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### Human Rights

In previous chapters we have examined various topics that have human rights dimensions. Chapter 2, for example, covers the U.N. Human Rights Council, international criminal tribunals, and hybrid courts; Chapter 3 the responsibility to Protect; and Chapter 4 the nature of the relationship between international human rights law and the law of armed conflict. These subjects, however, constitute only a small part of an increasingly vast and complex field.<sup>1</sup>

For purposes of this chapter, therefore, it is necessary to make “hard choices” for what topics to cover. Certainly, one of the most controversial topics in the field of human rights has been the war on terrorism and international human rights, with a primary focus on alleged violations of human rights by the Bush administration, especially with respect to interrogation methods and the due process rights of detainees at Guantanamo Bay and other locations. The writings on this topic are legion,<sup>2</sup> and I have briefly written on this topic myself.<sup>3</sup> In this chapter, however, my focus is elsewhere. First, I attempt to evaluate the difference, if any, the adoption of large numbers of human rights treaties by the United Nations has made in terms of meeting the U.N.’s goal to protect and promote human rights. Next, with respect to the human rights dimensions of U.N. antiterrorism efforts, the chapter turns to the financing of terrorism, Security Council Resolutions 1373 and 1267, and the so-called al-Qaeda and Taliban Sanctions Committee. Lastly, with respect to the United Nations, the chapter examines the record of the post of the High Commissioner of Human Rights.

Turning from the United Nations, the chapter explores some recent challenges facing the institution that is generally regarded as the most successful in “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,”<sup>4</sup> the European Court of Human Rights and Fundamental Freedoms. The chapter concludes with a section setting forth some hard choices that need to be made to improve future prospects for strengthening human rights on a global and regional basis.

## THE EFFICACY (OR NOT) OF INTERNATIONAL HUMAN RIGHTS TREATIES

Some years ago – I have forgotten exactly when – the Annual Meeting of the American Society of International Law had a panel on the topic: “The United Nations Adopts the Covenants, So What?” Yoram Dinstein, an eminent Israeli international law scholar and practitioner, was sitting in the first row. Dinstein sat quietly until approximately two minutes before the panel was scheduled to conclude, at which point he raised his hand. Upon being recognized by the chairman of the panel, the late Frank C. Newman, also an eminent international law scholar, especially in the field of international human rights, Dinstein took note of the title of the panel and then asked, “We have had a thorough discussion of the ‘what’ but whatever happened to the ‘so?’” Newman, not surprisingly, was taken aback by Dinstein’s question and had no time to make an adequate response.

It is not surprising that an Israeli, who, like many Israelis, views the United Nations with a jaundiced eye, would make such a comment with respect to the value of the U.N.’s adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>5</sup> More surprising was the publication in 2002 of an article by Oona Hathaway, an international law scholar, that, on the basis of a database covering the experiences of 166 states over a nearly forty-year period in five areas of human rights law, found that ratification of human rights treaties by the countries examined had little or no effect on their human rights records.<sup>6</sup> Somewhat more startling, Hathaway finds that:

Although the ratings of human rights practices of countries that have ratified international human rights treaties are generally better than those of countries that have not, noncompliance with treaty obligations appears to be common. More paradoxically, when I take into account the influence of a range of other factors that affect countries’ practices, I find that treaty ratification is not infrequently associated with worse human rights ratings than otherwise expected.<sup>7</sup>

Not surprisingly, Hathaway’s findings provoked considerable reaction, much of it hostile. In particular, Professors Ryan Goodman and Derek Jinks directly challenged both Hathaway’s methodology and policy analysis.<sup>8</sup> They suggest that “the incorporation of human rights norms [into state practice] is a process; treaty law plays an important role in this process; and Hathaway’s study does not provide a reason to reject these views.”<sup>9</sup>

Hathaway responded to the criticisms of Goodman and Jinks.<sup>10</sup> I am not qualified to evaluate her arguments compared with those of Goodman and Jinks regarding the methodology of her empirical analysis, so I will leave it to the statisticians to engage in such an evaluation. It is nonetheless noteworthy, perhaps, that a later empirical analysis of the effects of ratification of human rights treaties reaches results compatible with Hathaway’s findings. Eric Neumayer of the London School of Economics and Political Science and the International Peace Research Institute,

Oslo, Norway, concluded in his study that a beneficial effect of ratification of human rights treaties typically depended upon the extent of democracy and the strength of civil society groups in the ratifying country, as measured by participation in nongovernmental organizations (NGOs) with international linkages.<sup>11</sup> In the absence of democracy and a strong civil society, Neumayer found, “treaty ratification has no effect and is possibly even associated with more human rights violations.”<sup>12</sup> By contrast, ratification in pure autocracies with no civil society is associated with a worsening of human rights.

