUROPE BY TREATY* 20 (1875) [hereinafter cited as HERTSLET'S TREATY COLLECTION]; 1 *KEY TREATIES FOR THE GREAT POWERS 1814—1914*, at 15—16 (M. Hurst ed. 1972) [hereinafter cited as *KEY TREATIES*]. *Additional Articles between France and Great Britain—Paris, 30th May, 1814*, 1 *BRITISH AND FOREIGN STATE PAPERS 1812—1814*, at 172 (1841).

161. See 3 *BRITISH AND FOREIGN STATE PAPERS, 1815—1816*, at 971 (1838); 1 HERTSLET'S TREATY COLLECTION, *supra* note 160, at 60. The eight declarants were: Austria, France, Great Britain, Portugal, Prussia, Russia, Spain, and Sweden. For a diplomatic account see H. NICOLSON, *THE CONGRESS OF VIENNA—A STUDY IN ALLIED UNITY: 1812—1822*, at 209—14, 292—93 (Viking Compass ed. 1961).

162. 1 HERTSLET'S TREATY COLLECTION, *supra* note 160, at 60.

humanity.”<sup>163</sup> It then expressed the common desire for “prompt and effective” measures toward “the universal abolition of the Slave Trade.”<sup>164</sup> The Declaration, however, was toned down in deference to “the interests, the habits, and even the prejudices” of the signatory states,<sup>165</sup> with the understanding that it could not “prejudge the period that each particular Power may consider as most advisable for the definitive abolition of the Slave Trade.”<sup>166</sup> The Vienna Declaration of 1815 was reaffirmed by Austria, France, Great Britain, Prussia, and Russia in 1822 at Verona,<sup>167</sup> when those countries expressed their readiness to “concur in everything that may secure and accelerate the complete and final abolition” of the traffic in slaves.<sup>168</sup>

Moving from separate national action toward joint action, international measures in the middle of the nineteenth century included attempts to police the slave trade on the high seas by providing a right of visit, search, and seizure.<sup>169</sup> In this regard, the leading initiatives of Great Britain met with very considerable opposition because both the United States and France were deeply suspicious of British naval power. Though it was controversial whether the right of visit and search for suppression of the slave trade was in accord with customary international law,<sup>170</sup> significant efforts were made to secure this right by agreement, culminating in a number of bilateral and multilateral treaties that explicitly confirmed mutual rights of visit and search. The Treaty of 1831 between France and Great Britain<sup>171</sup> stipulated that the “mutual right of search may be exercised on board the Vessels of each of the two Nations,”<sup>172</sup> but confined it to the waters specified in the Treaty, *i.e.*, areas along the western coast of Africa, around Madagascar, and similar areas around Brazil, Cuba, and Puerto Rico.<sup>173</sup>

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163. *Id.*

164. *Id.* at 61.

165. *Id.*

166. *Id.*

167. *Id.* at 695.

168. *Id.* at 696.

169. *See generally* T. LAWRENCE, VISITATION AND SEARCH (1858); H. SOULSBY, THE RIGHT OF SEARCH AND THE SLAVE TRADE IN ANGLO-AMERICAN RELATIONS 1814—1862 (1933).

170. *See* M. McDUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 881—82 (1962).

171. 18 BRITISH AND FOREIGN STATE PAPERS 1830—1831, at 641 (1833). The Treaty was signed at Paris on November 30, 1831.

172. *Id.* at 642 (art. 1).

173. *Id.*

Modeled upon the earlier treaties between Great Britain and France, the Treaty of London of 1841,<sup>174</sup> signed by Austria, Great Britain, Prussia, Russia, and France, was to set a pattern for subsequent agreements. The treaty obliged the signatory states to "prohibit all trade in slaves, either by their respective subjects, or under their respective flags, or by means of capital belonging to their respective subjects; and to declare such traffic piracy."<sup>175</sup> "[A]ny vessel which may attempt to carry on the Slave Trade," it added, "shall, by that fact alone, lose all right to the protection of their flag."<sup>176</sup> Warships of any of the signatory states were empowered to visit and search such vessels. If the vessels were found to be transporting slaves, they were to be seized and handed over to the appropriate tribunals of the states to which they belonged.<sup>177</sup>

Prior to President Lincoln's Emancipation Proclamation,<sup>178</sup> the United States and Great Britain concluded the Treaty of Washington of 1862,<sup>179</sup> conferring upon each other a reciprocal right of visit, search, and detention of ships suspected of engaging in the slave trade on the high seas.<sup>180</sup> The exercise of this right was, however, restricted to an area "within the distance of 200 miles from the coast of Africa, and to the southward of the 32 parallel of north latitude; and within 30 leagues from the coast of the island of Cuba."<sup>181</sup> Captured vessels were to be brought before a Mixed Court of Justice, "formed of an equal number of individuals of the two nations,"<sup>182</sup> which would employ a procedure different from that of the federal or state courts, and be authorized to pronounce judgment without

174. 30 BRITISH AND FOREIGN STATE PAPERS 1841—1842, at 269 (1858). The Treaty was signed at London on December 20, 1841.

175. *Id.* at 272 (art. 1).

176. *Id.*

177. *See id.* at 272—84 (arts. 2—14).

178. Proclamation of January 1, 1863, 12 Stat. 1268. For the background and the aftermath of the Proclamation see J. FRANKLIN, *THE EMANCIPATION PROCLAMATION* (1963); J. FRANKLIN, *FROM SLAVERY TO FREEDOM* 239—338 (1956); Dillard, *The Emancipation Proclamation in the Perspective of Time*, 23 *LAW IN TRANSITION* 95 (1963).

179. 52 BRITISH AND FOREIGN STATE PAPERS 1861—1862, at 50 (1868). The Treaty was signed at Washington on April 7, 1862, and became effective when ratifications were exchanged at London on May 20, 1862.

180. *Id.* at 50—51 (art. 1).

181. *Id.* at 51 (art. 1(4)).

182. *Id.* at 53 (art. 4). These courts were located at Sierra Leone, the Cape of Good Hope, and New York. *Id. See also id.* at 51—53 (arts. 2—3).



appeal.<sup>183</sup>

In the late nineteenth century, important progress was made with the adoption of the General Act of the Berlin Conference on Central Africa of 1885<sup>184</sup> and the General Act of the Brussels Conference of 1890,<sup>185</sup> both of which sought to eradicate slavery and to suppress the slave trade. The General Act of Berlin of 1885, after expressing the signatories' pledge to "strive for the suppression of slavery and especially of the Negro-slave trade,"<sup>186</sup> affirmed that "trading in slaves is forbidden in conformity with the principles of international law as recognized by the signatory powers."<sup>187</sup> It further declared that the territories of the Congo basin were not to "serve as a market or way of transit for the trade in slaves of any race whatever."<sup>188</sup> The contracting states were to employ all means at their disposal to terminate the slave trade and to punish those engaged in it.<sup>189</sup>

The General Act of the Brussels Conference of 1890, called "the Magna Carta of the African slave trade,"<sup>190</sup> was the high point in international efforts to suppress the slave trade before World War I. Signed and ratified by 17 states, the General Act contained 100 articles under seven chapters, embodying a number of military, legislative, and economic measures.<sup>191</sup> The Act condemned slavery and the slave trade,<sup>192</sup> though it failed to define these terms, and

183. For detail see *id.* at 58 (ANNEX B—*Regulations for the Mixed Courts of Justice*).

184. GENERAL ACT of the Conference of Berlin, Relative to the Development of Trade and Civilization in Africa; the free Navigation of the Rivers Congo, Niger, &c; the Suppression of the Slave Trade by Sea and Land; the Occupation of Territory on the African Coasts &c; Signed at Berlin, 26th February 1885. 2 KEY TREATIES, *supra* note 160, at 880.

185. 82 BRITISH AND FOREIGN STATE PAPERS 1889—1890, at 55 (1896). For its text in English see U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 46—68; 3 AM. J. INT'L L. 29 (1909).

186. U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 9 (art. 6). Compare *id.*, with the other translated versions in 2 KEY TREATIES, *supra* note 160, at 885—86; 3 AM. J. INT'L L. Supp. 35 (1909).

187. U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 9 (art. 9).

188. *Id.*

189. See *id.*

190. C. GREENIDGE, *supra* note 81, at 176.

191. A significant fact about the General Act of Brussels was the range of its signatory states. They included not only all the major European powers and the United States, but also Turkey, Persia, and Zanzibar; the latter three still recognized slavery at the time.

192. Article 3 of the Act provides:

The powers exercising a sovereignty or a protectorate in Africa confirm and give precision to their former declarations, and engage to proceed gradually,

prohibited the trade in arms and ammunition which had been closely linked to slave-raiding and slave-selling in Africa.<sup>193</sup>

Though it fell short of offering a general right to visit and search, the Brussels General Act contained detailed provisions on visit and search of vessels of less than 500 tons within a specified maritime zone in which the slave trade still existed.<sup>194</sup> According to Article XLII, if officers in command of a warship had reason to believe a vessel of less than 500 tons in the maritime zone was "engaged in the slave trade" or "guilty of the fraudulent use of a flag," they were empowered to "examine the ship's papers."<sup>195</sup> This latter authority was confined to examination of documents unless the flag state of the suspected ship was a party to a special convention, in which case the examining officers were authorized to call the roll of the passengers and crew.<sup>196</sup> If the officer was "convinced" that an act connected with the slave trade had occurred on board, the ship was escorted into the nearest port where there was "a competent magistrate of the power whose flag has been used."<sup>197</sup>

An important contribution of the Brussels General Act to the transnational condemnation of slavery was the institutionalization of an intelligence function,<sup>198</sup> a function vital to combatting both slavery and the slave trade. Two permanent agencies were established. The first was an International Maritime Office at Zanzibar, represented by a delegate from each of the contracting states, whose

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as circumstances may permit, either by the means above indicated, or by any other means that they may consider suitable, with the repression of the slave-trade, each State in its respective possessions and under its own direction. Whenever they consider it possible, they shall lend their good offices to such powers as, with a purely humanitarian object, may be engaged in Africa in the fulfillment of a similar mission.

U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 47—48. Article 1(1) emphasizes that among

the most effective means of counteracting the slave-trade in the interior of Africa [is p]rogressive organization of the administration, judicial, religious, and military services in the African territories placed under the sovereignty or protectorate of civilized nations.

*Id.* at 46.

193. *See id.* at 49—51 (arts. 8—14).

194. *See* U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 57—59 (arts. 42—49). *See also* 1 UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS 273—74, U.N. Doc. ST/LEG/SER.B/1 (1951).

195. U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 57 (art. 42).

196. *Id.* at 57—58 (arts. 44—45).

197. *Id.* at 58 (art. 49).

198. On the intelligence function see McDougal, Lasswell & Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365 (1973).

objective was to "centralize all documents and information of a nature to facilitate the repression of the slave trade in the maritime zone."<sup>199</sup> Signatory states were required to furnish the following information: instructions given to the commanders of warships navigating the seas of the Maritime Zone, summaries of reports to governments regarding the grounds of seizure and of minutes indicating the results of searches, lists of "territorial or consular authorities and special delegates competent to take action as regards vessels seized,"<sup>200</sup> copies of judgments and condemnations of vessels, and "[a]ll information that might lead to the discovery of persons engaged in the slave trade" in the specified zone.<sup>201</sup> The second office was an International Bureau at Brussels, attached to the Belgian Foreign Office, whose objective was to facilitate exchange and circulation of documents and information concerning the slave trade.<sup>202</sup> The contracting states undertook to transmit to each other the text of their laws and administrative regulations relating to the General Act<sup>203</sup> and all "[s]tatistical information concerning the slave trade, slaves arrested and liberated, and the traffic in fire arms, ammunition, and alcoholic liquors."<sup>204</sup> The Zanzibar Office was to submit annual reports to the Bureau at Brussels which was to be responsible for the collection and periodic publication of relevant documents and information.<sup>205</sup>

The crystallization of transnational perspectives establishing the unlawfulness of slavery was accelerated by the efforts of national communities, paralleling the international efforts to suppress trade in slaves, to abolish slavery itself. Thus in England, slavery seems to have been regarded as unlawful at least since *Somerset's* case in 1772.<sup>206</sup> In 1791 the French Assembly proclaimed that "every

199. U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 63 (art. 77).

200. *Id.* at 63 (art. 77(3)).

201. *Id.* (art. 77(5)).

202. *Id.* at 64 (art. 82).

203. *Id.* (art. 81(1)).

204. *Id.* (art. 81(2)).

205. *Id.* at 64—65 (arts. 83—84). Because of the Brussels General Act, more had been done by the international community to suppress the slave trade during the period from its enactment to the outbreak of World War I than at any other historical period.

206. *Somerset v. Stewart*, 98 ENG. REP. 499 (K.B. 1772). *Cf.* A. ROBERTSON, HUMAN RIGHTS IN THE WORLD 15 (1972); Fisher, *The Suppression of Slavery in International Law*, 2 INT'L L.Q. 28, 31 (1950); Nadelhafft, *The Somerset [sic] Case and Slavery: Myth, Reality and Repercussions*, 51 J. NEGRO HIST. 193 (1966). For earlier efforts to abolish slavery in Europe see W. BROWNLOW, SLAVERY AND SERFDOM IN EUROPE 204—43 (1969).

person is free as soon as he enters France."<sup>207</sup> When abolition laws were extended to colonial territories or to the "overseas territories" of the "metropolitan" powers, these laws, by the sheer scope of their application, added new dimensions to transnational expectations. Thus, by the Imperial Act of 1833, Great Britain made slavery unlawful throughout the British Empire.<sup>208</sup> Similarly, France in 1848,<sup>209</sup> the Netherlands in 1863,<sup>210</sup> and Portugal in 1878<sup>211</sup> enacted national laws to outlaw slavery in all their territories. In the United States the abolition of slavery was an important issue preceding, and coincided with, the Civil War.<sup>212</sup> Other instances of the abolition of slavery included: Austria<sup>213</sup> and Chile<sup>214</sup> in 1811, Peru in 1821,<sup>215</sup> Guatemala in 1824,<sup>216</sup> Ceylon,<sup>217</sup> and Dominican Republic<sup>218</sup> in 1844, Tunisia in 1846,<sup>219</sup> Denmark<sup>220</sup> and Hungary in 1848,<sup>221</sup> Ecuador in 1851,<sup>222</sup> Argentine in 1853,<sup>223</sup> Venezuela in 1854,<sup>224</sup> Brazil in 1871,<sup>225</sup>

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207. H. LAUTERPACHT, AN INTERNATIONAL BILL, *supra* note 135, at 100.

208. *Suppression of Slavery*, 2 GENEVA SPECIAL STUDIES No. 4, at 4 (1931) [hereinafter cited as GENEVA STUDIES ON SLAVERY].

209. *Id.*

210. *Id.*

211. *Id.*

212. The thirteenth amendment, which was ratified on December 6, 1865, provides:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

*See generally* 2 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1004—08 (student ed. 1967); Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment* (pts. 1—2), 9 NAT'L B.J. 26 (1951) & 10 NAT'L B.J. 7 (1952); tenBroek, *The Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171 (1951).

213. *See* AWAD'S REPORT ON SLAVERY, *supra* note 128, at 18.

214. *Id.* at 31.

215. *Id.* at 112.

216. *Id.* at 70.

217. *Id.* at 29—30.

218. *Id.* at 55.

219. *Id.* at 134.

220. *Id.* at 53.

221. *Id.* at 73.

222. *Id.* at 55.

223. *Id.* at 16.

224. *Id.* at 161.

225. GENEVA STUDIES ON SLAVERY, *supra* note 208, at 4.

Cuba in 1886,<sup>226</sup> Egypt in 1896,<sup>227</sup> Siam in 1905,<sup>228</sup> and China in 1909.<sup>229</sup> The virtual universal identity in national prescription against slavery did not, however, succeed in abolishing it in fact. As has been pointed out:

[T]o make slavery illegal and to stamp it out in practice were found to be two different matters altogether. Laws exist almost everywhere, but practices do not conform with them. It has become increasingly clear, in recent decades, that national laws for the abolition of slavery are not enough.<sup>230</sup>

The more direct and explicit transnational perspectives against slavery were revived after the establishment of the League of Nations. Since activities under the Brussels General Act had been disrupted by World War I, at the end of the war it was felt among the state parties to this Act and to the General Act of Berlin of 1885 that a new convention was needed. Hence, the Convention of St. Germain-en-Laye of 1919<sup>231</sup> was signed and ratified by Belgium, France, Italy, Japan, the United Kingdom, and the United States. Building upon and strengthening Article 6 of the Berlin Act of 1885,<sup>232</sup> the contracting states pledged, according to Article 11 of the St. Germain Convention,<sup>233</sup> to exercise their continued vigilance "over the preservation of the native populations [in Africa] and to supervise the improvement of the conditions of their moral and material well being," and to "secure the complete suppression of slavery in all its forms," including forced labor, sham adoption of children, involuntary concubinage, and debt bondage, and "of the slave trade by land and sea."<sup>234</sup> In widening the concept of slavery to include its functional equivalents—"slavery in all its forms"—this Convention was a step forward. It has, however, been criticized on the grounds that it failed to embody provisions for enforcement, and that it had, according to a widely subscribed interpretation, the unfortunate effect of abrogating the Berlin Act of 1885 and the Brussels Act of 1890, at least among the immediately

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226. AWAD'S REPORT ON SLAVERY, *supra* note 128, at 49.

227. *Id.* at 139.

228. H. LAUTERPACHT, AN INTERNATIONAL BILL, *supra* note 135, at 101 n.11.

229. *Id.*

230. GENEVA STUDIES ON SLAVERY, *supra* note 208, at 4.

231. Convention with other Powers revising the General Act of Berlin, Sept. 10, 1919, 49 STAT. 3027, T.S. No. 877 (effective April 3, 1930).

232. See notes 184—89 & accompanying text *supra*; U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 9.

233. U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 12.

234. *Id.*

contracting parties.<sup>235</sup>

The Covenant of the League of Nations touched upon slavery in the context of the Mandates System which was purportedly designed to fulfill "a sacred trust of civilisation" by promoting "the well-being and development" of the inhabitants of the mandated territories.<sup>236</sup> Article 22(5) of the Covenant proscribed practices "such as the slave trade" in these territories.<sup>237</sup> General international conventions governing the slave trade, existing or prospective, were made applicable to all classes of Mandate. The special charters for the "C" mandates stipulated, as a rule, that "the slave trade shall be prohibited and no forced labor be permitted except for essential public work and services, and then only in return for adequate remuneration."<sup>238</sup> In the case of the Class B mandates, it was incumbent upon the mandatory power to facilitate the ultimate emancipation of all slaves and the elimination of slavery, domestic and other, as speedily as social conditions would permit.<sup>239</sup> The mandatory powers were required to submit annual reports on their administration, furnishing information relating to slavery and the slave trade, and to forced labor and other forms of servitude, as well as measures taken for their suppression. These reports were first examined by the Permanent Mandates Commission, a body of experts, and then transmitted to the Council of the League for review and recommendations.<sup>240</sup>

In an effort to cope with the question of slavery on a wider scale,

235. *See id.* at 11; C. GREENIDGE, *supra* note 81, at 178—79.

236. LEAGUE OF NATIONS COVENANT art. 22(1). *See also* J. HARRIS, *SLAVERY OR "SACRED TRUST?"* (1926).

237. LEAGUE OF NATIONS COVENANT art. 22(5).

238. GENEVA STUDIES ON SLAVERY, *supra* note 208, at 5.

239. *See* U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 12, 27—28.

These prescriptions about slavery were reinforced by Article 23 of the Covenant, the applicability of which was not confined to mandated territories. Pursuant to this Article, the Members of the League,

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children . . . .

LEAGUE OF NATIONS COVENANT art. 23(a)—(c).

240. *See* U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 28.

rather than merely in the mandated territories, the League of Nations in 1922 created the Temporary Slavery Commission to appraise global conditions and to make recommendations.<sup>241</sup> The report of the Commission in 1925<sup>242</sup> led to the adoption by the League Assembly, on September 25, 1926, of a most important convention which is still operative.<sup>243</sup> The Slavery Convention of 1926<sup>244</sup> contains only twelve articles. At the outset, in Article 1, it seeks to clarify the conception of the slavery that is being prohibited and to reconfirm older perspectives against the slave trade:

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.<sup>245</sup>

In Article 2, the contracting parties undertake to "prevent and suppress the slave trade" and "bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms."<sup>246</sup>

Slavery, as defined in Article 1(1), could be interpreted to confine what is prohibited technically to "chattel slavery" only.<sup>247</sup> Similarly, the qualification, "bring about progressively and as soon as possible,"<sup>248</sup> obviously weakens the commitment toward the "complete

241. See *id.* at 12; GENEVA STUDIES ON SLAVERY, *supra* note 208, at 7—8.

242. League of Nations Doc. A.19.1925. VI (1925). The Commission submitted the Report to Sir Eric Drummond, Secretary-General of the League, on July 25, 1925. See 5 MONTHLY SUMMARY OF THE LEAGUE OF NATIONS 180—83 (Aug. 15, 1925).

243. See note 280 & accompanying text *infra*.

244. International Convention to Suppress Slave Trade and Slavery, *adopted* Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927) [hereinafter cited as Convention to Suppress Slave Trade]. For a commentary see A. WARSHUIS, J. CHAMBERLAIN & Q. WRIGHT, THE SLAVERY CONVENTION OF GENEVA, SEPTEMBER 25, 1926 (International Conciliation No. 236, 1928).

245. Convention to Suppress Slave Trade, *supra* note 244, art. 1, 60 L.N.T.S. at 263.

246. *Id.* art. 2.

247. Regarding "chattel slavery" see C. GREENIDGE, *supra* note 81, at 36—48.

248. Such a gradual approach was justified on the ground that sudden abolition would almost certainly result in social and economic disturbances which would be more prejudicial to the development and well-being of the peoples than the provisional continuation of the present state of affairs.

U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 15.

abolition of slavery.” The choice words, “slavery in all its forms,” is, however, of considerable significance, especially in the light of Article 5 which concerns forced labor:

The High Contracting Parties recognize that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.<sup>249</sup>

Compulsory or forced labor, save in certain transitional circumstances, is to be exacted only for public purposes. Hence, in terms of broadening the concept of slavery to include certain functional approximations, the 1926 Convention offers some augmentation to the previous treaties concerning slavery and the slave trade, including the General Act of Brussels of 1890.<sup>250</sup>

Unfortunately, the measures of implementation achieved were not adequate to support this policy. In an attempt to revive a right to visit, search, and seize vessels carrying slaves, the British government proposed before the Sixth Assembly of the League in 1925 that provision be made to treat the transport of slaves as piracy, thereby empowering public ships to exercise the same authority regarding such vessels as for those engaged in piracy.<sup>251</sup> The proposal was not accepted.<sup>252</sup> Instead, Article 3 of the Convention merely binds the contracting parties to

adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.<sup>253</sup>

Article 3 further states that the parties “undertake to negotiate as soon as possible a general Convention with regard to the slave trade.”<sup>254</sup> This provision, as indicated in the United Nations Memorandum of 1951, “envisaged a revival with some modification of the

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249. Convention to Suppress Slave Trade, *supra* note 244, art. 5, 60 L.N.T.S. at 265.

250. See notes 159—240 & accompanying text *supra*.

251. See Gutteridge, *Supplementary Slavery Convention, 1956*, 6 INT'L & COMP. L.Q. 449, 454—56 (1957).

252. *Id.* See also M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 883 (1962).

253. Convention to Suppress Slave Trade, *supra* note 244, art. 3, 60 L.N.T.S. at 263.

254. *Id.*



maritime provisions of the General Act of Brussels 1890 as regards the Indian Ocean and Red Sea Coastal areas zone."<sup>255</sup> The contemplated General Convention has, however, never materialized. Similarly, no continuing agencies comparable to those under the General Act of Brussels have been established.

The proscription of forced labor which, in the words of Article 5 of the 1926 Slavery Convention, tends to develop into "conditions analogous to slavery,"<sup>256</sup> was given further concrete expression when the Convention concerning Forced or Compulsory Labour,<sup>257</sup> under the auspices of the International Labour Organization, was adopted on June 28, 1930, and came into effect on May 1, 1932. This Convention is significant in its recognition that "direct slavery cannot be overcome successfully until a way is found to deal with the variety of forms of coercive labor which in many cases become analogous to the root evil itself."<sup>258</sup> Article 1 of the Convention binds the contracting parties "to suppress the use of forced or compulsory labour in all its forms within the shortest possible period."<sup>259</sup> "Forced or compulsory labour" is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."<sup>260</sup> Article 2(2) explicitly exempts from this proscription "any work or service exacted in virtue of compulsory military service laws,"<sup>261</sup> "normal civic obligations,"<sup>262</sup> "a conviction in a court of law,"<sup>263</sup> emergencies,<sup>264</sup> and "minor communal services."<sup>265</sup> In sum, while the Convention forbids forced labor "for private purposes" in unequivocal terms, it adopts "a policy of gradual elimination" of forced labor "for public purposes."<sup>266</sup>

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255. U.N. MEMORANDUM ON SLAVERY, *supra* note 158, at 18.

256. Convention to Suppress Slave Trade, *supra* note 244, art. 5, 60 L.N.T.S. at 265.

257. Convention Concerning Forced or Compulsory Labour, *adopted* June 28, 1930, 60 U.N.T.S. 55 (I.L.O. General Conference) (entered into force May 1, 1932).

258. GENEVA STUDIES ON SLAVERY, *supra* note 208, at 12.

259. Convention Concerning Forced or Compulsory Labour, *adopted* June 28, 1930, art. 1(1), 60 L.N.T.S. 55, 56 (I.L.O. General Conference) (entered into force May 1, 1932).

260. *Id.* art. 2(1), 60 L.N.T.S. at 58.

261. *Id.* art. 2(2)(a).

262. *Id.* art. 2(2)(b).

263. *Id.* art. 2(2)(c).

264. *Id.* art. 2(2)(d).

265. *Id.* art. 2(2)(e).

266. C. JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS 28-29 (1960). On the question of forced labor see W. KLOOSTERBOER, INVOLUNTARY LABOUR

The establishment of the United Nations brought a new intensity to international efforts to eradicate slavery and suppress the slave trade. Though the word "slavery" is not used in the Charter of the United Nations, the provisions concerning human rights throughout the document make slavery completely incompatible with the Charter.<sup>267</sup>

The Charter's fundamental thrust against slavery is made more explicit in the words of the Universal Declaration of Human Rights.<sup>268</sup> Article 4 of this Declaration, an article acclaimed by one commentator as "the cornerstone of all human rights,"<sup>269</sup> states:

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.<sup>270</sup>

The legislative history of this Article establishes that the term "servitude" was intended to be so inclusive as to embrace the various functional equivalents of slavery, such as traffic in women, forced labor, and debt bondage.<sup>271</sup> In an instrument stressing that "[a]ll human beings are born free and equal in dignity and rights"<sup>272</sup> and that "[e]veryone has the right to recognition everywhere as a per-

SINCE THE ABOLITION OF SLAVERY (1960).

267. The Charter expresses its profound concern for human rights in its preamble and in six different articles; U.N. CHARTER arts. 1(3), 3(1)(b), 55, 56, 62, & 76. After reaffirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," the preamble projects, as one of its fundamental goals, international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* preamble. Phrases such as "promoting and encouraging respect of human rights" and "assisting in the realization of human rights and fundamental freedoms" appear with slight variations elsewhere in the Charter. Under Article 56

[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

*Id.* art. 56.

Among the above-mentioned purposes of Article 55 is "universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion."

*Id.* art. 55.

268. Universal Declaration, note 55 *supra*.

269. N. ROBINSON, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 107 (1958).

270. Universal Declaration, *supra* note 55, art. 4, U.N. Doc. A/810 at 73.

271. N. ROBINSON, *THE DELCARATION OF HUMAN RIGHTS* 107—08 (1958).

272. Universal Declaration, *supra* note 55, art. 1, U.N. Doc. A/810 at 72.

son before the law,"<sup>273</sup> a less inclusive formulation could scarcely be accepted.

In consolidation of earlier efforts, a new Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others<sup>274</sup> in 1949 proscribed an ancient form of human bondage. This Convention records the agreement of the parties to

punish any person who, to gratify the passions of another:

1. Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
2. Exploits the prostitution of another person, even with the consent of that person.<sup>275</sup>

The Convention also makes an offense of keeping or managing or knowingly financing "a brothel," or knowingly letting or renting "a building or other place" "for the purpose of the prostitution of others."<sup>276</sup> These offenses are, further, made "extraditable offenses."<sup>277</sup> The Convention, unfortunately, relies largely upon penal sanctions which have proved peculiarly inadequate in coping with this mode of human bondage. In the words of Nanda and Bassiouni:

[T]he emphasis was on penal sanctions without giving adequate consideration to the endemic social and psychological reasons for the existence of the problem and without any serious attempts at changing subjectivities and mores.<sup>278</sup>

As a result of a number of surveys requested by the General Assembly and the Economic and Social Council,<sup>279</sup> the United Nations has formally assumed the functions of the League of Nations under the 1926 Slavery Convention by virtue of a Protocol adopted by the General Assembly in 1953.<sup>280</sup> More importantly, the broad formulation of slavery in Article 4 of the Universal Declaration of Human

273. *Id.* art. 6.

274. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 (entered into force July 25, 1951).

275. *Id.* art. 1, 96 U.N.T.S. at 274.

276. *Id.* art. 2.

277. *Id.* art. 8, 96 U.N.T.S. at 276. We do not deal here with all aspects of this Convention. Other dimensions will be dealt with in a separate study on the affection value.

278. Nanda & Bassiouni, *Slavery and Slave Trade: Steps Toward Eradication*, 12 SANTA CLARA LAWYER 424, 440 (1972).

279. See UNITED NATIONS, *THE UNITED NATIONS AND HUMAN RIGHTS* 17 (1973).

280. Protocol Amending the Slavery Convention, *opened for signature* Dec. 7, 1953, [1956] 1 U.S.T. 479, T.I.A.S. No. 3532, 212 U.N.T.S. 17 (entered into force Dec. 7, 1953).

Rights has been put into convention form. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,<sup>281</sup> adopted on April 30, 1956, and entering into effect exactly a year later, seeks, as its lengthy title and preamble show, to "supplement" and "augment," and not to "abrogate," the 1926 Slavery Convention by according prominent attention to efforts to eliminate "institutions and practices similar to slavery," *i.e.*, all the various functional approximations to slavery.<sup>282</sup> Article 1 binds the contracting parties to

take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices . . .

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.<sup>283</sup>

In other provisions, in order to minimize the bondage of women,

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281. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *done* Sept. 7, 1956, [1967] 3 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957) [hereinafter cited as Supplementary Convention on Abolition of Slavery].

282. *Id.* preamble, [1967] 3 U.S.T. at 3204, 266 U.N.T.S. at 40-41.

283. *Id.* art. 1, [1967] 3 U.S.T. at 3204-05, 266 U.N.T.S. at 41.

the Convention stresses the importance of "consent" in marriages, and encourages national prescription of "suitable minimum ages of marriage" and "the registration of marriages."<sup>284</sup> In broader reach, Article 4 provides that "[a]ny slave who takes refuge on board any vessel of a State Party to this Convention shall *ipso facto* be free."<sup>285</sup> Article 5 forbids "mutilating, branding or otherwise marking a slave or a person of servile status."<sup>286</sup> While the word "slavery" is employed, as under the 1926 Convention, to designate classic "chattel" slavery, "a person of servile status" is made to refer to a victim of practices analogous to slavery, as outlined in Article 1 of the Convention.<sup>287</sup>

In measures toward implementation, the intelligence function is emphasized, requiring both mutual exchanges of information among the parties and active cooperation with the United Nations. The parties undertake to communicate to the U.N. Secretary-General, as a clearing center, "copies of any laws, regulations and administrative measures enacted or put into effect to implement the provisions of this Convention."<sup>288</sup> Despite efforts to revive a right of visit and search for vessels engaged in the slave trade, equating such ships with those engaged in piracy,<sup>289</sup> the 1956 Supplementary Convention provides only Article 3(1) which reads:

The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offense under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.<sup>290</sup>

The responsibility for punishment is, by this provision, confined to the flag state. Fortunately, this gap was quickly remedied by the Convention on the High Seas concluded in 1958.<sup>291</sup> This Convention, in addition to incorporating the substance of the 1956 Supplementary Convention,<sup>292</sup> stipulates in Article 22(1) a "reasonable ground

284. *Id.* art. 2, [1967] 3 U.S.T. at 3205, 266 U.N.T.S. at 42.

285. *Id.* art. 4.

286. *Id.* art. 5.

287. *Id.* art. 7, [1967] 3 U.S.T. at 3206, 266 U.N.T.S. at 43.

288. *Id.* art. 8(2), [1967] 3 U.S.T. at 3206, 266 U.N.T.S. at 44.

289. See Gutteridge, *Supplementary Slavery Convention, 1956*, 6 INT'L COMP. L.Q. 449, 454-60, 465-69 (1957).

290. Supplementary Convention on Abolition of Slavery, *supra* note 281, art. 3(1), [1967] 3 U.S.T. at 3205, 266 U.N.T.S. at 42.

291. Convention on the High Seas, *done* Apr. 29, 1958, [1962] 2 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

292. Article 13 of the High Seas Convention reads:

for suspecting” that “the ship is engaged in the slave trade,” along with suspicion of piracy, as among the exceptional circumstances which justify a warship in boarding “a foreign merchant on the high seas.”<sup>293</sup>

In response to the findings of the United Nations International Labour Organization *Ad Hoc* Committee on Forced Labour regarding the prevalence of “forced” or “corrective” labor as an instrument of “political coercion” or for other purposes,<sup>294</sup> a new Convention concerning the Abolition of Forced Labour was unanimously adopted, on June 25, 1957, by the General Conference of the International Labour Organization.<sup>295</sup> Article 1 of the Convention provides:

Each Member of the International Labour Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour:

- (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) As a method of mobilising and using labour for purposes of economic development;
- (c) As a means of labour discipline;
- (d) As a punishment for having participated in strikes;

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Every state shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.

*Id.* art. 13, [1962] 2 U.S.T. at 2316—17, 450 U.N.T.S. at 90.

Compare *id.*, with Article 4 of the 1956 Supplementary Convention:

Any slave who takes refuge on board any vessel of a State Party to this Convention shall *ipso facto* be free.

Supplementary Convention on Abolition of Slavery, *supra* note 281, art. 4, [1967] 3 U.S.T. at 3205, 266 U.N.T.S. at 42.

293. Convention on the High Seas, *done* Apr. 29, 1958, art. 22(1), [1962] 2 U.S.T. 2318, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 92.

294. See UNITED NATIONS & INTERNATIONAL LABOUR OFFICE, REPORT OF THE AD HOC COMMITTEE ON FORCED LABOUR, U.N. Doc. E/2431 (1953); International Labour Conference, 39th Session, Geneva, 1956, Report VI (2) (Supplement), REPORT OF THE ILO COMMITTEE ON FORCED LABOUR (1956); International Labour Conference, 40th Session, Geneva, 1957, Report IV (2) (Supplement), REPORT OF THE ILO COMMITTEE ON FORCED LABOUR (1957).

295. Convention Concerning the Abolition of Forced Labour, *adopted* June 25, 1957, 320 U.N.T.S. 292 (entered into force Jan. 17, 1959) (I.L.O. General Conference). For a commentary see C. JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS 25—46 (1960).

(e) As a means of racial, social, national, or religious discrimination.<sup>296</sup>

The drive toward implementation similarly takes on added intensity. Unlike the familiar phrases, "within the shortest possible period" and "progressively and as soon as possible" employed in the earlier Conventions,<sup>297</sup> the contracting parties pledge themselves to undertake "effective measures to secure the *immediate and complete* abolition of forced or compulsory labour."<sup>298</sup>

The ever growing transnational perspectives of authority outlawing slavery in all its manifestations was consolidated in the International Covenant on Civil and Political Rights adopted in 1966.<sup>299</sup> Thus, Article 8 of the Covenant states:

1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour . . . .<sup>300</sup>

The qualifications to this inclusiveness are that the "forced or compulsory labor" specified in paragraph 3(a) of Article 8 is not to be held "to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court,"<sup>301</sup> and is not to include:

- (i) Any work or service, not referred to in sub-paragraph *b*, normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
- (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.<sup>302</sup>

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296. Convention Concerning the Abolition of Forced Labour, *adopted June 25, 1957*, art. 1, 320 U.N.T.S. 294—96 (entered into force Jan. 17, 1959) (I.L.O. General Conference).

297. See notes 159—266 & accompanying text *supra*.

298. Convention Concerning the Abolition of Forced Labour, *supra* note 295, art. 2, 320 U.N.T.S. at 296 (emphasis added).

299. Covenant on Civil and Political Rights, note 57 *supra*.

300. *Id.* art. 8(1)—(3)(a), U.N. GAOR Supp. 16, at 54.

301. *Id.* art. 8(3)(b).

302. *Id.* art. 8(3)(c).

The legislative history of Article 8 establishes clearly that, even if "slavery" is given a more "limited and technical" connotation,<sup>303</sup> "servitude" is "a more general idea covering all possible forms of man's domination of man."<sup>304</sup> The proposed prohibition is described as extending to "servitude in any form, whether involuntary or not," so as to make it impossible "for any person to contract himself into bondage."<sup>305</sup>

On the regional level, comparable provisions, with the same degree of specification and with slight variations in wording, are found in Article 4 of the European Convention on Human Rights<sup>306</sup> and Article 6 of the American Convention on Human Rights.<sup>307</sup> Though

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303. *Annotations on the text of the Draft International Covenants on Human Rights*, 10 U.N. GAOR, Annexes, Agenda Item No. 28, at 33, U.N. Doc. A/2929 (1955) [hereinafter cited as *Annotations on the Covenants*].

304. *Id.*

305. *Id.*

306. Article 4 of the European Convention reads:

(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

European Convention, *supra* note 11, art. 4, 213 U.N.T.S. at 224—26.

307. Article 6 of the American Convention on Human Rights provides:

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.

2. No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

3. For the purposes of this article the following do not constitute forced or compulsory labour:

(a) work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical



Article 4 of the European Convention, for reasons unclear, omits specific reference to "the slave trade," it can scarcely be interpreted to make the slave trade permissible. Unlike the Covenant and the European Convention, Article 6(1) of the American Convention<sup>308</sup> uses the wording "involuntary servitude" instead of "servitude" and enumerates the prohibition of "traffic in women," together with that of the slave trade. The use of the additional word "involuntary" could lend support to restrictive interpretation that "voluntary" servitude is permissible. Such a reading would obviously be a misinterpretation, however, in the light of the whole development in transnational expectations of authority against slavery and servitude.<sup>309</sup>

The comprehensiveness with which slavery is prohibited is emphasized in Article 4(2) of the International Covenant on Civil and Political Rights<sup>310</sup> and in Article 15(2) of the European Convention,<sup>311</sup> both of which provide that under no circumstances (including even national emergencies) can there be derogation from the prohibition of slavery, the slave trade, and servitude. Regrettably, this restriction is not extended to the proscription of forced labor.<sup>312</sup>

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person;

(b) military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;

(c) service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or

(d) work or service that forms part of normal civic obligations.

American Convention, *supra* note 59, art. 6, 9 INT'L LEGAL MATERIALS at 103.

308. *Id.* art. 6(1).

309. See notes 158—305 & accompanying text *supra*.

310. Covenant on Civil and Political Rights, *supra* note 57, art. 4(2), 21 U.N. GAOR Supp. 16, at 53.

311. European Convention, *supra* note 11, art. 15(2), 213 U.N.T.S. at 232.

312. In the *Iversen Case*, brought before the European Commission on Human Rights, Iversen contended that his compulsory assignment under Norway's Provisional Act of 1956 to the public dental service in the Moskenes district in northern Norway constituted forced or compulsory labor in contravention of Article 4(2) of the European Convention. Drawing upon "the provisions and application of ILO Conventions and Resolutions on Forced Labour," the Commission identified the following two elements as essential to the concept of forced or compulsory labor: 1) "the work or service is performed by the worker against his will," and 2) the work or service performed "is unjust or oppressive" or "involves avoidable hardship." *Iversen Case*, [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 278, 328. Applying these criteria, the Commission concluded that Iversen's service was not forced or compulsory labor under Article 14, paragraph (2) of the Convention. The decision was based on the findings that

Such deficiency in prohibition is remedied in Article 27 of the American Convention<sup>313</sup> which specifies immunity from derogation for the prohibition of "forced or compulsory labor," as well as that of slavery, involuntary servitude, or the slave trade.

