The Future of Human Rights in International Jurisprudence: An Optimistic Appraisal

Benjamin B. Ferencz
THE FUTURE OF HUMAN RIGHTS IN INTERNATIONAL JURISPRUDENCE: AN OPTIMISTIC APPRAISAL

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The Symposium on the Future of Human Rights in the World Legal Order that appeared in the Winter, 1981 issue of the Hofstra Law Review contained penetrating comments by many outstanding scholars. No one can seriously challenge the theme of Professors McDougal and Chen that mankind now shares in an interdependent and interacting world community. There is, however, serious disagreement about the future of our world. The symposium explored important political, constitutional, and ideological problems, and correctly pointed out that the furtherance of human rights may depend on basic social, economic, and ecological changes. Aware of the fragile nature of human rights, Professor Falk regarded the optimists with a skeptical eye, but he is prepared to take their aspirations for a more humane world seriously, even if international law seems to him to be moving from "weak to weaker." Professor Sohn took to task some of those who fail to appreciate the advances since World War

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5. E.g., Murphy, Objections to Western Conceptions of Human Rights, 9 Hofstra L. Rev. 433 (1981).
Two, and the Taubenfelds, focusing on apartheid, found only slow progress in what is still a "tender flower." The symposium culminated with a leap into the future with Professors Bassiouni and Derby's outline for an international court to punish human rights violations. An historical review of the development of international law suggests that the concept of international human rights is but in its infancy. This article undertakes, in outline form, such a review, and demonstrates what is, in my estimation, an essential truth: that progress toward the further development of international human rights has just begun.

HUMAN RIGHTS BEFORE WORLD WAR TWO

Human life has existed on earth for hundred of thousands of years. International law is only a few centuries old. Pre-Christian-era codes, associated with such names as Menes, Hammurabi, Moses, Draco, Solon, and Manu outlined standards of conduct for fairly homogenous groups within limited territorial jurisdictions; but international law had not yet been born. The amphictyonic councils of the ancient Greek city-states and the "natural law" imposed throughout the Roman Imperium were early forerunners of a law of nations; but still the concept of human rights had not been created. It was only in connection with the most inhumane of all human activities—war—that humanitarian concepts first evolved. In medieval Europe, endless and unregulated conflict challenged the moral and political authority of the Church, and stimulated such theologians as Saint Augustine (354-430 A.D.) and Archbishop Isidore of Seville (560-636) to re-examine the early Roman considerations regarding justification for war. The peaceful settlement of conflicts, however, still remained the exception rather than the rule.

The twelfth-century crusades continued a regime of blood-let-

ting that lasted two hundred years. Those who opposed the Church risked torture, death, disqualification from office, loss of property, and the eternal damnation of excommunication. Despite, but also perhaps because of, the majestic conception of one universal Christian community, the Church fathers found no difficulty in justifying the massacre of infidels who did not share the faith.

Medieval prelates, kings, and princes reigned supreme within their fiefdoms, competing for power among themselves, and it was only in 1215, on the fields of Runnymede, that King John was forced by his lords to sign the Magna Carta and acknowledge that free men were entitled to judgment by their peers and that even a sovereign was not above the law. As feudalism declined, it became necessary to find a more suitable form of government than the shifting seignories. New institutions were born in the fourteenth and fifteenth centuries to further the commerce on which society depended. Maritime Consuls were given authority to resolve disputes with foreign merchants. Conservators of the Peace could interpret contracts, and the Hanseatic League of the Baltic States created new regulations to stimulate mercantile trade. Privateers and pirates, long considered hostis humani generi, the enemy of all mankind, were driven from the seas. Yet while these measures improved the lives of nearby inhabitants, the motivation was primarily commercial and only indirectly humanitarian.

The discovery of America and the colonization of the new world had profound human rights implications and effects. Medieval theology had taught that subjugating infidels was discharging divine will and therefore "barbarians" were not entitled to any humanistic considerations. The genocidal slaughter of the Incas by the Spanish Conquistadores caused some theologians to challenge the means employed to enforce God's universal laws. Franciscus de Victoria (1480-1546) deplored the intentional slaughter of the innocent and taught that the glory or advantage of the prince was not a valid reason for waging war. No one, he said, should be forced to fight in an unjust war, despite a sovereign's command; even in self defense, he thought, one must do as little harm as possible to the enemy. Loot-

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ing and wanton destruction were decried, and the humanitarian rules advocated by Victoria earned him the title of “one of the founders of international law.”

