

## CHAPTER SEVEN: HUMAN RIGHTS

Pages 157-184

### A. Human Rights

**Reading Assignment:** *International Law Anthology*, pp. 19-20 (humanitarian intervention), 21-24 (history of human rights), 205-25.

Universal Declaration of Human Rights  
Adopted by UN General Assembly  
Resolution 217A(III)  
of 10 December 1948

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

#### Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

#### Article 2

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

#### Article 3

Everyone has the right to life, liberty and security of person.

#### Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

#### Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

#### Article 6

Everyone has the right to recognition everywhere as a person before the law.

#### 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 against any discrimination in violation of the Declaration and against any incitement to such discrimination.

#### Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national

effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

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

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

NOTES AND QUESTIONS  
FOR CLASSROOM DISCUSSION

1. As a resolution of the General Assembly, the Universal Declaration of Human Rights is not itself a legally binding instrument. Nevertheless, many legally binding instruments (treaties, constitutions, statutes, judicial decisions) have, over the years, "incorporated" various provisions of the Universal Declaration either by direct reference or by the use of language similar to or identical with the language in the Declaration. As years go by, the

principles enunciated in the Universal Declaration appear increasingly to be a kind of irreducible minimum statement of human rights.

2. Reading the Universal Declaration can seem boring and uncontroversial. But imagine how it would appear to any reader, in any country, five hundred years ago! How about three hundred years ago? How about some countries today? Using your imagination in this way can help underscore the huge advance in perception that has occurred as civilized society increasingly displaces rulers as the focal point of life and focuses instead upon the rights of average citizens. From a perspective of several centuries, the Universal Declaration of Human Rights is an utterly revolutionary document.

3. Does the Universal Declaration signal a paradigm shift of international law from the rights of states to the rights of individuals? If there is such a shift, has international law gone too far in the direction of individual rights? Will international law overly infringe upon states' internal policies?

4. How can we prove that certain basic human rights, such as the prohibitions against genocide, torture, and enslavement, are in fact prohibitions of international law? Would any government of any state today take the position that genocide, torture, or enslavement are *permitted* by international law? If not, then does your answer to the second question provide a basis for an answer to the first question?

5. Could the Universal Declaration be construed to prohibit polygamy and polyandry? Genital circumcision? What Articles of the Declaration are most relevant here?

6. Why do we need a "hierarchy" of human rights? If we need such a hierarchy, do you agree with Professor Farer's version of it? Would a third-world country agree?

7. We have studied war crimes and the Kellogg-Briand pact's prohibition against the resort to war. Is "humanitarian intervention" an *exception* to the Kellogg-Briand pact? Or is it an act of war? How do we know? In what ways, if any, is an act of "humanitarian intervention" different from an act of war?

8. Article 2(4) of the United Nations Charter is discussed in the essays in the Anthology in connection with humanitarian intervention. The UN Charter is contained in full in Chapter 14 of this Coursebook. Following is the text of Article 2(4). Peruse its language. Does it prohibit humanitarian intervention? Inhibit it?

#### Article 2

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

9. In what sense is humanitarian intervention a human right? Whose right is it--the intervenor's or the intervenee's?

10. Was the intervention of the United States in Panama a case of "humanitarian intervention," or U.S. jingoistic paternalistic suppression of any Latin American development that the U.S. dislikes? Does it matter? Do motives *ever* matter? *Should* they matter? If we dispense with a state's motives for intervention, what's left?

11. If one were to debate whether the Panamanian intervention does (or does not) violate international law, what *legal criteria* should be applied to the facts?

12. Does the proposed "anti-tyranny" objective count as a legal criterion?

13. After having considered the pros and cons of the Panama debate, how do you come out? Why?

14. The Universal Declaration of Human Rights has been followed up by two comprehensive multilateral treaties: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. Directly following this set of questions are excerpts from those two conventions. As you look over their language, consider which articles, if any, add anything to the substance of the Universal Declaration. Do any articles subtract from the substance of the Universal Declaration?

15. In answering Question 14, note specifically Article 4 of the Civil and Political Rights Covenant regarding derogations. What derogations are permitted? Which ones are barred? Do you agree?

16. Among the rights you are considering in your answer to Question 14, consider the right to leave one's country. Perhaps it is not one of the most important human rights, but it is certainly specific and relatively unambiguous. Consider how it is worded in the Universal Declaration, Article 13. Then consider how it is worded in the Civil and Political Covenant, Article 12. Which one is better? Why?