In her article in the *Yale Law Journal*, Hathaway proposes, as a “first step” to combating widespread noncompliance with human rights treaties, enhancing the monitoring of human rights treaty commitments through “strengthening of the self-reporting system that currently serves as the backbone of the majority of human rights treaties.”<sup>13</sup> She also contends that the findings of her study may “give reason to reassess the current policy of the United Nations of promoting universal ratification of the major human rights treaties” on the ground that pressure to ratify, if not followed by strong enforcement and monitoring, may be counterproductive.<sup>14</sup>

Interestingly, Goodman and Jinks criticize this proposal on the ground that strengthening the monitoring and enforcement of treaty obligations would undermine the effectiveness of human rights treaties because fewer states would become parties to them, and thus it would reduce the opportunities for “shallow” ratification by problem countries.<sup>15</sup> In response, Hathaway states that “I, like Goodman and Jinks’s, believe that human rights treaties can and do change perceptions of what constitutes acceptable behavior and thereby can and do have a powerful impact on countries’ human rights practices. I therefore share Goodman and Jinks’s concern that any reforms aimed at enhancing the effectiveness of treaties not be made haphazardly.” She goes on to add, however:

Yet I do not agree that fostering a system of “shallow” ratification is necessary for, or always helpful to, the process of building national human rights cultures. Broad membership in the Optional Protocol to the Covenant on Civil and Political Rights, Articles 21 and 22 to the Torture Convention, and the European Convention on Human Rights belies Goodman and Jinks’s assumption that stronger treaties will necessarily be shunned. Moreover, to the extent that noncompliance with many human rights treaties is widespread and accepted with little formal comment or complaint, the power of those treaties to change discourse and expectations is weakened.<sup>16</sup>

In my view, Professor Hathaway has the better side in this exchange. Although the International Court of Justice, in its *Advisory Opinion on Reservations to the Convention on Genocide*,<sup>17</sup> advised that it was important that the convention have as many parties to it as possible, and that therefore a party reserving to the convention could be regarded as being a party to the convention even if the reservation is objected to by one or more of the parties to the convention but not by others, there

is no article in the convention providing for reservations. The Court also noted that a reservation contrary to the object and purpose of the convention would not be permitted. In other words, the drafters of the convention were concerned that it be effective, that is, that it induce state parties to take steps in national law and practice to fulfill the object and purpose of the convention.

It is noteworthy that the Convention on Genocide, despite the large number of state parties to it,<sup>18</sup> has been singularly ineffective in inducing state parties to fulfill its object and purpose, namely, the prevention of genocide or, if prevention fails, the prosecution and punishment of the perpetrators of genocide. Until the creation of the Yugoslav and Rwanda International Criminal Tribunals and of the International Criminal Court, all of which are empowered, subject to various limitations, to exercise jurisdiction to prosecute and punish the crime of genocide, no one was prosecuted, much less punished, for the crime.

The reasons for the failure of the Convention on Genocide to become an operational instrument for the protection and promotion of human rights are manifold and are beyond the scope of discussion in this chapter. Surely, however, one reason is that, unlike later human rights treaties, the Convention contains no provisions on enforcement, with the exception of Article VIII, which provides that any Contracting Party may call upon the “competent organs of the United Nations” to take action to prevent and suppress genocide,<sup>19</sup> and Article IX, a compromissory clause that allows disputes between Contracting Parties regarding the “interpretation, application or fulfillment” of the Convention to be submitted to the International Court of Justice at the request of any party to the dispute.<sup>20</sup> Article VIII, however, is unnecessary, because member states of the United Nations do not need to be parties to the Convention on Genocide to call upon the United Nations to prevent and suppress acts of genocide, and numerous Contracting Parties have filed reservations to Article IX, including the United States.<sup>21</sup> Moreover, until recently, situations allegedly involving genocide were referred neither to the United Nations nor to the International Court of Justice.<sup>22</sup>

The Convention on Genocide was an early U.N. human rights treaty, adopted in 1948. Later treaties have more or different enforcement provisions, including, at a minimum, a requirement that state parties submit reports to a committee established by the treaty on the steps they have taken to carry out their obligations and submit to a hearing in which members of the committee raise questions regarding their reports.<sup>23</sup> Some treaties provide that a state party to the treaty may declare that it recognizes the competence of the committee to receive and consider “communications” (i.e., complaints) to the effect that a state party claims that another state party is not fulfilling its obligations under the treaty.<sup>24</sup> In such a case the committee does not sit as an adjudicatory body but rather seeks to facilitate an amicable settlement between the parties and may offer its good offices to the state parties with a view to an amicable solution.<sup>25</sup> If an amicable solution is not found, the committee may, with the prior consent of the state parties concerned, appoint an ad hoc

conciliation commission.<sup>26</sup> Lastly, some treaties provide that a state party may at any time “declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.”<sup>27</sup> Alternatively, a state party may consent to the committee exercising such competence by becoming a party to an optional protocol, such as the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>28</sup>

It is noteworthy that, in October 1997, Jamaica became the first, and so far the only, state party to denounce the Optional Protocol and thus withdraw the right of individual petition to the Human Rights Committee.<sup>29</sup> This would seem to lend a measure of support to Goodman and Jinks’s thesis that overly strong procedures for the monitoring and enforcement of human rights treaty obligations may result in undermining the goal of universal or at least broad-based ratification of such treaties. On the other hand, Jamaica’s withdrawal from the Optional Protocol has not been followed by the withdrawal of other state parties.