Another Spaniard, Judge Advocate Balthazar Ayala, wrote in 1582: “War may not be declared against infidels merely because they are infidels, not even on the authority of emperor or Pope.” An Italian jurist, Alberico Gentili, writing in 1589, recognized the “common law of humanity” as the protector of mankind. In treaties written between 1612 and 1621, Francisco Suárez recognized that sovereign states, “being members of that universal society . . . when standing alone are never so self-sufficient that they do not require some mutual assistance, association and intercourse, at times for their own greater welfare and advantage, but at other times also of some moral necessity and need.” He perceived the interdependence of nations and the moral need to help others.

The name most frequently associated with the birth of international law is that of the Dutch jurist, Huig van Groot (1583-1645), more commonly known as Hugo Grotius. In the *Prolegomena* to his famous book on war and peace he spoke of the brotherhood of mankind and the need to treat all people fairly. “All men are sprung from the same first parents . . . it is wrong for a man to set a snare for his fellow-man.” He saw the connection between peace and justice and called for humane conduct even in warfare, “lest by imitating wild beasts too much we forget to be human.”

A few years after the death of this great jurist, the 1648 Treaty of Westphalia, often marked as the beginning of international law, brought to an end the Thirty-Years War that had split Germany into hostile religious camps. Europe was reorganized into a pluralistic and secular society of many independent nation-states which assured equal rights to catholics and protestants. The first chair in in-

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17. Id.
18. Scott, Preface to id. at 5.
23. Id. at 861.
ternational law was occupied at Heidelberg in 1661 by Professor Samuel Pufendorf who taught that "men should perform for each other the duties of humanity."25 These beginnings of international law and respect for human rights took place hardly more than three centuries ago.

The birth of the sovereign state soon gave rise to ideas of liberty and freedom. Christian von Wolff (1679-1754), in a treatise on the law of nations, espoused the idea that all states were equal and had the right to exist as independent states.26 Emerich de Vattel expressed similar thoughts but favored diplomatic intervention on behalf of oppressed co-religionists, stating that if "persecution is carried to an intolerable degree . . . all Nations may give help to an unfortunate people."27

Soon a number of plans began to appear for a more democratic restructuring of world society. The proposals went under various designations,28 but the basic idea—that states should join to establish common standards of future behavior—was the same. Jeremy Bentham (1747-1832) is credited with having been the first to use the expression "international law" in reference to such plans.29

The novel idea that all men are created equal and endowed with certain inalienable rights was proclaimed in the United States Declaration of Independence in 1776. The Bill of Rights of 1791 incorporated notions of freedom of speech, press, and fair trial into the new American Constitution. In France, in 1793, Henri Grégoire, the Bishop of Blois, built on the 1789 French Declaration on the Rights of Man and of the Citizen and advocated a code of immutable principles.30 Grégoire proposed that "[t]he private interest of one nation

29. See Colombos, Introduction to J. BENTHAM, PLAN FOR AN UNIVERSAL AND PERPETUAL PEACE 3 (1789 & reprint 1939).
[be] subordinated to the general interest of the human family."

His proposal was defeated but the effort has been described as "the first attempt to present a declaration of a law of nations to the national legislature of a country." These early stirrings of lawyers and legislatures, speaking out on behalf of what today is called human rights, began only two hundred years ago.

The wars of Napoleon at the beginning of the nineteenth century spread the ideas of the French revolution. When the states that had brought down the Emperor assembled in Paris in 1814 and again at the Congress of Vienna in 1815 they were unable to ignore human rights considerations. Freedom of religion was proclaimed and the slave trade was condemned. Nations began to understand that international conferences could be a useful tool in helping to maintain a peaceful world. The international congresses that reached agreement on such administrative matters as the regulation of postal and telegraphic services also considered means for restricting slavery and traffic in women and children. Arbitration as a substitute for war began to receive increasing attention, and human rights took a great step forward as consideration was given to new rules designed to minimize the suffering that would prove inevitable when war became unavoidable.