International Covenant on Civil and Political Rights  
Done at New York, Dec. 16, 1966.  
Entered into force, Mar. 23, 1976.<sup>1</sup>

#### Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

#### Article 2

1. 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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

#### Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

#### Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

#### Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

#### Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

#### Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### Article 8

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 labor.

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labor may be imposed as a punishment for a crime, the performance of hard labor in pursuance of a sentence to such punishment by a competent court.

(c) For the purpose of this paragraph the term "forced or compulsory labor" shall not 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.

#### Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

#### Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

#### Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

#### Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

#### Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

#### Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### Article 15

1. No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which,

at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

#### Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

#### Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

#### Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

#### Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

#### Article 24

1. Every child shall have, without any discrimination as to race, color sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

#### Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

#### Article 26

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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### Article 27

In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

#### Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

#### Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

IN FAITH WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Covenant, opened for signature at New York, on the nineteenth day of December, one thousand nine hundred and sixty-six.

### United States' Ratification of the International Covenant on Civil and Political Rights

On March 24, 1992 (legislative day, January 30, 1992), the Senate of the United States advised and consented to the ratification of the International Covenant on Civil and Political Rights, which had been adopted by the United Nations General Assembly on December 16, 1966, and signed on behalf of the United States on October 5, 1977 (Executive E, 95-2), subject to the following reservations, understandings, declarations and proviso:

I. The Senate's advice and consent is subject to the following reservations:

(1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by person below 18 years of age.

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offense was

committed, the United States does not adhere to the third clause of paragraph 1 of Article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstance, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status as those terms are used in Article 2, paragraph 1 and Article 26 to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based ``solely" on the status of race, color, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in Articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to ``exceptional circumstances" in paragraph 2(a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations. . . .

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

NOTES AND QUESTIONS  
FOR CLASSROOM DISCUSSION

1. Do reservations such as those of the United States eviscerate the Covenant on Civil and Political Rights? What does Philip Allott say about this (Anthology, p. 205)? Is Allott unduly hard on the human-rights movement? On the other hand, does Thomas Buergenthal convince you that the existence of the movement alone is valuable?<sup>2</sup>

2. Many scholars of international law believe that the first "declaration" by the United States Senate--that the provisions of Articles 1 through 27 of the Covenant are not self-executing--eviscerates the force of the International Covenant. In their view, the Convention contains numerous "rights" which are meaningless if they cannot directly be invoked by any person. Yet the declaration of non-self-execution means that the "rights" in the Convention do not exist for individual persons unless specifically provided by legislation. Thus, neither plaintiff nor defendant in any case, civil or criminal, may invoke or rely upon any "right" in the Convention. If a statute *enacts* a particular right contained in the Convention, then the litigant may invoke the *statute*, but not the Convention from which the statute was derived.

3. In your opinion, does the Senate's declaration of non-self-execution render the Convention meaningless as far as individuals are concerned? If your answer is yes, doesn't the declaration violate the nature and purpose of the Convention? Wasn't the nature and purpose of the Convention to provide human rights to all persons everywhere? If the Senate's declaration violates the nature and purpose of the Convention, isn't that an impermissible reservation? (Recall the materials in Chapter Three on reservations to multilateral conventions.)

4. Why did the Senate include its declaration of non-self-execution? Re-read Articles 14 and 15 of the Covenant. If these Articles were self-executing, wouldn't all criminal defendants in all criminal cases invoke the language of these Articles in the hope that the prosecution has committed some technical violation of one or more of their provisions? Wouldn't courts suddenly be plunged into the business of interpreting the meaning of Articles 14 and 15? Wouldn't courts be fearful that their interpretation must be consistent with the way that courts in other countries throughout the world have construed the same Articles? Would this not lead to endless litigation and delay? And if this is true of Articles 14 and 15, would it not be true, perhaps to a lesser extent, of all the other Articles in the Covenant?

5. But isn't the fear expressed in the preceding question a bit excessive? Granted that the first few courts to construe the Covenant would have to interpret its language; wouldn't the interpretation soon become "standard" and unexceptional?

6. If the Covenant were self-executing, and American courts had to construe its language in many cases, wouldn't this extra work for courts be a small price to pay for promoting the goal of universal human rights? Wouldn't the small price indeed be a token of the fact that individuals *have* human rights and are asserting them?

7. Although the Senate in its ratification of the Covenant has declared its provisions to be non-self-executing, is that declaration itself binding on courts? In other words, is it possible that a court someday might simply say that the Senate's declaration is the Senate's own opinion of the matter, but that the court, looking afresh at the Covenant, interprets it differently--i.e., interprets the Covenant to be self-executing?