Moreover, in recent years, new approaches to the monitoring of human rights treaties have been developed that go well beyond the standard techniques contained in the International Covenant on Civil and Political Rights and in its Optional Protocol. Now, in addition to the Human Rights Committee, there are eight U.N. treaty bodies, either in existence, or soon to be.<sup>30</sup> Some of the new approaches to monitoring have been summarized by Steiner, Alston, and Goodman:

Both the Convention against Torture (Art. 20) and the Optional Protocol to the CEDAW Convention (Art. 8) provide for an on-site visit, or inquiry, on an initially confidential basis, to be undertaken by one or more committee members where violations have been reliably attested and the state concerned agrees to the visit. The confidentiality may be, and consistently has been, waived once the visit has been made. Mexico, for example, has been the subject of visits under both procedures, one dealing with consistent reports of police torture, and the other concerning the killings of hundreds of young woman in Ciudad Juarez between 1993 and 2003, and both reports have been published.

More recent reports have been even more creative in terms of monitoring arrangements. At one end of the spectrum is the Optional Protocol to the Torture Convention of 2002, which entered into force in 2006. Its emphasis is on prevention and it establishes a Subcommittee for Prevention which can make on-site visits at any time. It also obligates states to establish their own national preventive mechanisms (NPMs) to monitor regularly all places of detention. At the other end of the spectrum is the proposed Committee on Enforced Disappearances. In addition to the traditional functions of state reporting, individual complaints, and interstate complaints, the proposed committee, as an urgent, humanitarian procedure, is empowered to undertake on-site inquiries and may call the attention of the U.N. General Assembly to situations of widespread and systemic disappearances.<sup>31</sup>

Contrary to Goodman and Jinks's suggestion that more rigorous implementation procedures for human rights treaties, as proposed by Oona Hathaway, might be counterproductive, there is no indication in this excerpt that the new approaches to monitoring the human rights treaties have resulted in state parties failing to ratify them or have undermined their effectiveness. Nor is there any reference to the desirability of so-called shallow ratification.

Moreover, an observation made by Hathaway in her article bears repeating:

In recent decades, faith in the power of international law to shape nations' actions has led to a focus on the creation of international law to shape nations' actions as a means to achieve human rights objectives. The treaties that have resulted may have played a role in changing discourse and expectations about human rights, thereby improving the practices of all nations. Yet, based on the present analysis, ratification of the treaties by individual countries appears more likely to offset pressure for change in human rights practices than to augment it. The solution to this dilemma is not the abandonment of human rights treaties, but a renewed effort to enhance the monitoring and enforcement of treaty obligations to reduce opportunities for countries to use ratification as a symbolic substitute for real improvements in their citizens' lives.<sup>32</sup>

An example of a country using ratification as a symbolic substitute for real improvements in its citizens' lives may be the United States' ratification of the International Covenant on Civil and Political Rights. For a number of years, the United States endured sharp criticism for its failure to ratify human rights treaties, especially the International Covenant on Civil and Political Rights. Much of this criticism came from countries with poor human rights records, such as the Soviet Union. When the United States finally did ratify, in 1992, it did so with a number of reservations, understandings and declarations, so-called RUDs. These RUDs have been subject to considerable scholarly criticism.<sup>33</sup> For its part, the Human Rights Committee has also weighed in heavily on the issue of the compatibility of the U.S. RUDs with the object and purpose of the Covenant.

As every state party is obligated to do under Article 40 of the Covenant, the United States submitted, on August 24, 1994, its report on measures it had taken to give effect to the rights recognized in the Covenant and on progress made in giving effect to the enjoyment of those rights to the Human Rights Committee.<sup>34</sup> The report contains a voluminous discussion of the political and legal structure in the United States for the protection of human rights, as well as a detailed setting forth of U.S. law and practice. In its Concluding Observations on the U.S. report, however, the Committee expresses its "regrets . . . that, while containing comprehensive information on the laws and regulations giving effect to the rights provided in the Covenant at the federal level, the report contained few references to the implementation of Covenant rights at the state level."<sup>35</sup> More significantly, the Committee declared the U.S. reservations to Article 6 (5) and Article 7 of the Covenant, both of which relate to the death penalty,<sup>36</sup> "incompatible with the object and purpose of the Covenant."<sup>37</sup> In both

reservations, the United States is proclaiming its willingness to be bound only by the constraints of the U.S. Constitution and not by the provisions of the Covenant.<sup>38</sup>

Moreover, in General Comment No. 24 on reservations to the Covenant,<sup>39</sup> the Human Rights Committee claimed that it had the competence to determine the legality of state parties' reservations. In response the United States argued that the Covenant did not "impose on States Parties an obligation to give effect to the Committee's interpretations or confer upon the Committee the power to render definitive or binding interpretations of the Covenant." The United States also rejected the determination of the Committee that "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."<sup>40</sup> In the view of the United States, this conclusion is "completely at odds with established legal practices and principles . . . The reservations contained in the United States instrument of ratification are integral parts of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified."<sup>41</sup>