It was a former Prussian army officer, Francis Lieber, who in 1863 drafted the most famous code for humanitarian conduct in warfare. At the request of President Abraham Lincoln, who wanted to reduce the suffering of both sides during the American civil war, Lieber drafted the "Instructions for the Government of the Armies of the United States in the Field." The Lieber Code became a model for later conventions prepared by the International

31. Id. art. 5, quoted in W. Darby, International Tribunals 168 (1904).
35. See Baldwin, The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World, 1 Am. J. Int'l L. 565, 568-78 (1907); id. app. at 808-29.
Committee of the Red Cross and for the Hague Conventions of 1899 and 1907. Comprehensive codes of international law and justice were prepared by Professor Bluntschli (1808-1881) at Heidelberg, and by David Dudley Field, the first President of the International Law Association, in New York. In 1910, President William Howard Taft, speaking in support of disarmament, urged the establishment of an international court and the development of a code of international equity.

There was a substantial gap, however, between advocacy of humanitarian and peaceable theories and their adoption. Sovereign states were unable to accept the peaceful procedures suggested for the settlement of their disputes. When the Great War began in 1914 it soon appeared that the humanitarian rules for the conduct of war were, to a large extent, obsolete. New weapons, including tanks, planes, and submarines, wrought uncontrollable devastation. Poison gas paralyzed soldiers in the trenches, and civilian populations became the victims, if not the intended targets, of expanded warfare. In the heat of battle, "military necessity" became the excuse to subordinate humanitarian considerations to the drive for victory. As a reaction to the cruelties of the war, a new sense of international morality began to emerge. In 1919, the Committee of Inquiry into the Breaches of the Laws of War recommended that those who had violated the customs of war and "the laws of humanity" should be brought to trial before an international tribunal. The Commission on Responsibility, established by the Allies, concluded that "however high their position," those who had violated the laws of war or "the
laws of humanity" were subject to criminal prosecution.\footnote{Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Mar. 29, 1919), \textit{reprinted in} 1 B. Ferencz, \textit{An International Criminal Court} 169 (1980).} It was felt that individual human rights deserved protection even in war, despite a sovereign's command, and further that international criminal law might play a useful role in helping to deter crimes against humanity.

The "laws of humanity" were considered too vague to serve as the basis for a criminal indictment in 1919, but the victors agreed that such laws would be clarified in the future in order to defeat any argument that punishment was based on ex post facto law.\footnote{See Report of the International Law Commission to the General Assembly, 4 U.N. GAOR Supp. (No. 10) at 5, U.N. Doc. A/925 (1949), \textit{reprinted in} 1949 Y.B. INT'L L. COMM'N 277, 283, U.N. Doc. A/CN.4/13.} The Treaty of Versailles required that the Kaiser be placed on trial for "a supreme offence against international morality and the sanctity of treaties,"\footnote{Treaty of Versailles, June 28, 1919, 11 Martens Nouveau Recueil 323.} but he escaped to asylum in Holland. Even those who had violated the traditional rules of war evaded punishment for their atrocities.\footnote{See Law Officer's Department, Royal Courts of Justice, \textit{Report of Proceedings Before the Supreme Court in Leipzig}, Cmd. No. 1450 (1921), \textit{reprinted in} 16 Am. J. INT'L L. 628-40 (1922). See generally S. Glueck, \textit{War Criminals} (1944).} It was a slow start, yet for the first time in history nations seriously considered imposing criminal penalties on heads of state for violations of fundamental human rights. That historical beginning was but one lifetime ago.

Out of the devastation of the World War One came a determination to create a new structure for international society. Post-war peace treaties contained provisions for protecting the racial, religious, and linguistic rights of minority populations in Europe.\footnote{See Robinson, \textit{From Protection of Minorities to Promotion of Human Rights}, 1948 Jewish Y.B. INT'L L. 115.} The Covenant of the newly formed League of Nations required members to "endeavor to secure and maintain fair and humane conditions of labour for men, women, and children,"\footnote{League of Nations Covenant art. 23(a).} "to secure just treatment of the native inhabitants of territories under their control,"\footnote{Id. art. 23(b).} and to take measures for the prevention and control of disease.\footnote{Id. art. 23(f).} Out of these provisions grew the important work of the International Labor Organization and its numerous efforts in later years to improve the health of persons everywhere. In addition, under the Covenant, man-
dated territories were to be a sacred trust for the benefit of the local inhabitants.  