The continuing need for more effective measures of implementation to eradicate all forms of slavery has been underscored by insistent demands within the United Nations for further study. At the request of the Economic and Social Council in July, 1963, the Secretary-General appointed Mohamed Awad as Special Rapporteur on Slavery.<sup>314</sup> Based upon the responses of the member states of the United Nations, the specialized agencies, and interested non-governmental organizations with consultative status, the Special Rapporteur completed a comprehensive survey, *Report on Slavery*,<sup>315</sup> in 1966. After reviewing Awad's report, the Economic and Social Council, in July, 1966, decided to refer the "question of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of *apartheid* and colonialism"<sup>316</sup> to the Commission on Human Rights for further study and specific recommendations of measures of implementation.<sup>317</sup> The Commission in turn entrusted this task to its Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>318</sup> Thus, in 1968, Mohamed Awad was again appointed Special Rapporteur and was

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the Provisional Act of 1956 imposed obligatory service, but since such service was for a short period, provided favourable remuneration, did not involve any diversion from chosen professional work, was only applied in the case of posts not filled after being duly advertised, and did not involve any discriminatory, arbitrary or punitive application, the requirement to perform that service was not unjust or oppressive; the Law of 1956 was properly applied to Iversen when he was directed to take up the post at Moskenes; further, in the particular case of the Applicant, the hardship of the post was mitigated by the reduction in the required term of his service from 2 years to 1 year.

*Id.*

An additional ground of justification, based on Article 4(3)(c), was the existence of an emergency caused by "threat of a breakdown" in the public dental service in northern Norway. *Id.* at 330.

313. American Convention, *supra* note 59, art. 27, 9 INT'L LEGAL MATERIALS at 109.

314. ECOSOC Res. 960, 36 U.N. ECOSOC Supp. 1, at 26, U.N. Doc. E/3816 (1963).

315. AWAD'S REPORT ON SLAVERY, note 128 *supra*.

316. ECOSOC Res. 1126, 41 U.N. ECOSOC Supp. 1, at 16, U.N. Doc. E/4264 (1966).

317. *Id.* at 7.

318. Commission on Human Rights, Report of the Twenty-third Session, 20 Feb.—23 March, 1967, 42 U.N. ECOSOC Supp. 6, at 159—61 (1967).

later instructed to study not only slavery but also "measures for combating the manifestations of the slavery-like practices akin to *apartheid* which exist in Southern Rhodesia and Namibia, especially the practices of forced, sweated African labour and the total denial of trade union rights to Africans in those territories."<sup>319</sup> After extensive consultations with the officials of many different intergovernmental organizations,<sup>320</sup> the Special Rapporteur in 1971 submitted his report<sup>321</sup> which contained a number of concrete proposals toward more effective implementation of the proscriptions of slavery and the slave trade in all their forms.<sup>322</sup>

The culmination of these activities has been the adoption by the Economic and Social Council on June 2, 1972, of an important resolution, Resolution 1695 (LII),<sup>323</sup> which incorporates and reflects essentially, except in one most important point,<sup>324</sup> the recommendations of the Special Rapporteur.<sup>325</sup> In summary, the Resolution urges the following:

1) wider ratifications of, or accession to, the 1926 Slavery Convention and the 1956 Supplementary Convention;<sup>326</sup>

2) enactment of necessary national laws "to prohibit slavery and the slave trade in all their practices and manifestations and to provide effective penal sanctions;"<sup>327</sup>

3) wider acceptance of the Forced Labor Convention of 1930, the Abolition of Forced Labor Convention of 1957, and other related

319. Sub-Commission Resolution 4 (XXII) of 10 September 1969. See *Question of Slavery and the Slave Trade in All Their Practices and Manifestations, Including the Slavery-like Practices of Apartheid and Colonialism* 5—6, U.N. Doc. E/CN.4/Sub.2/322 (1971) (Report submitted by the Special Rapporteur, Mr. Mohamed Awad) [hereinafter cited as *Awad's 1971 Report*].

320. The most important consultations were with officials of the International Labor Organization, the Office of United Nations High Commissioner for Refugees, Division of Narcotic Drugs, International Criminal Police Organization (INTERPOL), United Nations Educational, Scientific and Cultural Organization. See *Awad's 1970 Progress Report*, *supra* note 126, at 11—43; *Awad's 1971 Report*, *supra* note 319, at 9—29. Of non-governmental organizations, the Anti-Slavery Society contributed most importantly to the Special Rapporteur's survey.

321. *Awad's 1971 Report*, note 319 *supra*.

322. See *id.* at 32—50. See also AWAD'S REPORT ON SLAVERY, *supra* note 128, at 299—314; *Awad's 1970 Progress Report*, *supra* note 126, at 43—48.

323. ECOSOC Res. 1695, 52 U.N. ECOSOC Supp. 1, at 21, U. N. Doc. E/5183 (1972).

324. See text accompanying notes 337—51 *infra*.

325. See note 322 *supra*.

326. ECOSOC Res. 1695 ¶ 1, 52 U.N. ECOSOC Supp. 1, at 21, U.N. Doc. E/5183 (1972).

327. *Id.* ¶ 3.

Conventions and Recommendations adopted by the International Labor Organization;<sup>328</sup>

4) the cooperation of the International Criminal Police Organization (INTERPOL) with the United Nations, especially in furnishing information regarding "the international traffic in persons;"<sup>329</sup>

5) transmission by the Secretary-General of relevant information to the Sub-Commission;<sup>330</sup>

6) acceleration of national efforts toward "total emancipation of slaves and other persons of servile status" and absorption of such persons into "the general labor force;"<sup>331</sup>

7) assistance to victimized persons by all specialized agencies, intergovernmental organizations and non-governmental organizations concerned;<sup>332</sup>

8) exploration by the Sub-Commission of the "possibility" of establishing "some form of permanent machinery;"<sup>333</sup> and

9) preparation by the Secretary-General of "a survey on national legislation" and "a plan of technical co-operation," and submission of progress reports.<sup>334</sup>

#### *iv. Appraisal and recommendations*

From a perspective of many decades, there has been a conspicuous and consistent movement in transnational prescription toward the broad prohibition of servitude in all its many manifestations.<sup>335</sup> In substantive content, the contemporary prohibition would appear sufficiently comprehensive to meet all pertinent requirements. The more important community prescriptions most emphatically endorse and reflect basic policies consonant with our fundamental objectives and specifications honoring freedom of choice.<sup>336</sup>

In terms of implementation, however, achievements in the transnational arena have lagged. Undoubtedly, the adoption of the recommendations embodied in ECOSOC Resolution 1695 (LII) of 1972<sup>337</sup> would contribute greatly toward the elimination of slavery and the slave trade. The step most urgently required, however, is the establishment of a permanent body to oversee the application

328. *Id.* ¶ 4, at 22.

329. *Id.* ¶ 6.

330. *Id.* ¶ 7.

331. *Id.* ¶ 8.

332. *Id.* ¶ 9.

333. *Id.* ¶ 12.

334. *Id.* ¶ 13(a)—(b).

335. See notes 136—334 & accompanying text *supra*.

336. See notes 18—52 & accompanying text *supra*.

337. See notes 323—34 & accompanying text *supra*.

of all relevant international conventions. In this regard, it must be conceded that the response of the Economic and Social Council has been disappointing. When the Special Rapporteur of Slavery submitted his recommendations both in 1966<sup>338</sup> and in 1971,<sup>339</sup> he took occasion to emphasize, in the light of the earlier experience under the 1890 General Act of Brussels and the League of Nations, the overriding importance of establishing a standing committee of independent experts on slavery.<sup>340</sup> This he insisted was "the one suggestion which can be said to embrace all the other suggestions,"<sup>341</sup> such a committee "could help in promoting and supervising all the other activities."<sup>342</sup> In 1966, however, the Economic and Social Council avoided responsibility by referring "the question of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of *apartheid* and colonialism" to the Commission on Human Rights.<sup>343</sup> The infusion of the issues of "*apartheid* and colonialism," matters of proper and continuing concern to other U.N. bodies,<sup>344</sup> has further had the unfortunate effect of dispersing attention from the core question of slavery. Similarly, in 1972, the Economic and Social Council, in its Resolution 1695(LII),<sup>345</sup> instead of establishing appropriate permanent machinery for supervision, went no further than to order further study and exploration. For this purpose, it directed

the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine the possibility of the establishment of some form of permanent machinery to give advice on the elimination of slavery and on the suppression of the traffic in persons and exploitation of the prostitution of others, and to make recommendations with a view to seeking the better implementation of the United Nations instruments concerned.<sup>346</sup>

If the world community is genuinely interested in the complete eradication of all manifestations of slavery, it is urgently necessary to go beyond further studies and to establish without more delay a

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338. AWAD'S REPORT ON SLAVERY, note 128 *supra*.

339. *Awad's 1971 Report*, note 319 *supra*.

340. See AWAD'S REPORT ON SLAVERY, *supra* note 128, at 307-09; *Awad's 1971 Report*, *supra* note 319, at 49-50.

341. AWAD'S REPORT ON SLAVERY, *supra* note 128, at 307.

342. *Id.*

343. See text accompanying note 317 *supra*.

344. See notes 505-650 & accompanying text *infra*.

345. ECOSOC Res. 1695, 52 U.N. ECOSOC Supp. 1, at 21, U.N. Doc. E/5183 (1972).

346. *Id.* ¶ 12, at 22.

permanent body of independent experts whose charter of authority follows the guidelines proposed by the Special Rapporteur.<sup>347</sup> Among the essential activities of such a body would of course be the intelligence function—the gathering, processing, and dissemination of information relevant to decision-making.<sup>348</sup> In a world whose crystallized community expectations so thoroughly condemn slavery and the slave trade, it is reasonable to anticipate that the authoritative exposure of offending practices would be a long step toward their eradication. The new body could also perform the promoting function by addressing action recommendations to the United Nations, to other inter-governmental organizations, and to the various states. The permanent body could also be equipped to perform an invoking function, if granted authority to bring complaints to the Commission on Human Rights<sup>349</sup> or other appropriate bodies. Similarly, it could be directed to submit regular reports to the Economic and Social Council<sup>350</sup> in which appraisals are made of how states and inter-governmental organizations are discharging their responsibilities. Finally, the agency could design and supervise programs in education calculated to instruct and mobilize both the general public and effective elites toward more effective application of specific policies in the sphere of human rights.<sup>351</sup> Sustained by a vigilant

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347. See AWAD'S REPORT ON SLAVERY, *supra* note 128, at 308—09.

348. See generally McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73 (R. Falk & C. Black eds. 1969).

349. Regarding the procedures of complaints before the Commission on Human Rights see L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 739—856 (1973); Carey, *Progress on Human Rights at the United Nations*, 66 AM. J. INT'L L. 107 (1972); Cassese, *The Admissibility of Communications to the United Nations on Human Rights Violations*, 5 HUMAN RIGHTS J. 375 (1972); Humphrey, *The Right of Petition in the United Nations*, 4 HUMAN RIGHTS J. 463 (1971); Newman, *The New U.N. Procedure for Human Rights Complaints: Reform, Status Quo, or Chambers of Horror?*, in *Hearings on International Protection of Human Rights Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 715—22 (1973); Parsons, *The Individual Right of Petition: A Study of Methods Used by International Organizations to Utilize the Individual as a Source of Information on the Violations of Human Rights*, 13 WAYNE L. REV. 678 (1967); Schwelb, *The Abuse of the Right of Petition*, 3 HUMAN RIGHTS J. 313 (1970); Wilkoc, *Procedures to Deal with Individual Communications to International Bodies: The Subcommission on Prevention of Discrimination and Protection of Minorities*, 1 N.Y.U.J. INT'L L. & POL. 277 (1968).

350. For the importance of the appraising function see Lasswell, *Toward Continuing Appraisal of the Impact of Law on Society*, 21 RUTGERS L. REV. 645 (1967).

351. See Awad's 1971 Report, *supra* note 319, at 47—49. See also J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS 17—21 (1970).

world public opinion, and working in close cooperation with related entities, such as the International Labor Organization (regarding forced labor),<sup>352</sup> INTERPOL (regarding the traffic in persons),<sup>353</sup> and the Food and Agriculture Organization (regarding debt bondage and peonage),<sup>354</sup> such a specialized permanent body might succeed in accomplishing a great deal to make slavery in all its manifestations a thing of the past.

### c. *Claims for Elimination of Caste*

While slavery represents the most extreme deprivation of the fundamental freedom of choice for individuals, caste is a more limited hierarchized, systematic deprivation of groups, as determined by birth (parentage).<sup>355</sup> In cruel paradox, the respect value itself is employed to achieve and freeze hierarchical orderings and rankings, and hence discriminations, among the designated groups, not only in terms of respect, but also of all other values. A caste system

352. See *Awad's 1971 Report*, *supra* note 319, at 10—16; *Awad's 1970 Progress Report*, *supra* note 126, at 12—23.

353. See *Awad's 1971 Report*, *supra* note 319, at 22—27; *Awad's 1970 Progress Report*, *supra* note 126, at 32—39.

354. A crucial task is of course land reform. See *Question of Slavery and the Slave Trade in All Their Practices and Manifestations, Including the Slave-like Practices of Apartheid and Colonialism* 9—11, U.N. Doc. E/CN.4/Sub.2/337 (1973) (note by the Secretary-General).

355. For a discussion of the caste system see S. ANANT, *THE CHANGING CONCEPT OF CASTE IN INDIA* (1972); A. BETEILLE, *CASTES: OLD AND NEW* (1969); *SOCIAL INEQUALITY* (A. Beteille ed. 1969) (especially articles by Beteille, Dumont, and Srinivas); C. BOUGLE, *ESSAYS ON THE CASTE SYSTEM* (D. Pocock transl. 1971); O. COX, *CASTE, CLASS, AND RACE* (Modern Reader ed. 1970) [hereinafter cited as O. COX]; K. DAVIS, *THE POPULATION OF INDIA AND PAKISTAN* (1951); *JAPAN'S INVISIBLE RACE: CASTE IN CULTURE AND PERSONALITY* (G. De Vos & H. Wagatsuma eds. 1966) [hereinafter cited as *JAPAN'S INVISIBLE RACE*]; J. DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (3d ed. 1957); L. DUMONT, *HOMO HIERARCHICUS: AN ESSAY ON THE CASTE SYSTEM* (M. Sainsubry transl. 1970) [hereinafter cited as L. DUMONT]; G. GHURGE, *CASTE AND CLASS IN INDIA* (3d ed. 1957); A. HOCART, *CASTE: A COMPARATIVE STUDY* (1950); J. HUTTON, *CASTE IN INDIA: ITS NATURE, FUNCTION, AND ORIGINS* (4th ed. 1963) [hereinafter cited as J. HUTTON]; G. MYRDAL, *AN AMERICAN DILEMMA* 667—705 (1964); B. RYAN, *CASTE IN MODERN CEYLON* (1953); *STRUCTURE AND CHANGE IN INDIAN SOCIETY* (M. Singer & B. Cohn eds. 1968); M. SRINIVAS, *CASTE IN MODERN INDIA* (1962) [hereinafter cited as M. SRINIVAS]; M. TUMIN, *CASTE IN A PEASANT SOCIETY* (1952) [hereinafter cited as M. TUMIN]; S. VERBA, B. AHMED & A. BHATT, *CASTE, RACE, AND POLITICS: A COMPARATIVE STUDY OF INDIA AND THE UNITED STATES* (1971).

For a definitive historical account of castes in Indian society see 2 P. KANE, *HISTORY OF DHARMASTRA (Ancient and Medieval Religions and Civil Law)* 19—179 (1941) [hereinafter cited as P. KANE]; 5 *id.* at 1632—43 (1962).

decrees and enforces an hereditary (ascriptive) transmission of incapacity for freedom of choice.<sup>356</sup> In most societies a class structure differentiates between individuals in terms of value position, potential, and expectancy.<sup>357</sup> What caste adds to class is the freezing, the immobilization, of these differentiations.<sup>358</sup> In a cognitive map of a caste society the lines between castes are relatively clear. The lines are sustained by customary community expectations and by variegated sanctioning practices, and they are transmitted with little change from generation to generation.<sup>359</sup> Branded as inferior at birth, members of the lower castes, especially the "untouchables" or equivalents, are condemned in perpetuity to low position, potential, and expectancy in relation to all values.<sup>360</sup>

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356. For a concise description see Berreman, *The Concept of Caste*, 2 INT'L ENCYC. SOCIAL SCI. 333 (1968). See also Berreman, *Structure and Function of Caste Systems*, in JAPAN'S INVISIBLE RACE, *supra* note 355, at 277—307.

357. The literature on social stratification is, of course, vast. See generally CLASS, STATUS, AND POWER: SOCIAL STRATIFICATION IN COMPARATIVE PERSPECTIVE (2d ed. R. Bendix & S. Lipset 1966); B. BERNARD, SOCIAL STRATIFICATION: A COMPARATIVE ANALYSIS OF STRUCTURE AND PROCESS (1957); SOCIAL INEQUALITY (A. Beteille ed. 1969); THE IMPACT OF SOCIAL CLASS (P. Blumberg ed. 1972); T. BOTTOMORE, CLASSES IN MODERN SOCIETY (1965); R. DAHRENDORF, CLASSES AND CLASS CONFLICT IN INDUSTRIAL SOCIETY (rev. ed. 1959); SOCIAL MOBILITY IN BRITAIN (D. Glass ed. 1954); C. HELLER, STRUCTURED SOCIAL INEQUALITY (1968); A. HOLLINGSHEAD & F. REDLICH, SOCIAL CLASS AND MENTAL ILLNESS (1958); G. LENSKI, POWER AND PRIVILEGE: A THEORY OF SOCIAL STRATIFICATION (1966); K. MAYER & W. BUCKLEY, CLASS AND SOCIETY (3d ed. 1969); C. MILLS, WHITE COLLAR: THE AMERICAN MIDDLE CLASS (1951); M. MILNER, THE ILLUSION OF EQUALITY (1972); M. TUMIN, SOCIAL STRATIFICATION: THE FORMS AND FUNCTIONS OF INEQUALITY (1971); Parsons, *Social Classes and Class Conflict in the Light of Recent Sociological Theory*, in ESSAYS IN SOCIOLOGICAL THEORY 323 (rev. ed. 1954); *Social Stratification*, 15 INT'L ENCYC. SOCIAL SCI. 288 (1968).

358. As Dobzhansky has put it:

[A] person's caste is determined by that of his parents and by nothing else: one cannot be promoted to a higher caste or demoted to a lower one by any personal achievements or failures. A man of low caste could only hope that good behavior in his present life might let him be reincarnated in a higher caste. Class differentiation is, however, less rigid. Even the most rigid class society allows some individuals of humble birth to climb and others of privileged birth to slide down the social ladder.

T. DOBZHANSKY, *supra* note 40, at 242. See also H. LASSWELL & A. KAPLAN, POWER AND SOCIETY 62—69 (1950).

359. See O. Cox, *supra* note 355, at 3—20.

360. Kane gave this succinct account:

In most of the works on the castes in India a few features are pointed out as the characteristics of the caste system and as common to all castes and sub-castes. They are: (1) heredity (i.e. in theory a man is assigned to a particular caste by birth in that caste); (2) endogamy and exogamy (i.e. restriction as



Formally, participation in the community power process in terms of office-holding (elective as well as appointive) and voting may be open to all members of society. In reality, however, members of the lower castes are singularly handicapped by their lack of effective power, especially by the lack of base values such as wealth, enlightenment, and skill, whose control is necessary to effectiveness.<sup>361</sup> The perpetuation through the generations of a system of hierarchical value deprivations is characteristically sustained by severe deprivations of affection. Marriage is, as a rule, kept within the same caste so as to make crossing of caste lines virtually impossible.<sup>362</sup> Indeed, the whole range of an individual's permissible associations is determined by the group into which a person is born, with the barriers enforced by the myth of "pollution."<sup>363</sup>

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to marrying in the same caste and not marrying certain relatives or other persons, thought of the same caste); (3) restrictions as to food (i.e. what food and water may be taken or not taken and from whom); (4) occupation (i.e. members of most castes follow certain occupations and no others); (5) gradation of castes, some being at the top in the social scale and others being deemed to be so low that they are untouchable.

2 P. KANE, *supra* note 355, at 23. Cf. M. TUMIN, *PATTERNS OF SOCIETY* 91—102 (1973).

361. See M. SRINIVAS, *supra* note 355, 15—41; S. VERBA, B. AHMED & A. BHATT, *CASTE, RACE, AND POLITICS: A COMPARATIVE STUDY OF INDIA AND THE UNITED STATES* (1971).

362. See L. DUMONT, *supra* note 355, at 109—29; S. ANANT, *THE CHANGING CONCEPT OF CASTE IN INDIA* 104—18 (1972). For the invalidity of intercaste marriages under the Hindu Law and Usage see N. AIYAR, *MAYNE'S TREATISE ON HINDU LAW AND USAGE* 103, 164—72 (11th ed. 1950).

363. As Srinivas has put it:

The concept of pollution governs relations between different castes. This concept is absolutely fundamental to the caste system, and along with the concepts of karma and dharma it contributes to make caste the unique institution it is. Every type of inter-caste relation is governed by the concept of pollution. Contact of any kind, touching, dining, sex and other relations between castes which are structurally distant results in the higher of the two castes being polluted.

Srinivas, *The Caste System in India*, in *SOCIAL INEQUALITY* 265, 267 (A. Beteille ed. 1969). In the context of the Far East Passin has observed:

Another common feature is that they are looked upon as inferior and polluted, and in extreme cases perhaps not even quite human. In Japan, for example, the itinerant outcastes were actually called Hinin, "nonhuman"; while the practice of calling the Eta "four", the judgment of the court that they were worth only 1/7th of ordinary people, the use of the classifier for animals in counting them—all bespeak this conception. In Korea, similarly, the *Paekchong* were considered "barbarians" who had to be domesticated. In all cases, they were considered so polluted that their very presence, not to

Access to education and enlightenment may be formally reserved to the higher castes. Even where access is theoretically available to the lower castes, the lack of the other base values upon which the opportunity and leisure for study and inquiry depend may keep the victims of caste ignorant and content in the maintenance of a status quo of rigid stratification.<sup>364</sup> Members of an inferior caste are generally denied opportunity to discover and develop their latent talents or to acquire and exercise many socially useful skills. Certain highly regarded skills—those of the liberal professions, for example—may be kept within the exclusive domain of members of a superior caste, with monopolized transmission from generation to generation. The occupations open to different castes may not only be specialized, but rigidly controlled, with the lower castes being permitted to perform only unskilled labor.<sup>365</sup> This stratified division of occupations and ascriptive transmission of occupational skills often result in wide disparities in the distribution of wealth, with the lower castes living in a poverty often bordering on debt bondage.<sup>366</sup>

Conditioned early in life to view their superior or inferior status as a “natural” or “divine” expression of God’s will or as a “functional necessity” of society,<sup>367</sup> members of different castes are taught to be content with their respective pre-fixed stations in society. This acceptance of place and role, with its alleged avoidance of anxiety and disorder, is thought to be a key to individual well-being. Thus, life styles are made to differ significantly in terms of food, clothing, appearance, demeanor, and so on.<sup>368</sup> Very different considerations in social life, with expressions of respect or disrespect, are extended to the different castes.<sup>369</sup> The cumulative impact of these value deprivations tends to stifle even the development of appropriate norms

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mention their touch, was a positive danger to ordinary people.

Passin, *Untouchability in the Far East*, 11 MONUMENTA NIPPONICA 247, 260 (1955).

364. Cf. A. BETEILLE, CASTES: OLD AND NEW 57—86 (1969); N.Y. Times, Apr. 23, 1973, at 17, col. 1; *id.*, Nov. 29, 1972, at 4, col. 3.

365. See C. BOUGLE, ESSAYS ON THE CASTE SYSTEM 29—40 (D. Pocock transl. 1971); O. Cox, *supra* note 355, at 60—70.

366. See G. MYRDAL, ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS 273—81, 745-49 (1971); N.Y. Times, Oct. 26, 1973, at 3, col. 1 (city ed.); N.Y. Times, Oct. 5, 1973, at 10, col. 1; N.Y. Times, Dec. 8, 1968, at 7, col. 1.

367. For a brief summary of this theme see JAPAN’S INVISIBLE RACE, *supra* note 355, at xix—xxiii. See also note 379 *infra*.

368. See S. ANANT, THE CHANGING CONCEPT OF CASTE IN INDIA 73—89 (1972); L. DUMONT, *supra* note 355, at 130—51; J. HUTTON, *supra* note 355, at 71—91; M. TUMIN, *supra* note 355, at 84—108; Beteille, *Caste in a South Indian Village*, in SOCIAL INEQUALITY 273, 278—90 (A. Beteille ed. 1969).

369. See note 368 *supra*.

of responsible conduct. A person's religious belief and affiliation are determined by birth; there is practically no avenue for changing one's sacred or secular orientation. Should attempts to change be made, the larger society commonly refuses to recognize or honor them. Further, enforcement is simplified since caste members are readily identifiable.<sup>370</sup>

Historically, the caste system in the sense we have described has existed in many different cultures throughout the history of human society with varying degrees of approximation in value impact and with highly diversified patterns of institutional detail.<sup>371</sup> Without questioning the often alleged "uniqueness" of each society in tradition and development, it may be observed that a caste society flourishes best under the conditions of relative non-communication and physical immobility resulting from an underdeveloped science and technology, especially in terms of the relative lack of access to communication and transportation. While accelerating developments in science and technology have in recent decades released a new drive for mobility and fostered a trend toward universalization of equality, many communities remain in the grip of rigidly stratified barriers transmitted from the past. Though India is commonly singled out by commentators as the contemporary paradigm of a caste society,<sup>372</sup> that country is not alone in exhibiting indicia of high stratification and immobility.<sup>373</sup> In many societies, severe class differentiations approximate the hierarchical and hereditary deprivations characteristic of "caste," and the children who begin with little continue to be inordinately and permanently handicapped vis-a-vis the children who begin with much.<sup>374</sup>

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370. See J. KITAGAWA, *RELIGIONS OF THE EAST* 99—154 (enlarged ed. 1968); M. SRINIVAS, *supra* note 355, at 148—60.

371. See Kroeber, *Caste*, 3 *ENCYC. SOCIAL SCI.* 254, 254—55 (1930); 2 P. KANE, *supra* note 355, at 23; 5 *id.* at 1633.

372. See works cited in notes 355 & 366 *supra*.

373. See J. HUTTON, *supra* note 355, at 133—38; JAPAN'S INVISIBLE RACE, note 355 *supra*; B. RYAN, *CASTE IN MODERN CEYLON* (1954); M. TUMIN, note 355 *supra*; Passin, *Untouchability in the Far East*, 11 *MONUMENTA NIPPONICA* 247, 260 (1955). See also 8 *PEOPLES OF THE EARTH* 66—68, 79—80 (E. Evans-Pritchard ed. 1973) (regarding Hawaiian Polynesia and Tahitian Polynesia); 10 *id.* at 114—16 (Indonesian Bali); 12 *id.* at 8—36, 44—53 (India), 110—13 (Tamiland), 114—27 (Sri Lanka); 13 *id.* at 88—95 (Nepal); 15 *id.* at 92—96 (Kabul and the Pakhtun Afghanistan).

374. Lenski has put it this way:

Actually, however, there is no need to treat caste and class as separate phenomena. In the interest of conceptual parsimony one can quite legitimately define caste as a special kind of class—at least when class is defined as broadly as it has been here. Thus we may say that a class is *a caste to the*

The practices of caste are as incompatible as those of slavery with the basic policies of freedom of choice and equality of opportunity essential to human dignity.<sup>375</sup> To deny individuals freedom of choice on a collective basis determined by their birth is as invidious to human dignity as denial based on any other group characteristic. Such denial treats a human being as an appendage to a collectivity instead of as a person capable of self-fulfillment and contribution to society. The inherent contradiction in a system of caste is that it manipulates the value of respect in ways that institutionalize and perpetuate disrespect.<sup>376</sup>

The same justification has been offered for caste differentiations as for racism: that some people are inherently inferior because of parentage.<sup>377</sup> This myth, like other elements of racism, runs afoul of modern scientific findings.<sup>378</sup> Additional justification of caste is

*degree that upward mobility into or out of it is forbidden by the mores.*

G. LENSKI, *POWER AND PRIVILEGE: A THEORY OF SOCIAL STRATIFICATION* 77 (1966).

375. See notes 18—52 & accompanying text *supra*.

376. In the words of Beteille:

Caste has often been viewed as the prototype of all hierarchical systems. Principles of caste rank rest essentially on conceptions of social esteem. Social esteem is attached to particular styles of life, and groups are ranked as high or low according to how or whether they pursue such styles. What is highly esteemed varies from one society to another and depends ultimately on the value-system of the society. In India ritual elements (and, in particular, the ideas of purity and pollution) have historically occupied an important place in styles of life which have enjoyed high social esteem.

Beteille, *Caste in a South Indian Village*, in *SOCIAL INEQUALITY* 273, 290 (A. Beteille ed. 1969). See also notes 355—70 & accompanying text *supra*.

377. De Vos and Wagatsuma state:

In comparing systems of social segregation in various of the the world's cultures, those based on alleged caste impurity and those based on alleged racial inferiority are found to be the most fixed and immutable. One can too quickly conclude that these two concepts have very different bases for the classification and separation of two or more segments of a particular society. Instead of stressing the obvious surface differences, one might do well to consider whether there is a curious similarity between these concepts, whether they are not indeed, two dissimilar faces of identical inner psychological processes that seek external expression. . . . At first glance, racism may seem to bear no direct resemblance to the social segregation found in a caste system. But it is a major proposition of this volume that the contrary is true, that from the viewpoint of comparative sociology or social anthropology, and from the viewpoint of human social psychology, racism and caste attitudes are one and the same phenomenon.

JAPAN'S INVISIBLE RACE, *supra* note 355, at xix—xx.

See also Beteille, *Caste in a South Indian Village*, in *SOCIAL INEQUALITY* 273, 276—78 (A. Beteille ed. 1969); L. DUMONT, *supra* note 355, at 27—29.

378. See J. BAKER, *RACE* (1974) (contains a comprehensive bibliography); T.

sometimes grounded in a sacred mythology that purports to reward and punish people for acts committed in putative previous incarnations.<sup>379</sup> The appeal of such a justification is unlikely to reach beyond the circle of "true believers," and is subject to a continuous reinterpretation of fundamental assumptions.

As further justification, it is sometimes urged that caste is necessary to the functional division of society.<sup>380</sup> Yet, in the contemporary world it requires no Marxist insight to recognize that, though caste may sometimes be used as a form of economic exploitation,<sup>381</sup> a caste

DOBZHANSKY, note 40 *supra*; A. MONTAGUE, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (5th ed. 1974); A. MONTAGUE, *STATEMENT OF RACE* (3d ed. 1972).

379. Srinivas has observed:

A man is *born* into a sub-caste (*jati*) and this is the only way of acquiring membership. According to the traditional view, however, birth is not an accident. Certain Hindu theological notions like *karma* and *dharma* have contributed very greatly to the strengthening of the idea of hierarchy which is inherent in the caste system. The idea of *karma* teaches a Hindu that he is born in a particular sub-caste because he deserves to be born there. The actions he performed in a previous incarnation deserved such a reward or punishment, as the case might be. If he had performed better actions in his previous incarnation he would have been born in a higher caste. Thus the caste hierarchy comes to be an index of the state of an individual's soul. It also represents certain milestones on the soul's journey to God.

Thus the idea of deserts is associated with birth in a particular caste. A man is born in a high caste because of the good actions performed by him in his previous life, and another is born into a low caste because of bad actions performed in his previous life.

Srinivas, *The Caste System in India*, in *SOCIAL INEQUALITY* 265, 266 (A. Beteille ed. 1969).

In the same vein, Passin has summarized:

In the Hindu conception, everyone's place in the scheme of things was ordained by fate, by the endless chain of causation. Any given point in the unfolding of the universe was the effect of all preceding events. But cause and effect were not merely material; there was also an endless chain of moral cause and effect, and it was this chain of moral causation that affected the status of individuals. What one had done in previous incarnations determined one's status in the present one. The low castes were therefore, in a sense, serving penance in this life for their past sins and shortcomings, although through virtue and good works they might be able to attain higher status in their next incarnation.

Passin, *Untouchability in the Far East*, 11 *MONUMENTA NIPPONICA* 247, 252 (1955). See also J. HUTTON, *supra* note 355, at 189-91; Srinivas, *The Caste System in India*, in *SOCIAL INEQUALITY* 265, 269-72 (A. Beteille ed. 1969).

380. See, e.g., L. DUMONT, *supra* note 355, at 92-108; J. HUTTON, *supra* note 355, at 111-32; Srinivas, *The Caste System in India*, in *SOCIAL INEQUALITY* 269-72 (A. Beteille ed. 1969).

381. See *JAPAN'S INVISIBLE RACE*, *supra* note 355, at xxii.

system must impair, rather than facilitate, the wide shaping and sharing of wealth and other values. In a complex society, the greatest aggregate production and widest distribution of wealth and other values necessarily depends on a division of labor that lays aside the rigidification of occupational roles by inheritance, and provides individuals with ample opportunity to fully develop their varied talents in an open, mobile society. "The drawback of the caste and rigid class systems is," in the words of Dobzhansky, "precisely that they induce people to take up functions for which they are incompetent; hence so many worthless kings and barons."<sup>382</sup> In sum, it would appear that there is no common interest which caste can today serve in a society based upon human dignity.

In times when even slavery was still regarded as natural and lawful,<sup>383</sup> it could scarcely have been expected that caste might be regarded as unlawful. Beginning in the Far East and the ancient Mediterranean world, various caste systems have been sustained down through the centuries by customary expectations and practices in many different communities.<sup>384</sup> These range from the total and systematic stratification in India, through the "quasi-caste" systems in medieval Europe ("with aristocratic rank and privileges, sumptuary laws, feudalism, and occupation guilds in control of much of industry")<sup>385</sup> and in medieval Japan (with "sharp" and elaborate "distinctions of hereditary rank")<sup>386</sup> to pockets of de facto castes in recent times.<sup>387</sup>

In modern times, national community efforts to eradicate caste find their most striking and, of course, most important exemplification in India.<sup>388</sup> More than half a century of anti-caste efforts culminated in the adoption of the 1949 Constitution of India which envisages a fundamental reconstruction of the whole social structure of the country.<sup>389</sup> To secure "[e]quality of status and opportunity" for

382. T. DOBZHANSKY, *supra* note 40, at 244.

383. See notes 136—230 & accompanying text *supra*.

384. See Kroeber, *Caste*, 3 ENCYC. SOCIAL SCI. 254, 254—55 (1930).

385. *Id.* at 256.

386. *Id.*

387. See notes 372—74 *supra*.

388. See S. ANANT, *THE CHANGING CONCEPT OF CASTE IN INDIA* 14—37 (1972); 1 D. BASU, *COMMENTARY ON THE CONSTITUTION OF INDIA* 287—543 (5th ed. 1965); C. BOUGLE, *ESSAYS ON THE CASTE SYSTEM* 116—42 (D. Pocock transl. 1971); Galanter, *Changing Legal Conceptions of Caste*, in *STRUCTURE AND CHANGE IN INDIAN SOCIETY* 299 (M. Singer & B. Cohn eds. 1968).

389. For the text on the Constitution of India, which is unusually long and detailed, see 2 A. PEASLEE, *CONSTITUTIONS OF NATIONS* 308—438 (3d ed. 1966) [hereinafter cited as A. PEASLEE]. For the provisions of the Indian Constitution relating to the protection of fundamental human rights see BASIC DOCUMENTS ON

"all its citizens,"<sup>390</sup> the Indian Constitution, in section after section, includes caste as one of the impermissible grounds for differentiation in the treatment of people,<sup>391</sup> and strictly outlaws untouchability.<sup>392</sup> The prohibition of discrimination by caste extends to acts performed not only by "the State,"<sup>393</sup> but also by private individuals. Article 15(2) stipulates that no citizen shall on account of caste be subject to

any disability, liability, restriction or condition with regard to:

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing *ghats*, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.<sup>394</sup>

Article 16(2) further states that no citizen shall on account of caste be "ineligible for, or discriminated against in respect of, any employment or office under the State."<sup>395</sup> Article 17 declares the abolition of untouchability in these words:

'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.<sup>396</sup>

To carry out the prohibition of untouchability, the Untouchability (Offenses) Act was adopted in 1955.<sup>397</sup> The Act prescribes punish-

HUMAN RIGHTS 29—45 (I. Brownlie ed. 1971). For an earlier attempt at reform, as symbolized by the Caste Disabilities Removal Act (XXI of 1850) see N. AIYAR, MAYNE'S TREATISE ON HINDU LAW AND USAGE 73, 716—18 (11th ed. 1950); 3 P. KANE, *supra* note 355, at 547 n.1021, 616, 667. See also 2 *id.* at 177—79.

390. CONSTITUTION preamble (1949, amended 1963) (India), *reprinted in* 2 A. PEASLEE, *supra* note 389, at 308.

391. See *id.* arts. 15—17, *reprinted in* 2 A. PEASLEE, *supra* note 389, at 312—13.

392. It reads:

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

*Id.* art. 17, *reprinted in* 2 A. PEASLEE, *supra* note 389, at 312—13.

393. Article 15(1) provides: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." *Id.* art. 15(1), *reprinted in* 2 A. PEASLEE, *supra* note 389, at 312.

Article 16(2) further states that "No citizen shall, on grounds only of . . . caste . . . be ineligible for, or discriminated against in respect of any employment or office under the State." *Id.* art. 16(2) .

394. *Id.* art. 15(2).

395. *Id.* art. 16(2).

396. *Id.* art. 17.

397. Untouchability (Offenses) Act, No. 22 of 8 May 1955, *reprinted with com-*

ment for those who seek to impose or enforce disabilities on the ground of "untouchability" in regard to, *inter alia*, access to places of public worship; access to shops and restaurants and places of public accommodation; use of utensils in public places; the practice of professions, occupations, and trades; use of rivers, wells, and other water resources; access to hospitals, educational institutions, and charitable facilities; public transportation; housing; the practice of religious ceremonies and processions; and use of jewelry and finery.<sup>398</sup> Other measures have also been enacted to aid the "Scheduled Castes" and the "backward classes."<sup>399</sup> Yet, despite these heroic governmental prescriptive efforts toward the elimination of caste, the caste system, "so deeply entrenched in India's traditions,"<sup>400</sup> continues to persist. "The caste system," observes Gunnar Myrdal, in his monumental work, *Asian Drama*, "is probably stronger today than it was at the time when India became independent."<sup>401</sup> Such a phenomenon, Myrdal adds, "provides a striking example of the divergence of precept and practice."<sup>402</sup>

Aside from India, concern for the eradication of caste has been manifested in other territorial communities. Thus, for example, Article 17(1) of the 1962 Constitution of the Islamic Republic of Pakistan states that "[n]o citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of [inter alia] caste."<sup>403</sup> Article 10 of the 1962 Constitution of Nepal provides that "[n]o discrimination shall be made against any citizen in the application of general laws" and "in respect of appointment to the government service or any other public service" on account of "caste."<sup>404</sup> The 1948 Constitution of the Republic of Korea proclaims, in Article 9(2), that "[n]o privileged castes shall be recognized, nor be ever established in any form."<sup>405</sup>

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*mentary* in UNITED NATIONS, YEARBOOK ON HUMAN RIGHTS FOR 1955, 112, 120—22.

398. *Id.* §§ 3—4. The Act provides for up to six months imprisonment and/or a fine of 500 rupees for its violation. *Id.*

399. See Galanter, *Changing Legal Conceptions of Caste*, in STRUCTURE AND CHANGES IN INDIAN SOCIETY 299, 313—19 (M. Singer & B. Cohn eds. 1968).