In its General Comment No. 24 the Committee had also implicitly criticized the U.S. declaration accompanying its ratification that the substantive articles of the Covenant were not self-executing, thereby ensuring that the Covenant could not be the basis for a lawsuit in U.S. courts, as well as the U.S. practice of reserving to any provision of the Covenant that was inconsistent with existing U.S. federal or state law. Specifically, the Committee had stated in General Comment No. 24 that, with regard to implementing the Covenant in domestic law, domestic laws "may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level."<sup>42</sup> In its observations, the United States (along with the United Kingdom) met the criticisms (which had also been advanced by scholars and other commentators) head on:

First, this statement may be cited as an assertion that States Parties *must* allow suits in domestic courts based directly on the provisions of the Covenant. Some countries do in fact have such a scheme of "self-executing" treaties. In other countries, however, existing domestic law already provides the substantive rights reflected in the Covenant as well as multiple possibilities for suit to enforce those rights. Where these existing rights and mechanisms are in fact adequate to the purposes of the Covenant, it seems most unlikely that the Committee intends to insist the Covenant be directly actionable in court or that States must adopt legislation to implement the Covenant

Second, paragraph 12 states that "[r]eservations often reveal a tendency of States not to want to change a particular law." Some may view this statement as sweepingly critical of any reservation whatsoever which is made to conform to law. Of course,

since this is the motive for a large majority of the reservations made by States in all cases, it is difficult to say that this is inappropriate in principle. Indeed, one might say that the more seriously a State Party takes into account the necessity of providing strictly for domestic enforcement of its international obligations, the more likely it is that some reservations may be taken along these lines.<sup>43</sup>

A comment on these U.S. and British responses is in order. Frankly, they are a bit disingenuous. The complaint of the Committee is not based on an assertion that state parties must allow suits in domestic courts based on the provisions of the Covenant. Nor is it a sweeping criticism of any reservation whatsoever that is made to conform to law. Rather, it is a criticism of the U.S. determination to ensure that no domestic law or practice, federal or state, needs to be changed because of ratification of the Covenant. In particular, the United States is determined to ensure that none of its states need change their laws because the substance of the Covenant is covered by state rather than federal law. Because a primary purpose of human rights treaties is to change the laws of state parties in such a way as to improve them, Louis Henkin argues that the U.S. reservations are incompatible with the object and purpose of the Civil and Political Rights Covenant and therefore invalid under Article 19 of the Vienna Convention on the Law of Treaties.<sup>44</sup>

On the other hand, Curtis A. Bradley and Jack L. Goldsmith have advanced a strong practical argument in support of U.S. declarations that the Civil and Political Rights Covenant and other human rights treaties are non-self-executing:

The ICCPR, if self-executing, would have the same domestic effect as a congressional statute and thus would supersede inconsistent state law and prior inconsistent federal legislation. Literally hundreds of U.S. federal and state laws – ranging from essential civil rights statutes like Title VII to rules of criminal procedure – would be open to reconsideration and potential modification or invitation by courts interpreting the vague terms of the ICCPR. Even if courts ultimately decided that each of the differently worded provisions in the ICCPR did not require a change in domestic law, there was concern that litigation of these issues would be costly and would generate substantial legal uncertainty. These concerns also arose, although on a narrower scale, for the other human rights treaties.<sup>45</sup>

When the United States ratified the Civil and Political Rights Covenant, a number of state parties objected to one or more of the reservations and understandings and in some instances found them incompatible with the object and purpose of the Covenant.<sup>46</sup> The objecting states, however, took the position that their objections did not prevent the Covenant from entering into force between them and the United States in accordance with Articles 20 and 21 of the Vienna Convention on the Law of Treaties.<sup>47</sup>

Hence, as noted previously, a large number of legal issues have arisen between the United States and the Human Rights Committee regarding the U.S. RUDs and the Committee's claim that it has the authority to determine whether the RUDs are



compatible with the objective and purpose of the Covenant. There is no prospect, however, of an impartial third party issuing a binding decision in favor of one party or the other.

On November 28, 2005, the United States submitted, in a consolidated fashion, its second and third reports to the Committee.<sup>48</sup> In its “Concluding Observations” the Committee urges the United States to “review its interpretation of the Covenant and acknowledge its applicability with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war.”<sup>49</sup> The United States replied that it “continues to consider that its view is correct that the obligations it has assumed under the Covenant do not have extraterritorial reach.”<sup>50</sup>

Maintaining its position regarding the extraterritorial application of the Covenant, most of the Committee’s concerns related to extraterritorial situations, “notably the secret detention facilities outside the U.S., the allegations of death, torture or abuse of individuals in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations, the transfer, rendition, extradition, expulsion or *refoulement* of detainees, and the applicability of the ICCPR to the situation of armed conflict in Iraq.”<sup>51</sup> The Committee recommended that United States close its secret detention facilities and grant the International Committee of the Red Cross (ICRC) prompt access to any person detained in connection with an armed conflict. Although denying that it had any legal obligation to provide the ICRC with notice and access to these enemy combatants, the United States reported that, as of September 6, 2006, when the high-value detainees were moved from the secret detention facilities to Guantanamo, the ICRC had been granted access to them.