President Woodrow Wilson’s dream for a new order of international society suffered a fatal blow when an isolationist minority in the United States Senate managed to block the required two-thirds vote for ratification of the Covenant.  

Despite this setback, the United States continued to play an important role in international committees and conferences sponsored by the League. Former Secretary of War and State Elihu Root, a 1912 recipient of the Nobel Peace Prize, was an important member of the Committee of Jurists, which recommended the creation of an international court with compulsory jurisdiction to settle disputes. In addition, the Committee recommended the establishment of a High Court of International Justice to try crimes against international public order and “against the universal law of nations.”  

Ideas for a codification of such offenses and for an enforcement agency were supported by many legal scholars. The International Law Association called for a court with jurisdiction over offenses that were “‘contrary to the laws of humanity and the dictates of the public conscience.’” Sovereign states, however, were unwilling to submit themselves to the authority of any impartial tribunal, and the idea of an international court to enforce international human rights disappeared from the agenda of the League. In 1924, the League Assembly agreed to appoint a Committee for the Progressive Codification of International Law. The Committee’s name implicitly recognized that international law would have to change to meet the needs of a changing world.

Although scholars and some statesmen recognized the need to create new norms of international behavior and an effective enforcement mechanism, most states preferred to move toward these goals.

53. Id. art. 22, para. 1.
54. See 59 Cong. Rec. 4599 (1920) (49 for ratification; 35 against; 12 not voting).
56. Id., reprinted in 1 B. Ferencz, supra note 45, at 235.
slowly or not at all. They chose the familiar route of multilateral treaties. Their efforts included the Locarno Pacts of 1925 and the general renunciation of war in the Kellogg-Briand Pact of 1928. It was not generally recognized that, in the exchange of understandings, the leading signatories remained free to do as they pleased, under the guise of self defense, if, in their own opinion, their vital interests were at stake. The absence of a clear code of permissible behavior and the unwillingness of sovereign nations to grant compulsory jurisdiction to an impartial tribunal left international law severely impaired; human rights suffered accordingly. Without an effective system to safeguard the peace, disarmament was unacceptable. In 1931, the Japanese invaded Manchuria and, following the lead of the other powers, called it justified self defense to protect their vital interests. Those with no major stake in the conflict were unwilling to risk their resources to repel aggression. The League began to crumble, and Italy and Germany began to prepare for war.

A dramatic reminder of the need for more effective protection of human rights occurred in 1934. King Alexander of Yugoslavia, on a state visit to France, was assassinated by a terrorist seeking self-determination for Croatia. French Foreign Minister Louis Barthou, an innocent victim, was also killed. Italy refused to extradite the assassin and there was a widespread outcry for action. The League appointed a committee to draft a convention to deter terrorism. By 1935, experts had prepared the requested instruments, including the statutes for an international criminal court. The desire to obtain consensus caused the final 1938 draft of the Convention for the Prevention and Punishment of Terrorism to be substantially weakened, yet no state except India would accept its restraints. Terrorism of a new kind soon reached unimagined dimensions, and, for its failure to act, the world learned that reliance on the old system was
as hazardous as leaning on a very weak reed.

**HUMAN RIGHTS AFTER WORLD WAR TWO**

World War Two erupted in all its fury in 1939. Japan attacked the United States at Pearl Harbor in 1941. Germany forced millions of captives from many lands into slavery, but the codes of war, although they served as some deterrent, could not prevent the massive atrocities that accompanied the Nazi racial doctrines and the German concept of "total war." Culminating a program of intensive persecution, Nazi extermination squads, operating behind the German lines on the eastern front, murdered every Jewish man, woman, and child they came upon. Gypsies and communist functionaries suffered a similar fate. Millions of Russian prisoners of war starved to death. The world witnessed aggression, war crimes, and crimes against humanity on a scale never before imagined in human history. Ancient German cities were razed by retaliatory fire bombs, and Japan was forced to its knees by the incredible explosive force of atomic weapons that could also damage the genes of future generations. Before the devastation was over, many serious thinkers began to insist that there was an urgent need for a reorganization of international society in order to safeguard the human rights of all people.