400. G. MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS* 278 (1971).

401. *Id.*

402. *Id.*

403. CONSTITUTION art. 17(1) (1962, amended 1964) (Pakistan), *reprinted* in 2 A. PEASLEE, *supra* note 389, at 989.

404. CONSTITUTION art. 10 (Nepal, 1962), *reprinted* in 2 A. PEASLEE, *supra* note 389, at 774.

405. CONSTITUTION art. 9(2) (1948, amended 1962) (Republic of Korea), *reprinted*



The more recent trends in transnational prescription exhibit an increasing crystallization of larger community expectations that the practice of caste is unlawful. Contemporary international prescriptions have developed a peremptory norm of non-discrimination which embodies a wide range of impermissible grounds for differentiation.<sup>406</sup> Though the word "caste" is not always explicitly employed in describing the impermissible grounds, the consistent condemnation of differentiation by "social origin," "birth and other status," and "descent" would appear to put beyond doubt the conclusion that caste is today prohibited on the transnational level.

The important contemporary prescription commonly construed to condemn caste derives from the United Nations Charter<sup>407</sup> and is clearly articulated in the Universal Declaration of Human Rights<sup>408</sup> which, in Article 2, states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>409</sup>

This same theme is pursued in the International Covenant on Civil and Political Rights<sup>410</sup> which incorporates identical or nearly identical language in several of its provisions. Article 26 of the Covenant states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>411</sup>

Article 2(1) of the Covenant provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>412</sup>

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*in 2 A. PEASLEE, supra note 389, at 579.*

406. *See notes 651—79 & accompanying text infra.*

407. *See note 267 supra.*

408. Universal Declaration, note 55 *supra*.

409. *Id.* art. 2, U.N. Doc. A/810 at 72.

410. Covenant on Civil and Political Rights, note 57 *supra*.

411. *Id.* art. 26, 21 U.N. GAOR Supp. 16, at 55—56.

412. *Id.* art. 2(1), 21 U.N. GAOR Supp. 16, at 53.

Other provisions of the Covenant prohibit: discrimination on account of "social origin" in connection with permissible derogations;<sup>413</sup> discrimination against children on grounds of "social origin" or "birth";<sup>414</sup> and discrimination with regard to office-holding and voting on the grounds specified in Article 2.<sup>415</sup>

Comparable provisions appear in other important conventions. Thus, the International Covenant on Economic, Social and Cultural Rights,<sup>416</sup> in Article 2(2), stipulates:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>417</sup>

The Discrimination (Employment and Occupation) Convention of 1958<sup>418</sup> includes "social origin" among impermissible grounds of differentiation in its definition of "discrimination" in Article 1(1).<sup>419</sup> The Convention Against Discrimination in Education of 1960 includes "birth" as well as "social origin" in its definition of discrimination in Article 1(1).<sup>420</sup> On the regional level, both the European Convention on Human Rights<sup>421</sup> and the American Convention on Human Rights<sup>422</sup> have included both "social origin" and "birth" in the formulation of their non-discrimination clauses.

The legislative history of Article 2 of the Universal Declaration of Human Rights and the similar provisions in other conventions amply establish that the prohibition of discrimination by "social origin" and "birth and other status" indeed extends to differentia-

413. *Id.* art. 4(1).

414. *Id.* art. 24(1), 21 U.N. GAOR Supp. 16, at 55.

415. *Id.* art. 25.

416. Covenant on Economic Rights, note 58 *supra*.

417. *Id.* art. 2(2), 21 U.N. GAOR Supp. 16, at 49—50.

418. Convention Concerning Discrimination in Respect of Employment and Occupation, *adopted* June 25, 1958, 362 U.N.T.S. 31 (I.L.O. General Conference) (entered into force June 15, 1960) [hereinafter cited as Discrimination Convention].

419. *Id.* art. 1(1), 362 U.N.T.S. at 32—34.

420. Convention Against Discrimination in Education, *adopted* Dec. 14, 1960, art. 1(1), 429 U.N.T.S. 93, 96 (UNESCO General Conference) (entered into force May 22, 1962) [hereinafter cited as Convention Against Discrimination in Education]. "Birth" as well as "social origin" is included in its proscribed bases of discrimination.

421. European Convention, *supra* note 11, art. 14, 213 U.N.T.S. at 232.

422. American Convention, *supra* note 59, arts. 1 & 27, 9 INT'L LEGAL MATERIALS at 101, 109.

tion by "caste." Thus, when the Third Committee of the General Assembly was considering Article 2 of the draft Universal Declaration, the Indian delegation proposed the substitution of "caste" for "birth,"<sup>423</sup> and the Soviet delegation proposed the inclusion of "class" among the impermissible grounds of differentiation.<sup>424</sup> Both proposals were rejected because most of the Committee members agreed that the words, "social origin" and "birth or other status," as proposed by the Informal Drafting Group, were adequate to cover discrimination by caste or class. In the course of discussion, Mr. Santa Cruz (Chile), and the Cuban representative, preferred the wording "social status" or "social condition" to "birth," but agreed that the former "expression was implied in the word 'birth.'"<sup>425</sup> In the view of Mr. Chang (China), "The concept of race, colour, social origin, and in most cases sex, involved the question of birth, while social origin also embraced the idea of class or caste."<sup>426</sup> Mr. Imperial (Philippines) felt that "[t]he words 'class' and 'caste' referred to certain specific systems while 'birth' applied to everyone."<sup>427</sup> The view of Mrs. Roosevelt (United States) was summarized in the Committee records in these words:

[T]he declaration was intended for ordinary, not learned people and from that point of view, the original text seemed the most satisfactory. Although class and caste distinctions still existed, human beings were trying to outgrow the use of such words. In her opinion, the words 'property or other status' took into consideration the various new suggestions that had been made.<sup>428</sup>

Consequently, Mr. Appadorai (India) withdrew the Indian proposal with the following explanation:

[H]is delegation had only proposed the word "caste" because it objected to the word "birth." The words "other status" and "social origin" were sufficiently broad to cover the whole field; the delegation of India would not, therefore, insist on its proposal.<sup>429</sup>

The comprehensive annotations on the draft International Covenants, as prepared by the Secretary-General in 1955,<sup>430</sup> explicitly

423. U.N. GAOR, 3D COMM. 138—39 (1948).

424. *Id.* at 126, 138.

425. *Id.* at 137—38.

426. *Id.* at 139.

427. *Id.*

428. *Id.* at 138.

429. *Id.* at 139.

430. *Annotations on the Covenants*, note 303 *supra*.

state that the non-discrimination clauses in both Covenants "follow that of Article 2 of the Universal Declaration of Human Rights,"<sup>431</sup> and that the grounds of discrimination set forth in the Covenant provisions "are the same as those enumerated in Article 2 of the Declaration."<sup>432</sup> The same interpretation of other conventions influenced in their comparable provisions by the Universal Declaration would appear inescapable.

The International Convention on the Elimination of all Forms of Racial Discrimination<sup>433</sup> introduces still another concept—"descent"—which equally serves the function of condemning the practice of caste. This new concept originated with the Indian delegation when the Third Committee of the General Assembly was considering the adoption of the Convention.<sup>434</sup> As a consequence, the Convention was made to define "racial discrimination" by juxtaposing "descent" with "race, color, national or ethnic origin." Article 1(1) of the Convention, in utmost reach, states:

In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>435</sup>

Although the "record gives no indication of the situations the word [descent] was intended to cover,"<sup>436</sup> it is "reasonable to assume," as Dr. Schwelb has observed, "that the term 'descent' includes the notion of 'caste.'"<sup>437</sup> The inclusion of "descent" in the specification of "racial discrimination," therefore, makes the Anti-Racial Discrimination Convention still a further prescription in condemnation of caste.<sup>438</sup>

431. *Id.* at 17.

432. *Id.* at 61.

433. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter cited as Convention on the Elimination of All Forms of Racial Discrimination].

434. Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1002-03 (1966) [hereinafter cited as Schwelb].

435. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 1(1), 660 U.N.T.S. at 216.

436. Schwelb, *supra* note 434, at 1003.

437. *Id.* at 1003 n.43.

438. For further elaboration see notes 768-963 & accompanying text *infra*.

#### d. Claims for Elimination of Apartheid

##### i. Factual background

Apartheid is a comprehensive and systematic pattern of racial discrimination, containing identifiable components of both slavery and caste, which is prescribed and enforced by national law.<sup>439</sup> It has

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439. On apartheid see H. ADAM, *MODERNIZING RACIAL DOMINATION: SOUTH AFRICA'S POLITICAL DYNAMICS* (1971) [hereinafter cited as H. ADAM]; *SOUTH AFRICA: SOCIOLOGICAL PERSPECTIVES* (H. Adam ed. 1971); AFRICAN RESEARCH GROUP, *RACE TO POWER* (1974); M. BALLINGER, *FROM UNION TO APARTHEID* (1969); E. BROOKES, *APARTHEID: A DOCUMENTARY STUDY OF MODERN SOUTH AFRICA* (1968) [hereinafter cited as E. BROOKES]; *RACE, PEACE, LAW AND SOUTHERN AFRICA* (J. Carey ed. 1968); G. CARTER, *THE POLITICS OF INEQUALITY: SOUTH AFRICA SINCE 1948* (rev. ed. 1959); D. DE VILLIERS, *THE CASE FOR SOUTH AFRICA* (1970); *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE* (J. Dugard ed. 1973); W. FRYE, *IN WHITEST AFRICA: THE DYNAMICS OF APARTHEID* (1968); *A SURVEY OF RACE RELATIONS IN SOUTH AFRICA* (M. Horrell comp. 1973); M. HORRELL, *LEGISLATION AND RACE RELATIONS* (rev. ed. 1971); INTERNATIONAL COMM'N OF JURISTS, *EROSION OF THE RULE OF LAW IN SOUTH AFRICA* (1968); INTERNATIONAL COMM'N OF JURISTS, *SOUTH AFRICA AND THE RULE OF LAW* (1960); P. JOSHI, *APARTHEID IN SOUTH AFRICA* (1950); L. KUPER, *AN AFRICAN BOURGEOISIE: RACE, CLASS, AND POLITICS IN SOUTH AFRICA* (1965); L. KUPER, *PASSIVE RESISTANCE IN SOUTH AFRICA* (1956); *APARTHEID* (A. La Guma ed. 1971); *APARTHEID AND UNITED NATIONS COLLECTIVE MEASURES* (A. Leiss ed. 1965); A. MATHEWS, *LAW, ORDER AND LIBERTY IN SOUTH AFRICA* (1972); J. NGUBANE, *AN AFRICAN EXPLAINS APARTHEID* (1963); *SOUTHERN AFRICA IN PERSPECTIVE* (C. Potholm & R. Dale eds. 1972); P. RANDALL, *A TASTE OF POWER* (1973); N. RHODDIE, *APARTHEID AND RACIAL PARTNERSHIP IN SOUTHERN AFRICA* (1969); *SOUTH AFRICAN DIALOGUE* (N. Rhodie ed. 1973); A. SACHS, *JUSTICE IN SOUTH AFRICA* (1973); S. SLONIM, *SOUTH WEST AFRICA AND THE UNITED NATIONS: AN INTERNATIONAL MANDATE IN DISPUTE* (1973) [hereinafter cited as S. SLONIM]; *SOUTH AFRICA DEP'T OF FOREIGN AFFAIRS, SOUTH AFRICA AND THE RULE OF LAW* (1968); P. TEMPELS, *BANTU PHILOSOPHY* (1971); L. THOMPSON, *POLITICS IN THE REPUBLIC OF SOUTH AFRICA* (1966) [hereinafter cited as L. THOMPSON]; UNESCO, *APARTHEID* (2d ed. 1972); P. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 96—111 (1967); P. VAN DEN BERGHE, *SOUTH AFRICA, A STUDY IN CONFLICT* (1969) [hereinafter cited as P. VAN DEN BERGHE]; A. VANDENBOSCH, *SOUTH AFRICA AND THE WORLD* (1970); Ballinger, *U.N. Action on Human Rights in Southern Africa*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 248 (E. Luard ed. 1967); Legum, *Color and Power in the South African Situation*, in *COLOR AND RACE* 205 (J. Franklin ed. 1968); International Comm'n of Jurists, *Apartheid in Namibia*, 6 *OBJECTIVE: JUSTICE* No. 1, at 16—25 (1974); Landis, *South African Apartheid Legislation*, 71 *YALE L.J.* 1, 437 (1961) [hereinafter cited as Landis, *Apartheid Legislation*]; Mowle, *The Infringement of Human Rights in Nations of Southern Africa: The Response of the United Nations and the United States*, in *Hearings on International Protection of Human Rights Before the Subcomm. on International Organization and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 946—64 (1974) [hereinafter cited as *Hearings*]; Suzman, *Race Classification and Definition in the Legislation of the Union of South Africa 1910—1960*, *ACTA JURIDICA* 1960, at 339—67 (1961); *U.N. and*

components of slavery in that there is a complete deprivation of individual freedom of choice in regard to many values and that labor may be forced.<sup>440</sup> It has components of caste in that its victims are identified by birth or parentage and subjected to rigidified stratification.<sup>441</sup> Some descriptions of apartheid, especially those concerned

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*U.S. Response to Racial Discrimination in Southern Africa, in Hearings, supra, at 160—86.*

The United Nations, through its various sub-units, has been the most important source in the gathering, processing, and dissemination of information about apartheid. Of its ever increasing production of documents, in book form or other, useful citations include: REPORT OF THE SPECIAL COMMITTEE ON THE POLICIES OF APARTHEID OF THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA, U.N. Doc. A/7254 (1968); H. SANTA CRUZ, RACIAL DISCRIMINATION, U.N. Doc. E/CN.4/Sub.2/307/Rev.1 (1971) [hereinafter cited as H. SANTA CRUZ]; UNITED NATIONS, APARTHEID AND RACIAL DISCRIMINATION IN SOUTHERN AFRICA, OPI/335 (1968) [hereinafter cited as APARTHEID IN SOUTHERN AFRICA]; UNITED NATIONS, APARTHEID IN PRACTICE, OPI/53 (1971) [hereinafter cited as APARTHEID IN PRACTICE]; UNITED NATIONS, ECONOMIC AND SOCIAL CONSEQUENCES OF RACIAL DISCRIMINATORY PRACTICES, U.N. Doc. E/CN.14/132/Rev.1 (1963) [hereinafter cited as ECONOMIC AND SOCIAL CONSEQUENCES]; UNITED NATIONS, A PRINCIPLE IN TORMENT: III. THE UNITED NATIONS AND NAMIBIA (1971) [hereinafter cited as UNITED NATIONS & NAMIBIA]; UNITED NATIONS, REPRESSIVE LEGISLATION OF THE REPUBLIC OF SOUTH AFRICA, U.N. Doc. ST/PSCA/SER.A/7 (1969); UNITED NATIONS, REVIEW OF UNITED NATIONS CONSIDERATION OF APARTHEID, U.N. Doc. ST/PSCA/SER.A/2 (1967); *Interim Report of the Ad Hoc Working Group of Experts Prepared in Accordance with Resolution 19 (XXIX) of the Commission on Human Rights*, U.N. Doc. E/CN.4/1135 (1974); *Report of the Ad Hoc Working Group of Experts Set Up under Resolution 2 (XXIII) of the Commission on Human Rights*, U.N. Doc. E/CN.4/950 (1967); *Report of the Secretary-General on the Policies of Apartheid of South Africa*, U.N. Doc. A/9165 (1973); *Report of the Special Committee on Apartheid*, U.N. Doc. A/8422/Rev.1 (1971); *Report of the Special Committee on Apartheid on Policies of Apartheid of the Government of South Africa*, U.N. Doc. A/9168 (1973); *Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa, 1963, 18th Session*, U.N. Docs. A/5497 & Add.1 (1963); *Report of the United Nations Commission on the Racial Situation in the Union of South Africa*, 8 U.N. GAOR Supp. 16, U.N. Docs. A/2505 & A/2505/Add.1 (1953); *Report of the United Nations Council for Namibia*, U.N. Doc. A/9024 (1973); Rubin, *Law, Race and Colour in South Africa*, 6 OBJECTIVE: JUSTICE No. 1, at 29—35 (1974); *Study of Apartheid and Racial Discrimination in Southern Africa*, U.N. Docs. E/CN.4/949 (1967) [hereinafter cited as *Study of Apartheid*]; U.N. Doc. E/CN.4/949/Add.1—Add.5 (1967—68).

440. Cf. notes 79—130 & accompanying text *supra*. See also Awad, *Apartheid—A Form of Slavery*, 4 OBJECTIVE: JUSTICE No. 3, at 24—28 (1972). Apartheid, in his words, “applies [even] to death, with burial grounds racially zoned to ensure that the bodies remain as divided in death as they were in life (Group Areas Act).” *Id.* at 25.

441. Cf. notes 355—74 & accompanying text *supra*. Using a simple chart, Leonard Thompson has emphasized that

with its lawfulness under international law, have emphasized its racial segregation or separation features.<sup>442</sup> Apartheid is, however, much more than mere racial discrimination, whether that discrimination be sporadic or routine; it comprises a complex set of practices of domination and subjection, intensely hierarchised and sustained by the whole apparatus of the state, which affects the distribution of all values.<sup>443</sup>

In paradigm form, apartheid begins in a fundamental deprivation of respect, based upon group membership. Underlying its whole operation is a racial classification.<sup>444</sup> Value deprivations are linked

the primary ingredients of South African society are a dominant white group and three subordinate nonwhite groups. Since the white group is wholly endogamous by law and the nonwhite groups are almost wholly endogamous by custom, we shall call the South African a *caste society*, and the Whites, the Coloureds, the Asians, and the Africans the four South African *castes*, even though not all the ingredients of the classic Indian caste system are present in South Africa.

L. THOMPSON, *supra* note 439, at 96. Employing "a minimum definition of 'caste' as an endogamous group, hierarchically ranked in relation to other groups, and wherein membership is determined by birth and for life," Piere van den Berghe has reached the same conclusion. P. VAN DEN BERGHE, *supra* note 439, at 52—53.

442. See, e.g., *South West Africa Cases (Second Phase)*, [1966] I.C.J. 250, 284—316 (Tanaka, J., dissenting).

443. "Individual mobility which could cut across the ascribed race barriers is legally excluded in the castelike structure." H. ADAM, *supra* note 439, at 8. In a word, "the ascriptive criteria of race determine overall life chances." *Id.* at 9. A common theme about South Africa runs this way:

What distinguishes the situation in South Africa from racial discrimination elsewhere is that *apartheid*, or racial segregation, is an official and uncompromising governmental policy. South Africa's is the only government today that makes racial discrimination the foundation of its philosophy and the separation of races the basis of its conduct.

M. MOSKOWITZ, *THE POLITICS AND DYNAMICS OF HUMAN RIGHTS* 177 (1968).

444. On the basis of race, the population of South Africa has officially been divided into four groups: Whites (Europeans), Bantus (Africans, Natives), Coloureds, and Asians. These categories are officially defined in these terms:

"White person" means a person who—

(a) In appearance obviously is a white person and who is not generally accepted as a coloured person; or

(b) Is generally accepted as a white person and is not in appearance obviously not a white person; but does not include any person who for the purposes of his classification under the Act, freely and voluntarily admits that he is by descent a Bantu or a coloured person unless it is proved that the admission is not based on fact.

"Bantu" means a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa.

"Coloured person" means a person who is not a white person or a Bantu.

to and imposed by formally dividing and classifying the population into various racial groups, as officially prescribed. An individual is given a racial classification that is recorded in the official population register, and is required to carry an identity card stating that classification.<sup>445</sup> His participation in the different value processes of the community is made to depend not upon his capability, but upon the racial label assigned to him. In the words of a recent United Nations study:

A person's racial classification is of the utmost importance to him, for it decides, *inter alia*, where he may live, how he may live, what work he may do, what sort of education he will receive, what political rights he will have, if any, whom he may marry, the extent of the social, cultural and recreational facilities open to him, and generally, the extent of his freedom of action and movement.<sup>446</sup>

The basic deprivation of respect is sustained by an organization of internal power processes designed to maintain and perpetuate the domination of the ruling group.<sup>447</sup> Power monopolization, not power sharing, is the rule. Participation in community power processes is minimal for deprived groups, both in terms of office-holding (elec-

"Asians" means Natives of Asia and their descendants, mainly Indians.

Quoted from H. SANTA CRUZ, *supra* note 439, at 149.

In 1970, the total population of South Africa was 21,448,169, of which 70.2 percent were Africans, 17.5 percent were Whites, 9.4 percent were Coloureds, and 2.9 percent were Asians. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, A SURVEY OF RACE RELATIONS IN SOUTH AFRICA, 1972 at 63 (1973) [hereinafter cited as 1972 SURVEY].

445. This is required by the Population Registration Act, No. 30 of 1950. See E. BROOKES, *supra* note 439, at 19—25; H. SANTA CRUZ, *supra* note 439, at 149—50.

446. APARTHEID IN SOUTHERN AFRICA, *supra* note 439, at 6.

447. Heribert Adam has observed:

In South Africa domination is easily recognizable as direct personal exploitation. The rulers are not hidden behind a sophisticated ideology or an anonymous bureaucratic apparatus. On the contrary, they are definable as a precise group visible even to the most politically naive. In contrast to Western Countries, domination has been transformed into subtle manipulation but is experienced in daily and vivid humiliations. Consequently, there are few incentives for subordinates to identify with their rulers.

H. ADAM, *supra* note 439, at 5.

He further adds:

From the perspective of most authors in South Africa, two apparently diametrically opposed race or class castes face each other in visible polarization: white and non-white, ruler and ruled, privileged and underprivileged, exploiter and exploited, a numerical minority against a four-times stronger majority which has the support of an almost unanimous world opinion and is backed by the historical tendencies of a declining colonial era.

*Id.* at 9.

See also P. VAN DEN BERGHE, *supra* note 439, at 73—96.



tive as well as appointive) and voting.<sup>448</sup> Membership in the representative government is open only to one ruling racial group.<sup>449</sup> Freedom of movement, transnational and internal, is greatly curtailed.<sup>450</sup> For deprived groups, movement within the national boundaries, including choice of residence, is tightly controlled through an oppressive "pass system."<sup>451</sup> People may thus be forcibly removed from prohibited areas.<sup>452</sup> Members of one racial group are forbidden to participate in the activities of political parties or organizations of another racial group.<sup>453</sup> Individuals are subjected to arbitrary arrest and detention.<sup>454</sup> Differential justice in the courts is accorded to the

448. See H. SANTA CRUZ, *supra* note 439, at 162—68.

449. See APARTHEID IN SOUTHERN AFRICA, *supra* note 439, at 7; P. VAN DEN BERGHE, *supra* note 439, at 75.

450. See APARTHEID IN SOUTHERN AFRICA, *supra* note 439, at 13—14, 37—38, 59.

451. The "pass system" is one of the cornerstones of the apartheid in South Africa. In the words of Landis:

"Passes," broadly defined, include all documents required, under threat of penal sanctions, to be carried on the person by adult Africans—that is, blacks over 16—and to be presented upon command to any police official. They include not only internal passports, without which Africans cannot leave their home districts, but also permits to travel, to enter a city, to seek work, to take a job, to be out after curfew, as well as identification papers, tax receipts, rent receipts, et cetera. In particular, passes determine whether Africans in the reserves can go up to the cities, where the jobs are, and can take up employment if they find work. Apartheid theory treats Africans as "transient labor units," allowed on sufferance to work a 1-year contract in a city and then forced, by operation of the pass laws, to return to their reserves, where they may apply for new permits to return to the city if their labor is still needed. Without the revenue—meager as it is—from a city job an African in the reserves who does not own a farm will be in desperate straits while even a farmowner will rarely be able to reach subsistence level.

Pass raids by the police are a repeated form of harassment and source of humiliation to Africans. From time to time these raids are conducted in African "locations," where police break into homes and rouse their sleeping occupants to check on passes. Arrests for pass-related offenses have numbered from 500,000 to a million annually in recent years—this out of a population of 13 million African men, women, and children. (The number of arrests and convictions is virtually identical in pass cases.)

Landis, *Human Rights in Southern Africa and United States Policy in Relation Thereto*, in *Hearings*, *supra* note 439, at 164, 167. See also H. SANTA CRUZ, *supra* note 439, at 156—57, 168—72.

452. See H. SANTA CRUZ, *supra* note 439, at 169; *Interim Report of the Ad Hoc Working Group of Experts Prepared in Accordance with Resolution 19 (XIX) of the Commission on Human Rights*, 17—18, U.N. Doc. E/CN.4/1135 (1974).

453. See APARTHEID IN PRACTICE, *supra* note 439, at 32—33; H. SANTA CRUZ, *supra* note 439, at 166.

454. Joel Carlson, a courageous civil rights lawyer forced to exile from South

various groups.<sup>455</sup> Accumulated deprivations in all values, finally, make impossible the participation in effective power processes necessary for change in authoritative decisions.

In education, racial segregation is pervasive at all levels; enlightenment is made separate and unequal.<sup>456</sup> Educational facilities are inferior for the deprived groups whose members are educated differently for their different assigned roles in society.<sup>457</sup> Disproportionate

Africa in 1971, has given this vivid account:

Every single day, 365 days a year, seven days a week (Sundays included despite the super-Calvinist nature of the regime), a daily average of 2,500 Africans are arrested under the Pass Laws in South Africa. The average time for handling each of these cases is two minutes! In 1969, a parliamentarian was shocked to discover that 1,777,662 Africans had been arrested during the preceding year. On a daily average basis, the prison population is approximately 90,555 persons—two and one half times that of the United Kingdom, which has a population more than double that of South Africa. Forty-seven percent of the world's hangings take place in South Africa.

Carlson, *South Africa Today: The Security of the State vs. The Liberty of the Individual*, 2 HUMAN RIGHTS 125, 129—30 (1972). See also INTERNATIONAL COMM'N OF JURISTS, EROSION OF THE RULE OF LAW IN SOUTH AFRICA (1968); A. MATHEWS, LAW, ORDER AND LIBERTY IN SOUTH AFRICA 53—261 (1972); A. SACHS, JUSTICE IN SOUTH AFRICA 230—63 (1973); *Report of the Ad Hoc Working Group of Experts Set Up Under Resolution 2 (XXIII) of the Commission on Human Rights*, U.N. Doc. E/CN.4/950 (1967).

455. In the words of Awad's apt summary:

Justice is placed by law firmly in the hands of the whites. Judges, juries and magistrates are always whites, as are also the prosecution. Nearly all court officials are whites. There are separate docks for white and non-white accused; separate witness boxes for white and non-white witnesses; and separate seating for white and non-white spectators.

*Awad's 1971 Report*, *supra* note 319, at 52.

See also Rubin, *Law, Race and Colour in South Africa*, 6 OBJECTIVE: JUSTICE No. 1, at 32—34 (1974).

456. See UNESCO, APARTHEID (2d ed. 1972); L. THOMPSON, *supra* note 439, at 98—113.

457. South Africa's official policy on education has been declared in these words: Education must train and teach people in accordance with their opportunities in life, according to the sphere in which they live. Good racial relations cannot exist where education is given under the control of people who create the wrong expectations on the part of the native itself. Native education should be controlled in such a way that it should be in accordance with the policy of the State . . . . Racial relations cannot improve if the result of the native education is the creation of frustrated people.

*Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa*, at 90, U.N. Doc. A/5497 (1963). See also UNESCO, APARTHEID 37 (2d ed. 1972); International Comm'n of Jurists, *Apartheid in Namibia*, 6 OBJECTIVE: JUSTICE No. 1, at 16, 21 (1974).

levels of illiteracy are found within the deprived groups.<sup>458</sup> Censorship of the press is an established practice and opposing views are suppressed by coercion.<sup>459</sup> Similarly, members of deprived groups are commonly denied the opportunity to discover and develop their latent talents fully and to acquire and exercise a range of socially useful skills. Lack of education, job reservations, and a discriminatory apprenticeship system result in keeping skilled occupations within the domain of the ruling group and in denying deprived groups access to important skills, such as the managerial.<sup>460</sup>

In terms of wealth, deprivation is as intense as in other sectors. Ownership of land is curtailed by racial and area restrictions.<sup>461</sup> Certain occupations may be reserved to a single racial group to the exclusion of others ("job reservation").<sup>462</sup> There are tremendous disparities in wage scales, with higher wages for "civilized labor" and outrageously lower wages for "uncivilized labor."<sup>463</sup> Unequal pay for equal work is the rule; race, not ability, is the determining factor.<sup>464</sup> For the maintenance of "a permanent, abundant and cheap labour force," individuals may be required to register for employment, and may be forced to perform "compulsory and involuntary" labor.<sup>465</sup>

458. See ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 63—65.

459. See UNESCO, APARTHEID 233—53 (2d ed. 1972); *Interim Report of the Ad Hoc Working Group of Experts Prepared in Accordance with Resolution 19 (XXIX) of the Commission on Human Rights*, U.N. Doc. E/CN.4/1135, at 38—43 (1974).

460. See ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 48—52; L. THOMPSON, *supra* note 439, at 55—56.

461. See T. VAN REENEN, LAND—ITS OWNERSHIP AND OCCUPATION IN SOUTH AFRICA (1962); APARTHEID IN PRACTICE, *supra* note 439, at 36; ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 43; H. SANTA CRUZ, *supra* note 439, at 154—55; *Study of Apartheid and Racial Discrimination in Southern Africa*, U.N. Doc. E/CN.4/949, at 55—56 (1967).

462. See APARTHEID IN SOUTHERN AFRICA, *supra* note 439, at 20—21; ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 48—52.

463. "In practice, 'civilized labour' meant White labour; 'uncivilized labour,' Native labour." ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 50. See also *First, Work Wages and Apartheid*, U.N. UNIT ON APARTHEID, NOTES AND DOCUMENTS, No. 22/70 (1970); Gervasi, *Poverty, Apartheid and Economic Growth*, 3 OBJECTIVE: JUSTICE No. 4, at 3 (1971); Rogers, *The Standard of Living of Africans in South Africa*, U.N. UNIT ON APARTHEID, NOTES AND COMMENTS No. 45/71 (1971).

464. See ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 56—60; *Study of Apartheid and Racial Discrimination in Southern Africa*, U.N. Doc. E/CN.4/949, at 108—12; N.Y. Times, Oct. 10, 1973, at 63, col. 3.

465. UNITED NATIONS & INTERNATIONAL LABOUR OFFICE, REPORT OF THE AD HOC COMMITTEE ON FORCED LABOUR 79, U.N. Doc. E/2431 (1953). The Report further stated:

The ultimate consequence of the system is to compel the Native population to contribute, by their labour, to the implementation of the economic policies

Deprived groups are forbidden to form trade unions or to engage in collective bargaining.<sup>466</sup> Strikes are forbidden, and when they occur they may be crushed by the police and armed forces.<sup>467</sup>

With respect to well-being, "poverty, malnutrition and disease are widespread" among the deprived groups.<sup>468</sup> Torture may on occasion be used as an instrument of apartheid.<sup>469</sup> Poor housing conditions attend residential segregation and restrictions.<sup>470</sup> Health services for deprived groups are inferior, with an acute shortage of medical personnel in their groups.<sup>471</sup> Members of deprived groups are more exposed to demanding manual work hazardous to health.<sup>472</sup>

Endogamy is as much a requisite for apartheid as for caste.<sup>473</sup> Members of different racial groups are forbidden to intermarry, to live together, or to have any sexual contact.<sup>474</sup> Severe criminal penalties are imposed for violations.<sup>475</sup> Choice of mates within the same racial group may also be curtailed by geographical restrictions.<sup>476</sup> Families are forcibly split because of divergent racial classifications

of the country, but the compulsory and involuntary nature of this contribution results from the particular status and situation created by special legislation applicable to the indigenous inhabitants alone, rather than from direct coercive measures designed to compel them to work, although such measures, which are the inevitable consequence of this status, were also found to exist.

It is in this indirect sense therefore that, in the Committee's view a system of forced labor of significance to the national economy appears to exist in the Union of South Africa.

*Id.* at 79—80.

See also *Study of Apartheid*, *supra* note 439, at 121.

466. See INTERNATIONAL LABOUR OFFICE, *FIGHTING DISCRIMINATION IN EMPLOYMENT AND OCCUPATION* 74—75 (1968); *Allegations Regarding Infringements of Trade Union Rights*, U.N. Doc. E/5245 (1973).

467. See *ALLEGATIONS REGARDING INFRINGEMENTS OF TRADE UNION RIGHTS*, U.N. Doc. E/5245, at 15—22, 29—30 (1973).

468. H. SANTA CRUZ, *supra* note 439, at 191.

469. See UNITED NATIONS, *MALTREATMENT AND TORTURE OF PRISONERS IN SOUTH AFRICA*, U.N. Doc. ST/PSCA/SER.A/13 (1973); Ahmad, *Maltreatment and Torture of Prisoners in South Africa*, 5 OBJECTIVE: JUSTICE No. 1, at 27—41 (1973).

470. See *ECONOMIC AND SOCIAL CONSEQUENCES*, *supra* note 439, at 44—46.

471. *Study of Apartheid*, *supra* note 439, at 133—35.

472. Cf. *Awad's 1971 Report*, *supra* note 319, at 57; Diggs, Jr., *Inhuman Conditions in South Africa's Gold Mines*, 5 OBJECTIVE: JUSTICE No. 1, 42—47 (1973); N.Y. Times, Oct. 23, 1973, at 4, col. 3.

473. Cf. notes 362—63 & accompanying text *supra*.

474. G. CARTER, *THE POLITICS OF INEQUALITY: SOUTH AFRICA SINCE 1948*, at 76—81 (rev. ed. 1959); L. THOMPSON, *supra* note 439, at 32.

475. See Dugard, *The Legal Framework of Apartheid*, in *SOUTH AFRICAN DIALOGUE* 80, 84 (N. Rhoadie ed. 1973) [hereinafter cited as Dugard].

476. See H. SANTA CRUZ, *supra* note 439, at 173.

of family members or because of work needs.<sup>477</sup> Wives may not be able to live in urban areas with their working husbands.<sup>478</sup> Children may be required to obtain official permission in order to live with their fathers.<sup>479</sup> Congenial personal relationships of all kinds are stifled.<sup>480</sup>

The sense of responsibility and rectitude of individuals is impaired in many ways. Places of public worship are racially segregated.<sup>481</sup> Individuals may be denied access to churches outside the designated area.<sup>482</sup> Traditional African religions are demeaned. The cumulative impact of apartheid tends to create a negative self-image within the deprived person, which in turn adversely affects his ability to participate effectively in community processes.<sup>483</sup>

Viewed in the aggregate, the practices of apartheid have created an explosive situation in which value deprivations are all pervasive,<sup>484</sup> both individually and collectively. To perpetuate the domination of one race ("racial oligarchy"),<sup>485</sup> the deprived majority

477. See APARTHEID IN SOUTHERN AFRICA, *supra* note 439, at 12.

478. See *id.* at 12, 35—36.

479. See H. SANTA CRUZ, *supra* note 439, at 173.

480. In the words of Carlson:

The degradation of police and of their victims is an inevitable result. Pass Laws and their execution act like acid corroding human relationships and destroying all respect for law. People's feelings and concern for one another, which I believe all men and women have and exhibit in all civilized society, are eaten away in South Africa's violent, primitive society.

Carlson, *South Africa Today: The Security of the State vs. The Liberty of the Individual*, 2 HUMAN RIGHTS 125, 131 (1972).

481. See APARTHEID AND THE CHURCH, SPRO-CAS Pub. No. 8 (1972); Landis, *Apartheid Legislation*, *supra* note 439, at 452—53. Cf. Reeves, "Growing Tension" between State and Church in South Africa, 4 OBJECTIVE: JUSTICE No. 3, at 32—40 (1972).

482. See APARTHEID IN PRACTICE, *supra* note 439, at 37.

483. In the words of Representative Charles C. Diggs, Chairman of the Subcommittee on Africa, United States House of Representatives:

It is quite impossible to convey here the degree of suffering imposed by the system. It is not simply a matter of physical deprivation; it is a question also of the mental suffering which results from the tearing apart of the fabric of African society, just as in the days of the old slave trade.

Diggs, Jr., *Inhuman Conditions in South Africa's Gold Mines*, 5 OBJECTIVE: JUSTICE No. 1, 42—47 (1973); N.Y. Times, Oct. 23, 1973, at 4, col. 3.

484. See P. VAN DEN BERGHE, RACE AND RACISM 110 (1967).

485. H. ADAM, *supra* note 439, at 42. Verwoerd officially characterized the situation in these words:

"Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . 'Keeping it White' can only mean one thing, namely White domination, not 'leadership,' not 'guidance,' but 'con-

of the population is divided and fragmented by such devices as the creation of "homelands" and "group areas."<sup>486</sup> The wholesale practice of discriminatory deprivations is sustained by an elaborate network of oppressive laws, coercion, and "terror."<sup>487</sup> The victims are thus rendered powerless in managing their own affairs. They are deprived, in sum, of the right to shape their own destiny, of any meaningful capability of self-determination.<sup>488</sup>

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trol,' 'supremacy.' If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by White domination . . . we say that it can be achieved by separate development."

Reply of Ethiopia and Liberia, 4 South West Africa Cases, I.C.J. Pleadings 264 (1966).

486. See V. HIEMSTRA, *THE GROUP AREAS ACT* (1953); F. ROUSSEAU, *HANDBOOK ON THE GROUP AREAS ACT* (1960); P. VAN DEN BERGHE, *supra* note 439, at 110—54; *Apartheid in Namibia*, *supra* note 439, at 22—23; Landis, *Apartheid Legislation*, *supra* note 439, at 16—52; Rubin, *Bantustan Policy: A Fantasy and a Fraud*, U.N. UNIT ON APARTHEID, NOTES AND COMMENTS, No. 12/71 (1971); N.Y. Times, Jan. 21, 1973, § 1, at 1, col. 6.

487. See Carlson, *South Africa—A Police State*, U.N. UNIT ON APARTHEID, NOTES AND DOCUMENTS, No. 16/73 (1973); Carlson, *South Africa Today: The Security of the State vs. The Liberty of the Individual*, 2 HUMAN RIGHTS 125 (1972). *But see* SOUTH AFRICA DEP'T OF FOREIGN AFFAIRS, *SOUTH AFRICA AND THE RULE OF LAW* (1968).

Dugard, a leading international law scholar in South Africa, has concluded: Apartheid is a creature of the law. Conceived in racial prejudice it is nurtured in the womb of Parliament and brought forth in legislative form. It is not merely declaratory of existing social convention; it is often constitutive of new discriminatory practices. The law is as indispensable to apartheid as is race prejudice itself. An understanding of the role of the law in South Africa is essential for an understanding of apartheid.

Dugard, *supra* note 475, at 98.

Van den Berghe has divided oppressive laws within South Africa into two kinds: Nationalist laws fall into two discernible categories. On the one hand, such acts as the Population Registration Act, the Prohibition of Mixed Marriages Act, the Group Areas Act, the Bantu Education Act, the Extension of University Education Act, and the Promotion of Bantu Self-Government Act all fall into an internally consistent, long premeditated, and undeviating pattern, namely the steadfast implementation of the ends of apartheid. On the other hand, laws like the Public Safety Act, the Suppression of Communism Act, the Criminal Law Amendment Act, the Riotous Assemblies Act, the Unlawful Organizations Act, the "Sabotage" Act of 1962, and the "No Trial" Act of 1963 share the character of improvised, *ad hoc*, repressive measures, hurriedly passed during, or just after, crises, to give the police powers to crush opposition.

P. VAN DEN BERGHE, *supra* note 439, at 85.

488. Cf. Gervasi, *A Crisis of the Neo-Colonial System*, 4 OBJECTIVE: JUSTICE No. 3, at 21—24 (1972). For recent developments in South Africa see a series of detailed reports by Charles Mohr, a reporter for the New York Times: N.Y. Times, Nov. 20, 1974, at 18, col. 3; *id.*, Nov. 19, 1974, at 14, col. 1; *id.*, Nov. 18, 1974, at 16, col.

In the sense described above, apartheid has been, and may in the future be, manifested, with varying degrees of approximation, in differing communities. The practices presently imposed in South Africa and extended to Namibia of course epitomize apartheid in the contemporary world.<sup>489</sup> In lesser degree, apartheid may also be taking shape in Southern Rhodesia.<sup>490</sup> Similar practices have existed elsewhere as once, perhaps in more modest approximation, in the United States<sup>491</sup> and potentially may occur again.

*ii. Basic community policies*

In its aggregate patterns, apartheid would appear wholly contradictory to that fundamental freedom of individual choice which is inherent in shared respect.<sup>492</sup> If slavery, caste, racial discrimination, and other gross value deprivations are incompatible with human dignity when taken separately,<sup>493</sup> their comprehensive and systematic aggregation must *a fortiori* multiply such incompatibility.