8. Note that the Senate's understanding number (2) is not restrictive. It appears to be an attempt to graft a liberal interpretation upon the Covenant in order to help persuade other countries to view the Covenant in a similarly liberal manner. Is this a helpful approach to treaty ratification?

9. Re-read Article 20. Under the present interpretation of the First Amendment to the United States Constitution, it would be unconstitutional for Congress to prohibit war propaganda. Thus, Congress *does not have the power* to implement Article 20, even if it wanted to. As you have seen, in its first Reservation, the Senate specifically refers to Article 20 and states that it "does not authorize or require legislation" that would "restrict the right of free speech and association protected by the Constitution." What does this mean? Surely the Covenant *does* authorize and require legislation prohibiting war propaganda! Perhaps the Senate is simply saying that it refuses to follow Article 20. But then, why didn't the Senate say what it meant? (Perhaps some Senators wanted to keep open the possibility of legislating against "hate speech" as invited by the second section of Article 20, and therefore adopted a form of language that leaves the matter somewhat ambiguous.)

International Covenant on Economic, Social and Cultural Rights  
Done at New York, Dec. 16, 1966.  
Entered into force, Jan. 3, 1976.<sup>3</sup>

Article 1

[Same text as Article 1 of the International Covenant on Civil and Political Rights]

#### Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. 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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

#### Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

#### Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

#### Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

#### Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

#### Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work, which ensure, in particular:

(a) remuneration which provides all workers, as a minimum, with:

(i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) safe and healthy working conditions;

(c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

#### Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) the right of trade unions to establish national federations or confederations and the right of the latter to

form or join international trade-union organizations;

(c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) the right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize, to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

#### Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

#### Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.

#### Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed:

(a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

#### Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) the improvement of all aspects of environmental and industrial hygiene;

(c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

#### Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all

racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) primary education shall be compulsory and available free to all;
- (b) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) higher education shall be made equally accessible to all, on the basis of capacity by every appropriate means, and in particular by the progressive introduction of free education;
- (d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

#### Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

#### Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

- (a) to take part in cultural life;
- (b) to enjoy the benefits of scientific progress and its applications;
- (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

#### Article 27

The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

#### Article 31

The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

IN FAITH WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Covenant, opened for signature at New York, on the nineteenth day of December, one thousand nine hundred and sixty-six.

### NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Does the Economic and Social Covenant give everyone the right to food? See Article 11. Is this article realistic? What does it mean? What can it mean?

2. Does the same Covenant give everyone the right to work? See Article 6. Is the "opportunity to work" the same as a "right to work"? What if there are no opportunities in a particular state at a particular time? What

obligation would the government of that state then have under Article 6?

## **B. Torture: A Study in the Conflict Between State and Individual**

**Reading Assignment:** *International Law Anthology*, pp. 174-81.

### NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. The point of Tom Farer's essay is that we cannot understand torture without listening to the torturer's point of view. One might add that, to fully understand something, one must be, at least for a moment, sympathetic to it. After reading Farer's essay, do you have any sympathy for a torturer? Has the essay increased your understanding of the mentality of a torturer? Are you now more likely, or less likely, to condemn torture and to punish a torturer?

2. Various governments around the world from time to time engage in the torture of their political opponents. Yet they nearly always *deny* that torture occurs. And nearly all governments make torture a crime under their own laws. What, then, can we speculate as to the international customary law rule about torture? Does customary international law *permit* torture because it in fact occurs? Or does customary international law *prohibit* torture because states condemn the practice and do not admit that they engage in it? We will be studying the concept of customary international law in the next Chapter. Immediately following these questions is international law's current word on the topic, expressed in the Convention Against Torture.

3. Does the quote from Weschler on p. 178 of the Anthology add anything to Farer's depiction of the mentality of the torturer? Can "good intentions" ever justify the use of torture?

4. Suppose an ideological fanatic tells the police that he has hidden a bomb in a downtown store in your city, and that it will go off during the day. The bomb he describes is powerful enough to cause the death of over a thousand people. There is no way the police can evacuate the entire city. Unless the police discover the location of the bomb, many innocent lives will be lost. Are the police justified in torturing the fanatic in order to get him to reveal the location of the bomb? If you were the chief of police, what would you decide to do?

5. Does *every* torturer believe that *his* case is just a variation on the bomb case of the preceding question? Is it?

6. If you answered Question 4 by saying that torture was justified in that case, and if you could write whatever rule of law you wanted, could you draft a rule that would cover the bomb case in Question 4 but draw a line so that torture for any other reason would be prohibited?

7. What does Anthony D'Amato mean by the deviationist and entitlement theses? Do they throw any light on the nature of a state? On the nature of torture?

#### Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[Signed in New York, Dec. 10, 1984. Entered into force June 26, 1987. As of 1990, 16 states have ratified without qualification, 24 states have ratified with qualifications, and 28 states have signed but not ratified.]

##### *Article 1*

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

##### *Article 2*

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

##### *Article 3*

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

#### *Article 4*

1. Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature.

#### *Article 5*

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases:

(a) When the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

#### *Article 6*

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offense referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction.

#### *Article 7*

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offense referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offenses referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

#### *Article 8*

1. The offenses referred to in article 4 shall be deemed to be included as extraditable offenses in any extradition treaty existing between States Parties. States Parties undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offenses. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offenses as extraditable offenses between themselves subject to the conditions provided by the law of the requested

state.

4. Such offenses shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

*Article 9*

1. States Parties shall afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offenses referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

*Article 10*

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

*Article 11*

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

*Article 12*

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

*Article 13*

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

*Article 14*

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

*Article 15*

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

*Article 16*

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

[Articles 17 through 24 establish an international Committee Against Torture that will file annual reports with the General Assembly of the United Nations.]

[Articles 25 through 28 contain standard clauses specifying ratification procedures.]

*Article 29*

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the

United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they notify him whether they favor a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the State Parties favors such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

#### *Article 30*

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

#### *Article 31*

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective. Nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

#### *Article 32*

The Secretary-General of the United Nations shall inform all members of the United Nations and all States which have signed this Convention or acceded to it, of the following particulars:

(a) Signatures, ratifications and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27, and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

#### *Article 33*

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

### NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Can a private person torture another private person? Would such torture be prohibited under the Torture Convention?

2. If you answered Question 1 in the negative, what if a private person tortures another private person at the instigation of a public official? Would that change your answer to Question 1?

3. In the *Anthology*, you read about "torture regimes" resorting to torture in order to intimidate the public. Is this "use" of torture prohibited by the Torture Convention?

4. What does Article 1 of the Torture Convention mean when it talks about "a public official or other person acting in an official capacity"? Suppose a nation prohibits torture. If a person "acting in an official capacity" tortures someone, can the torturer be "acting in an official capacity" if torture is officially prohibited?

5. Suppose a state that has criminalized torture were to say, "If any torture goes on in our state, it cannot be done by public officials acting in their public capacity"? If the evidence shows widespread torture in that state, can the Torture Convention be applied to that state?

6. Suppose every state prohibits torture. (This is pretty close to actual fact.) Would that mean that the Torture Convention is not applicable at all to any state because it cannot be done by any official acting in an official capacity? With these questions in mind, read carefully the following case.

Filartiga v. Pena-Irala  
United States Court of Appeals, Second Circuit.  
630 F.2d 876 (1980)

IRVING R. KAUFMAN, Circuit Judge:

Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations. Under the Articles of Confederation, the several states had interpreted and applied this body of doctrine as a part of their common law, but with the founding of the "more perfect Union" of 1789, the law of nations became preeminently a federal concern. Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over "all causes where an alien sues for a tort only (committed) in violation of the law of nations." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), *codified at* 28 U.S.C. § 1350. Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction. Accordingly, we reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.

The appellants, plaintiffs below, are citizens of the Republic of Paraguay. Dr. Joel Filartiga, a physician, describes himself as a longstanding opponent of the government of President Alfredo Stroessner, which has held power in Paraguay since 1954. His daughter, Dolly Filartiga, arrived in the United States in 1978 under a visitor's visa, and has since applied for permanent political asylum. The Filartigas brought this action in the Eastern District of New York against Americo Norberto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito. Because the district court dismissed the action for want of subject matter jurisdiction, we must accept as true the allegations contained in the Filartigas' complaint and affidavits for purposes of this appeal.

The appellants contend that on March 29, 1976, Joelito Filartiga was kidnaped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay. Later that day, the police brought Dolly Filartiga to Pena's home where she was confronted with the body of her brother, which evidenced marks of severe torture. As she fled, horrified, from the house, Pena followed after her shouting, "Here you have what you have been looking for for so long and what you deserve. Now shut up." The Filartigas claim that Joelito was tortured and killed in retaliation for his father's political activities and beliefs.

Shortly thereafter, Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police for the murder of his son. As a result, Dr. Filartiga's attorney was arrested and brought to police headquarters where, shackled to a wall, Pena threatened him with death. This attorney, it is alleged, has since been disbarred without just cause.