Professor René Cassin of France, who was later to receive a Nobel prize for his work on the Declaration of Human Rights, declared as early as 1942 that the most fundamental of all violations of human rights was the waging of a war of aggression. He urged that an international court be created to punish the guilty. Professor Sheldon Glueck of the Harvard Law School proposed that an international criminal code be formulated to encompass such crimes as aggression, terrorism, and violations of an "international bill of

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69. For accounts of Nazi atrocities during the Second World War, see 1-42 International Military Tribunal, Trials of the Major War Criminals Before the International Military Tribunal (1947) (Blue Book) [hereinafter cited as Trials of Major War Criminals]; 1-15 Nuremberg Military Tribunals, Trials of War Criminals Before the Nuremberg Tribunals (1949) (Green Book) [hereinafter cited as Trials of War Criminals].

70. See The Einsatzgruppen Case, reprinted in 4 Trials of War Criminals, supra note 69, at 427 (Case No. 9). The author served as Chief Prosecutor for the United States in this case.


72. Id.
The British Government’s 1944 position on the fate of war criminals was identical, in substance and language, with the position it had taken a quarter of a century earlier in 1919. That government adhered to the view that “[i]t is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.” The British Foreign Secretary proposed what he called a “diplomatic disposition” of top Nazi leaders. What he meant, in non-diplomatic English, was that these violators of “international law” should be taken out and shot. United States Secretary of War Henry Stimson and his assistant, John J. McCloy, however, preferred the rule of law.

President Harry Truman designated Associate Justice Robert H. Jackson, on leave from the United States Supreme Court, to represent the United States in preparing a code of offenses to be charged against the German war criminals. A conference was convened in London in June, 1945, and within six weeks a consensus was hammered out among the major victorious powers. The London Charter provided that an International Military Tribunal, composed of judges from the United States, Great Britain, France, and the Soviet Union, would try the accused under prescribed procedures that would guarantee them a fair and public trial. The possible charges included: Crimes against Peace, or the planning, preparation, and waging of wars of aggression; War crimes, or violations of the traditional rules of war; and Crimes against Humanity, including extermination, enslavement, and other large-scale inhumane acts committed against civilians. The London Charter, signed by nineteen nations, was the first code to confirm that aggressive war

75. See Aide-Mémoire from the United Kingdom (Apr. 23, 1943), reprinted in 1 B. Ferencz, supra note 45, at 450-52.
was a crime, and that certain violations of human rights could so violate the norms of civilized society that they would be punishable as crimes against humanity. Justice Jackson, who served as Chief Prosecutor for the United States, saw these new charges as part of the natural evolution and development of international jurisprudence. The judgment of the tribunal that met at Nuremberg confirmed that the Charter was "an expression of international law existing at the time of its creation." "The law is not static," said the Court, "but by continued adaptation follows the needs of a changing world."

By the authority of a quadripartite law that further clarified crimes against humanity, the United States conducted twelve subsequent trials at Nuremberg in which international law may be said to have been crystallized. It was confirmed that violations of human rights, if of sufficient magnitude, could constitute crimes against humanity, even if committed by a state against its own citizens in time of peace. Superiors' orders could no longer excuse conduct but might be considered in mitigation. Heads of state were not immune from prosecution. Similar principles were applied in war crimes trials against Japanese nationals, and in trials throughout Europe, including Germany. The Nuremberg principles were unanimously affirmed by the first assembly of the United Nations in 1946. The idea that aggression was a crime and that there could be crimes against humanity was thus established in theory and practice and confirmed by the world community.

While the punishment of war criminals was in process, the United Nations was being formed. The U.N. Charter reached beyond the Covenant of the League in its determination "to save succeeding generations from the scourge of war." It reaffirmed "faith

81. 22 TRIALS OF MAJOR WAR CRIMINALS, supra note 69, at 461 (Judgment: Nazi Conspiracy and Aggression).
82. Id. at 464.
84. See T. Taylor, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10 (1949).
88. U.N. CHARTER preamble, para. 1.
in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small." Its goals included economic and social advancement as well as freedom for all, without distinction as to race, sex, language, or religion. The first General Assembly responded promptly to President Truman's expression of hope that the U.N. would "reaffirm the principles of the Nuremberg Charter in the context of a general codification of offences against the peace and security of mankind." In addition to affirming the Nuremberg principles, the Assembly declared that genocide was an international crime and appointed a new Committee for the Progressive Development of International Law and its Codification. Legal scholars demanded the repression of future crimes against humanity as there was a growing awareness that peace involved the protection of human rights.