In its origin, apartheid was sought to be justified upon the same grounds as racial discrimination, that is, some ethnic groups are by nature inferior to others.<sup>494</sup> It is, however, widely agreed today, as has already been noted, that there is no scientific basis for such an assumption.<sup>495</sup>

More recently, justifications have been offered for apartheid in terms of the richer development and ultimate independence of different ethnic groups.<sup>496</sup> It has not, however, been made clear that

1; *id.*, Nov. 17, 1974, § 1, at 1, col. 6.

489. Namibia is a territory under the "illegal" occupation of the government of South Africa. In Namibia, South Africa has imposed apartheid as intensively and extensively as in South Africa. For the controversy of South Africa's continued control over Namibia see notes 533—63 & accompanying text *infra*.

490. See *Study of Apartheid and Racial Discrimination in Southern Africa*, U.N. Doc. E/CN.4/949/Add.2 (1967); *Study of Apartheid*, *supra* note 439, at 47—69.

491. See, e.g., J. DENTON, *APARTHEID AMERICAN STYLE* (1967). As the Kerner Commission reported in 1968, the United States "is moving toward two societies, one black, one white—separate and unequal." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (Bantam ed. 1968). In the view of van den Berghe, "The closest historical parallel to the South African political system is found in southern United States, and not in Nazi Germany." P. VAN DEN BERGHE, *supra* note 439, at 80.

492. See notes 18—54 & accompanying text *supra*.

493. See notes 79—438 & accompanying text *supra*.

494. See J. BALICKI, *APARTHEID* 343 (1967); P. JOSHI, *APARTHEID IN SOUTH AFRICA* 17—29 (1950); H. SANTA CRUZ, *supra* note 439, at 151.

495. See notes 377—78 & accompanying text *supra*; notes 733—44 & accompanying text *infra*.

496. For a recent official statement by South Africa's Minister of Information

the oppressive practices which comprise apartheid are necessary, or even contributory, to such an objective.<sup>497</sup>

The suggestion is sometimes made that apartheid is necessary to secure the survival of the ruling white group.<sup>498</sup> It is not, however, clearly established that common interest requires a single ruling group to be able to maintain its historic form through posterity, or that such maintenance is worth its costs in terms of the human rights of others.<sup>499</sup>

The same policies, in sum, that condemn slavery, caste, racial discrimination, and other more particular value deprivations would appear equally to condemn apartheid. In the words of a UNESCO study:

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and Minister of the Interior see Mulder, *South Africa's Objectives*, N.Y. Times, May 14, 1974, at 37, col. 2. In Mulder's words:

The basic objectives of our policy include self-determination for the various nations in South Africa, protection of the identity of all ethnic groups and the elimination of domination of one people over others. This is a totally different picture from the one accepted by so many United States commentators.

. . . .

This transition from a single South Africa state consisting of black nations and a white nation into a bloc of politically independent states, economically interdependent, is taking place systematically and peacefully.

*Id.*

For brief summaries of South Africa's official position see H. ADAM, *supra* note 439, at 45—46; L. THOMPSON, *supra* note 439, at 13—17. For comprehensive, elaborate expositions of this position see Counter Memorial of South Africa, 2 South West Africa Cases, I.C.J. Pleadings 1, 457—88 (1966); Rejoinder of South Africa, 5 *id.* at 119—41, 242—47; Rejoinder of South Africa, 6 *id.* at 1, 149—65; Argument of Mr. De Villiers, 8 *id.* at 611, 653—67; Argument of Mr. De Villiers, 9 *id.* at 94—114; Address by Mr. Muller (South Africa), 12 *id.* at 67—84; Comment by Mr. De Villiers, 12 *id.* at 392—451. These complex, technical presentations have been adapted into a popular version: D. DE VILLIERS, *THE CASE FOR SOUTH AFRICA* (1970). See also *THE CASE FOR SOUTH AFRICA AS PUT FORTH IN THE PUBLIC STATEMENTS OF ERIC H. LOUW, FOREIGN MINISTER OF SOUTH AFRICA* (H. Biermann ed. 1963).

497. For elaborate expositions of this position see Memorial of Ethiopia, 1 South West Africa Cases, I.C.J. Pleadings 32, 108—90 (1966); Reply of Ethiopia and Liberia, 4 *id.* at 220, 476—512; Argument of Mr. Gross, 8 *id.* at 107, 111—24; Argument of Mr. Gross, 8 *id.* at 167, 258—69.

Recently, a liberal South African lawyer, Jack Unterhalter, made the observation that apartheid

sought to impose a system of "separate development" upon a majority without its consent and to exclude it from the opportunities and benefits of the largest, best developed and richest areas of the country.

N.Y. Times, Jan. 5, 1973, at 10, col. 1 (city ed.).

498. Cf. H. KATZEW, *APARTHEID AND SURVIVAL* (1965).

499. See note 497 *supra*.



The image of man—to whatever ethnic group he belongs or is made a part of—which results from the policy of apartheid in South Africa, is an image which is clearly opposite the one to which the community of nations is ethically and legally dedicated.<sup>500</sup>

### *iii. Trends in decision*

The prescriptions which outlaw apartheid include those relating to slavery, caste, racial discrimination, self-determination, and other more particular human rights. Increasingly, United Nations pronouncements also invoke certain prescriptions relating to crimes against humanity and threats to peace.<sup>501</sup> With the prescriptions relating to slavery and caste we have already dealt.<sup>502</sup> With the more recent crystallizations concerning racial discrimination we will deal in greater detail below.<sup>503</sup> In other contexts we propose, further, to deal with the questions of self-determination and violations of more particular human rights prescriptions.<sup>504</sup>

The immediate focus of attention here is upon those prescriptions which, building upon and integrating all the other prescriptions, uniquely condemn apartheid as a gross violation of human rights. There has been a consistent flow of resolutions and decisions giving authoritative interpretations of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants of Human Rights, and other relevant human rights prescriptions, which characterize apartheid, in the aggregate, as unlawful under international law.

The problem of apartheid has been before the United Nations ever since the first session of the General Assembly in 1946.<sup>505</sup> India at that time complained that South Africa had discriminated against South Africans of Indian origin.<sup>506</sup> From 1946 to 1952, the discussion of the Assembly was confined to the "treatment of people of Indian origin in the Union of South Africa."<sup>507</sup> In 1952, the larger

500. UNESCO, APARTHEID 255 (2d ed. 1972).

501. See notes 519—83 & accompanying text *infra*.

502. See notes 79—438 & accompanying text *supra*.

503. See notes 680—963 & accompanying text *infra*.

504. These will be treated in the chapters relating to power and other values.

505. For succinct accounts see UNITED NATIONS, ACTION AGAINST APARTHEID (1969); UNITED NATIONS, THE UNITED NATIONS AND HUMAN RIGHTS 40—45 (1973); UNITED NATIONS, REVIEW OF UNITED NATIONS CONSIDERATION OF APARTHEID, U.N. Doc. ST/PSCA/SER.A/2 (1967).

506. See [1946—47] YEARBOOK OF THE UNITED NATIONS 144—48.

507. UNITED NATIONS, REVIEW OF UNITED NATIONS CONSIDERATION OF APARTHEID, U.N. Doc. ST/PSCA/SER.A/2, at 3 (1967). Cf. S. MUKHERJI, INDIAN MINORITY IN SOUTH AFRICA (1959); B. PACHAI, THE INTERNATIONAL ASPECTS OF THE AFRICAN INDIAN

question of apartheid was inscribed as a separate item on the Assembly agenda under the title "Question of race conflict in South Africa resulting from the policies of *apartheid* of the Government of the Union of South Africa."<sup>508</sup> These two items continued to be considered separately until the seventeenth session (1962) when they were combined into one item—"The policies of *apartheid* of the Government of the Republic of South Africa."<sup>509</sup> This composite item has been a fixture on the agenda of the General Assembly year after year.<sup>510</sup> Meanwhile, the Security Council, in response to the world-wide indignation aroused by the Sharpeville incident,<sup>511</sup> met in March and April of 1960 to discuss the policies of apartheid.<sup>512</sup> Subsequently, the Council took up the same questions again in 1963, 1964, 1970, and 1972.<sup>513</sup> In recent years, several other bodies of the United Nations have dealt with various aspects of the apartheid question.<sup>514</sup>

Although the government of South Africa has consistently contended that its policy of "separate development" (apartheid) is a domestic matter outside the jurisdiction of the United Nations,<sup>515</sup>

QUESTION, 1860—1871 (1971).

508. See [1952] YEARBOOK OF THE UNITED NATIONS 297—306.

509. See [1962] YEARBOOK OF THE UNITED NATIONS 93—100.

510. See UNITED NATIONS, UNITED NATIONS AND HUMAN RIGHTS 40—45 (1973).

511. The incident took place on March 21, 1960, in South Africa. On that day, large numbers of Africans staged peaceful protests against the new decree that all Africans carry "reference books" at all times in order to move about within their own country. The protesters left their "reference books" behind and presented themselves at various police stations to invite arrest. In Sharpeville, an African township of Vereeniging near Johannesburg, the police used armored vehicles and shot at the crowd, while jet fighter planes flew overhead to frighten the demonstrators. Sixty-nine Africans were killed and nearly 200 were wounded. The large demonstrations which followed in many cities were again met with coercive suppression by the South African government. See A. REEVES, SHOOTING AT SHARPEVILLE: THE AGONY OF SOUTH AFRICA (1961).

512. See 15 U.N. SCOR, 851st—55th meetings (1960); [1960] YEARBOOK OF THE UNITED NATIONS 142—47.

513. See Policies of Apartheid of the Government of Africa: *Implementation by States of United Nations Resolutions on Apartheid* 2—5, 29—41, U.N. Doc. A/9168 (1973) (Report of the Special Committee on Apartheid); Report of the Security Council, 1963—1964, 19 U.N. GAOR Supp. 2, at 20—43, U.N. Doc. A/5802 (1964); Report of the Security Council, 1970—71, 26 U.N. GAOR Supp. 2, at 29—38, U.N. Doc. A/8402 (1971).

514. For a very useful account see *Co-ordination of United Nations Activities with Regard to Policies of Apartheid and Racial Discrimination in Southern Africa*, U.N. Doc. E/4817/Corr. 1 (1970) (Report by the Secretary-General) . See also notes 607—48 & accompanying text *infra*.

515. See 7 U.N. GAOR 53—69 (1952); R. HIGGINS, THE DEVELOPMENT OF INTERNA-

the U.N. organs have seen no legal difficulty in asserting their competence over this matter.<sup>516</sup> While the government of South Africa has exhibited continued defiance of the successive United Nations resolutions urging discontinuation of its policies and practices,<sup>517</sup> the numerical majority of the African-Asian members has asserted an increasing influence within the United Nations.<sup>518</sup> As the years have gone by, the United Nations, through various organs, has hardened and made more strident its condemnation of apartheid. The characteristic authoritative condemnations of apartheid make references to "a crime against humanity,"<sup>519</sup> "a crime against the conscience

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TIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 120—23 (1963).

516. See Report of the United Nations Commission on the Racial Situation in the Union of South Africa, 8 U.N. GAOR Supp. 16, at 15—34, 115, U.N. Docs. A/2505 & A/2505/Add.1 (1953). We propose to deal in detail with the problem of domestic jurisdiction in connection with human rights in chapters relating to the constitutive process of authoritative decision. Regarding the question of domestic jurisdiction see CORNELL LAW SCHOOL, *THE STATUS OF DOMESTIC JURISDICTION, PROCEEDINGS OF THE FOURTH SUMMER CONFERENCE ON INTERNATIONAL LAW* (1962); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 58—130 (1963); H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 166—220 (1950); M. RAJAN, *UNITED NATIONS AND DOMESTIC JURISDICTION* (2d ed. 1961); Fawcett, *Human Rights and Domestic Jurisdiction*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 286 (E. Luard ed. 1967); Ermacora, *Human Rights and Domestic Jurisdiction*, 124 *Hague Recueil* 371 (1968); McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 *AM. J. INT'L L.* 1 (1968).

517. All the resolutions on South Africa, adopted up to 1972 by the General Assembly and the Security Council, are conveniently itemized in *Policies of Apartheid of the Government of Africa: Implementation by States of United Nations Resolutions on Apartheid 29—30*, U.N. Doc. A/9168 (1973) (Report of the Special Committee on Apartheid).

518. For the growing influence of the African-Asian members in the United Nations see H. ALKER & B. RUSSETT, *WORLD POLITICS IN THE GENERAL ASSEMBLY* (1965); I. CLAUDE, *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* (4th ed. 1971); *INTERNATIONAL ORGANIZATION: POLITICS & PROCESS* (L. Goodrich & D. Kay eds. 1973); J. HADWEN & J. KAUFMANN, *HOW UNITED NATIONS DECISIONS ARE MADE* (2d ed. rev. 1962); T. HOVET, *BLOC POLITICS IN THE UNITED NATIONS* (1960); R. KEOHANE, *POLITICAL INFLUENCE IN THE GENERAL ASSEMBLY* (International Conciliation No. 557, 1966).

519. The formal condemnation by the General Assembly of apartheid as "a crime against humanity" first appeared in G.A. Res. 2202A, 21 U.N. GAOR Supp. 16, at 20, U.N. Doc. A/6316 (1966). This characterization has been reaffirmed in subsequent years: G.A. Res. 2307, 22 U.N. GAOR Supp. 16, at 19, U.N. Doc. A/6716 (1967); G.A. Res. 2396, 23 U.N. GAOR Supp. 18, at 19, U.N. Doc. A/7218 (1968); G.A. Res. 2506B, 24 U.N. GAOR Supp. 30, at 24, U.N. Doc. A/7630 (1969); G.A. Res. 2671F, 25 U.N. GAOR Supp. 28, at 33, U.N. Doc. A/8028 (1970); G.A. Res. 2775F, 26 U.N. GAOR Supp. 29, at 43, U.N. Doc. A/8429 (1971); G.A. Res. 2923E,

and dignity of mankind,"<sup>520</sup> "a threat to international peace and security,"<sup>521</sup> and a "violation" of "the Charter of the United Nations" and of "the provisions of the Universal Declaration of Human Rights."<sup>522</sup> Thus, General Assembly Resolution 2923F (XXVII) of 15 November 1972 expresses grave concern "about the explosive situation in South Africa and in southern Africa as a whole resulting from the inhuman and aggressive policies of apartheid pursued by the Government of South Africa, a situation which constitutes a threat to international peace and security," and reaffirms that "the practice of *apartheid* constitutes a crime against humanity."<sup>523</sup> In a special declaration adopted on the occasion of the twenty-fifth anniversary of the United Nations, the General Assembly again proclaimed:

We strongly condemn the evil policy of *apartheid*, which is a crime against the conscience and dignity of mankind and, like nazism, is contrary to the principles of the Charter.<sup>524</sup>

Similarly, the Security Council, in its Resolution 191 (1964) of June 18, 1964, expressed its conviction that "the situation in South Africa is continuing seriously to disturb international peace and security," and pronounced that

the situation in South Africa arising out of the policies of *apartheid* . . . [is] contrary to the principles and purposes of the Charter of the United Nations and inconsistent with the provisions of the Universal Declaration of Human Rights as well as South Africa's obligations under the Charter.<sup>525</sup>

The thrust of all these authoritative condemnations, repeated

27 U.N. GAOR Supp. 30, at 25, U.N. Doc. A/8730 (1972); G.A. Res. 3151G, 28 U.N. GAOR Supp. 30, at 32, U.N. Doc. A/9030 (1973); G.A. Res. 3324E, *Resolutions of the General Assembly at its Twenty-Ninth Regular Session*, at 98—100, U.N. Press Release GA/5194 (20 Dec. 1974).

520. G.A. Res. 2627, 25 U.N. GAOR Supp. 28, at 3, U.N. Doc. A/8028 (1970); G.A. Res. 2764, 26 U.N. GAOR Supp. 29, at 39, U.N. Doc. A/8429 (1971).

521. *See, e.g.*, G.A. Res. 2054, 20 U.N. GAOR Supp. 14, at 16, U.N. Doc. A/6014 (1965); G.A. Res. 2202A, 21 U.N. GAOR Supp. 16, at 20, U.N. Doc. A/6316 (1966); G.A. Res. 2396, 23 U.N. GAOR Supp. 18, at 19, U.N. Doc. A/7218 (1968); G.A. Res. 2923E, 27 U.N. GAOR Supp. 30, at 25, U.N. Doc. A/8730 (1972); G.A. Res. 3151G, 28 U.N. GAOR Supp. 30, at 32, U.N. Doc. A/9030 (1973).

522. *See, e.g.*, G.A. Res. 1663, 16 U.N. GAOR Supp. 17, at 10, U.N. Doc. A/5100 (1961); G.A. Res. 1761, 17 U.N. GAOR Supp. 17, at 9, U.N. Doc. A/5217 (1962); G.A. Res. 2671F, 25 U.N. GAOR Supp. 28, at 33, U.N. Doc. A/8028 (1970).

523. G.A. Res. 2923E, 27 U.N. GAOR Supp. 30, at 25, U.N. Doc. A/8730 (1972).

524. G.A. Res. 2627, 25 U.N. GAOR Supp. 28, at 3, U.N. Doc. A/8028 (1970).

525. S.C. Res. 191 (1964), *Resolutions and Decisions of the Security Council* 1964, at 13 U.N. Doc. S/5773.

again and again with only minor variations, is clearly toward the crystallization of shared general community expectations that apartheid, as an aggregate set of practices, is unlawful. Thus, as the Proclamation of Teheran in 1968 makes summary:

Gross denials of human rights under the repugnant policy of *apartheid* is a matter of the gravest concern to the international community. This policy of *apartheid*, condemned as a crime against humanity, continues seriously to disturb international peace and security. It is therefore imperative for the international community to use every possible means to eradicate this evil. The struggle against *apartheid* is recognized as legitimate . . . .<sup>526</sup>

Similarly, Article 5 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination urges:

An end shall be put without delay to governmental and other public policies of racial segregation and especially policies of *apartheid*, as well as all forms of racial discrimination and separation resulting from such policies.<sup>527</sup>

This consensus in general community expectation is codified by the enactment of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>528</sup> Article 3 stipulates:

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.<sup>529</sup>

Parallel with these developments, litigation has gone forward in the International Court of Justice testing South Africa's control over

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526. Proclamation of Teheran, Final Act of the International Conference on Human Rights, Tehran, 22 April—13 May 1968, U.N. Doc. A/CONF.32/41, at 4 (1968).

527. United Nations Declaration on the Elimination of All Forms of Racial Discrimination, *adopted* Nov. 20, 1963, art. 5, G.A. Res. 1904, 18 U.N. GAOR Supp. 15, at 35, 36, U.N. Doc. A/5515 (1963) [hereinafter cited as Declaration on the Elimination of All Forms of Racial Discrimination].

528. Convention on the Elimination of All Forms of Racial Discrimination, note 433 *supra*.

529. *Id.* art. 3, 660 U.N.T.S. at 218. Further documentation of this expectation may be found in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *adopted* Nov. 26, 1968, G.A. Res. 2391, 23 U.N. GAOR Supp. 18, at 40, U.N. Doc. A/7218 (1968). Article 1(b) includes "inhuman acts resulting from the policy of *apartheid*" among the crimes against humanity. *Id.* art. 1(b). Hence, the Convention excludes such acts from statutory limitation. For a detailed commentary see Miller, *The Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476 (1971).

Namibia (South West Africa).<sup>530</sup> In this litigation, strong arguments have been made, and ultimately affirmed by the Court, that the extension of apartheid to Namibia by the Government of South Africa is incompatible with the Charter of the United Nations and, hence, with the Mandate under which South Africa holds Namibia.<sup>531</sup> The central position urged, and now established, is that the unlawfulness of apartheid under international law renders unlawful South Africa's continued control of Namibia.<sup>532</sup>

Like apartheid more generally, the dispute over South Africa's continued control over Namibia has been a regular fixture on the agenda of the General Assembly since its first session.<sup>533</sup> In 1946, the Assembly rejected South Africa's request to annex the mandated territory.<sup>534</sup> Since 1968 this dispute about Namibia has also made an annual appearance before the Security Council.<sup>535</sup> Concurrently, Namibia has been the subject of litigation on which the International Court of Justice has rendered judgments or advisory opinions on six different occasions—1950,<sup>536</sup> 1955,<sup>537</sup> 1956,<sup>538</sup> 1962,<sup>539</sup> 1966,<sup>540</sup> and 1971.<sup>541</sup>

Namibia, known as South West Africa until renamed by the General Assembly in 1968,<sup>542</sup> is the only one of seven African territories

530. For a comprehensive historical and legal study see *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE* (J. Dugard ed. 1973). See also S. SLONIM, *supra* note 439; L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 337—504 (1973) (comprehensive bibliography on Namibia presented at 499—504) [hereinafter cited as L. SOHN & T. BUERGENTHAL]. For a brief account see *UNITED NATIONS & NAMIBIA*, note 439 *supra*.

531. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 57—58 [hereinafter cited as ICJ Advisory Opinion on Namibia].

532. *Id.* See also notes 561—63 & accompanying text *infra*.

533. See *UNITED NATIONS & NAMIBIA*, *supra* note 439.

534. See [1946—47] *YEARBOOK OF THE UNITED NATIONS* 205—08.

535. See L. SOHN & T. BUERGENTHAL, *supra* note 530, at 441—99. For the latest developments see *REPORT OF THE UNITED NATIONS COUNCIL FOR NAMIBIA*, U.N. Doc. A/9024 (1973).

536. Advisory Opinion on International Status of South-West Africa, [1950] I.C.J. 128.

537. Advisory Opinion on Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, [1955] I.C.J. 67.

538. Advisory Opinion on Admissibility of Hearings of Petitioners by the Committee on South-West Africa, [1956] I.C.J. 23.

539. South West Africa Cases, [1962] I.C.J. 319 (preliminary objections).

540. South West Africa Cases (Second Phase), [1966] I.C.J. 6.

541. ICJ Advisory Opinion in Namibia, note 531 *supra*.

542. The name has been changed "in accordance with the desires of its people."

once under the Mandate system of the League of Nations which was not put under the United Nations Trusteeship system.<sup>543</sup> When the League was dissolved after World War II, no specific provision was made regarding the future of the mandated territories; it was apparently assumed that they would all be voluntarily transformed into trust territories by the Mandatory Powers.<sup>544</sup> South Africa, however, failed to make such transfer in regard to Namibia, and over the years has intensified its control in defiance of the resolutions of U.N. bodies and decisions of the International Court of Justice.<sup>545</sup>

In 1950, in *Advisory Opinion on International Status of South-West Africa*,<sup>546</sup> the International Court of Justice declared that South Africa, having no unilateral "competence to modify the international status of the territory,"<sup>547</sup> continued to be subject, in the administration of South West Africa, to international obligations expressed in the League Covenant and the Mandate,<sup>548</sup> and that the function of supervision was to be assumed by the United Nations.<sup>549</sup> This opinion laid the legal framework for subsequent United Nations action in regard to Namibia.<sup>550</sup>

International concern deepened as the government of South Africa extended its practices of apartheid to South West Africa.<sup>551</sup> Thus, in 1960, Ethiopia and Liberia, two former members of the

G.A. Res. 2372, 22 U.N. GAOR Supp. 16A, at 1, U.N. Doc. A/6716/Add.1 (1968).

543. The other six African mandated territories placed under the international trusteeship system were: Togoland under French administration; Togoland under British administration; Cameroons under French administration; Cameroons under British administration; Tanganyika under British administration; and Ruanda-Urundi under Belgian administration.

544. Article 77(1)(a) of the Charter of the United Nations reads:

The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate.

U.N. CHARTER art. 77(1)(a).

This provision is traceable to the agreement reached at the Yalta Conference. For a brief legislative account see L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 478—80 (3d rev. ed. 1969). See also S. SLONIM, *supra* note 439, at 59—72.

545. See *UNITED NATIONS & NAMIBIA*, *supra* note 439, at 6—42. For "the Trusteeship Struggle" see S. SLONIM, *supra* note 439, at 75—122.

546. [1950] I.C.J. 128.

547. *Id.* at 144.

548. *Id.* at 143.

549. *Id.*

550. See notes 557—61 & accompanying text *infra*.

551. For the practices of apartheid in Namibia see *APARTHEID IN SOUTHERN AFRICA*, *supra* note 439, at 28—46; *Study of Apartheid and Racial Discrimination in Southern Africa*, U.N. Doc. E/CN.4/949/Add.1 (1967).

League, instituted contentious proceedings against South Africa before the International Court of Justice,<sup>552</sup> the unlawfulness of apartheid under international law being a central theme of their argument.<sup>553</sup> In 1962, in *South West Africa Cases (Preliminary Objections)*,<sup>554</sup> the Court dismissed South Africa's objections to its jurisdiction, thus clearing obstacles to a consideration of the merits.<sup>555</sup> Unfortunately, in July of 1966, after six long years of proceedings, the Court, patently contradicting its 1962 decision, simply held that "the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims"<sup>556</sup> and entirely evaded the substantive issue.

Outraged delegations within the United Nations were quick and decisive in their response.<sup>557</sup> On October 27, 1966, the General As-

552. Ethiopia and Liberia asked the court to require South Africa to fulfill its obligations and desist from violations of the Mandate, to abandon the policies and practices of apartheid in South Africa, and to be held accountable to the United Nations in its administration of the mandated territory.

553. Their central argument was that the policies and practices of apartheid are inherently incompatible with the obligation to "promote to the utmost the material and moral well-being and the social progress of the inhabitants," required by the Mandate. For a detailed elaboration of this theme see note 497 *supra*. For the text of the Mandate for South-West Africa see BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 242-44 (L. Sohn & T. Buergenthal eds. 1973).

554. [1962] I.C.J. 319.

555. *Id.* at 347.

556. *South West Africa Cases (Second Phase)*, [1966] I.C.J. 6, 51.

557. Reactions on the part of scholars were no less emphatic. See, e.g., ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE, *SOUTH WEST AFRICA CASES* (1968); Alexandrowicz, *The Juridical Expression of the Sacred Trust of Civilization*, 65 AM. J. INT'L L. 149 (1971); Cheng, *The 1966 South-West Africa Judgment of the World Court*, 20 CURRENT LEGAL PROBLEMS 181 (1967); D'Amato, *Legal and Political Strategies of the South West Africa Litigation*, 4 LAW IN TRANSITION Q. 8 (1967); Dugard, *The South West Africa Cases, Second Phase*, 83 S. AFR. L.J. 429 (1966); Falk, *The South West Africa Cases: An Appraisal*, 21 INT'L ORG. 1 (1967); Friedmann, *The Jurisprudential Implications of the South West Africa Case*, 6 COLUM. J. TRANSNAT'L L. 1 (1967); Green, *The United Nations, South West Africa and the World Court*, 7 INDIAN J. INT'L L. 491 (1967); Gross, *The South-West Africa Case*, 1 INT'L LAWYER 256 (1967); Gross, *The South-West Africa Case: What Happened?*, 45 FOREIGN AFFAIRS 36 (1966); Higgins, *The International Court and South West Africa: The Implications of the Judgment*, 8 J. INT'L COMM'N OF JURISTS 3 (1967); Landis, *The South West African Cases: Remand to the United Nations*, 52 CORN. L.Q. 627 (1967); Pollock, *The South West Africa Cases and the Jurisprudence of International Law*, 23 INT'L ORG. 767 (1967); Reisman, *Revision of the South West Africa Cases*, 7 VA. J. INT'L L. 1 (1966); Stone, *Reflections on Apartheid After the South West Africa Cases*, 42 WASH. L. REV. 1069 (1967); Verzijl, *The South West Africa Cases: Second Phase*, 3 INT'L RELATIONS 87 (1966); De Villiers & Grosskopf,



sembly adopted a resolution, declaring that

the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations.<sup>558</sup>

Subsequently, the Security Council, in its resolution 264 (1969), stated that it

1. Recognize[d] that the United Nations General Assembly terminated the Mandate of South Africa over Namibia and assumed direct responsibility for the Territory until its independence;

2. Consider[ed] that the continued presence of South Africa in Namibia is illegal and contrary to the principles of the Charter and the previous decisions of the United Nations and is detrimental to the interests of the population of the Territory and those of the international community;

3. Call[ed] upon the Government of South Africa to withdraw immediately its administration from the Territory.<sup>559</sup>

Reiterating this resolution, the Security Council declared further, in resolution 276 (1970), that

the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid.<sup>560</sup>

The continued defiance of the government of South Africa prompted the Security Council to submit the following question to the International Court of Justice for an advisory opinion:

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*South West Africa Case: A Reply from South Africa*, 1 INT'L LAWYER 457 (1967); *The World Court's Decision on South West Africa: A Symposium*, 1 INT'L LAWYER 12 (1966).

558. G.A. Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966).

For comments on the effect and implications of the Assembly's decision to terminate South Africa's mandate over South West Africa see J. DUGARD, *supra* note 439, at 396—446; S. SLONIM, *supra* note 439, at 313—46; Crawford, *South West Africa: Mandate Termination in Historical Perspective*, 6 COLUM. J. TRANSNAT'L L. 91 (1967); Dugard, *The Revocation of the Mandate for South West Africa*, 62 AM. J. INT'L L. 78 (1968); Hynning, *The Future of South West Africa: A Plebiscite?*, [1971] PROCEEDINGS, AM. SOC'Y INT'L L. 144; Khan & Kaur, *Deadlock over South-West Africa*, 8 INDIAN J. INT'L L. 179 (1968); Monroe, *Namibia—The Quest for the Legal Status of a Mandate: An Impossible Dream?*, 5 INT'L LAWYER 549 (1971).

559. S.C. Res. 264 (1969), 24 U.N. SCOR, *Resolutions and Decision of the Security Council* 1969, at 1—2, U.N. Doc. S/INF/24/Rev.1.

560. S.C. Res. 276 (1970), 25 U.N. SCOR, *Resolutions and Decisions of the Security Council* 1970, at 1, U.N. Doc. S/INF/25.

What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?<sup>561</sup>

In response, in 1971 the Court at long last dealt squarely with the problems of apartheid both in fact and in law. In describing the facts, the Court observed:

It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.<sup>562</sup>

In clarifying the law, the Court emphatically stated that apartheid is unlawful under international law:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.<sup>563</sup>

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561. S.C. Res. 284 (1970), *id.* at 4.

562. ICJ Advisory Opinion on Namibia, *supra* note 531, at 57.

563. *Id.* For appraisals of the Advisory Opinion on Namibia see J. DUGARD, note 439 *supra*; THE CASE FOR SOUTH WEST AFRICA (A. Lejeune ed. 1971); SOUTH AFRICA DEP'T OF FOREIGN AFFAIRS, SOUTH WEST AFRICA ADVISORY OPINION 1971: A STUDY IN INTERNATIONAL ADJUDICATION (1972); Acheson & Marshall, *Applying Dr. Johnson's Advice*, 11 COLUM. J. TRANSNAT'L L. 193 (1972); Brown, *The 1971 ICJ Advisory Opinion on South West Africa (Namibia)*, 5 VAND. J. TRANSNAT'L L. 213 (1971); Dugard, *Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future*, 11 COLUM. J. TRANSNAT'L L. 14 (1972); Gordon, *Old Orthodoxies Amid New Experiences: The South West Africa (Namibia) Litigation and the Uncertain Jurisprudence of the International Court of Justice*, 1 DENVER J. INT'L L. & POLICY 65 (1971); Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?*, 21 INT'L & COMP. L.Q. 270 (1972); Lissitzyn, *International Law and Advisory Opinion on*

The growing insistence that apartheid constitutes a "crime against humanity" reached a climax in the approval by the General Assembly in 1973 of the International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>564</sup> (Apartheid Convention). This proposed agreement, building upon the Genocide Convention,<sup>565</sup> seeks to make apartheid a crime against humanity, subject to universal jurisdiction. Many provisions in the Apartheid Convention are comparable to, or extend beyond, those in the Genocide Convention.<sup>566</sup>

Article 1 of the Apartheid Convention states:

1. The States Parties to the present Convention declare that

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*Namibia*, 11 COLUM. J. TRANSNAT'L L. 50 (1972); Rovine, *The World Court Opinion on Namibia*, 11 COLUM. J. TRANSNAT'L L. 203 (1972); Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337 (1972).

564. International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, G.A. Res. 3068, 28 U.N. GAOR Supp. 30, at 75, U.N. Doc. A/9030. The Convention was approved by a vote of 91 in favor, 4 against, with 26 abstentions. The four negative votes were cast by Portugal, South Africa, the United Kingdom, and the United States.

565. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). For discussion of the Convention see Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. 23; R. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79—95 (1944); N. ROBINSON, *THE GENOCIDE CONVENTION* (1960); *Hearings on Genocide Convention Before a Subcomm. of the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. (1970); *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/L. 565 (1972) (Preliminary Report by Special Rapporteur, N. Ruhashyankiko); Baade, *Individual Responsibility*, in 4 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 291 (R. Falk & C. Black eds. 1972); Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT'L L. 145 (1947); Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DENVER J. INT'L L. & POLICY 29 (1971) [hereinafter cited as Reisman]; Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1946).

566. See International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, art. 1, 28 U.N. GAOR Supp. 30, at 75, U.N. Doc. A/9030 (1973); Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Compare in particular the following provisions of the International Convention on the Suppression and Punishment of the Crime of Apartheid with those of the Genocide Convention respectively: art. 1(1), with art. 1; art. 2(a)(ii), with art. 2(b); art. 2(b), with art. 2(c); art. 3, with arts. 3 & 4; art. 4, with art. 5; art. 5, with art. 6. Cf. *Report of the Ad Hoc Working Group of Experts: Study Concerning the Question of Apartheid from the Point of View of International Penal Law*, U.N. Doc. E/CN.4/1075 (1972).

apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of *apartheid*.<sup>567</sup>

Article 2 singles out “policies and practices of racial segregation and discrimination as practiced in southern Africa” as an acute expression of the apartheid paradigm, and defines “the crime of *apartheid*” in very wide-ranging terms.<sup>568</sup> The specification in definition is of designated “inhuman acts” which are “committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”<sup>569</sup> The first two types of “inhuman acts” are indicated as follows:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part.<sup>570</sup>

Paragraphs (a)(i), (ii) and (b) are comparable to provisions in Article 2(a)(b)(c) of the Genocide Convention.<sup>571</sup> “Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid” is also made a “crime of

567. Apartheid Convention, *supra* note 564, art. 1, 28 U.N. GAOR Supp. 30, at 75.

568. *Id.* art. 2, at 75—76.

569. *Id.* at 76.

570. *Id.*

571. Compare *id.* art. 2(a)(i)—(ii), (b), with Genocide Convention, *supra* note 565, art. 2(a)—(c), 78 U.N.T.S. at 280.

apartheid.”<sup>572</sup> In recognition that apartheid may involve severe deprivations of all values, the definition of what constitutes a “crime of apartheid” ranges over the whole spectrum of values and many of the specific practices by which different values are shaped and shared. Thus, Article 2 of the Apartheid Convention specifies further other “inhuman acts” constituting crimes of apartheid:

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour.<sup>573</sup>

Under Article 3 of the Convention, “International criminal responsibility” is made to apply, “irrespective of the motive involved,” to “individuals, members of organizations and institutions and representatives of the State,” who “commit, participate in, directly incite or conspire,” or “directly abet, encourage or cooperate” “in the commission of the crime of *apartheid*.”<sup>574</sup> To suppress and eradicate the crime of apartheid, the contracting states are obligated to undertake “legislative, judicial and administrative” and “other measures” necessary to achieve a spectrum of sanctioning goals ranging from prevention and deterrence to prosecution, trial and punishment.<sup>575</sup> Article 5 declares that the crime of apartheid imparts universal jurisdiction:

Persons charged with the acts enumerated in article II of the pres-

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572. Apartheid Convention, *supra* note 564, art. 2(f), 28 U.N. GAOR Supp. 30, at 76.

573. *Id.* arts. 2(c)—(e).

574. *Id.* art. 3.

575. *Id.* art. 4.

ent Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.<sup>576</sup>

The Convention further urges the contracting states to implement United Nations decisions regarding apartheid and to cooperate fully with the competent U.N. organs.<sup>577</sup> The contracting states are also required to "submit periodic reports"<sup>578</sup> for review by "a group consisting of three members of the Commission of Human Rights," to be appointed by the Commission's Chairman.<sup>579</sup> The Commission on Human Rights is charged with additional responsibilities.<sup>580</sup>

Though this condemnation of apartheid has won practically universal support, doubts have been expressed about the necessity and practicability of making apartheid a crime against humanity subject to universal jurisdiction. The broad and highly general definition of the crime is seen to raise enormous difficulties, and perhaps even dangers to human rights, in applications in specific instances. Thus, when the General Assembly was considering the adoption of the Convention, Mr. Ferguson stated the official position of the United States:

A convention establishing *apartheid* as a crime against humanity is not necessary in view of the broad, all-inclusive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. That Convention effectively outlaws all practices of racial discrimination, specifically including that of *apartheid*. Moreover, the most serious offenses which may be associated with *apartheid* are directed against racial groups and, as such, are already made criminal and punishable under the Genocide Convention.

The proposed new draft convention purports to extend international criminal jurisdiction in a broad and ill-defined manner and seeks to rely upon present powers of domestic jurisdiction for its enforcement . . . .

. . . Deplorable as it is, we cannot, from a legal point of view, accept that *apartheid* can in this manner be made a crime against humanity. Crimes against humanity are so grave in nature that they must be meticulously elaborated and strictly construed under existing international law, as set forth primarily in the Nuremberg charter

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576. *Id.* art. 5.

577. *Id.* art. 6.

578. *Id.* art. 7(1).

579. *Id.* art. 9(1).

580. *Id.* art. 10, at 76-77.

and as applied by the Nuremberg tribunal.

[T]he broad extension of international jurisdiction under this draft convention, even in cases where there are no significant contacts between the offence and the forum State, and where the offender is not a national of the forum State, makes it impossible for the United States to accept this as consistent with the basic norms of fairness, due process and notice so essential in criminal law.<sup>581</sup>

Similarly, Mr. MacKenzie of the United Kingdom, in voting against the adoption of the Convention, explained:

There are a number of features of the Convention which we find entirely unsatisfactory and unacceptable. One of the most important is that it contains provisions which would violate the principles of international law concerning the proper exercise of criminal jurisdiction, principles to which we attach the highest importance. The provisions in question purport to authorize contracting States to exercise criminal jurisdiction in respect of certain matter covered by the Convention over acts done outside their jurisdiction by persons who are not their nationals. That assertion of jurisdiction would be totally inadmissible so far as my Government is concerned, and if this Convention should enter into force, my Government reserves its rights in relation to any attempt to assert such jurisdiction over United Kingdom nationals. We believe that many Governments share our position.<sup>582</sup>

Other delegations also voiced objections along similar lines.<sup>583</sup>

The important fact is, however, that whatever the merits or extravagances of the Apartheid Convention, apartheid, taken as an aggregate set of practices, violates practically every important par-

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581. 28 U.N. GAOR (provisional), U.N. Doc. A/PV.2185, at 12—15 (1973).

582. *Id.* at 23—25.

583. See, e.g., *Draft Convention on the Suppression and Punishment of the Crime of Apartheid* 11—14, U.N. Doc. A/8768 (1972) (Note by the Secretary-General) (views expressed by the delegations of Madagascar, Norway, and Sweden).

Notwithstanding these doubts and objections, it would be a mistake to discount the importance of the Apartheid Convention. It is an intense ceremonialization of the indignation that the people around the globe feel about apartheid. The characterization of apartheid as a "crime" itself promises to exert a far-reaching impact. In a comparable context, Reisman has incisively emphasized:

On the symbolic level, the characterization "crime" should convey maximum deterrence. Hence it is no surprise that the word "crime" is reserved for that pattern of behavior which is considered either the greatest challenge to elite objectives or most deleterious to group life.

Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DENVER J. INT'L L. & POLICY 34 (1971).

ticular prescription for the protection of specific rights embodied in the Universal Declaration of Human Rights and in the International Covenants on Human Rights. This comprehensive and systematic violation of particular human rights prescriptions is fully documented, article by article, in the elaborate United Nations *Study of Apartheid and Racial Discrimination in Southern Africa*, conducted by Manouchehr Ganji, Special Rapporteur appointed by the Commission on Human Rights.<sup>584</sup> In the same vein, Elizabeth S. Landis, a leading expert on the matter of apartheid, has flatly stated in recent testimony before the Sub-Committee on International Organizations and Movements of the House Committee on Foreign Affairs:

Even a cursory analysis of the situation in southern Africa shows that not a single one of the rights enumerated in the Declaration is honored by the white minority regimes of southern Africa.<sup>585</sup>

She has backed up her observation by various studies<sup>586</sup> and by an impressive table juxtaposing, one by one, specific provisions with specific violations.<sup>587</sup>

Some of the more important violations of the provisions of the Universal Declaration of Human Rights emphasized by the studies of Ganji, Landis and others<sup>588</sup> include:

- 1) the basic equality and dignity of every person protected in Article 1 and 2, violated by the deliberate systematic discriminations based on race formalized by the Population Registration Act of 1950;<sup>589</sup>
- 2) the "right to life, liberty and the security of person" under Article

584. *Study of Apartheid and Racial Discrimination in Southern Africa*, U.N. Docs. E/CN.4/949 & Add. 1—5 (1967—68) and U.N. Docs. E/CN.4/979 & Add.1—8 (1968—69). For the summary report of the 1967—68 study see APARTHEID IN SOUTHERN AFRICA, note 439 *supra*.

585. Landis, *Human Rights in Southern Africa and United States Policy in Relation Thereto*, in *Hearings*, *supra* note 439, at 164.

586. See, e.g., Landis, *Apartheid Legislation*, note 439 *supra*; Landis, *Human Rights in Southern Africa and United States Policy in Relation Thereto*, in *Hearings*, *supra* note 439; UNITED NATIONS, REPRESSIVE LEGISLATION OF THE REPUBLIC OF SOUTH AFRICA, U.N. Doc. ST/PSCA/SER.A/7 (1969) (a study prepared by Landis).

587. Landis, *Human Rights in Southern Africa and United States Policy in Relation Thereto*, in *Hearings*, *supra* note 439, at 164—66.

588. In highlighting the following itemizations, we draw heavily on the studies by Ganji, Landis, and Santa Cruz. See notes 584—87 *supra*; H. SANTA CRUZ, *supra* note 439, at 148—243. See also Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 83—84 (Separate Opinion of Vice President Ammoun).



3, violated by "repressive laws," especially the Terrorism Act of 1967;<sup>580</sup>

3) the prohibition of "slavery or servitude" of Article 4, violated by imposition of a criminal penalty for breach of an employment contract under the Bantu Labor Act of 1964, allowing the renting of black prisoners to private employers, thus constituting practices bordering on forced labor;<sup>591</sup>

4) the "equal protection of the law" under Article 7, violated by separate and unequal public facilities provided in the Reservation of Separate Amenities Act of 1953;<sup>592</sup>

5) "the right to an effective remedy by the competent national tribunals" in Article 8, violated by exemption from judicial review "banning orders" under the Suppression of Communism Act of 1950,<sup>593</sup> and detention under the Terrorism Act;<sup>594</sup>

6) the prohibition of "arbitrary arrest, detention, or exile" of Article 9, violated by a network of terror sustained by such measures as "Terrorism Act" and 180-Day Law;<sup>595</sup>

7) the right to "a fair and public" trial under Article 10, violated by the regularity and prevalence of arbitrary arrest, detention, and banning orders without judicial proceedings;<sup>596</sup>

589. Population Registration Act, No. 30 of 1950, 7 STAT. REP. S. AFRICA 71 (Butterworth 1959) (effective July 7, 1950). For discussion see E. BROOKES, *supra* note 439, at 109—25; M. HORRELL, LEGISLATION AND RACE RELATIONS 9—12 (rev. ed. 1971) [hereinafter cited as M. HORRELL]; H. SANTA CRUZ, *supra* note 439, at 148—50.

590. Terrorism Act, No. 83 of 1967, 9 STAT. REP. S. AFRICA 781 (Butterworth 1959) (effective June 27, 1967). See REPRESSIVE LEGISLATION, note 439 *supra*, for treatment of additional "repressive laws" in South Africa.

591. Bantu (Abolition of Passes and Co-ordination of Documents) Act, No. 67 of 1952, 6 STAT. REP. S. AFRICA 971 (Butterworth 1959) (effective July 11, 1952). See H. SANTA CRUZ, *supra* note 439, at 184—87; *Apartheid in Namibia*, *supra* note 439, at 20—21. See also notes 464—65 & accompanying text *supra*.

592. Reservation of Separate Amenities Act, No. 49 of 1953, 8 STAT. REP. S. AFRICA 311 (Butterworth 1959) (effective Oct. 9, 1953). For discussion see APARTHEID IN SOUTHERN AFRICA, *supra* note 439, at 26—27; M. HORRELL, *supra* note 589, at 77—83.

593. Suppression of Communism Act, No. 44 of 1950, 9 STAT. REP. S. AFRICA 71 (Butterworth 1959) (effective July 17, 1950).

594. Terrorism Act, No. 83 of 1967, 9 STAT. REP. S. AFRICA 781 (Butterworth 1959) (effective June 27, 1967). See REPRESSIVE LEGISLATION, *supra* note 439, at 18—43, 80—91; "Banning Orders" Issued Against Opponents of Apartheid in South Africa, U.N. UNIT ON APARTHEID, NOTES & DOCUMENTS No. 3/69 (1969).

595. See EROSION OF THE RULE OF LAW, *supra* note 439, at 7—30; REPRESSIVE LEGISLATION, note 439 *supra*; Report of the Ad Hoc Working Group, *supra* note 439, at 41—46; *Repressive Measures Against Opponents of Apartheid*, U.N. Doc. A/AC.115/L.375 (1973).

596. See notes 454—55 *supra*.

- 8) an individual's right to "privacy, family, home or correspondence," or "honor and reputation," protected under Article 12, violated by such measures as searches and seizures without warrant, night raids of homes in the name of enforcing the Immorality Act prohibiting interracial sexual relations;<sup>597</sup>
- 9) the "right to freedom of movement and residence" provided in Article 13, violated by the restrictions imposed by the "pass system" and the Group Areas Act;<sup>598</sup>
- 10) the "right to marry and to found a family" protected under Article 16, violated by forbidding interracial marriages through the Prohibition of Mixed Marriages Act<sup>599</sup> and by the pass laws system, separating family members and restricting wives from living with husbands in a specified area;<sup>600</sup>
- 11) "the right to own property" under Article 17, violated by restrictions on land ownership and by forcible removal of Africans from "Black spots";<sup>601</sup>
- 12) the rights of "freedom of opinion and expression" of Article 19 and "freedom of peaceful assembly and association" of Article 20, violated by the Suppression of Communism, Riotous Assemblies, and Unlawful Organizations Acts;<sup>602</sup>

597. Immorality Act, No. 23 of 1957, 9 STAT. REP. S. AFRICA 611 (Butterworth 1959) (effective Apr. 12, 1957). See M. HORRELL, *supra* note 589, at 8; Landis, *Human Rights in Southern Africa and United States Policy in Relation Thereto*, in *Hearings on International Protection of Human Rights Before the Subcomm. on International Organization and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 165, 167 (1974); *Study of Apartheid and Racial Discrimination in Southern Africa* 68—70, U.N. Doc. E/CN.4/949 (1967).

598. Group Areas Act, No. 36 of 1966, 15 STAT. REP. S. AFRICA 121 (Butterworth 1959) (effective Oct. 26, 1966). See notes 450—55 *supra*.

599. Prohibition of Mixed Marriages Act, No. 55 of 1949, 15 STAT. REP. S. AFRICA 91 (Butterworth 1959) (effective July 8, 1949).

600. See notes 474—79 *supra*; E. BROOKES, *supra* note 439, at 179—84; M. HORRELL, *supra* note 589, at 13.

601. See notes 452 & 461 *supra*.

602. Suppression of Communism Act, No. 44 of 1950, 9 STAT. REP. S. AFRICA 71 (Butterworth 1959); Riotous Assemblies Act, No. 17 of 1956, *id.* at 571 (effective Mar. 16, 1956); Unlawful Organizations Act, No. 34 of 1960, *id.* at 711 (effective Apr. 7, 1960).

Section 6 of the Suppression of Communism Act provides:

If the State President is satisfied that any periodical or other publication—

- (a) Professes, by its name or otherwise, to be a publication for propagating the principles or promoting the spread of communism; or
- (b) Is published or disseminated by or under the direction or guidance of an organization which has been declared an unlawful organization by or under section two, or was published or disseminated by or under the direction or guidance of any such organization immediately prior to the date upon which it became an unlawful organization; or
- (c) Serves *inter alia* as a means for expressing views propagated by any

13) "the right to take part in the government" and "the right of equal access to public service" under Article 21, violated by complete abolition of African representation in Parliament;<sup>603</sup>

14) the "right to work," the "right" to "just," "equal pay," and "the right to form and to join trade unions" under Article 23, violated by "job reservations," outrageously discriminatory wage differentials, and the Industrial Conciliation Act of 1956;<sup>604</sup>

15) the "right to education" under Article 25, violated by separate and unequal educational facilities and opportunities through such measures as the Bantu Education Act of 1953<sup>605</sup> and the Extension of University Education Act of 1959.<sup>606</sup>

The success of the general community in formulating and clarifying prescriptions designed to end apartheid has not, unfortunately, been matched by a comparable success in the application of such prescriptions. In the course of the struggle over the problems of apartheid in South Africa and Namibia, there has been a continuous flow of decisions in purported application and in performance of related functions, such as intelligence, promotion, invocation, and appraisal, in aid of application.<sup>607</sup> Many authoritative bodies,

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such organization, or did so serve immediately prior to the said date; or

(d) Serves *inter alia* as a means for expressing views or conveying information, the publication of which is calculated to further the achievement of any of the objects of communism; or

(e) Is a continuation or substitution, whether or not under another name, of any periodical or other publication the printing, publication or dissemination whereof has been prohibited under this section, he may without notice to any persons concerned, by proclamation in the Gazette prohibit the printing, publication or dissemination of such periodical, publication or the dissemination of such publication; and the State President may in like manner withdraw any such proclamation.

Suppression of Communism Act No. 44 of 1950, *as amended by Act No. 50 of 1951 & Act. No. 76 of 1962*, quoted in H. SANTA CRUZ, *supra* note 439, at 175. See also REPRESSIVE LEGISLATION, *supra* note 439, at 18—46, 55—59.

603. See E. BROOKES, *supra* note 439, at 116—29; H. SANTA CRUZ, *supra* note 439, at 162—68.

604. Industrial Conciliation Act, No. 28 of 1956, 18 STAT. REP. S. AFRICA 399 (Butterworth 1959) (effective Jan. 1, 1957). See notes 462—67 *supra*.

605. Bantu Education Act, No. 47 of 1953, 6 STAT. REP. S. AFRICA 1031 (Butterworth 1959) (effective Jan. 1, 1954).

606. Extension of University Education Act, No. 45 of 1959, 12 STAT. REP. S. AFRICA 693 (Butterworth 1959) (effective June 19, 1959). See APARTHEID IN PRACTICE, *supra* note 439, at 24—26; APARTHEID IN SOUTHERN AFRICA, *supra* note 439, at 44—45; E. BROOKES, *supra* note 439, at 41—71; M. HORRELL, *supra* note 589, at 64—73.

607. On the seven functions of decision—intelligence, promotion, prescription, invocation, application, appraisal, and termination—consult McDougal, Lasswell

including the General Assembly, the Security Council, the International Court of Justice, the Economic and Social Council, the Secretary-General, the Secretariat (especially the Unit on Apartheid); the Commission on Human Rights, the Special Committee on Apartheid, the Special Committee on Decolonization, the Trust Fund for South Africa, the United Nations Council on Namibia, and many *ad hoc* committees of experts established under various resolutions, as well as the Specialized Agencies such as FAO, ILO, UNESCO, WHO, and the Universal Postal Union, have participated in these activities.<sup>608</sup> The General Assembly and the Security Council have, of course, played the most important roles. A wide range of sanctioning measures has been invoked, though without much success, in a sequence of attempts to put the prescriptions condemning apartheid into controlling practice in southern Africa.<sup>609</sup> These attempted enforcement measures cover the whole spectrum of the traditional instruments of policy—diplomatic, ideological, economic, and military.<sup>610</sup>

Prior to 1960, the General Assembly had placed most emphasis on persuasive measures by repeatedly urging a peaceful settlement through patient negotiations with the government of South Africa.<sup>611</sup> Since 1960, however, as persuasion proved futile and the African-Asian membership in the United Nations greatly increased, more coercive measures have been sought. The intensity of the demand

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& Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 261 (1967).

608. See UNITED NATIONS, ACTION AGAINST APARTHEID (1969); *Co-ordination of United Nations Activities with Regard to Policies of Apartheid and Racial Discrimination in Southern Africa*, U.N. Doc. E/4817/Corr.1 (1970) (Report by the Secretary-General).

609. See generally C. LEGUM & M. LEGUM, SOUTH AFRICA: CRISIS FOR THE WEST (1964); APARTHEID AND UNITED NATIONS COLLECTIVE MEASURES: AN ANALYSIS (A. Leiss ed. 1965); SANCTIONS AGAINST SOUTH AFRICA (R. Segal ed. 1964); J. SPENCE, REPUBLIC UNDER PRESSURE: A STUDY OF SOUTH AFRICAN FOREIGN POLICY (1965); R. TAUBENFELD & H. TAUBENFELD, RACE, PEACE, LAW, AND SOUTHERN AFRICA (1968); A. VANDENBOSCH, SOUTH AFRICA AND THE WORLD (1970).

610. For a convenient summary of these proposed measures of enforcement see *Policies of Apartheid of the Government of Africa: Implementation by States of United Nations Resolutions on Apartheid* 29—41, U.N. Doc. A/9168 (1973) (Report of the Special Committee on Apartheid). Concerning the four traditional instruments of policy and sanction see M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 261—383 (1961).

611. See UNITED NATIONS, ACTION AGAINST APARTHEID 9—11 (1969); UNITED NATIONS, REVIEW OF UNITED NATIONS CONSIDERATION OF APARTHEID, U.N. Doc. ST/PSCA/SER.A/2, at 3—5 (1967).

of the African-Asian members for such measures is well indicated by Moskowitz:

What makes South Africa's racial policies a matter of such urgent concern to the international community is the identification of the non-White world with the cause of the Black man there. To the overwhelming majority of the Afro-Asian nations, there is no conceivable crime greater than *apartheid*.<sup>612</sup>

Thus, in 1962, for the first time, the General Assembly in Resolution 1761(XVII) requested member states to undertake, "separately or collectively," the following specific measures to "bring about the abandonment" of South Africa's apartheid policies:<sup>613</sup>

- (a) Breaking off diplomatic relations with the Government of the Republic of South Africa or refraining from establishing such relations;
- (b) Closing their ports to all vessels flying the South African flag;
- (c) Enacting legislation prohibiting the ships from entering South African ports;
- (d) Boycotting all South African goods and refraining from exporting goods, including all arms and ammunition, to South Africa;
- (e) Refusing landing and passage facilities to all aircraft belonging to the Government of South Africa and companies registered under the laws of South Africa.<sup>614</sup>

In the same resolution the Assembly further approved the establishment of a Special Committee to "keep the racial policies of the Government of South Africa under review" and to report to the Assembly and the Security Council.<sup>615</sup> With the expansion of its responsibilities through the years, the Special Committee on Apartheid has performed vital functions in aid of the General Assembly and the Security Council.<sup>616</sup>

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612. M. MOSKOWITZ, *THE POLITICS AND DYNAMICS OF HUMAN RIGHTS* 177 (1968).

613. G.A. Res. 1761, 17 U.N. GAOR Supp. 17, at 9, U.N. Doc. A/5217 (1962).

614. *Id.* ¶ 4.

615. *Id.* ¶ 5, 17 U.N. GAOR Supp. 17, at 9-10.

616. First known as the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa, its title has been shortened, since December 8, 1970, to the Special Committee on Apartheid. For its activities see its annual reports submitted to the General Assembly and the Security Council: *Report*, 29 U.N. GAOR Supp. 22, U.N. Doc. A/9622 (1974); *Report*, 28 U.N. GAOR Supp. 22, U.N. Doc. A/9022 (1973); *Report*, 27 U.N. GAOR Supp. 22, U.N. Doc. A/8722 (1972); *Report*, 26 U.N. GAOR Supp. 22, U.N. Doc. A/8422/Rev.1 (1971); *Report*, 25 U.N. GAOR Supp. 22, U.N. Doc. A/8022/Rev.1 (1970); *Report*, 24 U.N. GAOR Supp. 25, U.N. Doc. A/7625/Rev.1 (1969); *Report*, U.N. Doc. A/7254 (1968); *Report*, U.N. Docs. A/6864 & A/6864/Add.1-S/8196 (1967); *Report*, U.N. Doc.

In subsequent years, as the situation in South Africa has continued to deteriorate, the Assembly has repeatedly reaffirmed the measures recommended in Resolution 1761 (XVII) and urged fuller implementation by member states.<sup>617</sup> In 1969, the Assembly was more detailed and specific in its recommendation of economic sanctions by urging member states

(a) To desist from collaborating with the Government of South Africa, by taking steps to prohibit financial and economic interests under their national jurisdiction from co-operating with the Government of South Africa and companies registered in South Africa;

(b) To prohibit airlines and shipping lines registered in their countries from providing services to and from South Africa and to deny all facilities to air flights and shipping services to and from South Africa;

(c) To refrain from extending loans, investments and technical assistance to the Government of South Africa and companies registered in South Africa;

(d) To take appropriate measures to dissuade the main trading partners of South Africa and economic and financial interests from collaborating with the Government of South Africa and companies registered in South Africa.<sup>618</sup>

Other measures that have been urged by the Assembly include: coordination of efforts by the specialized agencies;<sup>619</sup> rendering "relief" and legal, educational, and other assistance to victims of apartheid through the United Nations Trust Fund for South Africa;<sup>620</sup> rendering "effective political, moral and material assistance

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A/6486—S/7565 (1966); *Report*, U.N. Doc. A/5957—S/6605 (1965); *Report*, U.N. Docs. A/5825, A/5825/Add.1—S/6073 & S/5426/Add.1 (1964); *Report*, U.N. Docs. A/5497, A/5497/Add.1—S/5426 & S/5426/Add.1 (1963).

617. *See, e.g.*, G.A. Res. 2144A, 21 U.N. GAOR Supp. 16, at 46, U.N. Doc. A/6316 (1966); G.A. Res. 2439, 23 U.N. GAOR Supp. 18, at 47, U.N. Doc. A/7218 (1968); G.A. Res. 2446, 23 U.N. GAOR Supp. 18, at 51, U.N. Doc. A/7218 (1968); G.A. Res. 2547B, 24 U.N. GAOR Supp. 30, at 56, U.N. Doc. A/7630 (1969); G.A. Res. 2646, 25 U.N. GAOR Supp. 28, at 71, U.N. Doc. A/8028 (1970); G.A. Res. 2671F, 25 U.N. GAOR Supp. 28, at 33, U.N. Doc. A/8028 (1970); G.A. Res. 2714, 25 U.N. GAOR Supp. 28, at 79, U.N. Doc. A/8028 (1970).

618. G.A. Res. 2506, ¶ 5, 24 U.N. GAOR Supp. 30, at 23, U.N. Doc. A/7630 (1969). *See also* G.A. Res. 2671F, ¶ 7, 25 U.N. GAOR Supp. 28, at 33, U.N. Doc. A/8028 (1970); G.A. Res. 2784, 26 U.N. GAOR Supp. 29, at 79, U.N. Doc. A/8429 (1971); G.A. Res. 2923E, 27 U.N. GAOR Supp. 30, at 25, U.N. Doc. A/8730 (1972); G.A. Res. 3151G, 28 U.N. GAOR Supp. 30, at 16—18, U.N. Doc. A/9030 (1973).

619. *See, e.g.*, G.A. Res. 2054A, ¶ 10, 20 U.N. GAOR Supp. 14, at 16, U.N. Doc. A/6014 (1965); G.A. Res. 3151D, 28 U.N. GAOR Supp. 30, at 31, U.N. Doc. A/9030 (1973).

620. G.A. Res. 2054B, ¶ 2, 20 U.N. GAOR Supp. 14, at 17, U.N. Doc. A/6014

to all those combatting the policies of apartheid;<sup>621</sup> a massive continuing publicity campaign through the mass media, with international seminars and so on;<sup>622</sup> an international boycott of racially-oriented sports teams;<sup>623</sup> discouragement of emigration to South Africa;<sup>624</sup> and the termination of "all cultural, educational and civic contacts and exchanges with racist institutions in South Africa."<sup>625</sup>

In response to the requests of the Assembly and member states, the Security Council, as indicated above, dealt with the apartheid

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(1965). See also G.A. Res. 2144A, ¶ 7, 21 U.N. GAOR Supp. 16, at 46, U.N. Doc. A/6316 (1966); G.A. Res. 2202B, 21 U.N. GAOR Supp. 16, at 21, U.N. Doc. A/6316 (1966); G.A. Res. 2397, 23 U.N. GAOR Supp. 18, at 21, U.N. Doc. A/7218 (1968); G.A. Res. 2547A, 24 U.N. GAOR Supp. 30, at 55, U.N. Doc. A/7630 (1969); G.A. Res. 2671E, 25 U.N. GAOR Supp. 28, at 33, U.N. Doc. A/8028 (1970); G.A. Res. 3151F, 28 U.N. GAOR Supp. 30, at 32, U.N. Doc. A/9030 (1973).

621. G.A. Res. 2202A, ¶ 5(c), 21 U.N. GAOR Supp. 16, at 20, U.N. Doc. A/6316 (1966). See also G.A. Res. 2307, ¶ 8, 22 U.N. GAOR Supp. 16, at 20, U.N. Doc. A/6716 (1967); G.A. Res. 2396, ¶ 7, 23 U.N. GAOR Supp. 18, at 20, U.N. Doc. A/7218 (1968); G.A. Res. 2446, ¶ 6, 23 U.N. GAOR Supp. 18, at 51, U.N. Doc. A/7218 (1968); G.A. Res. 2506B, ¶ 4, 24 U.N. GAOR Supp. 30, at 24, U.N. Doc. A/7630 (1969); G.A. Res. 2671B, 25 U.N. GAOR Supp. 28, at 32, U.N. Doc. A/8028 (1970); G.A. Res. 2775F, ¶ 6, 26 U.N. GAOR Supp. 29, at 6, U.N. Doc. A/8429 (1971); G.A. Res. 2923E, ¶ 11, 27 U.N. GAOR Supp. 30, at 26, U.N. Doc. A/8730 (1972).

622. G.A. Res. 2054A, 20 U.N. GAOR Supp. 14, at 16, U.N. Doc. A/6014 (1965), urged all Member States to "co-operate with the Secretary-General and the Special Committee" to achieve "the widest possible dissemination of information on the policies of *apartheid* of the Government of South Africa and on United Nations efforts to deal with the situation." *Id.* at 17. For reiteration of this call, see G.A. Res. 25, 47B, 24 U.N. GAOR Supp. 30, at 56, U.N. Doc. A/7630 (1969); G.A. Res. 2671C, 25 U.N. GAOR Supp. 28, at 32, U.N. Doc. A/8028 (1970); G.A. Res. 2775G, 26 U.N. GAOR Supp. 29, at 44, U.N. Doc. A/8429 (1971); G.A. Res. 3151C, 28 U.N. GAOR Supp. 30, at 30-31, U.N. Doc. A/9030 (1973).

623. See, e.g., G.A. Res. 2396, ¶ 12, 23 U.N. GAOR Supp. 18, at 20, U.N. Doc. A/7218 (1968); G.A. Res. 2671F, ¶ 8, 25 U.N. GAOR Supp. 28, at 34, U.N. Doc. A/8028 (1970); G.A. Res. 2775D, 26 U.N. GAOR Supp. 29, at 42, U.N. Doc. A/8429 (1971); G.A. Res. 2923E, ¶ 14, 27 U.N. GAOR Supp. 30, at 26, U.N. Doc. A/8730 (1972).

624. In 1968, the General Assembly requested all Member States to "discourage the flow of immigrants, particularly skilled and technical personnel, to South Africa." G.A. Res. 2396, ¶ 11, 23 U.N. GAOR Supp. 18, at 19, U.N. Doc. A/7218 (1968). See also G.A. Res. 2775F, ¶ 9, 26 U.N. GAOR Supp. 29, at 43, U.N. Doc. A/8429 (1971).

625. G.A. Res. 3151G, ¶ 10(d), 28 U.N. GAOR Supp. 30, at 33, U.N. Doc. A/9030 (1973). See also G.A. Res. 2396, ¶ 12, 23 U.N. GAOR Supp. 18, at 20, U.N. Doc. A/7218 (1968); G.A. Res. 2547B, 24 U.N. GAOR Supp. 30, at 56, U.N. Doc. A/7630 (1969); G.A. Res. 2646, 25 U.N. GAOR Supp. 28, at 71, U.N. Doc. A/8028 (1970); G.A. Res. 2671F, 25 U.N. GAOR Supp. 28, at 33, U.N. Doc. A/8028 (1970).

problems in 1960, 1963, 1964, 1970 and 1972.<sup>626</sup> The central call on the part of the Security Council has been for an arms embargo. Thus, the Security Council in Resolution 181 (1963) called upon "all States to cease forthwith the sale and shipment of arms, ammunition of all types and military vehicles to South Africa,"<sup>627</sup> and further, in Resolution 182 (1963), called upon

all States to cease forthwith the sale and shipment of equipment and materials for the manufacture and maintenance of arms and ammunition in South Africa.<sup>628</sup>

These resolutions calling for arms embargo have many times been reaffirmed by the General Assembly<sup>629</sup> and were further strengthened by the Council itself in Resolution 282 (1970).<sup>630</sup>

[This Resolution c]alls upon all States to strengthen the arms embargo

(a) By implementing fully the arms embargo against South Africa unconditionally and without reservations whatsoever;

(b) By withholding the supply of all vehicles and equipment for use of the armed forces and paramilitary organizations of South Africa;

(c) By ceasing the supply of spare parts for all vehicles and military equipment used by the armed forces and paramilitary organizations of South Africa;

(d) By revoking all licenses and military patents granted to the South African Government or to South African companies for the manufacture of arms and ammunition, aircraft and naval craft or other military vehicles and by refraining from further granting such licenses and patents;

(e) By prohibiting investment in, or technical assistance for, the manufacture of arms and ammunition, aircraft, naval craft, or other military vehicles;

(f) By ceasing provision of military training for members of the South African armed forces and all other forms of military co-

626. See notes 511—13 & accompanying text *supra*.

627. S.C. Res. 181 (1963), 18 U.N. SCOR, *Resolutions and Decisions of the Security Council 1963*, at 7, U.N. Doc. S/INS/Rev.1 (1963).

628. S.C. Res. 182 (1963), *id.* at 8—10.

629. See G.A. Res. 1978A, 18 U.N. GAOR Supp. 15, at 20, U.N. Doc. A/5515 (1963); G.A. Res. 2054A, 20 U.N. GAOR Supp. 14, at 16, U.N. Doc. A/6014 (1965); G.A. Res. 2144A, 21 U.N. GAOR Supp. 16, at 46, U.N. Doc. A/6316 (1966); G.A. Res. 2202A, 21 U.N. GAOR Supp. 16, at 20, U.N. Doc. A/6316 (1966); G.A. Res. 2307, 22 U.N. GAOR Supp. 16, at 19, U.N. Doc. A/6716 (1967); G.A. Res. 2506B, 24 U.N. GAOR Supp. 30, at 24, U.N. Doc. A/7630 (1969).

630. S.C. Res. 282, 25 U.N. SCOR, *Resolutions and Decisions of the Security Council 1970*, at 12, U.N. Doc. S/INF/25 (1970).



operation with South Africa;

(g) By undertaking the appropriate action to give effect to the above measures.<sup>631</sup>

Meanwhile, various supporting decisions were being made by the specialized agencies. On December 5, 1963, the Conference of the Food and Agriculture Organization of the United Nations decided not to invite the government of South Africa to participate in any of the Organization's activities. South Africa thereupon withdrew from FAO on December 18, 1963.<sup>632</sup> After repeated condemnations by the International Labor Conference, urging renunciation of the apartheid policy,<sup>633</sup> the government of South Africa withdrew from the International Labor Organization in March 1966.<sup>634</sup> In 1964, the Congress of the Universal Postal Union adopted a resolution demanding the expulsion of South Africa from the organization.<sup>635</sup> In April of 1955, South Africa withdrew from the United Nations Educational, Scientific and Cultural Organization, allegedly in protest

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631. *Id.* ¶ 4. In October 1974, the Security Council rejected a draft resolution, sponsored by Kenya, Mauritania, Cameroon, and Iraq, which would have had the Council recommend to the General Assembly that South Africa be expelled from the United Nations pursuant to Article 6 of the Charter. Although the vote was 10 in favor, 3 opposed, and 2 abstaining, the resolution was vetoed by the negative votes of France, the United Kingdom, and the United States. See UN MONTHLY CHRONICLE, Nov. 1974, at 9—40. Shortly afterwards, on November 12, 1974, the General Assembly upheld the following ruling of its President:

On the basis of the consistency with which the General Assembly has regularly refused to accept the credentials of the delegation of South Africa, one may legitimately infer that the General Assembly would in the same way reject the credentials of any other delegation authorized by the Government of the Republic of South Africa to represent it, which is tantamount to saying in explicit terms that the General Assembly refuses to allow the delegation of South Africa to participate in its work.

G.A. Res. 3324E, *Resolutions of the General Assembly at its Twenty-Ninth Regular Session*, at 27 U.N. Press Release GA/5194 (20 Dec. 1974). South Africa was thus, in effect, suspended from the 29th Session of the General Assembly. See N.Y. Times, Nov. 13, 1974, at 1, col. 2. See also *id.*, Sept. 28, 1974, at 2, col. 7; *id.*, Oct. 1, 1974, at 3, col. 1; *id.*, Oct. 7, 1974, at 6, col. 4; *id.*, Oct. 19, 1974, at 3, col. 1; *id.*, Oct. 25, 1974, at 5, col. 1; *id.*, Oct. 30, 1974, at 7, col. 1; *id.*, Oct. 31, 1974, at 1, col. 4.

632. *Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa* 154, U.N. Doc. A/5825 (1964).

633. See notes 465—66 *supra*; INTERNATIONAL LABOUR OFFICE, FIGHTING DISCRIMINATION IN EMPLOYMENT AND OCCUPATION 72—81 (1968).

634. H. SANTA CRUZ, *supra* note 439, at 211—12.

635. *Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa* 156—57, U.N. Doc. A/5825 (1964).

of a number of UNESCO publications condemning apartheid.<sup>636</sup> The World Health Assembly, in March, 1964, decided to suspend the voting privileges of South Africa<sup>637</sup> and, in 1965, adopted an amendment to the Constitution of the World Health Organization which empowered the Health Assembly with the authority to suspend or exclude a member "deliberately practising a policy of racial discrimination."<sup>638</sup>

Following the General Assembly's formal termination of South Africa's Mandate over Namibia in 1966<sup>639</sup> and the 1971 Advisory Opinion of the International Court of Justice on Namibia,<sup>640</sup> many member states of the United Nations sought sanctioning measures designed to end the "illegal occupation" of that territory by the government of South Africa.<sup>641</sup> As an instrument to facilitate termination of South Africa's effective control over Namibia, the United Nations Council for Namibia was established pursuant to General Assembly Resolution 2248 (S-V) of 1967.<sup>642</sup> The Council is empowered by the same Resolution to "administer" Namibia "until independence, with the maximum possible participation" of its people, to "promulgate" necessary "laws, decrees and administrative regulations," to establish "a constituent assembly to draw up a constitution," to maintain "law and order in the Territory," and to "transfer all powers to the people of the Territory upon the declaration of

636. See H. SANTA CRUZ, *supra* note 439, at 212; UNESCO, *APARTHEID* (2d ed. 1972).

637. *Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa* 157, U.N. Doc. A/5825 (1964).

638. Article 7(b) of the Constitution of the World Health Organization as amended, reads:

(b) If a Member ignores the humanitarian principles and the objectives laid down in the Constitution, by deliberately practising a policy of racial discrimination, the Health Assembly may suspend it or exclude it from the World Health Organization.

Nevertheless, its rights and privileges, as well as its membership, may be restored by the Health Assembly on the proposal of the Executive Board following a detailed report proving that the State in question has renounced the policy of discrimination which gave rise to its suspension or exclusion.

CONSTITUTION OF THE WORLD HEALTH ORGANIZATION, *as amended* May 20, 1965, art. 7(b), *reprinted in* 4 INT'L LEGAL MATERIALS 745, 746 (1965).

639. G.A. Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966).

640. Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

641. See note 609 *supra*.

642. G.A. Res. 2248 (S-V), 5 U.N. GAOR Supp. 1 (Spec. Sess.), at 1—2, U.N. Doc. A/6657 (1967).

independence.<sup>643</sup> The Council is charged by General Assembly Resolution 3031 (XXVII) of 1972<sup>644</sup> with additional responsibilities in conducting the foreign affairs of Namibia and in arranging for external assistance.<sup>645</sup> Because of the vehement opposition of the government of South Africa, the Council has not, however, been able to assert its physical presence within Namibia.<sup>646</sup>

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643. *Id.* (pt. II).

644. G.A. Res. 3031, 27 U.N. GAOR Supp. 30, at 88, U.N. Doc. A/8730 (1972).

645. These additional responsibilities are:

(a) To represent Namibia in international organizations, at conferences and on any other occasion as may be required;

(b) To ensure the participation in an appropriate capacity of the representatives of the Namibian people in its activities;

(c) To continue its consultations at the United Nations Headquarters, in Africa or elsewhere with the representatives of the Namibian people and the Organization of African Unity;

(d) To continue to assume responsibility for the urgent establishment of short-term and long-term co-ordinated programmes of technical and financial assistance to Namibia in the light of the relevant provisions of resolution 2248 (S-V) and taking into account resolution 2872(XXVI) of 20 December 1971;

(e) To continue to expand the existing scheme for issuing identity certificates and travel documents to Namibians by concluding appropriate agreements with Governments of Member States;

(f) To continue to promote publicity with regard to the question of Namibia and to assist the Secretary-General in the discharge of the task entrusted to him under paragraph 14 below;

(g) To undertake a study of the compliance of Member States with the relevant United Nations resolutions, taking into account the advisory opinion of the International Court of Justice relating to Namibia;

(h) To examine the question of foreign economic interests operating in Namibia, and to seek effective means to regulate such activities as appropriate;

(i) To continue to examine the question of bilateral and multilateral treaties which explicitly or implicitly include Namibia, and to seek to replace South Africa as the party representing Namibia in all relevant bilateral and multilateral treaties.

*Id.* ¶ 9, 27 U.N. GAOR Supp. 30, at 89.

646. For the recent activities of the United Nations Council for Namibia see the following reports of the Council: 24 U.N. GAOR Supp. 24, U.N. Doc. A/7624/Rev.1 (1969); 25 U.N. GAOR Supp. 24, U.N. Doc. A/8024 (1970); 26 U.N. GAOR Supp. 24, U.N. Doc. A/8424 (1971); 27 U.N. GAOR Supp. 24, U.N. Doc. A/8724 (1972); U.N. Doc. A/9024 (1973).

In 1972, the Security Council, pursuant to its resolution 309 (1972) of 4 February 1972, invited the Secretary-General

to initiate as soon as possible contacts with all parties concerned, with a view to establishing the necessary conditions so as to enable the people of Nami-

The failure of the various sanctioning measures designed to eradicate apartheid in southern Africa is too conspicuous to require elaboration.<sup>647</sup> As the Special Committee on Apartheid has pointed out in its 1973 Report:

[W]hile a large number of Member States have implemented these resolutions, in some cases at great economic sacrifice, some other States (particularly a few main trading partners of South Africa) have ignored them. Some States have greatly increased their trade with and investment in South Africa during the past decade. A few States have even continued to provide military equipment to South Africa. As a result, the United Nations action on *apartheid* has remained far from effective.<sup>648</sup>

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bia, freely and with strict regard to the principle of human equality, to exercise their right to self-determination and independence, in accordance with the Charter of the United Nations.

27 U.N. SCOR, *Resolutions of the Security Council 1972*, at 4, U.N. Doc. S/INF/28 (1972).

Hence, the Secretary-General established contacts with the government of South Africa, and visited both South Africa and Namibia during March 6—10, 1972. After receiving the initial encouraging report submitted by the Secretary-General, U.N. Doc. S/10738 (1972), the Security Council urged the Secretary-General to continue his contacts, assisted by a special representative. S.C. Res. 319 (1972), *id.* at 5. Subsequently, the mandate of the Secretary-General was further extended by S.C. Res. 323 (1972), *id.* at 6. Despite these efforts, the United Nations Council for Namibia has concluded:

The contacts authorized by the Security Council between the Secretary-General of the United Nations and the illegal South African occupation regime have failed, clearly demonstrating the bad faith of the South African regime in refusing to accept the last offer to negotiate a peaceful transfer of power in Namibia. The failure of the contacts is due primarily to the fact that South Africa clearly entered into them with the intention of using the contacts to consolidate their domination over Namibia and to divert attention from the problem, thus arresting the increasing pressure of the international community. It is now incumbent on the Security Council, and particularly those members who argued most forcefully for offering this chance of a "dialogue" to South Africa, to adopt whatever measures may be necessary to enforce international law as defined by the International Court of Justice and the relevant resolutions of the United Nations.

*Report of the United Nations Council for Namibia 73*, U.N. Doc. A/9024 (1973).

647. See note 609 *supra*.

648. *Policies of Apartheid of the Government of Africa: Implementation by States of United Nations Resolutions on Apartheid 5*, U.N. Doc. A/9168 (1973) (Report of the Special Committee on Apartheid).

See AFRICAN RESEARCH GROUP, *RACE TO POWER* (1974); D. AUSTIN, *BRITAIN AND SOUTH AFRICA* (1966); R. FIRST, J. STEELE & S. GURNEY, *THE SOUTH AFRICAN CONNECTION: WESTERN INVESTMENTS IN APARTHEID* (1972); SOUTHERN AFRICA AND THE UNITED

Such failure is perhaps but a dramatic demonstration of the characteristic weaknesses of a world arena in which both authoritative decision making and effective power are relatively decentralized.<sup>649</sup> It remains for increasing global interdependence and the growing consciousness, and conscience, of mankind to change the outcome.<sup>650</sup>

## 2. Claims Relating to a Basic Equality of Opportunity in the Enjoyment of All Values, that is, Freedom from Discrimination for Reasons Irrelevant to Capability

The deprivations with which we are here concerned are those, whether imposed by state officials or others, which deny individuals effective freedom of choice about participation in community value processes because of alleged group characteristics which bear no rational relation to the individuals' actual potentialities for such participation. The individuals in any community may, of course, differ greatly in their potentialities for participation in different

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STATES (W. Hance ed. 1968); SOUTHERN AFRICA IN PERSPECTIVE (C. Potholm & R. Dale eds. 1972); UNITED NATIONS, UNIT ON APARTHEID, FOREIGN INVESTMENT IN THE REPUBLIC OF SOUTH AFRICA, U.N. Doc. ST/PSCA/SER.A/11 (1970); Hirschmann, *Pressure on Apartheid*, 52 FOREIGN AFFAIRS 168 (1973); *International Conference of Trade Unions Against Apartheid*, U.N. Doc. A/9169 (1973) (Report of the Special Committee on Apartheid); *Military Build-up in South Africa and Implementation of the Arms Embargo Against South Africa*, U.N. Docs. A/9180 & S/11005 (1973) (Report of the Special Committee on Apartheid).

649. See generally M. BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* (1968); 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* (C. Black & R. Falk eds. 1971); J. CAREY, *UN PROTECTION OF CIVIL AND POLITICAL RIGHTS* (1970); R. FALK, *LEGAL ORDER IN A VIOLENT WORLD* (1968); 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* (R. Falk & C. Black eds. 1969); R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* (1970); W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964); *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* (L. Gross ed. 1969); O. LISSITSYN, *INTERNATIONAL LAW IN A DIVIDED WORLD 1* (International Conciliation No. 543, 1963); M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960); W. REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* (1971); B. ROLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* (1960).