As had been the case with the first report of the United States, the second and third reports gave rise to numerous differences of opinion regarding legal issues between the United States and the Committee. There is no evidence that these issues were resolved between the parties, however, much less referred to a third party for a binding decision. Moreover, there was no U.S. press or television coverage of any of the public hearings on the three U.S. reports.<sup>52</sup> Finally, there is no evidence that the United States changed its views on these legal issues, much less its law and practice, as a result of these hearings. Accordingly, the evidence is considerable that the United States has viewed ratification as a “symbolic substitute” for real improvements in its citizens’ lives.

Unlike the United States, the Soviet Union (now the Russian Federation) was an early ratifier of the Civil and Political Rights Covenant, having done so in March 23, 1976. It also ratified the Optional Protocol in January 1, 1992. The Committee considered the fifth periodic report of the Russian Federation at three meetings in 2003.<sup>53</sup> Its concerns with the report, in contrast to those it had with respect to the U.S. reports, did not focus on legal issues. Rather, they addressed alleged failures of Russia to carry out its obligations under the Covenant as well as to implement the Committee’s views under the Optional Protocol in two cases.<sup>54</sup> The Committee urged Russia “to review its position in relation to views adopted by the Committee

under the Optional Protocol and to implement the Views, in order to comply with Article 2 (3) of the Covenant which guarantees a right to an effective remedy when there has been a violation of the Covenant.”<sup>55</sup>

As to alleged Russian failures to carry out its obligations under the Covenant, for example, the Committee expressed its concern regarding persistent inequality in the enjoyment of Covenant rights by women; the large number of persons in Russia who are being trafficked for sexual and labor exploitation; continuing substantiated reports of human rights violations in the Chechen Republic, including “extrajudicial killings, disappearances and torture, including rape”<sup>56</sup>; the provision in the Federal Law “On Combating Terrorism” that exempts law enforcement and military personnel from liability for harm caused during counterterrorist operations; the closure in recent years of independent media companies and an increase in state control of major media outlets (TV channels, radio stations, and newspapers); and journalists, researchers and environmental activists who have been tried and convicted on treason charges, “essentially for having disseminated information of legitimate public interest, . . . in some cases where the charges were not proven, the courts have referred the matter back to prosecutors instead of dismissing the charges.”<sup>57</sup>

These and other Committee allegations of Russian violations of the Covenant paint a grim picture of the state of human rights in Russia as of 2003. The situation has not improved since then if reports by the U.S. Department of State,<sup>58</sup> Amnesty International,<sup>59</sup> and Freedom House<sup>60</sup> are to be believed. For example, the introductory summary of Freedom House’s report states:

The 2007 State Duma elections marked a new low in the Kremlin’s manipulation of the political process. The authorities sharply restricted outside election observers and ensured that the campaign environment favored Kremlin-backed parties, which won the vast majority of seats. More ominously for Russian democracy, President Vladimir Putin announced that he intended to remain on the political stage after his second term ended in 2008. [Putin was as good as his word, because he was appointed Prime Minister of Russia.] Putin’s continued tenure would benefit the circle of security-agency veterans he has appointed to top positions in the government and state-owned enterprises and set Russia on a firmly authoritarian course. During the year, the authorities continued to place strict limits on opposition political parties, public demonstrations, the media, and nongovernmental organizations, and failed to launch any serious initiatives to address Russia’s extensive corruption.<sup>61</sup>

In the same vein, the introductory summary of the Amnesty International report reads as follows:

The Russian authorities were increasingly intolerant of dissent or criticism, branding it “unpatriotic.” A crackdown on civil and political rights was evident throughout the year and in particular during the run-up to the State Duma (parliament) elections

in December. Given the strict state control of TV and other media, demonstrations were the flashpoint during the year for political protests, with police detaining demonstrators, journalists, and human rights activists, some of whom were beaten. Activists and political opponents of the government were also subjected to administrative detention.

The number of racist attacks that came to the attention of the media rose; at least 61 people were killed across the country. Although authorities recognized the problem and there was an increase in the number of prosecutions for racially motivated crimes, these measures failed to stem the tide of violence.

The European Court of Human Rights noted that Russia was responsible for enforced disappearances, torture and extrajudicial executions in 15 judgments relating to the second Chechen conflict which began in 1999. There were fewer reported cases of disappearances in the Chechen Republic than in previous years; however, serious human rights violations were frequent and individuals were reluctant to report abuses, fearing reprisals. Ingushetia saw an increase in serious violations, including enforced disappearances and extrajudicial executions.