During the course of the Paraguayan criminal proceeding, which is apparently still pending after four years, another man, Hugo Duarte, confessed to the murder. Duarte, who was a member of the Pena household,<sup>4</sup> claimed that he had discovered his wife and Joelito *in flagrante delicto*, and that the crime was one of passion. The Filartigas have submitted a photograph of Joelito's corpse showing injuries they believe refute this claim. Dolly Filartiga, moreover, has stated that she will offer evidence of three independent autopsies demonstrating that her brother's death "was the result of professional methods of torture." Despite his confession, Duarte, we are told, has never been convicted or sentenced in connection with the crime.

In July of 1978, Pena sold his house in Paraguay and entered the United States under a visitor's visa. He was accompanied by Juana Bautista Fernandez Villalba, who had lived with him in Paraguay. The couple remained in the United States beyond the term of their visas, and were living in Brooklyn, New York, when Dolly Filartiga, who

was then living in Washington, D. C., learned of their presence. Acting on information provided by Dolly the Immigration and Naturalization Service arrested Pena and his companion, both of whom were subsequently ordered deported on April 5, 1979 following a hearing. They had then resided in the United States for more than nine months.

Almost immediately, Dolly caused Pena to be served with a summons and civil complaint at the Brooklyn Navy Yard, where he was being held pending deportation. The complaint alleged that Pena had wrongfully caused Joelito's death by torture and sought compensatory and punitive damages of \$10,000,000. The Filartigas also sought to enjoin Pena's deportation to ensure his availability for testimony at trial. The cause of action is stated as arising under "wrongful death statutes; the U. N. Charter; the Universal Declaration on Human Rights; the U. N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as 28 U.S.C. § 1350, Article II, sec. 2 and the Supremacy Clause of the U. S. Constitution. Jurisdiction is claimed under the general federal question provision, 28 U.S.C. § 1331 and, principally on this appeal, under the Alien Tort Statute, 28 U.S.C. § 1350.

Judge Nickerson stayed the order of deportation, and Pena immediately moved to dismiss the complaint on the grounds that subject matter jurisdiction was absent and for *forum non conveniens*. On the jurisdictional issue, there has been no suggestion that Pena claims diplomatic immunity from suit. The Filartigas submitted the affidavits of a number of distinguished international legal scholars, who stated unanimously that the law of nations prohibits absolutely the use of torture as alleged in the complaint. Pena, in support of his motion to dismiss on the ground of *forum non conveniens*, submitted the affidavit of his Paraguayan counsel, Jose Emilio Gorostiaga, who averred that Paraguayan law provides a full and adequate civil remedy for the wrong alleged. Dr. Filartiga has not commenced such an action, however, believing that further resort to the courts of his own country would be futile.

Judge Nickerson heard argument on the motion to dismiss on May 14, 1979, and on May 15 dismissed the complaint on jurisdictional grounds. The district judge recognized the strength of appellants' argument that official torture violates an emerging norm of customary international law. Nonetheless, he felt constrained by dicta contained in two recent opinions of this Court, *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835, and *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), to construe narrowly "the law of nations," as employed in § 1350, as excluding that law which governs a state's treatment of its own citizens.

The district court continued the stay of deportation for forty-eight hours while appellants applied for further stays. These applications were denied by a panel of this Court on May 22, 1979, and by the Supreme Court two days later. Shortly thereafter, Pena and his companion returned to Paraguay.

Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, 28 U.S.C. § 1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Since appellants do not contend that their action arises directly under a treaty of the United States,<sup>5</sup> a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

The Supreme Court has enumerated the appropriate sources of international law. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 295 (E.D.Pa.1963). In *Smith*, a statute proscribing "the crime of piracy (on the high seas) as defined by the law of nations," 3 Stat. 510(a) (1819), was held sufficiently determinate in meaning to afford the basis for a death sentence. The *Smith* Court discovered among the works of Lord Bacon, Grotius, Borchard and other commentators a genuine consensus that rendered the crime "sufficiently and constitutionally defined." *Smith, supra*, 18 U.S. (5 Wheat.) at 162, 5 L.Ed. 57.

*The Paquete Habana*, 175 U.S. 677 (1900), reaffirmed that

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*Id.* at 700. Modern international sources confirm the propriety of this approach.

*The Paquete Habana* is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." *Id.* at 694. Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796) (distinguishing between "ancient" and "modern" law of nations).

The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law. Thus, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Court declined to pass on the validity of the Cuban government's expropriation of a foreign-owned corporation's assets, noting the sharply conflicting views on the issue propounded by the capital-exporting, capital-importing, socialist and capitalist nations.