Some of the difficulties in enforcing prescriptions about threats to the peace are illustrated by the futility in the attempts to apply sanctions in Southern Rhodesia. See McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

650. We will elaborate on this point in the chapters dealing with the world constitutive process of authoritative decision. For indication of the difficulties see McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (R. Falk & C. Black eds. 1969).

value processes or even in different phases of the same value process. These differences in potentialities for participation do not, however, vary uniformly and rationally with alleged group characteristics described in terms of race, sex, religion, political opinion, language, age, alienage, possession of property, birth, and other status. Differentiation in the treatment of individuals based upon group categorizations having no rational relation to the genuine potential of the individual for contribution to common interest is commonly described, in both legal and popular parlance, as discrimination.<sup>651</sup> Thus, a basic United Nations Study of 1949 recites:

[D]iscrimination includes any conduct based on a distinction made on grounds of natural or social categories, which have no relation either to individual capacities or merits, or to the concrete behaviour of the individual person.<sup>652</sup>

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651. *See, e.g.*, a series of studies on discrimination undertaken under the auspices of the United Nations: C. AMMOUN, *STUDY OF DISCRIMINATION IN EDUCATION*, U.N. Doc. E/CN.4/Sub.2/181/Rev.1 (1957); J. INGLES, *STUDY OF DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY*, U.N. Doc. E/CN.4/Sub.2/220/Rev.1 (1963); A. KRISHNASWAMI, *STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960); M. RANNAT, *STUDY ON EQUALITY IN THE ADMINISTRATION OF JUSTICE*, U.N. Doc. E/CN.4/Sub.2/296/Rev.1 (1972); V. SAARIO, *STUDY OF DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK*, U.N. Doc. E/CN.4/Sub.2/265/Rev.1 (1967); H. SANTA CRUZ, note 439 *supra*; H. SANTA CRUZ, *STUDY OF DISCRIMINATION IN THE MATTER OF POLITICAL RIGHTS*, U.N. Doc. E/CN.4/Sub.2/213/Rev.1 (1962); UNITED NATIONS, *THE MAIN TYPES AND CAUSES OF DISCRIMINATION*, U.N. Doc. E/CN.4/Sub.2/40/Rev.1 (1949) (Memorandum submitted by the Secretary-General).

*See also* E. VIERDAG, *THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW* (1973) [hereinafter cited as E. VIERDAG]; McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT'L L. 177 (1970); Sorensen, *The Quest for Equality*, 507 INT'L CONCILIATION 289 (1956); Van Dyke, *Human Rights Without Discrimination*, 67 AM. POL. SCI. REV. 1267 (1973).

For a discussion of positive programs to remove the causes of inequality and of the importance of managing all phases of the constitutive process to prevent, deter, restore, rehabilitate, and reconstruct instances of discrimination, see notes 918—63 & accompanying text *infra*. See also note 52 & accompanying text *supra*.

652. UNITED NATIONS, *THE MAIN TYPES AND CAUSES OF DISCRIMINATION* 9, U.N. Doc. E/CN.4/Sub.2/40/Rev.1 (1949) (Memorandum submitted by the Secretary-General). Based on the United Nations studies of various aspects of discrimination, McKean has summarized:

It was generally agreed that the term "discrimination" is not synonymous with "differential treatment" or "distinction". Rather, in the sense used in the studies, "discrimination" means some sort of distinction made against a person according to his classification into a particular group or category rather than by taking into account his individual merits or capacities.

Though less extreme in its incidence than slavery,<sup>653</sup> and less hierarchized in its differentiations than caste<sup>654</sup> and apartheid,<sup>655</sup> discrimination may still be most comprehensive, systematic, and severe in the value deprivations it imposes.

The prevalence through history, even into contemporary life, of wide-ranging discriminations, based upon many alleged group characteristics and extending through all community value processes, is a matter of common knowledge. The horrors of comprehensive and systematic racial discrimination are matched only by the persistent and equally destructive corrosions of its less institutionalized and less routinized expression, with all such expression constituting a deep and imminent threat to contemporary world public order.<sup>656</sup>

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McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT'L L. 177, 180 (1970) (footnote omitted).

653. See notes 79—354 & accompanying text *supra*.

654. See notes 355—438 & accompanying text *supra*.

655. See notes 439—650 & accompanying text *supra*.

656. The horror of racial discrimination in southern Africa, which has aroused world-wide indignation, represents, of course, the most notorious, extreme case. Racial discrimination exists elsewhere in less systematic and less routinized fashions. Discrimination is practiced against the "colored" people of Great Britain, the blacks and other minority groups of the United States, the overseas Chinese in southeast Asia, the Indian settlers in East Africa, and the Aborigines in Australia.

Drawing largely upon a series of reports published by the Minority Rights Group based in London, Dehner has given this summary account:

Aside from South Africa, there is virtually no concern expressed about discriminatory practices of U.S.-controlled foreign companies. Yet, ethnic and racial discrimination infests much of the world. Among the minorities which commentators have found to be victims of economic discrimination are the Burakumin (Eta) in Japan, the southern African tribes of the Sudan, the Eritreans of Ethiopia, the Crimean Tatars and the Volga Germans in the Soviet Union, the Basques of Spain and France, the Chinese in Southeast Asia, the Biharis of Bangladesh, Oriental immigrants and Druzes in Israel, the East Indians of Guyana and Trinidad, the non-white population of the United Kingdom, Albanians in Yugoslavia, Indians in Burma and Malaya, the Watusi of Rwanda, the Tamil-speaking Ceylonese of Ceylon, East Asians in Kenya, French Canadians in Canada, Walloons in Belgium, various Indian geographic and caste groups, and Arabs and Bretons in France. Even if some of these charges of discrimination are untrue, it is clear that racial prejudice is a global scourge.

Dehner, *Multinational Enterprise and Racial Non-Discrimination: United States Enforcement of an International Human Right*, 15 HARV. INT'L L. J. 71, 81—82 (1974) (footnotes omitted).

The series of reports include: G. DEVOS, JAPAN'S OUTCASTES—THE PROBLEM OF THE BURAKUMIN (Rep. No. 3, 1971); A. DZIDZIENYO, THE POSITION OF BLACKS IN BRAZILIAN SOCIETY (Rep. No. 7, 1971); Y. GHAI, THE ASIAN MINORITIES OF EAST AND CENTRAL AFRICA (Rep. No. 4, 1971); G. GRANT, THE AFRICANS' PREDICAMENT IN

The damage done to women, and hence to the whole community, by centuries-old practices of sex discrimination has just begun to filter into the consciousness of both women and men in a few parts of the world. The bloodiness of religious intolerance and oppression has perhaps receded in geographic range, but continues to immerse particular communities, while discriminations based upon unorthodox secular conceptions of rectitude are of abiding concern.<sup>657</sup> Discriminations, and even persecutions, arising from intolerance of differing political opinions are characteristic of totalitarian communities, past and present, and sometimes infect even communities which upon occasion prize the wide sharing of power.<sup>658</sup> Even a factor so indifferent to human potentialities as language affiliation or preference continues to give rise to varying discriminations in many different parts of the world.<sup>659</sup> Finally, many severe differentiations, often amounting to discriminations and affecting access to all value processes, continue to be made almost everywhere in terms of such blanket categorizations as age, alienage, possession of property, birth, or other status.<sup>660</sup>

It has been emphasized above,<sup>661</sup> and reiterated in our condemnations of caste and apartheid,<sup>662</sup> that any differentiations in the treatment of individuals based upon broad group memberships or alleged characteristics, without regard to actual individual differences in capabilities and potentialities, is highly destructive of that basic freedom of choice which shared respect requires. The most fundamental meaning of human dignity is that individuals are to be regarded and treated as total personalities having their own unique

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RHODESIA (Rep. No. 8, 1972); H. MABBETT, P. MABBETT & C. COPPEL, THE CHINESE IN INDONESIA, THE PHILIPPINES AND MALAYSIA (Rep. No. 10, 1972); G. MORRISON, THE SOUTHERN SUDAN AND ERITREA: ASPECTS OF WIDER AFRICAN PROBLEMS (Rep. No. 5, 1971); A. SHEEHY, THE CRIMEAN TARTERS AND VOLGA GERMANS: SOVIET TREATMENT OF TWO NATIONAL MINORITIES (Rep. No. 6, 1971); B. WHITAKER, THE BIHARIS IN BANGLADESH (Rep. No. 11, 1972).

657. Long after the religious wars of the past, religious tensions have persisted. The bloodiness of the confrontation between Protestants and Catholics in Northern Ireland has been protracted. Religious friction occurs elsewhere between Buddhists and Catholics in South Vietnam, Hindus and Moslems in India and Pakistan, Arabs and Jews in Israel and the Arab countries.

658. Witness, for instance, the recent political struggles in Chile, Greece, the Philippines, South Korea, South Vietnam, and Taiwan.

659. Note, for example, India, Canada, and Belgium.

660. Deprivations based on these group characteristics extend to each of all the values—power, enlightenment, wealth, well-being, and so on.

661. See notes 18—54 & accompanying text *supra*.

662. See notes 355—650 & accompanying text *supra*.



characteristics and potentialities, and are not to be manipulated and managed in mass in terms of putative characteristics assigned through group labels. The only permissible differentiations between individuals that a law of human dignity can honor for the recruitment and training of people for performance of the many different roles in our modern, complex society are very particular ones. These differentiations must be based entirely upon a careful configurative appraisal of the individual person with all his distinctive characteristics, and of the range of opportunities for participation in social processes that are either open or can be made open to him. An effective collective effort to afford every individual the utmost opportunity to develop his latent talents into socially useful skills and capabilities can only augment the aggregate production of all community values, including respect, which then become available for cumulative commitment and immediate enjoyment.

It would appear that a general norm of non-discrimination, fully expressive of these policies, is rapidly emerging as an accepted prescription of international law. A major stated purpose of the United Nations Charter, reinforced by more detailed provisions,<sup>663</sup> is to "achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>664</sup> The Universal Declaration of Human Rights,<sup>665</sup> no less broad in its specification of purposes, expands the itemization of impermissible group characterizations. Article 2 states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.<sup>666</sup>

The thrust toward a general principle of non-discrimination is strengthened by Article 7:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection

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663. This objective has been repeated and reinforced throughout the Charter. See U.N. CHARTER arts. 13(1), 55, 56, 62(2), 76(c).

664. *Id.* art. 1(3).

665. Universal Declaration, note 55 *supra*.

666. *Id.* art. 2, U.N. Doc. A/810 at 72.

against any discrimination in violation of this Declaration and against any incitement to such discrimination.<sup>667</sup>

Similarly, the International Covenants on Human Rights, though purporting to confine their protection to broadly specified particular rights, offer a broad and expandable itemization of impermissible group characterizations. Thus, the International Covenant on Civil and Political Rights states, in Article 2(1), that

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>668</sup>

It adds, in Article 26, that

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>669</sup>

Again, Article 2(2) of the International Covenant on Economic, Social, and Cultural Rights provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>670</sup>

The increasingly explicit aspiration of authoritative prescription toward comprehensiveness, both in reference to protected rights and to impermissible group characterizations, is illustrated in the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>671</sup> as well as in the Declaration, of the same title, which

667. *Id.* art. 7, U.N. Doc. A/810 at 73.

668. Covenant on Civil and Political Rights, *supra* note 57, art. 2(1), 21 U.N. GAOR Supp. 16, at 53.

669. *Id.* art. 26, 21 U.N. GAOR Supp. 16, at 55—56. Compare the principle espoused by Article 26 with Article 7 of the Universal Declaration, note 55 *supra*.

670. Covenant on Economic Rights, *supra* note 58, art. 2(2), 21 U.N. GAOR Supp. 16, at 49—50.

671. Convention on the Elimination of All Forms of Racial Discrimination, note 433 *supra*.

preceded it.<sup>672</sup> In practically identical terms, these influential formulations affirm that

the Charter of the United Nations is based on the principles of dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,<sup>673</sup>

and that

the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,<sup>674</sup>

and, further, that

all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.<sup>675</sup>

The comprehensiveness of this norm of non-discrimination is further documented and confirmed by recurring assertions in the Proclamation of Teheran issued by the International Conference on Human Rights in 1968.<sup>676</sup> Among its various emphases, the Proclamation solemnly states that:

It is imperative that the members of the international community fulfill their solemn obligations to promote and encourage respect for human rights and fundamental freedoms for all without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions,<sup>677</sup>

and that:

The primary aim of the United Nations in the sphere of human rights is the achievement by each individual of the maximum freedom and

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672. Declaration on the Elimination of All Forms of Racial Discrimination, note 527 *supra*.

673. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, preamble, 660 U.N.T.S. at 212—16.

674. *Id.* at 212—14.

675. *Id.* at 214.

676. Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF.32/41 (1968).

677. *Id.* at 4.

dignity. For the realization of this objective, the laws of every country should grant each individual, irrespective of race, language, religion or political belief, freedom of expression, of information, of conscience and of religion, as well as the right to participate in the political, economic, cultural and social life of his country.<sup>678</sup>

It will be convenient to further document and illustrate the emergence of this general norm of non-discrimination by reference to the development of more specific prescriptions banning discriminations based upon certain alleged particular group characteristics: race (including color, descent, national or ethnic origin), sex, religion, political opinion, language, age, alienage, possession of property, birth and other status.<sup>679</sup>

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678. *Id.* This norm of non-discrimination has been expressed in similar terms in other universal and regional human rights conventions and declarations. *See, e.g.*, International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, G.A. Res. 3068, 28 U.N. GAOR Supp. 30, at 75, U.N. Doc. A/9233/Add.1 (1973); American Convention, note 59 *supra*; Declaration on Social Progress and Development, *adopted* Dec. 11, 1969, arts. 1 & 2, G.A. Res. 2542, 24 U.N. GAOR Supp. 30, at 49, U.N. Doc. A/7630 (1969); Declaration on Elimination of Discrimination Against Women, *adopted* Nov. 7, 1967, G.A. Res. 2263, 22 U.N. GAOR Supp. 16, at 35, U.N. Doc. A/6716 (1967); Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples, *adopted* Dec. 7, 1965, principles 1 & 3, G.A. Res. 2037, 20 U.N. GAOR Supp. 14, at 40, U.N. Doc. A/6014 (1965); Employment Policy Convention, *adopted* July 9, 1964, art. 1(2)(c), 569 U.N.T.S. 65 (entered into force July 15, 1964); Protocol to the Convention Against Discrimination in Education, *adopted* Dec. 10, 1962, [1969] U.N.T.S. No. 9423 (Cmd. 3894); Convention Against Discrimination in Education, note 420 *supra*; Declaration on the Rights of the Child, *adopted* Nov. 20, 1959, principle 1, G.A. Res. 1386, 14 U.N. GAOR Supp. 16, at 19, U.N. Doc. A/4354 (1959); Discrimination Convention, note 418 *supra*; Convention Relating to the Status of Stateless Persons, *adopted* Sept. 23, 1954, art. 3, 360 U.N.T.S. 117 (entered into force June 6, 1960); European Convention, note 11 *supra*; Convention Relating to the Status of Refugees, *adopted* July 25, 1951, art. 3, 189 U.N.T.S. 137; Equal Remuneration Convention, *adopted* June 29, 1951, 165 U.N.T.S. 304 (entered into force May 23, 1953); Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

679. The complete documentation of this thesis would explore not only expectations created by agreements, but also those created by international and other judicial authoritative decisions, as well as those created by the whole flow of decisions, constitutional and other, within national communities. In other words, the conclusion we suggest can be reached by reference to all the sources of international law itemized in article 38 of the Statute of the International Court of Justice: international conventions, international custom, "the general principles of law recognized by civilized nations," and "judicial decisions and the teachings of the most highly qualified publicists of the various nations." I.C.J. STAT. art. 38. For such an approach see *South West African Cases*, (Second Phase), [1966] I.C.J.

a. *Claims Relating to Race*

i. *Factual background*

The deprivations imposed as "racial discrimination" are made under the aegis of a group categorization which, even when "race" is supplemented by such ancillary concepts as "color," "ethnic origin," "national origin," "descent," and "birth,"<sup>680</sup> makes a most ambiguous and incomplete reference to empirical fact. The popular categorizations of "race," whether by officials or non-officials when indulging in "a man's most dangerous myth,"<sup>681</sup> are built upon vague, shifting, and erratic references to such factors as skin color, body build, eye cast or color, hair texture, nose shape, blood type, genetic affiliation, and historical or cultural association.<sup>682</sup> "To most people," a 1950 UNESCO statement realistically asserts, "a race is any group of people whom they choose to describe as a race."<sup>683</sup> The statement elaborates:

Thus, many national, religious, geographic, linguistic or cultural groups have, in such loose usage, been called 'race,' when obviously Americans are not a race, nor are Englishmen, nor Frenchmen, nor any other national group. Catholics, Protestants, Moslems, and Jews are not races, nor are groups who speak English or any other language thereby definable as a race; people who live in Iceland or England or India are not races; nor are people who are culturally Turkish or Chinese or the like thereby describable as races.<sup>684</sup>

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250, 284—316 (Tanaka, J., dissenting).

680. See notes 792—807 & accompanying text *infra*.

681. A. MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (5th ed. rev. 1974) .

682. For a fascinating and detailed description of the physical differences among various human groups see J. BAKER, *RACE* 179—417 (1974). See also C. COON, *THE LIVING RACES OF MAN* (1965); C. COON, *THE ORIGIN OF RACES* (1962).

683. A. MONTAGU, *STATEMENT ON RACE* 8 (3d ed. 1972) [hereinafter cited as A. MONTAGU]. The Statement was prepared by a panel of distinguished scientists, representing various disciplines and regions, under the auspices of UNESCO. See *id.* at 13 for the names of these distinguished scholars. Three additional statements concerning race were subsequently issued by UNESCO: *Statement on the Nature of Race and Race Differences*, June 1951, *id.* at 137—47; *Proposals on the Biological Aspects of Race*, August 1964, *id.* at 148—55; and *Statement on Race and Racial Prejudice*, September 1967, *id.* at 156—64.

684. A. MONTAGU, *supra* note 683, at 8. Additional complications are generated by the imprecision with which these generic terms are used.

The layman's conception of "race" is so confused and emotionally muddled that any attempt to modify it would seem to be met by the greatest obstacle of all, the term "race" itself. This is another reason why the attempt to retain the term "race" in popular parlance must fail. The term is a trigger word:

Even the characterizations of "a race" offered by scientists, though displaying a somewhat more stable reference to objectively ascertainable factors, commonly admit of highly diverse application to individual human beings.<sup>685</sup> The core reference appears to be to sub-groups within the closed species of man which are genetically open but exhibit "some distinguishing genetic variability."<sup>686</sup> Thus, Dobzhansky, in identifying mankind as "a complex Mendelian population, a reproductive community all members of which are connected by ties of mating and parentage"<sup>687</sup> and describing a "Mendelian population" as one which possesses "a common gene pool,"<sup>688</sup> defines "races" as "arrays of Mendelian populations belonging to the same biological species, but differing from each other in incidence of some genetic variants."<sup>689</sup> He adds that the "delimitation of the Mendelian populations which are called races is always to some extent vague, because their gene pools are not wholly disjunct."<sup>690</sup> Similarly, Osborne emphasizes:

Most important is the fact that subspecies and races, unlike species,

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utter it and a whole series of emotionally conditioned responses follow.

*Id.* at 65.

Hence, the proposal to substitute the term "ethnic group" for "race". See *id.* at 59—71. Cf. C. PUTNAM, RACE AND REALITY (1967); P. ROSE, THE SUBJECT IS RACE (1968) which deals with "traditional ideologies and the teaching of race relations."

685. See generally A. ALLAND, HUMAN DIVERSITY (1971); T. DOBZHANSKY, note 40 *supra*; S. GARN, HUMAN RACES (3d ed. 1971); READINGS ON RACES (2d ed. S. Garn 1968); R. GOLDSBY, RACE AND RACES (1971); J. KING, THE BIOLOGY OF RACE (1971); M. KLASS & H. HELLMAN, THE KINDS OF MANKIND (1971); THE CONCEPT OF RACE (A. Montagu ed. 1964); RACE: INDIVIDUAL AND COLLECTIVE BEHAVIOR (E. Thompson & E. Hughes eds. 1958); UNESCO, RACE AND SCIENCE (1969).

686. Osborne, *The History and Nature of Race Classification*, in THE BIOLOGICAL AND SOCIAL MEANING OF RACE 159, 164 (R. Osborne ed. 1971). Similarly, the 1950 UNESCO statement on race, in identifying "race" as "one of the group of populations [capable of interbreeding] constituting the species *Homo sapiens*," further defines it as

a group or population characterized by some concentrations relative as to frequency and distribution, of hereditary particles (genes) or physical characteristics, which appear, fluctuate, and often disappear in the course of time by reason of geographical and/or cultural isolation.

A. MONTAGU, *supra* note 683, at 7—8, 36, 40—41, 46.

Mankind as a whole constitutes a single biological species which is a "genetically closed system," whereas all races, whatever the usage of the word race, are "genetically open systems." T. DOBZHANSKY, *supra* note 40, at 183.

687. T. DOBZHANSKY, GENETIC DIVERSITY AND HUMAN EQUALITY 57 (1973).

688. *Id.*

689. *Id.* at 67.

690. *Id.* at 59.

are not closed genetic or evolutionary units, but simply breeding populations within which a significant number of individuals carry a particular variant of a gene common to the species.<sup>691</sup>

He also adds: "What is taken as a meaningful 'racial' differentiation within any given species will depend entirely upon the classifier, the circumstances, and the purposes of the classification."<sup>692</sup> Further, it would appear that even among scientists a diversity of references as to the core meaning of race causes difficulties. Thus, Scott observes:

From a biological viewpoint the term race has become so encumbered with superfluous and contradictory meanings, erroneous concepts, and emotional reactions that it has almost lost its utility. Any scientist who continues to use it will run a major risk of being misunderstood, even if he rigorously limits his own definition. He will run the additional risk in his own thinking of finding it difficult to avoid past misconceptions.<sup>693</sup>

The value deprivations, both historical and continuing, imposed through "racial" discrimination and its equivalences, always comprehensive and intensive, may be subtle and hidden or open and horrendous.<sup>694</sup> When racial discrimination is a systematic instru-

691. Osborne, *The History and Nature of Race Classification*, in *THE BIOLOGICAL AND SOCIAL MEANING OF RACE* 159, 161 (R. Osborne ed. 1971).

692. *Id.* at 164.

693. Scott, *Discussion*, in *SCIENCE AND THE CONCEPT OF RACE* 59 (M. Mead, T. Dobzhansky, E. Tobach & R. Light eds. 1968). In the words of Clyde Kluckhohn, a well-known anthropologist: "Though the concept of race is genuine enough, there is perhaps no field of science in which the misunderstandings among educated people are so frequent and so serious." G. ALLPORT, *THE NATURE OF PREJUDICE* 106 (1958) (quoting Kluckhohn).

The vagueness of "race," it may be observed, is attributable principally to two reasons: 1) the vagueness written into the scientific definition, an 2) the bewildering diversity in the use of the word that ignores any scientific usage.

694. Some of these words are borrowed from Henkin, *National and International Perspectives in Racial Discrimination*, 4 *HUMAN RIGHTS J.* 263 (1971).

As Judge Ammoun, Vice-President of the International Court of Justice, observed in his Separate Opinion in the Namibia case of 1971:

The violation of human rights has not come to an end in any part of the world: to realize that fact one need only consult the archives of the European Court of Human Rights, the Human Rights Commission of the United Nations or the International Commission of Jurists, or simply read the world press. Violations of personal freedom and human dignity, the racial, social or religious discrimination which constitutes the most serious of violations of human rights since it annihilates the two-fold basis provided by equality and liberty, all still resist the currents of liberation in each of the five continents. I.C.J. Advisory Opinion on Namibia, *supra* note 531, at 75-76.

One of the outstanding features of the contemporary world is the revival

ment of state policy, deprivations may begin by denying respect through official classification of populations in racial terms, such as the dichotomy of "Aryans" and "non-Aryans" under the Nazis<sup>695</sup> and the fourfold classification employed in South Africa today.<sup>696</sup> Such classifications may be reinforced by elaborate systems of identification by which members of deprived groups are required to carry identity cards and to wear specified insignia of humiliation.<sup>697</sup>

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of biological traits as pseudo-biological identity symbols. In the prophetic words of DuBois:

[T]he problem of the twentieth century is the problem of the colour line—the relation of the darker to the lighter races of men in Asia and Africa, in America and in the Islands of the sea.

W. DuBois, *THE SOULS OF BLACK FOLK* 13 (2d ed. 1903).

Similarly, Connor has given the following statistics:

Of a total of 132 contemporary states, only 12 (9.1 per cent) can be described as essentially homogeneous from an ethnic viewpoint. An additional 25 states (18.9 per cent of the sample) contain an ethnic group accounting for more than 90 per cent of the state's total population, and in still another 25 states the largest element accounts for between 75 and 89 per cent of the population. But in 31 states (23.5 per cent of the total), the largest ethnic element represents only 50 to 74 per cent of the population, and in 39 cases (29.5 per cent of all states) the largest group fails to account for even half of the state's population. Moreover, this portrait of ethnic diversity becomes more vivid when the number of distinct ethnic groups within states is considered. In some instances, the number of groups within a state runs into the hundreds, and in 53 states (40.2 per cent of the total), the population is divided into more than five significant groups.

Connor, *Nation-Building or Nation-Destroying?*, 24 *WORLD POLITICS* 319, 320 (1972) (footnote omitted).

695. On the atrocities associated with the racist policies of the Nazis see *AMERICAN JEWISH CONFERENCE, NAZI GERMANY'S WAR AGAINST THE JEWS* (1947); H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* (2d ed. 1958); *THE THIRD REICH* (M. Beaumont, J. Fried & E. Vermeil eds. 1955); R. HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (1961) [hereinafter cited as R. HILBERG]; O. JANOWSKY & M. FAGEN, *INTERNATIONAL ASPECTS OF GERMAN RACIAL POLICIES* (1937) [hereinafter cited as O. JANOWSKY & M. FAGEN]; M. LOWENTHAL, *THE JEWS OF GERMANY* (1936); *Nazi Conspiracy and Aggression, Opinion and Judgment* (U.S. Gov't Printing Office 1947); H. SANTA CRUZ, note 439 *supra*.

696. This fourfold classification is as follows: white persons (Europeans); Bantus (Africans); coloured persons; and Asians. For a discussion of the wide range of severe value deprivations associated with racial discrimination in the context of apartheid see notes 444—86 & accompanying text *supra*.

697. See R. HILBERG, *supra* note 695, 118—21 for a discussion of the identification system used by Nazi Germany. "The whole identification system," in the words of Hilberg, "with its personal documents, specially assigned names, and conspicuous tagging in public, was a powerful weapon in the hands of the police," facilitating the enforcement of residence and movement restrictions, generating arbitrary arrests of non-Aryans, and causing "a paralyzing effect on its victims." *Id.* at 121.



In such regimes, the degree and scope of an individual's participation in the different community value processes are dictated more by the arbitrary racial label attached to the individual than by his or her unique capabilities and potentialities. The degree of respect—the freedom of choice and esteem by self and others—which a person may enjoy is determined by the group to which he or she is assigned; segregation in access to public amenities and accommodations, and compulsory gestures of submission may be constant reminders of disrespect.<sup>698</sup>

The total domination by one racial group over another may epitomize deprivations in the power process. In the name of race, individuals are often disfranchised outright or by such devices as weighted voting;<sup>699</sup> they also are denied access to office-holding—appointive and elective, local and national, executive and judicial, civilian and military.<sup>700</sup> Discriminatory measures may be taken to deprive

698. Cf. J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 79—114 (1959) [hereinafter cited as J. GREENBERG]; 2 G. MYRDAL, *AN AMERICAN DILEMMA* (1964); C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d ed. rev. 1966); Franklin, *History of Racial Segregation in the United States*, 34 *ANNALS* 1 (1956).

Note the vivid description by Woodward:

The public symbols and constant reminders of his [the Negro's] inferior position were the segregation statutes, or "Jim Crow" laws. They constituted the most elaborate and formal expression of sovereign white opinion upon the subject. In bulk and detail as well as in effectiveness of enforcement the segregation codes were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.

C. WOODWARD, *supra* at 7 (footnote omitted).

699. According to a study prepared by the United States Commission on Civil Rights, the various devices employed to disfranchise the blacks in 10 southern states of the United States include the following: "diluting the Negro vote," "preventing Negroes from becoming candidates or obtaining office," "discrimination against Negro registrants," "exclusion or an interference with Negro poll watchers," "vote fraud," "discriminatory selection of election officials," and "intimidation and economic dependence." UNITED STATES COMM'N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION* 19—131 (1968). See also J. GREENBERG, *supra* note 698, at 133—53; L. LITWACK, *NORTH OF SLAVERY* 74—79 (1961), Comment, *Representative Government and Equal Protection*, 5 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 472 (1970).

700. See, e.g., O. JANOWSKY & M. FAGEN, *supra* note 695, at 134—35, 146—54; UNITED STATES COMM'N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION* 40—59 (1968).

individuals of nationality,<sup>701</sup> to effect banishment (expulsion),<sup>702</sup> or to deny emigration or travel abroad.<sup>703</sup> For being or not being a member of a specified racial group, individuals may also be denied access, temporarily or permanently, to territorial communities.<sup>704</sup> Other measures of power deprivation include arbitrary arrest and detention,<sup>705</sup> police brutality and torture,<sup>706</sup> differential justice for various groups through perversion of the judicial process,<sup>707</sup> and exclusion from military training and service.<sup>708</sup>

Enlightenment is restricted when access to educational institutions is denied because of racial group membership. This may take the form of exclusion from higher education<sup>709</sup> or from elementary

701. See O. JANOWSKY & M. FAGEN, *supra* note 695, at 60—72, 134—35, 142—45; McDougal, Lasswell & Chen, *Nationality and Human Rights: The Protection of the Individual in External Areas*, 83 YALE L.J. 900, 947—48 (1974).

702. See R. HILBERG, *supra* note 695, at 137—44; O. JANOWSKY & M. FAGEN, *supra* note 695, at 49—60.

703. See J. INGLES, STUDY OF DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY 20—23, U.N. Doc. E/CN.4/Sub.2/220/Rev.1 (1963).

704. A notorious example was, of course, the essentially whites-only immigration policy in Australia. Other examples include discriminatory policies toward “coloured” immigrants in the United Kingdom and the national quota system used in the United States prior to 1965. See generally M. BANTON, RACE RELATIONS 368—93 (1967); P. FOOT, IMMIGRATION AND RACE IN BRITISH POLITICS (1965); I. MACDONALD, RACE RELATIONS AND IMMIGRATION LAW (1969); S. PATTERSON, IMMIGRATION AND RACE RELATIONS IN BRITAIN 1960—1967 (1969); E. ROSE, COLOUR AND CITIZENSHIP (1969); Patterson, *Immigrants and Minority Groups in British Society*, in THE PREVENTION OF RACIAL DISCRIMINATION IN BRITAIN 21 (S. Abbott ed. 1971).

See also Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROB. 213 (1956); Jaffe, *The Philosophy of Our Immigration Law*, 21 LAW & CONTEMP. PROB. 358 (1956); Scully, *Is the Door Open Again?—A Survey of Our New Immigration Law*, 13 U.C.L.A.L. REV. 227 (1966).

705. See H. SANTA CRUZ, *supra* note 439, at 255.

706. Cf. *id.* at 256—57; NATIONAL ADVISORY COMM’N ON CIVIL DISORDERS, REPORT 299—336 (Bantam ed. 1968).

707. See O. JANOWSKY & M. FAGEN, *supra* note 695, at 192—96; H. SANTA CRUZ, *supra* note 439, at 260—63; UNITED STATES COMM’N ON CIVIL RIGHTS, JUSTICE (1961).

708. For instance, the Nazi Conscription Law provided that “Aryan descent is a pre-supposition for active military service.” O. JANOWSKY & M. FAGEN, *supra* note 695, at 154.

Instead of being denied access to military training and service, blacks in the United States have in recent years complained that there have been proportionately too many blacks in the combat forces, especially when the United States was engaged in the Vietnam conflict. See Lee, *The Draft and the Negro*, in WHITE RACISM 341 (B. Schwartz & R. Disch eds. 1970).

709. See C. AMMOUN, STUDY OF DISCRIMINATION IN EDUCATION 10—28, U.N. Doc. E/CN.4/Sub.2/181/Rev.1 (1957); ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 69—72; L. LITWACK, NORTH OF SLAVERY 113—17, 120—21 (1961).

and secondary schools,<sup>710</sup> or exclusion from educational employment such as teaching and research.<sup>711</sup> A racial quota system may be rigidly imposed for access to different educational institutions.<sup>712</sup> Separate and unequal educational opportunities and facilities prevail where race is a critical factor in social process.<sup>713</sup> Other forms of privation include denial of access to the mass media and the suppression of dissent.<sup>714</sup> In relation to skill, members of particular groups may be denied opportunity to discover and fully develop their latent talents. By being denied access to adequate schooling, they are often deprived of the acquisition of socially significant skills.<sup>715</sup> Other forms include denial of the practice of the liberal professions, notably law, medicine, and dentistry,<sup>716</sup> and denial of pursuit of "artistic or cultural activities."<sup>717</sup>

In deprivations of wealth, race may be employed to limit access to resources and the enjoyment of income. Under the guise of an economic "division of labor," race discrimination may become a device for preserving an ample supply of cheap labor and perpetuating an inherited relationship of economic exploitation.<sup>718</sup> Because of racial groupings, individuals may be denied access to certain occupations and professions; they may be underpaid in relation to others for the same type of employment; and they may be denied job advancement.<sup>719</sup> The ownership, purchase, and sale of land and

710. See ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 69—72; O. JANOWSKY & M. FAGEN, *supra* note 695, at 175—77.

711. O. JANOWSKY & M. FAGEN, *supra* note 695, at 158—61.

712. Cf. W. KOREY, THE SOVIET CAGE: ANTI-SEMITISM IN RUSSIA 52 (1973); G. SIMPSON & J. YINGER, RACIAL AND CULTURAL MINORITIES 454—57 (3d ed. 1965); Braverman, *Medical School Quotas*, in BARRIERS: PATTERNS OF DISCRIMINATION AGAINST JEWS 74—77 (N. Belth ed. 1958).

713. Cf. J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); J. GREENBERG, *supra* note 698, at 208—74; C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972); G. SIMPSON & J. YINGER, RACIAL AND CULTURAL MINORITIES 413—62 (3d ed. 1965).

714. R. HILBERG, *supra* note 695, at 650—53.

715. INTERNATIONAL LABOUR OFFICE, FIGHTING DISCRIMINATION IN EMPLOYMENT AND OCCUPATION 52—59 (1968).

716. See, e.g., O. JANOWSKY & M. FAGEN *supra* note 695, at 135, 155—58, 174—75.

717. See, e.g., *id.* at 160, 177—78.

718. See ECONOMIC AND SOCIAL CONSEQUENCES, *supra* note 439, at 48—61.

719. See generally B. HEPPLE, RACE, JOBS AND THE LAW IN GREAT BRITAIN 180—226 (1972); EMPLOYMENT, RACE AND POVERTY (A. Ross & H. Hill eds. 1967); M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966); Hepple, *Employment*, in THE PREVENTION OF RACIAL DISCRIMINATION IN BRITAIN 155—74 (S. Abbott ed. 1971); Jowell & Prescott-Clarke, *Racial Discrimination and White-Collar Workers in Britain*, in *id.* at 175—93.

other property may be curtailed or forbidden because of race.<sup>720</sup> Practices bordering on forced labor may be visited upon deprived racial groups.<sup>721</sup> Other measures of wealth deprivation include expropriation of property, freezing of personal assets, and imposition of special taxes.<sup>722</sup>

The extremes in deprivations of well-being on grounds of race may include systematic extermination (genocide) and torture of all types.<sup>723</sup> Racially deprived groups, victims of poverty, suffer starvation, malnutrition, diseases, and poor health services;<sup>724</sup> they are often excluded from necessary health facilities and left more exposed to physical abuse and hazards. They sometimes become victims of human experimentation.<sup>725</sup> They suffer a higher rate of mortality, infant and adult alike, in comparison with other members of the community.<sup>726</sup> Racially segregated housing generally leads to the concentration of deprived groups in ghettos.<sup>727</sup>

The shaping and sharing of affection may be drastically impaired

720. H. SANTA CRUZ, *supra* note 439, at 174, 218, 230.

721. Cf. UNITED NATIONS AND INTERNATIONAL LABOUR OFFICE, REPORT OF THE AD HOC COMMITTEE ON FORCED LABOUR 3—127, U.N. Doc. E/2431 (1953).

722. See R. HILBERG, *supra* note 695, at 54—101, 156—68.

723. The most notorious example is, of course, the extermination of six million Jews under the Third Reich. For a detailed description of this destruction process see *id.* at 177—256, 555—635. More recent examples of massive extermination include the killing of Ibos in the Biafra conflict, the killing of Chinese in Indonesia, and the killing of Bengalis by the Pakistanis.

724. *Id.* at 101—74; H. SANTA CRUZ, *supra* note 439, at 257—60; NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 269—73 (Bantam ed. 1968). In Nazi Germany, for example, the government policy was to concentrate Jews in ghettos and subject them to severe food rationing whereby many individuals died of starvation.

725. H. SANTA CRUZ, *supra* note 439, at 258.

Note, for instance, this brief account of the Nazis:

The inmates were subjected to cruel experiments at Dachau in August 1942; victims were immersed in cold water until their body temperature was reduced to 28°C, when they died immediately. Other experiments included high altitude experiments in pressure chambers, experiments with how long human beings could survive in freezing water, experiments with poison bullets, experiments with contagious diseases, and experiments dealing with sterilization of men and women by X-rays and other methods.

NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT 81—82 (1947), *quoted in* H. SANTA CRUZ, *supra* note 439, at 258.

726. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 270—71 (Bantam ed. 1968).

727. For a profile of the formation of racial ghettos see *id.* at 236—47. See also R. HILBERG, *supra* note 695, at 106—25; 2 G. MYRDAL, AN AMERICAN DILEMMA 618—27 (1964).

because of racial categorizations. Deprivations include the prohibition of inter-racial marriages and sexual relations between people of different races, and the termination of inter-racial marriages already consummated.<sup>728</sup> When segregated and isolated, people are handicapped in developing genuinely congenial personal relationships of any kind. Other forms of deprivation are the denial of custodian rights to parents of an allegedly inferior race<sup>729</sup> and the prohibition of adoption crossing racial lines.<sup>730</sup> Under the perverse influence of the race myth, even a community's norms of rectitude are formulated and pursued under a double standard. What is permissible for one racial group may be forbidden to another. People may not be permitted to worship the same god or even to go to churches; places of public worship may be destroyed on account of race.<sup>731</sup> The cumulative impact of racial discrimination tends to foster a negative self-image among members of deprived groups, further handicapping their responsible participation in community processes.<sup>732</sup>

*ii. Basic community policies*

A basic policy in any community that honors shared respect must be that of affording every individual member of the community full

728. See R. SICKELS, *RACE, MARRIAGE AND THE LAW* 10—91 (1972). See also O. JANOWSKY & M. FAGEN, *supra* note 695, at 196—99.

729. See O. JANOWSKY & M. FAGEN, *supra* note 695, at 199—200.

730. See, e.g., *id.* at 199—201.

731. The destruction of synagogues by the Nazis is a notorious example. R. HILBERG, *supra* note 695, at 5.

732. An inquiry into the causes of these multiple deprivations would require an extensive scientific treatise. It is simplistic to suggest that most racial discriminations are caused by prejudices, since the concept of prejudice is ill-defined and leaves open the question: what is the cause of prejudice? See generally G. ALLPORT, note 695 *supra*; A. BURNS, *COLOUR PREJUDICE* (1948); D. CANTE, *FRANTZ FANON* (1970); F. FANON, *BLACK SKIN, WHITE MASKS* (1967); F. FANON, *THE WRETCHED OF THE EARTH* (1965); UNITED NATIONS, *THE MAIN TYPES AND CAUSES OF DISCRIMINATION*, U.N. Doc. E/CN.4/Sub.2/40/Rev.1 (1949) (Memorandum submitted by the Secretary General); G. SIMPSON & J. YINGER, *RACIAL AND CULTURAL MINORITIES* (3d ed. 1965); Schachter, *How Effective are Measures Against Racial Discrimination?*, 4 *HUMAN RIGHTS J.* 293 (1971).