NGOs were weighed down by burdensome reporting requirements imposed by changes to legislation. Torture was used by police against detainees, including to extract “confessions”; violence against inmates in prisons was also reported.<sup>62</sup>

The U.S. Department of State’s summary of the “most notable human rights developments during the year” in Russia was especially stark:

The most notable human rights developments during the year were the contract style killings of proreform Central Bank Deputy Chairman Anrei Kozlov and journalist Anna Politkovskaya, known for uncovering human rights abuses in Chechnya. Continuing centralization of power in the executive branch, a compliant State Duma, political pressure on the judiciary, intolerance of ethnic minorities, corruption and selectivity in enforcement of the law, continuing media restrictions and self-censorship, and harassment of some nongovernmental organizations (NGOs) resulted in an erosion of the accountability of government leaders to the population. Security forces were involved in additional significant human rights problems, including alleged government involvement in politically motivated abductions, disappearances and unlawful killings in Chechnya and elsewhere in the North Caucasus; hazing in the armed forces that resulted in severe injuries and deaths; torture, violence, and other brutal or humiliating treatment by security forces; harsh and frequently life-threatening prison conditions; corruption in law enforcement; and arbitrary arrest and detention. The executive branch allegedly exerted influence over judicial decisions in certain high-profile cases. Government pressure continued to weaken freedom of expression and media independence, particularly of major national networks. Media freedom declined due to restrictions as well as harassment, intimidation, and killing of journalists. Local authorities continued to limit freedom of assembly and restrict religious groups in some regions. There were also reports of societal discrimination, harassment, and violence against members

of some religious minorities and incidents of anti-Semitism. Authorities restricted freedom of movement and exhibited negative attitudes toward, and sometimes harassed, NGOs involved in human rights monitoring. Also notable was the passage and entry into force of a new law on NGOs, which has already had some adverse effect on their operations. There was widespread governmental and societal discrimination as well as racially motivated attacks against ethnic minorities and dark-skinned immigrants, including the outbreak of violence against Chechens in the northwest and the initiation of a government campaign to selectively harass and deport ethnic Georgians. Xenophobic, racial, and ethnic attacks, and hate crimes were on the rise. Violence against women and children, trafficking in persons, and instances of forced labor were also reported.<sup>63</sup>

It appears that the submission of five reports to the Human Rights Committee, relatively hard-hitting expressions of “concern” by the Committee regarding numerous violations of the Covenant by Russia, as well as failure to adhere to the views of the Committee about individual “communications” (i.e., complaints) submitted under the Optional Protocol have had little if any effect in improving the human rights record of Russia. In light of this failure, it may be appropriate to consider briefly some “radical” proposals for reform advanced by Hathaway in her *Yale Law Journal* article.<sup>64</sup>

Hathaway first suggests that the findings of her study regarding the limited effects of the ratification of human rights treaties “may also give reason to reassess the current policy of the United Nations of promoting universal ratification of the major human rights treaties.”<sup>65</sup> She goes on to propose that “it may be worthwhile to develop, consider, and debate more radical approaches to improving human rights through the use of new types of treaty membership policies. If countries gain some expressive benefit from ratifying human rights treaties, perhaps this benefit ought to be less easily obtained.”<sup>66</sup>

Hathaway identifies three alternative approaches to improving human rights through the use of new types of treaty membership policies. The first would require that countries demonstrate that they are complying with certain human rights standards as a condition precedent to becoming a party to human rights treaties. Second, “membership in a treaty regime could be tiered, with a probationary period during the early years of membership followed by a comprehensive assessment of country practices for promotion to full membership.”<sup>67</sup> Lastly, “treaties could include provisions for removing countries that are habitually found in violation of the terms of the treaty from membership in the treaty regime.”<sup>68</sup>

In principle, there is much to be said for Hathaway’s proposals. Sadly, in reality there is little to no chance of their being adopted. Although it is not, strictly speaking, a “human rights treaty,” the U.N. Charter contains numerous human rights provisions. More important, it contains conditions on states’ admission to membership in the United Nations. Article 3 of the Charter provides: “The original Members of the United Nations shall be the States which, having participated in the United Nations

Conference on International Organization at San Francisco, or having previously signed the Declaration of United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110." Article 4 (1) provides that "[m]embership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the organization, are able and willing to carry out these obligations."

It is questionable at best whether the original members of the United Nations were peace-loving states or truly accepted the obligations contained in the Charter or were "able and willing to carry out these obligations." Be that as it may, it is clear that not all of the present 192 member states satisfied these criteria at the time of their admission. The reality, of course, is these criteria have been a dead letter because of the unwillingness of U.N. membership to apply them, and temporary exclusions of states from membership have been based on political factors, especially during the days of the Cold War.

Under Article 5 of the U.N. Charter, a member state against which preventive or enforcement action has been taken by the Security Council may be suspended from "the rights and privileges of membership" by the General Assembly, upon a recommendation of the Security Council,<sup>69</sup> and under Article 6, "[a] Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council." No member state, however, has had its rights and privileges of membership suspended, nor has any member state ever been expelled from the organization. In short, as the lamentable failure of member states to take forceful action against egregious violators of human rights under the so-called responsibility to protect, which we examined in Chapter 3, also demonstrates, the United Nations is reluctant to utilize coercive means against states solely because of their human rights record.