The case at bar presents us with a situation diametrically opposed to the conflicted state of law that confronted the *Sabbatino* Court. Indeed, to paraphrase that Court's statement, *id.* at 428, there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody.

The United Nations Charter (a treaty of the United States, *see* 59 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. It provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion. [Art. 55]

And further:

All 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. [Art. 56]

While this broad mandate has been held not to be wholly self-executing, *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466,468 (2d Cir. 1965), this observation alone does not end our inquiry.<sup>6</sup> For although there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, "no one shall be subjected to torture."<sup>7</sup> The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles of international law." G.A.Res. 2625 (XXV) (Oct. 24, 1970).

Particularly relevant is the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975).<sup>8</sup>

These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, "members can no longer contend that they do not know what human rights they promised in the Charter to promote." Sohn, "A Short History of United Nations Documents on Human Rights," in *The United Nations and Human Rights, 18th Report of the Commission* (Commission to Study the Organization of Peace ed. 1968). Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." *E. Schwelb, Human Rights and the International Community* 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 U.N. ESCOR, *supra*. Indeed, several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law. Waldlock, "Human Rights in Contemporary International Law and the Significance of the European Convention," *Int'l & Comp. L.Q.*, Supp. Publ. No. 11 at 15 (1965).

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. *Smith, supra*, 18 U.S. (5 Wheat.) at 160-61, 5 L.Ed. 57. The international consensus surrounding torture has found expression in numerous international treaties and accords. [Citations omitted.] Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited,

expressly or implicitly, by the constitutions of over fifty-five nations,<sup>9</sup> including both the United States<sup>10</sup> and Paraguay.<sup>11</sup> Our State Department reports a general recognition of this principle:

There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens . . . . There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity. (Department of State, Country Reports on Human Rights for 1979, published as Joint Comm. Print, House Comm. on Foreign Affairs, and Senate Comm. on Foreign Relations, 96th Cong. 2d Sess. (Feb. 4, 1980), Introduction at 1.)

We have been directed to no assertion by any contemporary state of a right to torture its own or another nation's citizens. Indeed, United States diplomatic contacts confirm the universal abhorrence with which torture is viewed:

In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.<sup>12</sup>

Having examined the sources from which customary international law is derived--the usage of nations, judicial opinions and the works of jurists--we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. Accordingly, we must conclude that the dictum in *Dreyfus v. von Finck*, *supra*, 534 F.2d at 31, to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state," is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as well as the express foreign policy of our own government,<sup>13</sup> all make it clear that international law confers fundamental rights upon all people vis -a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.

Appellee submits that even if the tort alleged is a violation of modern international law, federal jurisdiction may not be exercised consistent with the dictates of Article III of the Constitution. The claim is without merit. It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.

A case properly "aris(es) under the . . . laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III.

During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law. 1 Blackstone, Commentaries 263-64 (1st Ed. 1765-69); 4 *id.* at 67. Under the Articles of Confederation, the Pennsylvania Court of Oyer and Terminer at Philadelphia, per McKean, Chief Justice, applied the law of nations to the criminal prosecution of the Chevalier de Longchamps for his assault upon the person of the French Consul-General to the United States, noting that "(t)his law, in its full extent, is a part of the law of this state . . . ." *Respublica v. DeLongchamps*, 1 U.S. (1 Dall.) 113, 119, 1 L.Ed. 59 (1784). Thus, a leading commentator has written:

It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case. This doctrine was originally conceived and formulated in England in response to the demands of an expanding commerce and under the influence of theories widely accepted in the late sixteenth, the seventeenth and the eighteenth centuries. It was brought to America in the colonial years as part of the legal heritage from England.

It was well understood by men of legal learning in America in the eighteenth century when the United Colonies broke away from England to unite effectively, a little later, in the United States of America. (Dickenson, "The Law of Nations as Part of the National Law of the United States," 101 U.Pa.L.Rev. 26, 27 (1952)).

It was hardly a radical initiative for Chief Justice Marshall to state in *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815), that in the absence of a congressional enactment, United States courts are "bound by the law of nations, which is a part of the law of the land." These words were echoed in *The Paquete Habana*, *supra*, 175 U.S. at 700: "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."<sup>14</sup>

[There are limits to the Alien Tort Statute. It] does not confer jurisdiction over an action by a Luxembourgish international investment trust's suit for fraud, conversion and corporate waste. *IIT v. Vencap*, 519 F.2d 1001, 1015 (1975). In *IIT*, Judge Friendly astutely noted that the mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt not steal' . . . (into) the law of nations." It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.