By 1948, the Assembly adopted a Convention on the Prevention and Punishment of the Crime of Genocide. An International Law Commission of fifteen experts representing different legal systems began to prepare a code of offenses and considered the establishment of an international criminal court. By that time, the unity of the war-time allies had broken down and a "cold war" reflected the competing ideologies. Special committees were established by the U.N. to deal with the problem of defining aggression and the creation of an international criminal jurisdiction. By 1954, as hostilities in Vietnam increased, progress on the code, the definition, and the court was stymied by the political antagonism between the major powers. The advancement of human rights through law seemed to have reached a plateau where nations had to pause until they again recognized the need for mutual cooperation.

Despite these sharp divisions, the clamor for human rights protection was irrepressible. In 1948, the Assembly adopted the Univer-

89. Id. preamble, para. 2.
90. Id. art. 55(c).
92. 15 DEP'T OF STATE BULL. 954 (1946).
97. For a documentary history of the work on the definition of aggression, see 1-2 B. FERENCZ, supra note 80. For a similar treatment of the effort towards establishment of an international criminal court, see 1-2 B. FERENCZ, supra note 45.
sal Declaration of Human Rights,88 which was followed in succeeding years by the International Covenants on Civil and Political Rights89 and on Economic, Social and Cultural Rights,100 as well as a host of conventions against discrimination.101 Four Geneva Conventions of 1949, providing more humane treatment for prisoners of war, wounded, and civilians, were widely accepted.102 Racial discrimination in Rhodesia was described as "a crime against humanity."103 Apartheid in South Africa was equally condemned.104 A 1968 convention provided that statutes of limitations would not apply to war crimes and crimes against humanity.105 The illegal seizure of aircraft was denounced as a violation of human rights,106 and the use of mercenaries was called a criminal act.107 In 1973, the Assembly adopted a convention calling for the punishment of apartheid "irrespective of the motive,"108 and another convention was adopted to prevent and punish crimes against diplomatic agents.109 The actions of the United States in Vietnam also came under legal attack

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as international lawyers challenged the legality of American involvement and methods of warfare.\textsuperscript{110} Young people across the world recalled the Nuremberg principles in an effort to bring a halt to violations of human rights in Vietnam.\textsuperscript{111} International law was asserted on a broad scale.

Many new nations acquired their independence and statehood after World War Two. The pre-war colonial system that carried within it the seeds of its own destruction was slowly eroded and replaced by fledgling states demanding a fair share of the world's humanity. It was only natural that such dynamic changes should be accompanied by turbulence and disruption of the old social order. In the more established nations of Europe and South America it was possible to create new institutions designed to protect human rights within a regional community. In 1950, the Council of Europe reached agreement on a European Convention on Human Rights to be enforced by a Commission and Court of Human Rights at Strasbourg.\textsuperscript{112} A similar institution was recently created in San José, Costa Rica by the Organization of American States.\textsuperscript{113} Many legal or humanitarian organizations, such as the International Commission of Jurists and Amnesty International, began to monitor and report on human rights violations throughout the world, and supported their arguments by reference to the growing number of United Nations and national declarations and conventions demanding respect for human rights.\textsuperscript{114} A U.N. Declaration called for Friendly Relations and Cooperation among States.\textsuperscript{115}

It was not until the end of the Vietnam war and a new international atmosphere of détente that the U.N., in 1974, achieved a con-
sensus in defining aggression.118 The definition had its shortcomings, of course, but it was a significant step toward world peace and removed the stumbling-block to further work on the code of crimes against mankind.117 Several Western states, notably the United States and Great Britain, doubted whether the world was yet ready to formulate or enforce such a code. They felt it would be a waste of time even to make the effort. The overwhelming majority of states, however, recognized the need to set clearer standards about permissible international behavior, and younger states wanted to be heard. It was generally agreed that a revised code would have to include advances that had been made since the draft was tabled in 1954 and that new norms should also be considered. It was argued, for example, that the code should prohibit threats to the environment, the use of nuclear or biological weapons, incitement to racial hatred, and other human rights violations. At the end of 1980, the Secretary-General was instructed to prepare an analytical paper while governments were encouraged to make their views known before the item could be considered further, at the end of 1981.118