For the importance of race in world affairs see *RACE AMONG NATIONS: A CONCEPTUAL APPROACH* (G. Shepherd & T. LeMelle eds. 1970).

Any serious investigation of the causes of racial discrimination would require a comprehensive exploration of both predispositional and environmental factors. The root causes of destructive impulses which find expression in discrimination are traceable through the whole process through which people are socialized and involve varying combinations of demands, identification, and expectations. The environmental variables are as multifaceted as the many differing features of man's social process in exploitation of the vast complex global resources.

opportunity to discover, mature, and exercise his or her capabilities and potentialities, both for self-development and for contribution to aggregate common interest.<sup>733</sup> All practices which differentiate between individuals upon the basis of alleged "racial" characteristics, whether in popular or scientific conception, would appear to be entirely destructive of this policy.

The justification commonly given for racial discrimination, as for caste differentiation and the practices of apartheid, is that some groups of people are inherently superior to other groups because of their biological inheritances.<sup>734</sup> Discrimination, it is argued, facilitates a more effective use of limited resources, in aggregate common interest, if the alleged facts of inherent superiority and inferiority among groups are accepted as a basis for differential treatment and assignment of individuals' roles in ongoing social processes.

It should be obvious that none of the popular conceptions of race, based upon random combinations of physical features and cultural associations, bears any rational relation to the capabilities and potentialities of an individual for either self-development or contribution to common interest. As Allport has observed:

Most people do not know the difference between race and ethnic group, between race and social caste, between nurture and nature. It makes for an economy of thought to ascribe peculiarities of appearance, custom, values, to race. It is simpler to attribute differences to

733. See notes 19, 40—44 & accompanying text *supra*.

734. For the extreme view of Count Arthur de Gobineau, that "surpasses in scope and sinister grandeur even the pages of *Mein Kampf*" see M. BIDDISS, *FATHER OF RACIST IDEOLOGY: THE SOCIAL AND POLITICAL THOUGHT OF COUNT GOBINEAU* (1970). In emphasizing the superiority of the Aryans, Gobineau asserted:

Everything great, noble and fruitful in the works of man on this earth, in science, art and civilization, derives from a single starting point, is the development of a single germ and the result of a single thought; it belongs to one family alone, the different branches of which have reigned in all the civilized countries of the universe.

*Id.* at 113.

For a convenient summary see Klineberg, *Racialism in Nazi Germany*, in *THE THIRD REICH* at 852—63 (M. Beaumont, J. Fried & E. Vermeil eds. 1955). Note also the following statement by Hermann Gauch:

The non-Nordic man occupies an intermediate position between the Nordics and the animals, just about next to the anthropoid ape. He is therefore not a complete man. He is really not a man at all in true contradistinction to animals, but a transition, an intermediate stage. Better and more apt, therefore, is the designation "subhuman" (*Untermensch*).

*Id.* at 859 (quoting Gauch).

For historical accounts of racist ideology see H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 158—84 (2d ed. 1958); F. HERTZ, *RACE AND CIVILIZATION* (1928).

heredity than to juggle all the complex social grounds for differences that exist.<sup>735</sup>

When conceptions of this kind, of vague empirical references with no scientific basis, are employed by officials and others to make important differentiations among individuals, opportunities for arbitrary deprivation and oppression abound.

It is scarcely less obvious that scientific conceptions of race, designed roughly to distinguish large groups for broad purposes of inquiry, can be made to differentiate individuals in terms of potentialities only with great violence to fact. When creating racial categorizations scientists are, as Osborne emphasizes, "examining a population as a whole and comparing the pattern of *gene frequencies* of that entire population with another population,"<sup>736</sup> they are not purporting to specify the detailed characteristics or potentialities of any particular member of the group. In most scientific conceptions, further, the differences in potentialities within any particular group are greater than any of the differences between groups. In the words of Dobzhansky,

the striking fact, which not even the racists can conceal, is that the race differences in the averages are much smaller than the variations within any race. In other words, large brains and high IQ's of persons of every race are much larger and higher than averages for their own or any other race. And conversely, the low variants in every race are much below the average for any race.<sup>737</sup>

Similarly, after exhaustive inquiry, Baker concludes:

Every ethnic taxon of man includes many persons capable of living responsible and useful lives in the communities to which they belong, while even in those taxa that are best known for their contributions to the world's store of intellectual wealth, there are many so mentally deficient that they would be inadequate members of any society. It follows that no one can claim superiority simply because he or she belongs to a particular ethnic taxon.<sup>738</sup>

It remains unknown how such differences between individuals in

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735. G. ALLPORT, *THE NATURE OF PREJUDICE* 107—08 (1958). "An imaginative person," he adds, "can twist the concept of race any way he wishes, and cause it to configure and 'explain' his prejudices." *Id.* at 108.

736. Osborne, *The History and Nature of Race Classification*, in *THE BIOLOGICAL AND SOCIAL MEANING OF RACE* 161 (R. Osborne ed. 1971).

737. Dobzhansky, *Biological Evolution and Human Equality*, in *SCIENCE AND THE MODERN WORLD* 15, 28 (J. Steinhardt ed. 1966).

738. J. BAKER, *RACE* 534 (1974).

capabilities and potentialities as do exist differentially depend upon heredity and environment. Dobzhansky is again excellent witness:

The plain truth is that it is not known just how influential are the genetic variables in psychic or personality traits, or how plastic these traits might be in different environments that can be contrived by modern technology, medicine, and educational methods.<sup>739</sup>

The continuing challenge for all dedicated to a commonwealth of human dignity is, thus, that of creating and maintaining a society which encourages and assists all individuals to develop and exercise their fullest capabilities in the shaping and sharing of all values. "The birthright of every human being," Ashley Montagu aptly asserts, "should be the recognition of his uniqueness, and the opportunity to develop that uniqueness to the optimum."<sup>740</sup> While extraordinary opportunities may be afforded the extraordinarily gifted, every effort should be made, in the interest both of shared respect and of the greatest aggregate production of community values, to provide every individual with the opportunity and facilities for overcoming any unique biological limitations, whether or not associated with imputed genetic deficiencies. Shared respect requires non-discrimination for reasons irrelevant to potentialities, and shared respect is a fundamental component in any rational

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739. Dobzhansky, *Biological Evolution and Human Equality* in SCIENCE AND THE MODERN WORLD 15, 27 (J. Steinhardt ed. 1966). On the continuing debate of heredity versus environment (nature or nurture) see B. BLOOM, STABILITY AND CHANGE IN HUMAN CHARACTERISTICS (1964); J. CROW & M. KIMURA, AN INTRODUCTION TO POPULATION GENETICS THEORY (1970); T. DOBZHANSKY, GENETICS OF THE EVOLUTIONARY PROCESS (1970); T. DOBZHANSKY, *supra* note 40, at 51—75; R. HERRNSTEIN, I.Q. IN THE MERITOCRACY (1973); C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 64—84 (1972); A. JENSEN, GENETICS AND EDUCATION (1972); Darlington, *Race, Class, and Culture*, in BIOLOGY AND THE HUMAN SCIENCES 95 (J. Pringle ed. 1972); Jensen, *How Much Can We Boost IQ and Scientific Achievement?*, 39 HARV. EDUCATIONAL REV. 1 (1969); Jensen, *Reducing the Heredity-Environment Uncertainty: A Reply*, 39 HARV. EDUCATIONAL REV. 449 (1969); Shockley, *Models, Mathematics, and the Moral Obligation to Diagnose the Origin of Negro IQ Deficits*, 41 REV. EDUCATIONAL RESEARCH 369 (1971).

740. A. MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE xiii (5th ed. rev. 1974). Speaking of "the man of flesh and bone," instead of "political man, social man, man in the abstract," Rene Dubos has observed:

All human beings are related, biologically and mentally, but no two of them have exactly the same biological and mental constitution. Furthermore, the individuality of any person living now is different from that of anyone who has ever lived in the past or will live in the future. Each person is unique, unprecedented, and unrepeatable.

Dubos, *Biological Determinants of Individuality*, in INDIVIDUALITY AND THE NEW SOCIETY 148 (A. Kaplan ed. 1970).



conception of human dignity. The important emphasis was made by Charles Darwin a century ago:

Although the existing races of man differ in many respects, as in colour, hair, shape of skull, proportions of the body, &c., yet if their whole structure be taken into consideration they are found to resemble each other closely in a multitude of points. Many of these are of so unimportant or of so singular a nature, that it is extremely improbable that they should have been independently acquired by aboriginally distinct species or races. The same remark holds good with equal or greater force with respect to the numerous points of mental similarity between the most distinct races of man.<sup>741</sup>

He added:

As man advances in civilization, and small tribes are united into larger communities, the simplest reason would tell each individual that he ought to extend his social instincts and sympathies to all members of the same nation, though personally unknown to him. This point being once reached, there is only an artificial barrier to prevent his sympathies extending to the men of all nations and races.<sup>742</sup>

The significance for common interest of "the self-actualization of human individuals and the fullest possible realization of their socially valuable capacities and potentialities"<sup>743</sup> has been well stated by Dobzhansky:

Individuals and groups will arrange their lives differently, in accordance with their diverse notions of what form of happiness they wish to pursue. Their contributions to mankind's store of achievements will be different in kind and different in magnitude. The point is, however, that everybody should be able to contribute up to the limit of his ability. To deny the equality of opportunity to persons or groups is evil because this results in wastage of talent, ability, and aptitude, besides being contrary to the basic ethic of humanity.<sup>744</sup>

### *iii. Trends in decision*

The concerted community effort in recent decades to combat and eradicate racial discrimination has been a driving force behind the emergence of the more general norm of non-discrimination. Prior to

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741. C. DARWIN, *THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX* 178 (1st Ams ed. 1972).

742. *Id.* at 122.

743. Dobzhansky, *Biological Evolution and Human Equality*, in *SCIENCE AND THE MODERN WORLD* 15, 33 (J. Steinhart ed. 1966).

744. *Id.*

the establishment of the United Nations, the global community provided individuals scant protection against discrimination on racial or other grounds. Some modest protection, "though hesitating and infrequent,"<sup>745</sup> was afforded by the doctrine of humanitarian intervention. The early assertions of a right of humanitarian intervention were made predominantly for the protection of oppressed religious groups,<sup>746</sup> yet the victims for whom protection was extended upon occasion included groups of distinctive national or ethnic origin, such as the Greek people oppressed by Turkey from 1827 to 1830<sup>747</sup> and the Armenians oppressed by Turkey before World War I.<sup>748</sup>

A more substantial step was taken when, following World War I, the League of Nations was empowered to oversee an international regime for the protection of "racial, religious or linguistic minorities."<sup>749</sup> The victorious Principal Allied and Associated Powers through treaty stipulations imposed upon Poland, Czechoslovakia, the Serb-Croat-Slovene State (Yugoslavia), Romania, Greece, Austria, Bulgaria, Hungary, and Turkey special obligations to protect minority groups within their respective boundaries.<sup>750</sup> These states undertook to "assure full and complete protection of life and lib-

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745. H. LAUTERPACHT, AN INTERNATIONAL BILL, *supra* note 135, at 47; H. LAUTERPACHT, INTERNATIONAL LAW, *supra* note 68, at 120.

746. See M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 17—43 (1962). On humanitarian intervention see I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 338—42 (1963); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973); L. SOHN & T. BUERGENTHAL, *supra* note 530, at 137—211; Bowett, *The Use of Force in the Protection of Nationals*, 43 GROTIIUS SOC'Y 111 (1957); Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147 (1967); Claydon, *Humanitarian Intervention and International Law*, 1 QUEEN'S INTRA. L.J. 36 (1969); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973); Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205 (1969); Stowell, *Humanitarian Intervention*, 33 AM. J. INT'L L. 733 (1939); Wiseberg, *Humanitarian Intervention: Lessons from the Nigerian Civil War*, 7 HUMAN RIGHTS J. 61 (1974).

747. M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 22—24 (1962); H. LAUTERPACHT, INTERNATIONAL LAW, *supra* note 68, at 120.

748. See L. SOHN & T. BUERGENTHAL, *supra* note 530, at 181—94.

749. We propose to deal with the question of minority protection in a later article.

750. These treaty stipulations were conveniently compiled in LEAGUE OF NATIONS, PROTECTION OF LINGUISTIC, RACIAL AND RELIGIOUS MINORITIES BY THE LEAGUE OF NATIONS: PROVISIONS CONTAINED IN THE VARIOUS INTERNATIONAL INSTRUMENTS AT PRESENT IN FORCE, 1927, I.B.2.

erty" to all their inhabitants "without distinction of birth, nationality, language, race or religion."<sup>751</sup> Similar obligations were assumed by Albania, Estonia, Latvia, Lithuania, and Iraq upon their admission to the League of Nations.<sup>752</sup> To ensure the fulfillment of these obligations, the provisions affecting "persons belonging to racial, religious, or linguistic minorities" were made "obligations of international concern,"<sup>753</sup> "placed under the guarantee of the League of Nations," and could not be modified "without the assent of a majority" of the League Council.<sup>754</sup> The Council was further authorized to "take such action and give such directions as it may deem proper and effective" when a complaint of violation was brought to its attention.<sup>755</sup>

The contemporary broad prescription against discriminations imposed by group categorizations of "race" has its origins in the United Nations Charter and certain authoritative ancillary expressions and commitments. The importance which most of mankind today ascribes to the prohibition of race as a ground for differentiation is clearly evidenced by the prominent place accorded race and its equivalents in all the various recent enumerations of impermissible grounds. Thus, the Charter of the United Nations, in Article 1(3), projects one of its purposes as "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to *race*, sex, language, or religion" and restates this concern in Articles 13(1)(b),<sup>756</sup> 55(c)<sup>757</sup> and 76(c)<sup>758</sup> in the chap-

751. *Id.* at 43 (The Treaty with Poland, art. 2). The treaty with Poland served as the model for other comparable treaties. *See also id.* at 8 (The Peace Treaty with Austria, art. 63); *id.* at 11 (The Peace Treaty with Bulgaria, art. 50); *id.* at 22 (The Treaty with Greece, art. 2); *id.* at 29 (The Peace Treaty with Hungary, art. 55); *id.* at 51 (The Treaty with Roumania, art. 2); *id.* at 61 (The Treaty with the Serb-Croat-Slovene State, art. 2); *id.* at 92 (The Treaty with Czechoslovakia, art. 2); *id.* at 97 (The Peace Treaty with Turkey, art. 38).

752. *Id.* at 4 (The Declaration made by Albania before the Council of the League of Nations on October 2, 1921, art. 2); *id.* at 14 (Estonia); *id.* at 32 (Latvia); *id.* at 34 (Declaration of Lithuania, dated May 12, 1922, art. 2).

753. *See, e.g.,* The Treaty with Poland, art. 12, *id.* at 44.

754. *Id.* (The Treaty with Poland, art. 12).

755. *Id.* at 45 (The Treaty with Poland, art. 12).

756. Article 13(1)(b) of the U.N. Charter reads:

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

. . . .

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

ters dealing with the functions of the General Assembly, "International Economic and Social Co-operation," and "International Trusteeship System." Similarly, the Universal Declaration of Human Rights stipulates, in Article 2, that its protections are to be extended "without distinction of any kind, such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"<sup>759</sup> In Article 7 it provides for equal protection before the law "without any discrimination."<sup>760</sup>

This same theme is carried forward in the Discrimination (Employment and Occupation) Convention, adopted in June, 1958, under the auspices of the International Labour Organization, which was designed to ensure "equality of opportunity and treatment in respect of employment and occupation . . ."<sup>761</sup> This Convention specifically prohibits, in Article 1(1)(a), any discrimination "on the basis of *race, colour, sex, religion, political opinion, national extraction or social origin* . . ."<sup>762</sup> The Convention against Discrimination in Education, adopted in December 1960 under the auspices of the United Nations Educational, Scientific and Cultural Organization, seeks to "promote equality of opportunity and treatment for all in education."<sup>763</sup> This Convention prohibits, in Article 1(1), any

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U.N. CHARTER art. 13(1)(b).

757. Article 55(c) reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

. . . .

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

*Id.* art. 55(c).

758. Article 76(c) reads:

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

. . . .

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world.

*Id.* art. 76(c).

759. Universal Declaration, *supra* note 55, art. 2, U.N. Doc. A/810 at 72 (emphasis added).

760. *Id.* art. 7, U.N. Doc. A/810 at 73.

761. Discrimination Convention, *supra* note 418, art. 2, 362 U.N.T.S. at 34.

762. *Id.* art. 1(1)(a), 362 U.N.T.S. at 32 (emphasis added).

763. Convention Against Discrimination in Education, *supra* note 420, preamble, 429 U.N.T.S. at 94.

discrimination in the field of education because of "*race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth.*"<sup>764</sup>

The more recent International Covenants on Human Rights, incorporating precisely the wording and order of Article 2 of the Universal Declaration of Human Rights, also explicitly prohibit discrimination on grounds of race. Thus, the International Covenant on Civil and Political Rights, in Article 2(1), requires that a state

ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*<sup>765</sup>

The provision for equality before the law, in Article 26, guarantees

to all persons equal and effective protection against discrimination on any ground such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*<sup>766</sup>

The International Covenant on Economic, Social and Cultural Rights, in Article 2(2), imposes a comparable prohibition upon states for protection of all the rights which it enunciates.<sup>767</sup>

The general community prescription against racial discrimination has been further articulated and fortified by the adoption of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination in November, 1963,<sup>768</sup> and of the International Convention on the Elimination of All Forms of Racial Discrimination in December, 1965.<sup>769</sup> In the winter of 1959—1960, as "an epidemic of swastika-painting and other 'manifestations of anti-

764. *Id.* art. 1(1), 429 U.N.T.S. at 96 (emphasis added).

765. Covenant on Civil and Political Rights, *supra* note 57, art. 2(1), 21 U.N. GAOR Supp. 16, at 53 (emphasis added).

766. *Id.* art. 26, 21 U.N. GAOR Supp. 16, at 55—56 (emphasis added).

767. It reads:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Covenant on Economic Rights, *supra* note 58, art. 2(2), 21 U.N. GAOR Supp. 16, at 49—50.

768. Declaration on the Elimination of All Forms of Racial Discrimination, note 527 *supra*.

769. Convention on the Elimination of All Forms of Racial Discrimination, note 433 *supra*.

Semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature<sup>770</sup> swept through a number of states in Europe and Latin America, the Sub-Commission on Prevention of Discrimination and Protection of Minorities took the "unprecedented"<sup>771</sup> step of condemning these manifestations as violations of the Charter of the United Nations and the Universal Declaration of Human Rights.<sup>772</sup> The Sub-Commission, in gathering, processing, and studying all the relevant information, brought the matter to the attention of its superior bodies and urged effective measures of prevention and eradication, especially the formulation of an international convention.<sup>773</sup> The General Assembly, at its seventeenth session in 1962, decided to prepare two separate sets of instruments: one set (a draft declaration and a draft convention) on "the elimination of all forms of racial discrimination" and the other on "the elimination of all forms of religious intolerance," with priority being accorded to the former.<sup>774</sup> This "compromise solution"<sup>775</sup> was reached largely because the Arab delegations wished to downplay the issue of anti-Semitism and because

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770. Schwelb, *supra* note 434, at 996, 997. See also Deutsch, *The 1960 Swastika-Smearings: Analysis of the Apprehended Youth*, MERRILL-PALMER Q. OF BEHAVIOR & DEV. 1 (Apr. 1962), reprinted in MINORITY PROBLEMS 341 (A. Rose & C. Rose eds. 1965); Moskowitz, *The Narrowing Horizons of United Nations Concern with Racial Discrimination*, 4 HUMAN RIGHTS J. 278, 282-83 (1971) [hereinafter cited as Moskowitz].

771. Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. 869, 882 (1968).

772. *Report of the Twelfth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights* 58, U.N. Doc. E/CN.4/800 (E/CN.4/Sub.2/206) (1960).

773. *Report of the Thirteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights* 60, 63, U.N. Doc. E/CN.4/815 (E/CN.4/Sub.2/211) (1961).

774. G.A. Res. 1780, 17 U.N. GAOR Supp. 17, at 32, U.N. Doc. A/5217 (1962); G.A. Res. 1781, *id.* at 33. It has been sharply pointed out that the decision to have two separate sets of instruments was motivated by politics rather than merits. Schwelb, *supra* note 434, at 999.

By drawing a line of demarcation separating discrimination on religious grounds from discrimination on racial and ethnic grounds, the United Nations departed radically from well-established and widely-accepted norms which recognize that, apart from certain obvious cases, racial discrimination was usually brought about not solely by differences in race or colour, but also by cultural, religious and other differences which led to mistrust and prejudice.

Moskowitz, *supra* note 770, at 282.

775. Schwelb, *supra* note 434, at 999.

the Eastern European and other delegations insisted that the question of religious discrimination was far less important and urgent than that of racial discrimination.<sup>776</sup> Thereafter, on November 20, 1963, the General Assembly adopted the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.<sup>777</sup> Meanwhile, the preparation of the draft convention on racial discrimination was under way. The Commission on Human Rights, building upon a text prepared by the Sub-Commission,<sup>778</sup> completed its draft in 1964,<sup>779</sup> and the draft was considered by the Third Committee of the General Assembly in 1965.<sup>780</sup> The General Assembly, on December 21, 1965, adopted the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>781</sup> As of this writing, the envisaged Declaration and Convention on the Elimination of Religious Intolerance are yet to be adopted.<sup>782</sup>

The Declaration on the Elimination of Racial Discrimination, in solemnly affirming "the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations,"<sup>783</sup> proclaims that discrimination on the ground of "race, colour, or ethnic origin" is "an offense to human dignity," "a denial of the principles of the Charter of the United Nations," and "a violation" of the Universal Declaration of Human Rights.<sup>784</sup> The Declaration, extending its concern to acts of states as well as of private institutions or groups and individuals,<sup>785</sup> urges that special efforts be made to prevent racial discrimination, especially in "civil

776. See, *id.*; Moskowitz, *supra* note 770, at 282—84.

777. Declaration on the Elimination of All Forms of Racial Discrimination, note 527 *supra*.

778. *Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights* 13—57, U.N. Doc. E/CN.4/873 (E/CN.4/Sub.2/241) (1964).

779. *Report on the Twentieth Session, Commission on Human Rights*, 37 U.N. ECOSOC Supp. 8, at 9, U.N. Doc. E/3873 (E/CN.4/874) (1964).

780. *Report of the Third Committee, Draft International Convention on the Elimination of All Forms of Racial Discrimination*, 20 U.N. GAOR Annexes, Agenda Item No. 58, at 13, U.N. Doc. A/6181 (1965). For a verbatim record of the Third Committee's discussions see 20 U.N. GAOR, 3D COMM. 57—141, 147—52, 313—400, 419—66, 495—509 (1965).

781. Convention on the Elimination of All Forms of Racial Discrimination, note 433 *supra*.

782. See McDougal, Lasswell, and Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Non-Discrimination* (forthcoming).

783. Declaration on the Elimination of All Forms of Racial Discrimination, *supra* note 527, preamble, 18 U.N. GAOR Supp. 15, at 36.

784. *Id.* art. 1.

785. *Id.* arts. 2(1)—(2).

rights, access to citizenship, education, religion, employment, occupation, and housing,"<sup>786</sup> and in "equal access to any place or facility intended for use by the general public."<sup>787</sup> The Declaration condemns racist propaganda and organizations and urges that "all incitement to or acts of violence" against any racial group be made "punishable under law."<sup>788</sup> States are further urged to take steps to outlaw and prosecute racist organizations.<sup>789</sup> To ensure equal treatment of individuals, states are urged to "take effective measures to revise governmental and other public policies," "rescind" discriminatory "laws and regulations," and "pass" necessary legislation of protection.<sup>790</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination, in reinforcing the preceding Declaration, represents "the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races."<sup>791</sup> In spelling out its prohibition of discrimination, the Convention specifies in comprehensive and detailed terms the impermissible grounds for differentiation, the particular acts forbidden, and the various actors who are precluded from engaging in discrimination. Beyond the mere prohibition of activities, the bare characterization of unlawfulness, the Convention further seeks to cope with some of the causes of discrimination and to project procedures which may serve the purposes of preventing and deterring discrimination, as well as of restoring and rehabilitating already exacerbated situations.

The group categorization of "race," offered by the Convention in Article 1(1),<sup>792</sup> is as broad and generous as the group characterization commonly employed in discrimination is vague and arbitrary. In implementing its stated objective of banning racial discrimina-

786. *Id.* arts. 3(1).

787. *Id.* art. 3(2).

788. *Id.* art. 9(1), (2), 18 U.N. GAOR Supp. 15, at 37.

789. *Id.* art. 9(3).

790. *Id.* art. 4, 18 U.N. GAOR Supp. 15, at 36.

791. Schwelb, *supra* note 434, at 1057.

792. Article 1(1) of the Convention reads:

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

Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 1(1), 660 U.N.T.S. at 216.



tion "in all its forms and manifestations,"<sup>793</sup> the Convention adds to "race" the ancillary concepts of "colour, descent, or national or ethnic origin . . . ."<sup>794</sup> Though the *travaux préparatoires* indicate no very precise reference for "race,"<sup>795</sup> it appears that the framers of the Convention intended to catch all the traditional biological and cultural meanings. The UNESCO statements on race were, as several commentators have noted,<sup>796</sup> current at the time the Convention was prepared, and it would appear a reasonable interpretation, in light of the major purposes of the Convention, that all the biological and cultural categorizations included within these statements are among those condemned by the Convention.<sup>797</sup> The reach of the prohibited categorization of color—since people come in many gradations of white, black, yellow, and brown, and since almost all groups may be observed to have some uniqueness<sup>798</sup>—would appear to be equally broad. The concept of "national origin," specified as different from "nationality" in the sense of present membership in a state, has been said to include both "politico-legal" and "ethnographical" (or "historico-biological") senses.<sup>799</sup> Deriving its vagueness from its origin in the minorities treaties after World War I,<sup>800</sup> this concept apparently is intended to refer to a person's prior iden-

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793. *Id.* preamble, 660 U.N.T.S. at 212—16.

794. *Id.* art. 1(1), 660 U.N.T.S. at 216.

795. The *travaux préparatoires* of the Convention are cited in notes 778—80 *supra*.

796. See, e.g., N. LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 41—42 (1970) [hereinafter cited as N. LERNER]; E. VIERDAG, *supra* note 651, at 89—90; Coleman, *The Problem of Anti-Semitism Under the International Convention on the Elimination of All Forms of Racial Discrimination*, 2 HUMAN RIGHTS J. 609, 616—17 (1969) [hereinafter cited as Coleman]. These UNESCO statements on race are collected in A. MONTAGU, note 683 *supra*.

797. See notes 680—93 & accompanying text *supra* for a discussion of the concept of race. See also E. VIERDAG, *supra* note 651, at 87—90; Coleman, *supra* note 796, at 616—19.

798. For a detailed description of the significance and variety of color of different population groups see J. BAKER, *RACE* 149—60 (1974). See also E. VIERDAG, *supra* note 651, at 97—99.

799. See Coleman, *supra* note 796, at 619—22; Schwelb, *supra* note 434, at 1006—07.

800. Cf. notes 749—55 & accompanying text *supra*. As Claude has observed: The basic instruments of the League minority system purported to safeguard certain rights of "racial, religious or linguistic minorities," but the framers of the system made it clear that they regarded this terminology as synonymous with "national minorities."

I. CLAUDE, *NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM* 17 (1955).

tifications, whether chosen or ascribed, with states and with the larger cultural groups (popularly known as nations) which transcend any particular state.<sup>801</sup> The words "ethnic origin," again, refer to both biological and cultural characteristics with a diversity bewildering even in scientific usage.<sup>802</sup> "Any discrimination," concludes one commentator, "based on an individual's cultural identification may be tantamount to discrimination on ethnic grounds."<sup>803</sup> The group characterization unique to this Convention, that of "descent," was, as previously elaborated, introduced by the delegation of India to outlaw discrimination based on "caste."<sup>804</sup> Its ambiguities are obviously sufficiently ample to cure any inadequacies of reference that may inhere in the other concepts.

The broad sweep of prohibited grounds in the Convention—whether its categorizations are taken separately or in the aggregate—would thus appear to afford protection to a vast variety of potential victims of discrimination. The complex of practices known as "anti-Semitism,"<sup>805</sup> for example, though not mentioned in the

801. During the debate before the Third Committee, Mr. Resich of Poland, in emphasizing the importance of including "national origin" as a forbidden ground in the Convention, stated:

A "nation" was created when persons organized themselves politically on the basis of a common culture, common traditions or other factors. There were nations that were made up of different ethnic groups, such as Switzerland. But there were also situations in which a politically organized nation was included within a different State and continued to exist as a nation in the social and cultural senses even though it had no government of its own. The members of such a nation within a State might be discriminated against, not as members of a particular race or as individuals, but as members of a nation which existed in its former political form.

20 U.N. GAOR, 3d Comm. 83 (1965).

Similarly, Mr. Villgrattner of Austria indicated:

For half a century the terms "national origin" and "nationality" had been widely used in literature and in international instruments as relating, not to persons who were citizens of or held passports issued by a given State, but to those having a certain culture, language and traditional way of life peculiar to a nation but who lived within another State.

*Id.* at 84.

802. Cf. A. MONTAGU, *supra* note 683, at 59—71.

803. Coleman, *supra* note 796, at 623.

804. See notes 423—29 & accompanying text *supra*.

805. On anti-Semitism see A. FORSTER & B. EPSTEIN, *THE NEW ANTI-SEMITISM* (1974); W. KOREY, *THE SOVIET CAGE: ANTI-SEMITISM IN RUSSIA* (1973); P. LENDVAI, *ANTI-SEMITISM WITHOUT JEWS* (1971); H. LUMER, *SOVIET ANTI-SEMITISM—A COLD WAR MYTH* (1964); *ANTI-SEMITISM: A SOCIAL DISEASE* (E. Simmel ed. 1946); Rogow, *Anti-Semitism*, 1 INT'L ENCYC. SOCIAL SCI. 345 (1968).

Convention,<sup>806</sup> might easily be outlawed under several of the Convention's forbidden group categorizations.<sup>807</sup>

The inclusive, open-ended compass of the rights the Convention protects against discrimination is established both by broad generalization and by detailed, illustrative specification. Thus, in Article 1(1) "racial discrimination" is defined as acts which have "the purpose or effect of nullifying or impairing the recognition, enjoyment

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806. In the Commission on Human Rights and at the Third Committee of the General Assembly, the United States unsuccessfully sought to incorporate a clause specifically condemning anti-Semitism in the Convention. For an account see Schwelb, *supra* note 434, at 1011—15. Mr. Comay of Israel, in echoing the United States proposal, emphasized that "anti-Semitism, with which the entire history and fate of every generation of the Jewish people had been tragically bound up, should be expressly mentioned in the draft Convention." 20 U.N. GAOR, 3d Comm. 115 (1965).

The history of the Jewish people was that of a branch of the human family which had been singled out for cruel hostility and savage persecution. Anti-Semitism, which had assumed at different times religious, racial, economic and cultural aspects, was unfortunately not something which belonged to the remote past, for, after having reached its culminating horror in the twentieth century with the atrocities of the Hitler regime, the declared aim of which was to ensure the "final solution of the Jewish question" by systematically exterminating all Jews in cold blood, anti-Semitism had now become the stock-in-trade of every political group aiming to subvert democratic institutions and freedoms. It was thus precisely because anti-Semitism continued to exist in the world that it must be mentioned expressly in the Convention.

*Id.*

His lone voice was overshadowed, however. The Third Committee approved, instead, the Greek-Hungarian proposal "not to include in the draft International Convention on the Elimination of All Forms of Racial Discrimination any reference to specific forms of racial discrimination." *Id.* at 113, 118. Mr. Rogers of the United States, in expressing disappointment over the outcome, indicated that

his delegation was firmly convinced that anti-Semitism, which constituted a particularly dangerous form of racial discrimination, deserved special mention just as apartheid did. Thus, in conjunction with Brazil, his delegation had submitted an amendment to include in the Convention an article condemning anti-Semitism. Anti-Semitism was one of the gravest and most persistent problems facing humanity, dating back over 2,000 years. Historically, it had been a barometer of the political health of States: where Jews had been unsafe, other minorities also soon found themselves in danger. That was what had happened in 1939.

*Id.* at 119.

Finally, he stressed that "it was clear that there was a general feeling condemning anti-Semitism and that anti-Semitism was covered by the terms of the Convention." *Id.*

807. See Coleman, note 796 *supra*; Schwelb, *supra* note 434, at 1014—15. See also Lerner, *Anti-Semitism as Racial and Religious Discrimination under United Nations Conventions*, 1 ISRAEL Y.B. ON HUMAN RIGHTS 103 (1971).

or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>808</sup> This is followed in Article 5 by further broad generalization and a lengthy, minute itemization of protected rights, clearly intended to be illustrative, not exhaustive. The initial terms of Article 5 read:

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, *notably* in the enjoyment of the following rights . . . .<sup>809</sup>

The detailed itemization of protected rights offered by Article 5 begins by indicating that all persons have the right to challenge deprivations through appropriate tribunals and the “right to security of person,” then lists political rights in general and other civil rights in particular, continues with economic, social, and cultural rights, and concludes with the right of access to public accommodations and facilities.<sup>810</sup> The right to challenge deprivations is recognized as fundamental to the effective realization of the norm of non-discrimination; hence, “the right to equal treatment before the tribunals and all other organs administering justice” is accorded prominence.<sup>811</sup> “The right to security of person” extends to “protection by the State against violence or bodily harm, whether inflicted by government officials or by an individual group or institution.”<sup>812</sup> Political rights include the right to voting and office-holding “at any level,” elective and appointive, and “equal access to public service.”<sup>813</sup> Other civil rights include the “right to freedom of movement,” internal and transnational,<sup>814</sup> to “nationality,”<sup>815</sup> to “marriage and choice of spouse,”<sup>816</sup> to “own property,”<sup>817</sup> to “freedom of thought” and “expression,”<sup>818</sup> and to “freedom of peaceful assembly

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808. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 1(1), 660 U.N.T.S. at 216.

809. *Id.* art. 5, 660 U.N.T.S. at 220—22 (emphasis added).

810. *Id.*

811. *Id.* art. 5(a), 660 U.N.T.S. at 220.

812. *Id.* art. 5(b).

813. *Id.* art. 5(c).

814. *Id.* art. 5(d)(i), (ii).

815. *Id.* art. 5(d)(iii).

816. *Id.* art. 5(d)(iv).

817. *Id.* art. 5(d)(v).

818. *Id.* art. 5(d)(vii), (viii), 60 U.N.T.S. at 222.

and association.”<sup>819</sup> “Economic, social and cultural rights” include the “right to work,” employment, “equal” and “just” remuneration,<sup>820</sup> the right to “form and join trade unions,”<sup>821</sup> to “housing,”<sup>822</sup> to health care and “social security,”<sup>823</sup> “education and training,”<sup>824</sup> and to “equal participation in cultural activities.”<sup>825</sup> Not being tied to any other particular human rights instrument, the Convention further enumerates “the right to inherit”<sup>826</sup> and “the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks,”<sup>827</sup> two items ostensibly missing from the Universal Declaration of Human Rights.

That all this itemization in Article 5 is intended to be illustrative, not exhaustive, is abundantly demonstrated by the use in appropriate contexts of such terms as “notably,”<sup>828</sup> “in particular,”<sup>829</sup> and “such as.”<sup>830</sup> The placing of “notably” in the opening paragraph, preceding any itemization, unequivocally expresses an intent for comprehensiveness in the human rights protected.<sup>831</sup>

It has been suggested that there might be “contradictions” between Article 1(1) and Article 5 on the grounds that while Article 1(1) employs the phrase “or any other field of *public life*” and omits

819. *Id.* art. 5(d)(ix).

820. *Id.* art. 5(e)(i).

821. *Id.* art. 5(e)(ii).

822. *Id.* art. 5(e)(iii).

823. *Id.* art. 5(e)(iv).

824. *Id.* art. 5(e)(v).

825. *Id.* art. 5(e)(vi).

826. *Id.* art. 5(d)(vi).

827. *Id.* art. 5(f).

828. See text accompanying note 809 *supra*.

829. This phrase is employed to illustrate “political rights,” “civil rights,” and “economic, social and cultural rights” in Article 5(c)—(e). Thus, Article 5(c) reads:

Political rights, *in particular* the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 5(c), 660 U.N.T.S. at 220 (emphasis added).

830. Article 5(f) states:

The right of access to any place or service intended for use by the general public, *such as* transport, hotels, restaurants, cafes, theatres and parks.

*Id.* art. 5(f), 660 U.N.T.S. at 222 (emphasis added).

831. Lerner has pointed out that “[t]he word ‘notably’ was used in order to avoid a restrictive interpretation of the rights enumerated.” N. LERNER, *supra* note 796, at 67.

a reference to "civil rights,"<sup>832</sup> Article 5 "lists several rights which certainly do not come within the sphere of public life."<sup>833</sup> The wording "any other field of public life" in Article 1(1) would not appear to be used in any limiting or restrictive sense. "Public life," an innovative non-technical term, would appear placed on the same general level as "the political, economic, social, cultural" fields so that together they might encompass all sectors of organized life of the community. The listing of many rights which would ordinarily be described as "private" in Article 5 is clear indication that "public life" in Article 1(1) is not used in contradistinction to "private" rights.<sup>834</sup> The reference would appear rather as a generic summation of all rights protectable by law, designed to be all inclusive in reach. This interpretation is supported not only by the major purposes of the Convention, but also by the explicit rejection of a proposal to include in Article 1(1) the modifying clause, "set forth *inter alia* in the Universal Declaration of Human Rights," as originally proposed in the Sub-Commission's draft.<sup>835</sup>

At the eighth session of the Committee on the Elimination of Racial Discrimination in 1973, an attempt was made to undercut the broad reach of the rights protected by the Convention by factitious interpretation of Article 5.<sup>836</sup> A member of the Committee<sup>837</sup> suggested that Article 5 of the Convention did not establish any particular human rights, even those explicitly enumerated, but only a right to be free from racial discrimination and to equality before the law.<sup>838</sup> "Its sole purpose," he reasoned, "was to establish the obligation of states parties to ensure that there was no racial discrimination in the enjoyment of those human rights and to 'guarantee the right of everyone . . . to equality before the law' in the enjoyment of those rights."<sup>839</sup> He added:

832. See Schwelb, *supra* note 434, at 1005.

833. *Id.*

834. See Elkind, *Discrimination: A Guide for the Fact Finder (International Convention on the Elimination of All Forms of Racial Discrimination)*, 32 U. Prrt. L. Rev. 307, 312—19 (1971).

835. *Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, draft art. 1(1), at 45—46, U.N. Doc. E/CN.4/873 (E/CN.4/Sub.2/241) (1964). See also N. LERNER, *supra* note 796, at 39—40, 43; Schwelb, *supra* note 434, at 1003—04.

836. See REPORT OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, 28 U.N. GAOR Supp. 18, at 12—10, U.N. Doc. A/9018 (1973).

837. Mr. Fayeze A. Sayegh of Kuwait.

838. REPORT OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, 28 U.N. GAOR Supp. 18, at 12, U.N. Doc. A/9018 (1973).

839. *Id.*

Article 5 did not purport to be an international convention on civil, political, social, economic, cultural and other rights. Nor did it purport to virtually transform the Universal Declaration of Human Rights into an international convention, or to render the principles of that Declaration legally binding upon any State which ratified or acceded to the Convention.<sup>840</sup>

The notion that a right of non-discrimination can be established without establishing the rights protected from discrimination is about as meaningful as the notion of minting a one-sided coin. The Convention on the Elimination of All Forms of Racial Discrimination is, of course, built upon the assumption that individuals already have a wide range of human rights which are protected by the Charter of the United Nations, by many ancillary authoritative instruments and expressions, and by that consensus of general community expectations commonly known as customary international law.<sup>841</sup> This particular Convention is itself an important expression of this growing general community consensus; in this sense it clearly establishes the rights it purports to secure. Neither tied to, nor restricted by, any other particular human rights instrument,<sup>842</sup> the Convention is designed, in the words of the preamble, to eliminate "racial discrimination in all its forms and manifestations"<sup>843</sup> in relation to all human rights, established by whatever authority. The deliberate decision not to tie the Convention to other particular instruments, including even the much venerated Universal Declaration of Human Rights, represents a shared aspiration to make its protection as inclusive as possible of all rights, both present and prospective.<sup>844</sup>

The particular acts forbidden by the Convention are those which arbitrarily differentiate between individuals in the enjoyment of human rights. Article 1(1) makes the basic specification in terms of "any distinction, exclusion, restriction or preference . . . which has

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840. *Id.*

841. See notes 651—79 & accompanying text *supra*.

842. See note 835 & accompanying text *supra*.

843. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, preamble, 660 U.N.T.S. at 212—16.