*IIT* adopted a dictum from *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292 (E.D.Pa.1963) to the effect that "a violation of the law of nations arises only when there has been a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state and (b) used by those states for their common good and/or in dealings inter se." *IIT, supra*, 519 F.2d at 1015, quoting *Lopes, supra*, 225 F.Supp. at 297. We have no quarrel with this formulation so long as it be understood that the courts are not to prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good. As one commentator has noted:

the sphere of domestic jurisdiction is not an irreducible sphere of rights which are somehow inherent, natural, or fundamental. It does not create an impenetrable barrier to the development of international law. Matters of domestic jurisdiction are not those which are unregulated by international law, but those which are left by international law for regulation by States. There are, therefore, no matters which are domestic by their 'nature.' All are susceptible of international legal regulation and may become the subjects of new rules of customary law of treaty obligations. (Preuss, 'Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction,' Hague *Receuil* (Extract, 149) at 8, reprinted in H. Briggs, *The Law of Nations* 24 (1952).)

Here, the nations have made it their business, both through international accords and unilateral action, to be concerned with domestic human rights violations of this magnitude.<sup>15</sup> The case before us therefore falls within the *Lopes/IIT* rule.

Pena also argues that "(i)f the conduct complained of is alleged to be the act of the Paraguayan government, the suit is barred by the Act of State doctrine." This argument was not advanced below, and is therefore not before us on this appeal. We note in passing, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. See *Underhill v. Hernandez*, 168 U.S. 250 (1897). Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

**Reading Assignment:** *International Law Anthology*, pp. 315-20.

#### NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. The defendant in this case was physically present in the jurisdiction of the court. But the defendant and the victim are citizens of Paraguay, and the torture occurred in Paraguay. What business is it of a United States court to accept jurisdiction over the subject matter of such a case? Do you think that United States courts should accept jurisdiction in such cases?

2. Does the court proceed on the basis that the law it is applying is United States law which has incorporated international law?

3. The Filartiga case was remanded to the district court. The subsequent opinion of the district court is given in Chapter 11, "International Law in U.S. Courts," of this Coursebook.

4. As this Coursebook goes to press, the State Department has not replied to the letter of April 29, 1991, on behalf of Scott and Vivian Nelson, requesting United States espousal of their torture claims (*Anthology*, pp. 315-20). The Torture Victim Protection Act, reproduced below, was enacted in part due to the compelling testimony of Scott Nelson in Congress. Some of the language of the Act was suggested by Nelson's lawyer at the time, Anthony D'Amato.

Torture Victim Protection Act of 1991  
106 Stat. 73 (Mar. 12, 1992)

SECTION 1. SHORT TITLE.

This act may be cited as the "torture victim protection act of 1991".

SECTION 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.--An individual who, under actual or apparent authority, or color of law, of any foreign nation--

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.--A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.--No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SECTION 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING.--For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE.--For the purposes of this Act--

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

**C. Group Rights**

**Reading Assignment:** *International Law Anthology*, pp. 255-68.

NOTES AND QUESTIONS  
FOR CLASSROOM DISCUSSION

1. What is the "self" in "self-determination"? Can international law answer this question? If so, what is the answer?

2. If international law has no choice but to attempt to determine the "self" in "self-determination," what factors should it consider?