The 100-page analytical paper prepared by the Secretary-General119 outlined the background of the proposed code and systematically categorized the views of governments as reflected in written comments and statements made during debates on the subject.120 It was a comprehensive study that illustrated many differences of opinion regarding substantive and procedural aspects of the problem. Almost everyone agreed that a code to protect the security of mankind would be desirable, but many doubted whether the international community was politically ready to formulate such a code or accept an effective enforcement mechanism. The discussion in the Sixth Committee (Legal) manifested considerable caution, hesitation, and indecision; it also revealed determination and hope.121 The effort of

120. Id. at 5-35.
some Western states and Japan to halt further consideration of the subject was overwhelmingly defeated. A consensus resolution keeping the item alive was adopted on December 4, 1981 with only seventeen abstentions.\(^2\) The International Law Commission is to consider the code and report back in 1982 regarding the priority it could accord the subject and whether it could present a preliminary report to the Assembly in 1983. The resolution also provided that the code be included as a separate item on the Committee’s agenda in 1982, where it would be accorded “priority and the fullest possible consideration.”\(^3\)

**AN OPTIMISTIC APPRAISAL**

Those who doubt the utility of the legal effort to advance human rights have been discouraged by much of what they see: a world at war in many regions and human rights violations everywhere. The pessimists note that many of those states that urge legal controls to inhibit aggression, terrorism, and other crimes against humanity insist on retaining for themselves the freedom to use every conceivable means to attain certain of their own particular goals.\(^4\) The result has been that, in order to attain a consensus, many of the declarations and conventions or laws are deliberately formulated with such ambiguity as to allow the parties to interpret the vague clauses as they may see fit to further their own interests. Human rights abuses by nations against their own citizens are widespread and are often met by terroristic counter-measures, so that it becomes difficult to distinguish terrorism from heroism. It cannot be denied that Machiavellian deception has not yet disappeared from international relations, and many states still cling to outmoded notions of absolute national sovereignty, despite the interdependence of humankind and the menace of thermonuclear annihilation. Faced with such melancholy observations, surely there is reason for cynicism, disillusionment, or despair. But there is more to the doughnut than the hole.

I have tried to sketch a few of the jurisprudential developments

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36/SR. 69.

122. U.N. Doc. A/36/774 (1981) (89 voted in favor; abstentions by Australia, Belgium, Burma, Canada, France, Germany, F.R., Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, New Zealand, Spain, Turkey, United Kingdom, and United States).


in support of human rights, but there are, in addition, developments in other areas that contribute to the well-being of people everywhere. A host of acronyms describes the many new agencies created to encourage a more equitable distribution of international resources: The IBRD,\textsuperscript{125} IFC,\textsuperscript{126} ICSC,\textsuperscript{127} UNCTAD,\textsuperscript{128} GATT,\textsuperscript{129} and UNCI- TRAL\textsuperscript{130} focus on economic aid to underdeveloped nations. The NIEO\textsuperscript{131} is directed at a more equitable distribution of the earth's resources. Perhaps the most dramatic development of recent years has been the effort to obtain a world treaty on the Law of the Sea, which has, as one of its goals, the sharing of the resources of the oceans as the common heritage of mankind. No one could expect such a revolutionary thought to be universally acclaimed. In a competitive world it was to be anticipated that some nations would seek to obtain the maximum benefit for themselves. Although no universal agreement has yet been reached, great progress has been made.\textsuperscript{132} Plans for a comprehensive dispute-settlement machinery are near completion,\textsuperscript{133} and, despite recent United States hesitation, there are realistic hopes that the law of the sea can be codified in the not too distant future.\textsuperscript{134} If such substantial progress can be made regarding four-fifths of this planet, can the remaining one-fifth be far behind?