#### THE FINANCING OF TERRORISM, SECURITY COUNCIL RESOLUTION 1373, THE AL-QAEDA AND TALIBAN COMMITTEE, AND HUMAN RIGHTS

Terrorist fund-raising has long been noted as a major obstacle standing in the way of efforts to combat international terrorism.<sup>70</sup> Through a series of steps, this concern led to the General Assembly adopting a resolution on December 9, 1999, opening for signature the International Convention for the Suppression of the Financing of Terrorism.<sup>71</sup>

Dealing with the financing of terrorism is a delicate matter. A major problem is that terrorists often operate through "front operations" that appear on the surface to be engaged in legitimate activities or through organizations that in fact have charitable, social, or cultural goals and engage in legitimate activities to further these goals. Moreover, in some states, such as the United States, action by the government to prevent or limit the financing of organizations with charitable or similar goals could

raise serious constitutional issues. In an effort to avoid such difficulties, Article 2 (1) of the convention carefully limits its scope:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.

As in the case of its predecessor “antiterrorism conventions,” the principal objective of the financing convention is to require state parties to criminalize and establish jurisdiction over the offenses set forth in the convention and to extradite or submit for prosecution the persons accused of the commission of such offenses. An innovative provision in the financing convention, however, is in Article 5. It requires each state party to “take the necessary measures to enable a legal entity located in its territory organized under its laws to be held liable when a person responsible for the management or control of that legal entity” has committed an offense under the convention. Normally, the antiterrorist conventions address only the issue of criminal and not civil liability. The convention also enhances the deterrent effect of its provisions by providing for the seizure or freezing of funds and proceeds used for the commission of an offense and by prohibiting state parties from claiming privileged communication, banking secrecy, or the fiscal nature of the offense to refuse a request for mutual assistance from another state party.<sup>72</sup>

The financing convention, as well as the general effort to combat the financing of terrorism, received an enormous boost when on September 28, 2001, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, adopted Resolution 1373.<sup>73</sup> By any measure, Resolution 1373 constitutes a landmark step by the Council. It has been characterized as a “minitreaty containing obligations that the majority of states had not been willing to accept in the recent past in treaty form.”<sup>74</sup> Among the obligations that Resolution 1373 imposes on U.N. member states is to criminalize “all activities falling within the ambit of terrorist financing; it obliged states to freeze all funds or financial assets of persons and entities that are directly or indirectly used to commit terrorist acts or that are owned and controlled by persons engaged in, or associated with, terrorism; it obliged states to prevent their nationals (including private financial institutions) from making such funds available, in effect imposing strict client detection measures, STR [Suspicious Transactions Reports] procedures, and subordination to other intergovernmental institutions in order to receive the names of designated terrorist organizations or individuals; and it imposed substantive

and procedural criminal law measures at the domestic level, including an obligation to cooperate in the acquisition of evidence for criminal proceedings.”<sup>75</sup>

Arguably, the most significant step the Council took in Resolution 1373 was to establish a committee (the Counter-Terrorism Committee [CTC]) to monitor implementation of the resolution and to call upon states to report to the committee, no later than ninety days after the date of adoption of the resolution, on the steps they have taken to implement the resolution. The Council further “[e]xpresses its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter.”<sup>76</sup>

As early as April 1, 2003, the Counter-Terrorism Committee had received reports from all U.N. member states.<sup>77</sup> As might be expected, these reports varied in quality and length, “largely reflecting the different levels of capacity among states to implement Resolution 1373 and different levels of resources states have to prepare a report under Resolution 1373.”<sup>78</sup>

At the same time, there was concern expressed early on that implementation of Resolution 1373 not be used as an excuse to infringe on human rights. Sergio Vieira de Mello, at the time the U.N. High Commissioner for Human Rights, as well as his predecessor, Mary Robinson, urged the Counter-Terrorism Committee to appoint an expert on human rights and take on the responsibility of monitoring states’ compliance with human rights norms in the area of counterterrorism, with Vieira de Mello even offering to provide the Committee with such an expert.<sup>79</sup>

At first the Counter-Terrorism Committee was somewhat resistant to these suggestions. Its position at the time was that “the task of monitoring adherence to human rights obligations in the fight against terrorism falls outside of the CTC’s mandate.”<sup>80</sup> Human rights activists, however, continued to press for a greater focus by the CTC on human rights issues, and this pressure has had an effect.