3. How, according to Claudia Saladin (*Anthology*, p. 255), did the League of Nations pave the way for the general human rights movement? Do you prefer the League's approach to that of the United Nations?
4. What empirical claim are John Stuart Mill and Michael Walzer making regarding intervention? What aspect of this view does Fernando Teson criticize? Do you agree with Teson?
5. Everyone might agree that a person should not be subject to discrimination simply because the person is a member of a particular group. But is this statement sufficient to express the totality of our philosophy against discrimination? Do we need more--such as a concept of group autonomy?
6. Is it fair to say that the concept of "group rights" raises the question whether equality in law or equality in fact should be the goal of the international community?
7. What is the difference between internal and external self-determination?
8. What is it like to submit totally to a group? Does it enhance an individual's sense of power? Or sense of fulfillment? Does a person who "belongs" to a group have a heightened feeling of security? Of purpose in life? Are these values more important than the feeling of individual autonomy?
9. Do group claims for autonomy deprive individuals of their rights and liberties as D'Amato asserts, or do group rights give the members a greater freedom than they could have as individuals? Why?
10. Can we take all the *words* that are used to denote individual autonomy--words like freedom, liberty, autonomy, self-reliance, wants, desires, independence--and reinterpret them so that they apply to, and describe, the status of a person who has submitted totally to a group? If so, does our language ultimately fail to describe the difference between individual freedom and group freedom?
11. But what about the expression "group rights"? Does it make sense to talk about the rights of a group? If it does, what are those rights in opposition to? The rights of other groups? Or the rights of individuals?
12. Do minorities need special rights to defend their culture? To give meaning to other fundamental rights?
13. Should all cultures be preserved? Some cultures? How would one choose? And what cost should be paid to preserve them?
14. Do all laws restrict freedom?
15. What are Isaiah Berlin's concepts of negative and positive freedom? How do they apply to the case of Jenny and Ahmed?
16. Note Isaiah Berlin's trenchant observation, on p. 262 of the *Anthology*, that if freedom means the satisfaction of desires, freedom could be increased either by satisfying those desires or eliminating them! Does this throw some light on the *real* freedom of a woman like Fariva? But what would Fariva say about it? And when she says what she wants to say, are we required to believe her? Would it be arrogant and paternalistic *not* to believe her?
17. Does freedom have an objective meaning? Anthony D'Amato sees freedom as choice, while Guyora Binder sees freedom as "realizing oneself." Which perspective do you agree with? Which perspective would Fariva agree with?
18. Are you persuaded by Binder's argument that any moral view demands embodiment in a culturally bounded community?
19. Where do dissenters fit in the picture according to D'Amato? How would Binder deal with the problem of rights of dissenters?
20. Is Binder right when she asserts that democracy depends on group autonomy?
21. Can group rights interfere with human rights? Or are group rights part of human rights? Prediction is hazardous, but--is it just possible that these two rather abstract questions may put on the table the single most important international issue that humankind will have to confront in the next century?

## FOOTNOTES Chapter 7

**1** Among the parties as of 1993 are some 110 countries, including most of the countries of the Western Hemisphere, most of the countries of Europe including the former Soviet Union, most of the countries of Africa, and, in addition, Australia and New Zealand, Vietnam and North Korea, and, in the Middle East, Egypt, Iran, Iraq, Israel, Jordan and Libya. Many countries have ratified with reservations. An account of the United States' reservations directly follows the text of this Convention.

**2** As a child, Thomas Buergenthal was smuggled out of Europe and brought to the United States. Nearly all his relatives were victims of the Nazi holocaust. His words on pp. 205-06 of the Anthology are, for this reason, especially poignant.

**3** As of 1993, about 110 countries, but not the United States, have ratified this Covenant, some with reservations.

**4** Duarte is the son of Pena's companion, Juana Bautista Fernandez Villalba, who later accompanied Pena to the United States.

**5** Appellants "associate themselves with" the argument of some of the amici curiae that their claim arises directly under a treaty of the United States, Brief for Appellants at 23, but nonetheless primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather than independent sources of law.

**6** We observe that this Court has previously utilized the U.N. Charter and the Charter of the Organization of American States, another non-self-executing agreement, as evidence of binding principles of international law. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). In that case, our government's duty under international law to refrain from kidnapping a criminal defendant from within the borders of another nation, where formal extradition procedures existed, infringed the personal rights of the defendant, whose international law claims were thereupon remanded for a hearing in the district court.

**7** Eighteen nations have incorporated the Universal Declaration into their own constitutions. 48 *Revue Internationale de Droit Penal* Nos. 3 & 4, at 211 (1977).

**8** [Editor's Note: This Resolution defines "torture" in the same terms as used in the subsequent Convention Against Torture of 1984, set out above in the beginning of this section.]

**9** 48 *Revue Internationale de Droit Penal* Nos. 3 & 4 at 208 (1977).

**10** U.S.Const., Amend. VIII ("cruel and unusual punishments" prohibited); id. Amend. XIV.

**11** Constitution of Paraguay, Art. 45 (prohibiting torture and other cruel treatment).

**12** Memorandum of the United States as Amicus Curiae at 16 n.34. The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, "The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law." J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 4-5 (Oxford 1944).

**13** E. g., 22 U.S.C. § 2304(a)(2) ("Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."); 22 U.S.C. § 2151(a) ("The Congress finds that fundamental political, economic, and technological changes have resulted in the interdependence of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms").

**14** The plainest evidence that international law has an existence in the federal courts independent of acts of Congress is the long-standing rule of construction first enunciated by Chief Justice Marshall: ``an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *The Charming Betsy*, 6 U.S. (2 Cranch), 34 (1804), *quoted in Lauritzen v. Larsen*, 345 U.S. 571 (1953).

**15** As President Carter stated in his address to the United Nations on March 17, 1977:

All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of the citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.

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