Despite the continuing competition and distrust between the "super-powers," more progress in the military field has been made in recent years than would have been dreamed possible not long ago. International peace-keeping forces, under U.N. supervision, have played a useful role in maintaining peace in various areas of the globe.\textsuperscript{135} There are now binding international agreements regarding the testing of nuclear weapons in outer space and on the ocean floor,
as well as for the rescue of astronauts and the regulation of satellite broadcasting.\textsuperscript{136} There are also agreements governing the activities of states on the moon and on other celestial bodies,\textsuperscript{137} and agreements for the limitation of strategic arms are in process. Although the effort to eliminate man's capacity for self-annihilation is still unfulfilled, more people are beginning to feel that unless we destroy all weapons of mass destruction the weapons will destroy us all.

International environmental controls and worldwide cooperation in the health field are most encouraging. Diseases that once plagued the inhabitants of many lands have been completely eliminated, and there have been impressive gains in population control. Education and scientific information are being exchanged on a scale never before seen in human history. A milestone was reached in 1975 with the signing of the Final Act of the Conference on Security and Cooperation in Helsinki.\textsuperscript{138} Thirty-five nations, representing competitive social systems, agreed to honor a wide variety of civil, social, and economic rights, and to have the agreement monitored in later public conferences.\textsuperscript{139} This is not to suggest that such agreements are free from fault or function satisfactorily. They do not. Their inadequacies, however, simply demonstrate that dramatic changes from the past and complete acceptance of new norms of international behavior cannot be achieved in a brief period of time. Deviations, repudiations, and hesitations are to be expected, and although disappointment may be justified, despair is never an acceptable substitute for hope.

For most of man's life on earth there has been no such thing as "human rights." International law itself is still in its infancy, and only during recent years have the deliberations of the early theologians, scholars, and jurists moved from obscure treatises into treaties, from hopeful musings into the conventions and statutes of many lands. Early schemes for restructuring world society found partial fulfillment in the United States Constitution, the League of Nations, and an improved United Nations Organization. It was a great step forward when nations learned, not too long ago, to substitute conference for conflict and to establish humanitarian rules if conflict proves

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  \item 136. For a list of treaties, see M. BASSIOUNI, INTERNATIONAL CRIMINAL LAW, A DRAFT INTERNATIONAL CRIMINAL CODE 71 (1980).
  \item 137. Id.
  \item 139. Id. Follow-up to the Conference, arts. 2-3, 14 I.L.M. at 1325.
\end{itemize}
unavoidable. It took two world wars and incalculable suffering to convince sovereign states that the judicial process might be a useful tool to help deter aggression and other crimes against humanity. The dissolution of the colonial system was further international affirmation that all people are entitled to equal dignity and equal rights. Universal declarations defined some of those rights, and some enforcement procedures have gone into effect. Despite the enormous complexity of the contemporary world, when seen in the perspective of history, it is, in my judgment, unmistakably clear that substantial progress has been made toward the advancement of human rights on a global scale.

In the final analysis, there is something positive to be said in each one of the views presented in the Hofstra symposium. The development of new norms of international behavior, as predicted by Professors McDougal and Chen,140 has been described; and the types of problems suggested by Professors Rusk,141 Oliver,142 and Murphy143 have also been illustrated in this historical review. The need for social change, as suggested by Professors Schechter144 and Nanda,145 should also have become apparent. In addition, the many setbacks and vacillations that have been noted in the development of international human rights may help us to understand, if not to share, the disappointment of Professor Falk.146 Seen in totality, however, it should be clear that, as noted by Professor Sohn,147 enormous strides have been made during recent years and that, despite the slow progress recognized by the Taubenfelds,148 the development of human rights is still in its early stages. Professors Bassiouni and Derby, as pioneers of the new legal discipline of international criminal law,149 have shown us where we may hope to go if we are to see a more rational world order. Their important outline for an international court150 that may enforce new rules of international behavior is a beacon to guide those who will take us into the future. I hope

140. McDougal & Chen, supra note 2.
141. Rusk, supra note 3.
142. Oliver, supra note 4.
143. Murphy, supra note 5.
144. Schechter, supra note 6.
146. Falk, supra note 7.
147. Sohn, supra note 8.
148. Taubenfeld & Taubenfeld, supra note 9.
150. Id. at 547; see M. BASSIOUNI, supra note 136.
that my own admittedly and deliberately optimistic appraisal will give to those who must carry the burden the faith that it can be done in time.