844. When the Convention on Racial Discrimination was adopted in December of 1965, the two draft International Covenants on Human Rights were nearing completion in the protracted process of drafting and redrafting, which had commenced shortly after the adoption of the Universal Declaration of Human Rights in December of 1948. Subsequently, both draft Covenants were, on December 16, 1966, adopted and opened for signature, ratification and accession by the General Assembly.

the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms . . . .”<sup>845</sup> It will be observed that this comprehensive formulation, expressed in the fourfold categories of “distinction, exclusion, restriction or preference,” seeks to catch every form of deprivation that may be imposed in social process.<sup>846</sup> These four terms would appear to embrace both action and inaction and coercive indulgence as well as deprivation.<sup>847</sup> Even attempts to discriminate appear to be included by the reference to “purpose” as an alternative to “effect.” This alternative reference to purpose and effect suggests that either alone is adequate to establish unlawful discrimination: mere purpose, without proof of success, may suffice, while effects, even in the absence of deliberate intent, are clearly forbidden. This broad reach is further strengthened by the prohibition even of incitement to discrimination. Thus, Article 4 condemns “all propaganda and all organizations” preaching the “superiority” of one race and promoting “racial hatred and discrimination” and seeks the eradication of “all incitement to, or acts of,” racial discrimination.<sup>848</sup> In promotion of this end, the Article obliges contracting states to

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;<sup>849</sup>

and, further, to

declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law.<sup>850</sup>

Cognizant of the potentially intricate ramifications of such broad

845. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 1(1), 660 U.N.T.S. at 216.

846. “It was agreed finally,” as Lerner has pointed out in his commentary, “that the four mentioned terms would cover all aspects of discrimination which should be taken into account.” N. LERNER, *supra* note 796, at 41.

847. *Cf. id.*; Schwelb, *supra* note 434, at 1001.

848. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 4, 660 U.N.T.S. at 218—20.

849. *Id.* art. 4(a), 660 U.N.T.S. at 220.

850. *Id.* art. 4(b).



formulation, the Convention emphasizes at the same time that "due regard" be given to "the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention,"<sup>851</sup> ostensibly with special reference to the rights of "freedom of opinion and expression" and "freedom of peaceful assembly and association."<sup>852</sup>

The Convention's broad formulation of forbidden acts is not, however, intended to prescribe that all differentiations are unlawful discriminations.<sup>853</sup> The differentiations made impermissible are those which fail to establish a demonstrable, rational relation to individual potentialities for self-development and contribution to the aggregate common interest.<sup>854</sup> This basic requirement of ration-

851. *Id.* art. 4.

852. *Id.* arts. 5(d)(viii)—(ix), 660 U.N.T.S. at 222. Article 4 is a very controversial provision and has provoked considerable apprehension, especially within the United States, because of its potential incompatibility with broad freedom of expression. *See, e.g.*, Hauser, *United Nations Law on Racial Discrimination*, [1970] PROCEEDINGS, AM. SOC'Y INT. L., at 114, 117—18; Henkin, *National and International Perspectives in Racial Discrimination*, 4 HUMAN RIGHTS J. 263, 266 (1971). *But see* Bitker, *The International Treaty Against Racial Discrimination*, 53 MARQ. L. REV. 68, 75—76 (1970); Ferguson, *The United Nations Convention on Racial Discrimination: Civil Rights by Treaty*, 1 LAW IN TRANSITION Q. 61, 71—75 (1964); Reisman, *supra* note 565, at 49—51.

853. McKean has aptly observed that

in international legal usage, "discrimination" has come to acquire a special meaning. It does not mean any distinction or differentiation but only arbitrary, invidious or unjustified distinctions, unwanted by those made subject to them. Moreover, it does not forbid special measures of protection designed to aid depressed groups, classes or categories of individuals, so long as these special measures are not carried on longer than is reasonably necessary. . . .

In this respect, the definition accepted in the international sphere is more advanced and sophisticated than that adopted in most municipal legal systems. This is an important instance of international law and the work of international institutions providing inspiration for municipal law, and a reversal of the usual situation whereby international law adapts principles of municipal law by analogy to deal with international problems.

McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT'L L. 177, 185—86 (1970).

854. In the proceedings of the *South West Africa Cases* before the International Court of Justice, the plea of Liberia and Ethiopia that a general norm of non-discrimination existed under international law was repeatedly referred to by South Africa as alleged norms of "non-differentiation," which would obviously be untenable.

The response of Judge Tanaka in his dissenting opinion is illuminating: Briefly, a different treatment is permitted when it can be justified by the criterion of justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law.

ality, that is, an absence of arbitrariness, is implicit in the reference in Article 1(1) to the impairment of "human rights and fundamental freedoms" and is made explicit in Articles 1(4) and 2(2).<sup>855</sup> Thus, these Articles provide that appropriate measures of assistance to traditionally deprived groups undertaken for the purpose of achieving genuinely effective equality of opportunity and treatment for all members of the community do not come within the purview of the prohibition established.<sup>856</sup>

In its effort to secure the complete eradication of racial discrimination, the Convention brings both official and non-official actors within its purview. The ban upon official discriminatory actions is extended to all levels of government. Thus, contracting states undertake, under Articles 2(1)(a), (b), and (c),<sup>857</sup> to

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South West Africa Cases (Second Phase), [1966] I.C.J. 4, 306 (Tanaka, J., dissenting). "Justice or reasonableness," he added, "as a criterion for the different treatment logically excludes arbitrariness." *Id.* He further elaborated:

Equal treatment is a principle but its mechanical application ignoring all concrete factors engenders injustice. Accordingly, it requires different treatment, taken into consideration, of concrete circumstances of individual cases. The different treatment is permissible and required by the considerations of justice; it does not mean a disregard of justice.

*Id.* at 308.

855. Article 1(4) reads:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 1(4), 660 U.N.T.S. at 216.

Article 2(2) reads:

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

*Id.* art. 2(2), 660 U.N.T.S. at 218.

856. With the question of special assistance to deprived groups we propose to deal in some length in a later article.

857. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, arts. 2(1)(a)—(c), 660 U.N.T.S. at 218.

engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation . . .; not to sponsor, defend or support racial discrimination by any persons or organizations . . .; [and finally to] take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.<sup>858</sup>

This prohibition on official actors is extended also to promotion or incitement of racial discrimination. Article 4(c) obliges contracting states not to "permit public authorities or public institutions, national or local, to promote or incite racial discrimination."<sup>859</sup> In recognition that "racial discrimination is often private discrimination,"<sup>860</sup> the Convention in one brief but important provision asserts a broad reach extending to private parties and associations. Article 2(1)(d) stipulates:

Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.<sup>861</sup>

In rounding out its substantive prescriptions, the Convention provides for remedies against all actors, official and non-official alike. Article 6 reads:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.<sup>862</sup>

The comprehensive prohibition of discrimination on grounds of race contained within this Convention is fortified by many parallel expressions emanating from various United Nations bodies. It may be recalled that in the long train of resolutions regarding apartheid, adopted both by the General Assembly and the Security Council,

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858. *Id.*

859. *Id.* art. 4(c), 660 U.N.T.S. at 220.

860. Henkin, *National and International Perspectives in Racial Discrimination*, 4 HUMAN RIGHTS J. 263, 265 (1971).

861. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 2(1)(d), 660 U.N.T.S. at 218.

862. *Id.* art. 6, 660 U.N.T.S. at 222.

there has been a recurrent, emphatic, and equally general condemnation of racial discrimination as unlawful under international law.<sup>863</sup> The continued exacerbation caused by racial discriminations led the General Assembly to proclaim the year 1971 as International Year for Action to Combat Racism and Racial Discrimination.<sup>864</sup> The intensely aroused "conscience and sense of justice of mankind" for "the total and unconditional elimination of racial discrimination and racism"<sup>865</sup> reached a climax with the General Assembly's decision to launch "the Decade for Action to Combat Racism and Racial Discrimination,"<sup>866</sup> inaugurating a wide range of concerted activities on December 10, 1973, the twenty-fifth anniversary of the Universal Declaration of Human Rights.<sup>867</sup> In the Programme for the Decade for Action to Combat Racism and Racial Discrimination approved by the General Assembly on November 2, 1973, it is emphatically declared that

discrimination between human beings on the ground of race, colour or ethnic origin is an affront to humanity and shall be condemned as a violation of the principles of the Charter of the United Nations and of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a factor capable of disturbing peace and security among peoples.<sup>868</sup>

The crystallization of contemporary prescriptions against racial discrimination is further confirmed by the International Court of Justice in the *Namibia* case.<sup>869</sup> One end result of the long and tortuous litigation on Namibia (South West Africa) was the unequivocal condemnation of racial discrimination by the International Court of Justice. In holding South Africa's continued occupation of Namibia to be in violation of the Mandate and the Charter of the United Nations,<sup>870</sup> the Court pronounced, in 1971, in language worth reiterating:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an interna-

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863. See notes 505—25 & accompanying text *supra*.

864. G.A. Res. 2785, 26 U.N. GAOR Supp. 29, at 81, U.N. Doc. A/8429 (1971).

865. G.A. Res. 2544, preamble, 24 U.N. GAOR Supp. 30, at 53, U.N. Doc. A/7630 (1969).

866. G.A. Res. 3057, 28 U.N. GAOR Supp. 30, at 70, U.N. Doc. A/9030 (1973).

867. *Id.* preamble.

868. *Id.*, Annex at 1.

869. I.C.J. Advisory Opinion on Namibia, note 531, *supra*.

870. *Id.* at 58.

tional status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.<sup>871</sup>

This conclusion had been anticipated by the profound and eloquent dissenting opinion of Judge Tanaka in the *South West Africa Cases (Second Phase)*<sup>872</sup> in 1966, a previous incarnation of the 1971 case. Drawing upon every source of international law authorized in the Statute of the International Court of Justice, Judge Tanaka concluded:

From what has been said above, we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law as is contended by the Applicants, and as a result, the Respondent's obligations as Mandatory are governed by this legal norm in its capacity as a member of the United Nations . . . .<sup>873</sup>

On the regional level, comparable prescription can be found in the European Convention of Human Rights and the American Convention of Human Rights. The European Convention, in Article 14, provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>874</sup>

Similarly, the American Convention, in Article 1(1), obliges the contracting states to

undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.<sup>875</sup>

871. *Id.* at 57.

872. *South West Africa Cases (Second Phase)*, [1966] I.C.J. 4, 284 (Tanaka, J., dissenting).

873. *Id.* at 293.

874. European Convention, *supra* note 11, art. 14, 213 U.N.T.S. at 232 (emphasis added).

875. American Convention, *supra* note 59, art. 1(1), 9 INT'L LEGAL MATERIALS at

This growing consensus in transnational expectation against racial discrimination has been further fortified by the development of new "general principles of law" as expressed in national constitutions, statutes, and judicial decisions. As Judge Tanaka observed in his condemnation of racial discrimination in the *South West Africa Cases (Second Phase)* in 1966:

The principle of equality before the law, however, is stipulated in the list of human rights recognized by the municipal system of virtually every State no matter whether the form of government be republican or monarchical and in spite of any differences in the degree of precision of the relevant provisions. This principle has become an integral part of the constitutions of most of the civilized countries in the world. Common-law countries must be included.<sup>876</sup>

"There is a clear trend," in the words of Santa Cruz, "to include constitutional provisions not only guaranteeing equality before the law but specifically providing against racial discrimination."<sup>877</sup> He further states:

Almost all the constitutions or basic laws of States contain provisions relating to human rights and fundamental freedoms, and a great majority of States have enacted legislation or taken other measures aimed at preventing or combating racial discrimination and achieving equal rights for all without distinction. A majority of constitutions promulgated in recent years contain provisions giving effect to the human rights and fundamental freedoms set out in the Universal Declaration on Human Rights.<sup>878</sup>

It may be noted that the national constitutions employ, in addition to the standard terms of race, color, descent, national origin, and ethnic origin, as illustrated in the Convention on the Elimination of Racial Discrimination,<sup>879</sup> a wide range of other words to refer to prohibited grounds of differentiation, such as nationality,<sup>880</sup> racial origin,<sup>881</sup> origin,<sup>882</sup> tribe,<sup>883</sup> tribal affiliation,<sup>884</sup> family,<sup>885</sup> place of

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101 (emphasis added).

876. *South West Africa Cases (Second Phase)*, [1966] I.C.J. 4, 299 (Tanaka, J., dissenting).

877. H. SANTA CRUZ, *supra* note 439, at 28.

878. *Id.*

879. See notes 791—807 & accompanying text *supra*.

880. See, e.g., CONSTITUTION art. 20(2) (Czechoslovakia, 1960), reprinted in 2 A. PEASLEE, *supra* note 389, at 231; CONSTITUTION arts. 123 & 135 (1936, amended 1965) (Union of Soviet Socialist Republics), reprinted in 2 A. PEASLEE, *supra* note 389, at 1005—06.

881. See, e.g., Civil Code of Cambodia art. 21, cited in H. SANTA CRUZ, *supra* note 439, at 28 n.43.

birth,<sup>886</sup> social origin and position,<sup>887</sup> place of origin,<sup>888</sup> national and racial appurtenance,<sup>889</sup> social extraction,<sup>890</sup> kinship,<sup>891</sup> and filiation.<sup>892</sup>

Special national legislation, in implementation of constitutional protections, has also been enacted to prevent and eradicate racial discrimination. For example, the United States has in recent years effectively resorted to a series of civil rights enactments, notably: the Civil Rights Act of 1964, outlawing racial discrimination in public accommodations and employment and strengthening federal power to enforce school integration;<sup>893</sup> the Voting Rights Act of 1965 banning the use of literacy tests and related devices to deny the right to vote on account of race or color;<sup>894</sup> and the Fair Housing Act

882. See, e.g., CONSTITUTION art. 1 (Congo (Brazzaville), 1963), *reprinted in* 1 A. PEASLEE, *supra* note 389, at 85—86; CONSTITUTION arts. 2 & 3 (1958, amended 1963) (France), *reprinted in* 3 A. PEASLEE, *supra* note 389, at 312—13.

883. See, e.g., CONSTITUTION arts. 10(2)—(3) (Nepal, 1962), *reprinted in* 2 A. PEASLEE, *supra* note 389, at 774.

884. See, e.g., CONSTITUTION art. 15 (Congo (Leopoldville), 1964), *reprinted in* 1 A. PEASLEE, *supra* note 389, at 105.

885. See, e.g., *id.*

886. See, e.g., *id.*

887. See, e.g., CONSTITUTION art. 76 (Mongolian Peoples Republic, 1960), *reprinted in* 2 A. PEASLEE, *supra* note 389, at 762.

888. See, e.g., CONSTITUTION art. 14 (Kenya, 1963), *reprinted in* 1 A. PEASLEE, *supra* note 389, at 264; CONSTITUTION art. 11 (Malawi, 1964), *reprinted in* 1 A. PEASLEE, *supra* note 389, at 482; CONSTITUTION art. 17 (1962, amended 1963) (Uganda), *reprinted in* 1 A. PEASLEE, *supra* note 389, at 928—29; CONSTITUTION art. 14 (Zambia, 1964), *reprinted in* 1 A. PEASLEE, *supra* note 389, at 1031.

889. See, e.g., Electoral Law of 24 Oct. 1956 (Poland), *cited in* H. SANTA CRUZ, *supra* note 439, at 30 n.69.

890. See, e.g., *id.*

891. See, e.g., CONSTITUTION art. 11 (1951, amended 1963) (Libya), *reprinted in* 1 A. PEASLEE, *supra* note 389, at 437.

892. See, e.g., CONSTITUTION art. 25 (Ecuador, 1967), *reprinted in* 4 A. PEASLEE, *supra* note 389, at 463. Article 150, paragraph 1 of the Constitution of Brazil provides:

All are equal before the law, without distinction as to sex, race, occupation, religious creed, or political convictions. *Racial prejudice* shall be punished by law.

CONSTITUTION art. 150, ¶ 1 (Brazil, 1967), *reprinted in* 4 A. PEASLEE, *supra* note 389, at 192 (emphasis added).

893. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to h-6 (1970), *as amended*, 42 U.S.C. §§ 2000c, c-6(a)(2), c-9, d-5, e to e-17, h-2 (Supp. II, 1972). For its predecessors see the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 90; Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

894. Voting Rights Act of 1965, 42 U.S.C. §§ 1973—73p (1970).

of 1968 abolishing discrimination in residential housing.<sup>895</sup> The enactment by the United Kingdom of the Race Relations Act of 1968,<sup>896</sup> in the wake of the growing racial tension exacerbated by the inflow of "colored" immigrants, is another notable example.

The judicial processes of states have also played a role in creating transnational expectations. The tremendous changes propelled by the Supreme Court in the law of the United States have carried a message to many parts of the world. The clear trend of the Court's decisions has been toward the elimination of racial discrimination in all its forms and manifestations.<sup>897</sup> In its epochal decision in *Brown v. Board of Education*,<sup>898</sup> the Court held that "in the field of education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>899</sup> The impact of this decision has been felt not only in the educational sector,<sup>900</sup> but also in many other sectors of community life. In the power sector, earlier

895. Fair Housing Act of 1968, 42 U.S.C. §§ 3601—31 (1970).

896. Race Relations Act of 1968, c. 71. The text of this Act and that of its predecessor, the Race Relations Act of 1965, c. 71, is reprinted in A. LESTER & G. BINDMAN, *RACE AND LAW IN GREAT BRITAIN* 419—58 (1972). For a useful legislative background consult H. STREET, G. HOWE & G. BINDMAN, *THE STREET REPORT ON ANTI-DISCRIMINATION LEGISLATION* (1967). See also I. MACDONALD, *RACE RELATIONS AND IMMIGRATION LAW* (1969); Hepple, *Race Relations Act 1968*, 32 *MODERN L. REV.* 181 (1969).

897. See generally D. BELL, *RACE, RACISM AND AMERICAN LAW* (1973) [hereinafter cited as D. BELL]; 2 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (stu. ed. 1967) [hereinafter cited as T. EMERSON, D. HABER & N. DORSEN]; 2 N. DORSEN, N. CHACHKIN & S. LAW, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (1973 Supp.) [hereinafter cited as N. DORSEN, N. CHACHKIN & S. LAW]; J. GREENBERG, note 698 *supra*; M. KONVITZ, *BILL OF RIGHTS READER* 523—611 (5th ed. rev. 1973); 2 *THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 201—341 (L. Pollak ed. 1968); Larson, *The New Law of Race Relations*, 1969 *WIS. L. REV.* 470; Pollak, *Law and Liberty: The American Constitution and the Doctrine that All Men are Created Equal*, 2 *HUMAN RIGHTS* 1 (1972).

898. 347 U.S. 483 (1954).

899. *Id.* at 495.

900. After the first *Brown* decision of May 1954, the Supreme Court further ruled in 1955 that desegregation in public schools be effected with "all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). Consequently, there have been repeated attempts, through various devices, to avoid, evade, and delay compliance with the Court ruling. For a detailed description see A. BLAUSTEIN & C. FERGUSON, *DESEGREGATION AND THE LAW* (2d ed. 1962). Confronted with a flow of litigation, the Court has generally remained vigilant in barring various devices designed to sidestep the holding and spirit of the *Brown* decisions. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).



decisions invalidating "the White Primary"<sup>901</sup> have in recent years been fortified by a series of civil rights acts,<sup>902</sup> especially the Voting Rights Act of 1965<sup>903</sup> and the Voting Rights Act Amendments of 1970.<sup>904</sup> The net effect of these statutes has been to secure effectively the equal right to vote and to stand for election by outlawing the employment of obstructive devices such as literacy tests or other registration obstacles.<sup>905</sup> Their validity, though challenged, has been upheld by the Court.<sup>906</sup> Building upon a far-reaching doctrine of "state action,"<sup>907</sup> the Court has, further, proceeded to outlaw the separation of public facilities and accommodations (e.g., buses, parks, beaches and bathhouses, golf courses, auditoriums, courtroom seating, hotels, restaurants, other places of entertainment),<sup>908</sup> public housing,<sup>909</sup> employment,<sup>910</sup> and other areas of public

901. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

902. See D. BELL, *supra* note 897, at 129—58; 2 T. EMERSON, D. HABER & N. DORSEN, *supra* note 897, at 1141—1219; 2 N. DORSEN, N. CHACHKIN & S. LAW, *supra* note 897, at 39—75.

903. Voting Rights Act of 1965, 42 U.S.C. §§ 1973—73p (1970).

904. Voting Rights Act Amendments of 1970, 42 U.S.C. §§ 1973b(a), b(b), aa to bb-4 (1970).

905. See notes 902—04 *supra*.

906. *Georgia v. United States*, 411 U.S. 526 (1973); *Oregon v. Mitchell*, 400 U.S. 112 (1971); *Gaston County v. United States*, 395 U.S. 285 (1969); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 601 (1966). See also UNITED STATES COMM'N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION* (1968); Avins, *Literacy Tests and the Fifteenth Amendment: The Original Understanding*, 12 So. TEX. L.J. 24 (1970); Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1 (1965); Cox, *Constitutionality of the Proposed Voting Rights Act of 1965*, 3 HOUSTON L. REV. 1 (1965); Rice, *Voting Rights Act of 1965: Some Dissenting Observations*, 15 KAN. L. REV. 159 (1966); Note, *1965 Voting Rights Act: An Evaluation*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 357 (1968).

907. See 2 T. EMERSON, D. HABER & N. DORSEN, *supra* note 897, at 1645—73; 2 N. DORSEN, N. CHACHKIN & S. LAW, *supra* note 897, at 269—87. See also EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 416—18 (13th rev. ed. H. Chase & C. Ducat eds. 1973); Avins, *Toward Freedom of Choice in Places of Public and Private Accommodation*, 48 NEB. L. REV. 21 (1968); Avins, *What is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1 (1968).

908. See, e.g., *Daniel v. Paul*, 395 U.S. 298 (1968) (snack bars); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (motels and other places of public accommodation); *Watson v. Memphis*, 373 U.S. 526 (1963) (parks and other recreational facilities); *Wright v. Georgia*, 373 U.S. 284 (1963) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches).

909. Cf. D. BELL, *supra* note 897, at 607—710; 2 T. EMERSON, D. HABER & N.

concern.<sup>911</sup> In 1967, the Court, in holding unconstitutional a Virginia statute barring interracial marriages in *Loving v. Virginia*,<sup>912</sup> pronounced: "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."<sup>913</sup> In *Jones v. Alfred H. Mayer Co.*,<sup>914</sup> the Court held that all racial discrimination, private as well as public, in the sale or rental of property is outlawed by the Civil Rights Act of 1866, a statute enacted in legitimate exercise of the congressional power to enforce the thirteenth amendment.<sup>915</sup> "It may well be," in the words of Larson, "that this decision, by infusing new vitality both into the early Reconstruction statutes and into the thirteenth amendment, will prove to be the most far-reaching race relations case since the Civil War."<sup>916</sup> Larson adds:

*Jones*, at one stroke, supplied a broad fair housing law, and quite possibly an equally broad law banning discrimination in employment, professional services, private education, retail establishments, and service businesses of all sorts, by revitalizing the Reconstruction statutes on equal property and contract rights, as well as the thirteenth amendment abolishing slavery.<sup>917</sup>

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DORSEN, *supra* note 897, at 1579—1643; 2 N. DORSEN, N. CHACHKIN & S. LAW, *supra* note 897, at 222—68.

910. Cf. D. BELL, *supra* note 897, at 711—856; 2 T. EMERSON, D. HABER & N. DORSEN, *supra* note 897, at 1467—1567; 2 N. DORSEN, N. CHACHKIN & S. LAW, *supra* note 897, at 175—221.

911. An example is discrimination in health and welfare services. See 2 T. EMERSON, D. HABER & N. DORSEN, *supra* note 897, at 1716—46; 2 N. DORSEN, N. CHACHKIN & S. LAW, *supra* note 897, at 300—46.

912. 388 U.S. 1 (1967).

913. *Id.* at 10.

914. 392 U.S. 409 (1968).

915. *Id.* at 443—44. In the words of Justice Stewart, who delivered the opinion of the Court:

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

*Id.* at 443 (footnotes omitted).

916. Larson, *The New Law of Race Relations*, 1969 Wis. L. Rev. 470, 486.

917. *Id.* at 471. The development in the national law of the United States,

In establishing structures and procedures for the application of the newly emerged basic prescription against racial discrimination, the general community has moved significantly toward more highly specialized and increasingly centralized structures and procedures. The most general goal sought in application is of course that of minimizing to the utmost degree possible the occurrence of racial discrimination. Yet, it is widely recognized that, because of the complexity residing in both the practices of racial discrimination and their causes, the broad goal of minimization must be made more specific in terms of a whole series of inter-related sub-goals.<sup>918</sup> These sub-goals may be summarized as follows: 1) *prevention*, from a long-range perspective, of the occurrence of racial discrimination by fostering appropriate predispositions in people; 2) *deterrence*, at the incipient stage, of attempts to engage in racial discrimination; 3) *restoration*, with promptness, of exacerbated situations when disruption has been caused by discriminatory acts; 4) *rehabilitation* of victims of discriminatory situations by affording appropriate remedies and compensations; 5) *reconstruction*, in a concerted long-term effort, of the whole social environment, including the special measures necessary to ameliorate accumulated grievances and to promote the self-development of all community members; and 6) *correction* of offenders by invoking the community process of criminal sanction.<sup>919</sup>

Toward these ends, the Convention on the Elimination of Racial Discrimination, in recognition of the highly decentralized structure of world effective power, thrusts upon individual states the primary

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entirely paralleling and supporting the Convention on Racial Discrimination, is comprehensively traced and analyzed by Professor Nathaniel Nathanson. See Nathanson, *International Convention on the Elimination of All Forms of Racial Discrimination: The Convention Obligations Compared with the Constitutional and Statutory Law of the United States* (Paper presented to the Panel on Human Rights Law and International Implementation, American Society of International Law, February 1974). A comprehensive study would undoubtedly demonstrate the comparable trend of development in differing national communities. Cf. H. SANTA CRUZ, *supra* note 439, at 26—42; Batshaw, *A Landmark Decision Against Discrimination in Canada*, 4 HUMAN RIGHTS J. 207 (1971); Keith, *Race Relations and the Law in New Zealand*, 6 HUMAN RIGHTS J. 329 (1973); Kinsells, *The Canadian Model for the Protection from Discrimination*, 4 HUMAN RIGHTS J. 270 (1971); Smith, *Prevention of Discrimination Under Kenya Law*, 20 INT'L & COMP. L.Q. 136 (1971).

918. Cf. Reisman, *supra* note 565, at 51—54; Schacter, *How Effective are Measures Against Racial Discrimination*, 4 HUMAN RIGHTS J. 293 (1971).

919. For detailed formulation and application of these goals, see R. ARENS & H. LASSWELL, IN DEFENSE OF PUBLIC ORDER: THE EMERGING FIELD OF SANCTION LAW 199—203 (1961); M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 261—383 (1961).

responsibility for achieving the major goal of minimization of racial discrimination by relating concrete undertakings to these sub-goals. To secure the long-term goal of prevention, the Convention, in Article 7, stipulates:

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.<sup>920</sup>

To deter the consummation of immediately threatened discriminatory acts, the Convention, in Article 4, bans not only racist propaganda and organizations but also incitement to racial discrimination.<sup>921</sup> To restore the exacerbated situations caused by past discriminations, the Convention, in Article 6, requires contracting states to "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions."<sup>922</sup> For the purpose of rehabilitation, the Convention, again in Article 6, requires contracting states to afford victims "just and adequate reparation or satisfaction for any damage suffered . . . ."<sup>923</sup> For measures directed toward long-range reconstruction, the Convention stresses the importance of undertaking special programs to assist traditionally deprived groups,<sup>924</sup> a move vital to the attainment of genuinely effective equality of opportunity, and urges a continuing effort of enlightenment to change people's predispositions,<sup>925</sup> a task essential to the sub-goal of reconstruction as well as of broader prevention.<sup>926</sup> The Convention, in Article 2(1)(e), further states:

Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other

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920. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 7, 660 U.N.T.S. at 222.

921. *Id.* art. 4, 660 U.N.T.S. at 218—20.

922. *Id.* art. 6, 660 U.N.T.S. at 222. .

923. *Id.*

924. *Id.* arts. 1(4) & 2(2), 660 U.N.T.S. at 216, 218.

925. *Id.* art. 7, 660 U.N.T.S. at 222.

926. Oriented to the long-term, the sub-goals of reconstruction and prevention may in many ways be overlapping; they are integrative rather than mutually exclusive.

means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.<sup>927</sup>

And finally, the Convention, in seeking the sub-goal of correction, obliges contracting states to make certain acts criminal offenses, including dissemination of racist ideas, incitement to racial discrimination, acts of racial violence, rendering assistance to racist activities, and participation in racist organizations and activities.<sup>928</sup>

To supervise the degree of compliance by contracting states, the Convention on Racial Discrimination established the Committee on the Elimination of Racial Discrimination, consisting of "eighteen experts of high moral standing and acknowledged impartiality" serving "in their personal capacity."<sup>929</sup> The competence conferred upon the Committee is fourfold:

1) to appraise, under Article 9, reports on "the legislative, judicial, administrative or other measures" of compliance submitted by contracting states and thus to "make suggestions and general recommendations;"<sup>930</sup>

2) to act, pursuant to Articles 11 and 13, on complaints brought by one State Party against another for failing to give effect to the provisions of the Convention;<sup>931</sup>

3) to deal with petitions by individuals under the conditions specified in Article 14;<sup>932</sup>

4) to cooperate, pursuant to Article 15, with competent United Nations bodies regarding petitions from the inhabitants of Trust, Non-Self-Governing and other dependent territories.<sup>933</sup>

The reporting system is a feature characteristic of most of the transnational human rights instruments.<sup>934</sup> Under Article 9 of the

927. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 2(1)(e), 660 U.N.T.S. at 218.

928. *Id.* arts. 4(a)—(b), 660 U.N.T.S. at 220.

929. *Id.* art. 8(1), 660 U.N.T.S. at 224.

930. *Id.* art. 9, 660 U.N.T.S. at 224—26.

931. *Id.* arts. 11—13, 660 U.N.T.S. at 226—30.

932. *Id.* art. 14, 660 U.N.T.S. at 230—32.

933. *Id.* art. 15, 660 U.N.T.S. at 232—34.

934. See Das, *Measures of Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination with Special Reference to the Provisions Concerning Reports from States Parties to the Convention*, 4 HUMAN RIGHTS J. 213 (1971); Schwelb, *supra* note 434, at 1034—37. Cf. C. JENCKS, *THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM* (1957); E. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THREE DECADES OF I.L.O. EXPERIENCE* (1966); Schwelb, *Civil and Political Rights: The International Measures of Implementation*, 62 AM. J. INT'L L. 827, (1968); Schwelb, *Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1 HUMAN RIGHTS J. 375 (1968).

Convention, each State Party is required, except initially, to submit a biannual report, and the Committee may request further information if necessary.<sup>935</sup> The Committee's annual report to the General Assembly not only relays information about its activities, but may also contain both general and specific recommendations.<sup>936</sup> The importance of the reporting system has been underscored by Reisman in these words:

This Committee function of appraisal and recommendation should not be underestimated. If it is carried forward impartially, a total public picture of trends in regard to the elimination of racial discrimination will be available. Trouble spots will be highlighted and publicized and priorities and tactics for action can be determined by official and private international organizations operating beyond the formal confines of the Committee. The threat of international exposure may stimulate some states to take more active measures to combat racial discrimination.<sup>937</sup>

Under the inter-state complaint procedure provided in Articles 11 through 13, any State Party may bring an alleged violation of the Convention by another Party to the attention of the Committee.<sup>938</sup> The complaint ("communication") will be transmitted to the State Party concerned, which then has three months to "submit to the Committee written explanations or statements clarifying the matter."<sup>939</sup> "If the matter is not adjusted to the satisfaction of both parties," either party has the right to "refer the matter again to the Committee;"<sup>940</sup> the Committee is authorized to deal with the matter upon ascertaining that the requirements of exhaustion of "domestic remedies" are met.<sup>941</sup> "After the Committee has obtained and collated all the information it deems necessary," according to Article 12(1)(a), it is incumbent upon the Committee Chairman to appoint an ad hoc Conciliation Commission, "comprising five persons who may or may not be members of the Committee,"<sup>942</sup> but who are in

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935. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 9(1), 660 U.N.T.S. at 224—26.

936. *Id.* art. 9(2), 660 U.N.T.S. at 226.

937. Reisman, *supra* note 565, at 59.

938. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, arts. 11—13, 660 U.N.T.S. at 226—30.

939. *Id.* art. 11(1), 660 U.N.T.S. at 226.

940. *Id.* art. 11(2).

941. *Id.* art. 11(3). These requirements, as in general international law, would be dispensed with "where the application of the remedies is unreasonably prolonged." *Id.*

942. *Id.* art. 12(1)(a), 660 U.N.T.S. at 228.

principle "appointed with the unanimous consent of the parties to the dispute."<sup>943</sup> The Commission is to make available its "good offices" to the disputing parties in search of "an amicable solution" on the basis of "respect" for the Convention.<sup>944</sup> Failing an agreed settlement, the Commission is required to "prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute."<sup>945</sup> This report, together with the "declarations of the States Parties concerned"<sup>946</sup> signifying their acceptance or rejection of the report's recommendations, is to be made available to all the other contracting states after a specified period.<sup>947</sup>

The right of individual petition is made subject to the option of states under the Convention. "A State Party may," under Article 14(1), "at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention."<sup>948</sup> The same provision, however, immediately adds: "No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration."<sup>949</sup> Furthermore, the competence of the Committee regarding individual petitions is operative "only when at least ten States Parties" have made the requisite declarations of acceptance.<sup>950</sup> The Committee, guided by a set of somewhat complicated procedures for handling such petitions,<sup>951</sup> especially the exhaustion of domestic

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943. *Id.* According to Article 12(1)(b):

If the States Parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

*Id.* art. 12(1)(b).

944. *Id.* art. 12(1)(a). Note the emphasis on "respect" for the Convention.

945. *Id.* art. 13(1), 660 U.N.T.S. at 230. For a technical interpretation of this provision see Schwelb, *supra* note 434, at 1040-41.

946. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 13(3), 660 U.N.T.S. at 230.

947. *Id.*

948. *Id.* art. 14(1).

949. *Id.*

950. *Id.* art. 14(9), 660 U.N.T.S. at 232.

951. *Id.* arts. 14(2)-(6), 660 U.N.T.S. at 230-32.

remedies,<sup>952</sup> may engage in fact-finding and formulate "its suggestions and recommendations."<sup>953</sup> The Committee is required, under Article 14(8), to "include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations."<sup>954</sup> To accord individual victims competence to invoke the prescriptions of the Convention before the Committee is indeed an immensely significant step, though achievement of the requisite number of acceptances (at least 10) seems to be delayed.<sup>955</sup>

Unlike the restriction imposed on individual petitions in Article 14(1),<sup>956</sup> Article 15(2)(a) authorizes the Committee to

receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514(XV) applies, relating to matters covered by this Convention which are before these bodies.<sup>957</sup>

This sharp contrast has provoked a commentator to call it another manifestation of "the UN's double standard on human rights complaints."<sup>958</sup>

During the first four years (1970—1973) of its operation, the Committee on the Elimination of Racial Discrimination has concerned

952. *Id.* art. 14(7)(a), 660 U.N.T.S. at 232.

953. *Id.* art. 14(7)(b).

954. *Id.* art. 14(8).

955. As of this writing, only four states—Austria, the Netherlands, Sweden, and Uruguay—have made the required declaration.

956. See text accompanying note 948 *supra*.

957. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, art. 15(2)(a), 660 U.N.T.S. at 232—34.

958. J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS 151 (1970). Similarly, Mr. MacDonald of Canada, shortly after the Convention was approved by the Third Committee of the Assembly, characterized the incorporation of Article 15 as "bad politics and worse law." 20 U.N. GAOR, 3d Comm. 504 (1965). In the words of one commentator:

It makes the Committee on the Elimination of Racial Discrimination a kind of auxiliary organ to the organs dealing with the implementation of the right to self-determination, at the present the Trusteeship Council and the Committee of Twenty-four.

Schwelb, *The Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination* in INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-FIFTH CONFERENCE 605 (1974).



itself mainly with appraising reports submitted by the contracting states and making general recommendations,<sup>959</sup> and considering, pursuant to Article 15, petitions submitted by the inhabitants of various dependent territories,<sup>960</sup> in addition to making necessary organizational arrangements, notably its own rules of procedure.<sup>961</sup> The Committee has not been seized with any formal inter-state complaint under Article 11.<sup>962</sup> The procedure for individual petitions contemplated in Article 14 is yet to be set in operation, because only four of the 76 state parties have made the requisite declaration.<sup>963</sup>

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959. The general recommendations are presented in the Committee's annual reports. See *1973 Report*, 28 GAOR Supp. 18, at 21—78, 103—07, 112—19, U.N. Doc. A/9018 (1973) [hereinafter cited as *1973 Report*]; *1972 Report*, 27 U.N. GAOR Supp. 18, at 12—26, 37—39, 57—67, U.N. Doc. A/8718 (1972) [hereinafter cited as *1972 Report*]; *1971 Report*, 26 U.N. GAOR Supp. 18, at 5—25, 31—34, U.N. Doc. A/8418 (1971) [hereinafter cited as *1971 Report*]; *1970 Report*, 25 U.N. GAOR Supp. 27, at 9—11, 32—36, U.N. Doc. A/8027 (1970) [hereinafter cited as *1970 Report*].

960. See *1973 Report*, *supra* note 959, at 79—98, 106—07, 120—22; *1972 Report*, *supra* note 959, at 27—29, 40—53, 68—71; *1971 Report*, *supra* note 959, at 26—28, 31—47, 58—61; *1970 Report*, *supra* note 959, at 11—14, 37—39.

961. Pursuant to Article 10(1) of the Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 433, 660 U.N.T.S. at 226, the Committee adopted its Provisional Rules of Procedure (78 rules in total) in 1970 at its first and second sessions. For its text see *1970 Report*, *supra* note 959, at 17—31. Prior to the adoption of the Committee's Provisional Rules of Procedures, a comprehensive, detailed draft had been proposed in a law journal. See Newman, *The New International Tribunal*, 56 CALIF. L. REV. 1559 (1968).

For the subsequent adoption of the amendments to the Committee's Provisional Rules of Procedure see *1971 Report*, *supra* note 959, at 4, 33 (Rule 35); *1972 Report*, *supra* note 959, at 8—11, 37 (Rules 64A & 66A); *1973 Report*, *supra* note 959, at 6—8, 103 (Rules 13 & 56).

962. Nevertheless, allegations arising from the reports submitted to the Committee by Panama about discrimination in the Panama Canal Zone and by Syria about discrimination in the Golan Heights took on the character, in a manner of speaking, of inter-state complaints. See *1971 Report*, *supra* note 959, at 13—25, 31, 34; *1973 Report*, *supra* note 959, at 30—31, 51—52, 104—05. See also L. SOHN & T. BUERGENTHAL, *supra* note 530, at 866—98; Schwelb, *supra* note 958, at 593—605.

963. For continuation of this discussion see McDougal, Lasswell, and Chen, *Human Rights for Women and World Public Order*, 69 AM. J. INT'L L. 497 (1975); McDougal, Lasswell, and Chen, *Non-conforming Political Opinion and Human Rights: Transnational Protection Against Discrimination*, 2 YALE STUDIES OF WORLD PUBLIC ORDER (forthcoming, 1975), and other subsequent publications. These articles will eventually be published under the same authorship, in book form, as HUMAN RIGHTS AND WORLD PUBLIC ORDER.