In particular, in 2004, with the establishment of the Counter-Terrorism Committee Executive Directorate (CTED),<sup>81</sup> which provided the CTC with a larger, more permanent, and professional staff body to support its work, the CTC shifted to a more proactive policy on human rights. Specifically, CTED was mandated to liaise with the Office of the High Commissioner for Human Rights (OHCHR) and other human rights organizations in matters related to counterterrorism, and a human rights expert was appointed to the CTED staff.<sup>82</sup>

Security Council Resolution 1624,<sup>83</sup> which deals with incitement, stresses that states must ensure that any measures they take to implement the resolution comply with all of their obligations under international law, in particular human rights law, refugee law, and humanitarian law. “The resolution’s preamble highlights the relevance of the right to freedom of expression and the right to seek asylum in the context of counterincitement measures; it also states that incitement poses a serious and growing danger to the enjoyment of human rights. The Committee is mandated to include issues related to implementing the resolution in its dialogue with Member States.”<sup>84</sup>

As recommended by the CTED Executive Director and endorsed by Security Council Resolution 1805,<sup>85</sup> a working group on issues raised by Resolution 1624 and human rights aspects of counterterrorism in the context of Resolution 1373 was recently established in CTED. The working group's main objectives are to enhance expertise and develop common approaches by CTED staff on these issues, as well as to consider ways in which the Committee might more effectively encourage member states to comply with their international obligations in this area.<sup>86</sup>

### *The al-Qaeda and Taliban Committee*

Before its adoption of Resolution 1373, the Security Council, concerned with the terrorist attacks initiated from Afghanistan by Osama bin Laden and al-Qaeda and the financing of such attacks by drug trafficking and money laundering, addressed the sheltering of bin Laden and his organization, as well as the cultivation, production, and trafficking of drugs in areas controlled by the Taliban, in a resolution adopted on December 8, 1998.<sup>87</sup> Moreover, by Resolution 1267 of October 15, 1999, the Security Council approved a series of sanctions against Afghanistan and obliged states to freeze Taliban and al-Qaeda resources, establishing for this purpose a monitoring committee called colloquially the al-Qaeda and Taliban Committee (hereinafter the "Sanctions Committee"). This committee is responsible for maintaining the list of individuals and entities against which all member states are required to impose financial, travel, and arms-related sanctions. Like the CTC this committee has attracted "significant attention from governments and nongovernmental organizations (NGOs) concerned about the human rights implications of this sanctions regime, as well as from the Council of Europe Committee on Legal Affairs."<sup>88</sup> Because of these concerns, reportedly, "[s]upport for the regime seems to be eroding as a result of concerns regarding the quality of information on the list and the lack of fully transparent procedures for adding and removing names from it."<sup>89</sup>

Despite these concerns, the Sanctions Committee has had difficulty in agreeing on procedures for adding and removing names from the list. States such as China, Russia, and the United States have reportedly argued, among other things, that the goal of Security Council sanctions is not to punish the financiers but rather to prevent the commission of terrorist acts, that the sanctions are of a temporary, administrative character, and that therefore "notions of legal due process, as enshrined in the International Covenant on Civil and Political Rights (ICCPR) and other relevant human rights instruments do not apply to those on the list."<sup>90</sup>

This argument stands in sharp contrast to the views of the Office of the U.N. High Commissioner for Human Rights, which has stated that "while the system of targeted sanctions represents an important improvement over the former system of comprehensive sanctions, it nonetheless continues to pose a number of serious human rights



concerns related to the lack of transparency and due process in listing and delisting procedures.”<sup>91</sup> Similarly, the Council of Europe has expressed growing concern that the imposition of these sanctions “must, under the European Convention of Human Rights and the [ICCPR] . . . respect certain minimum standards of procedural protection and legal certainty.”<sup>92</sup> The Council of Europe is also concerned that “international, regional, or national courts might find the Security Council sanctions’ regimes incompatible with due process norms, such as the rights to be informed of the charges against oneself, to be heard and defend oneself against these charges, and to an effective remedy.”<sup>93</sup>

In response to these and other expressions of concern, the Sanctions Committee established new delisting procedures in December 2006 and requested the Secretary-General to establish a “focal point” to receive delisting requests and, where appropriate, to forward them to the committee. In March 2007 such a focal point was established.<sup>94</sup> The response to this action, however, was mixed. Although it was regarded as a step in the right direction, the decision as to whether delisting should take place was left to the committee, and in the view of one commentator, this “does not and cannot address the right of listed individuals to an effective review mechanism, which requires a certain degree of impartiality and independence in the decision making itself.”<sup>95</sup>

As noted by a report of a leading NGO:

Many critics believe that only the establishment of an independent panel of experts to consider delisting requests can ensure that individuals on the list are guaranteed their rights to effective review of their listing by a competent and independent mechanism and to effective remedy. The council’s response, the creation of the focal point, is unlikely to be the end of the story on this issue as more and more states are faced with a situation where national or international courts are seized with complaints challenging the legality of the U.N. sanctions and their implementation by states due to the lack of a fair and effective review system. The outcome of those various challenges to the individual listings and the procedures themselves is likely to influence the council’s further treatment of these issues. In the meantime, Denmark, Liechtenstein, Sweden, and Switzerland continue to push for the establishment of a meaningful review system, now advocating the establishment of a review panel within the Security Council.<sup>96</sup>

On September 3, 2008, the European Court of Justice, the highest court of the European Union, handed down a landmark decision<sup>97</sup> in which the Court set aside a judgment of the E.U.’s Court of First Instance (CFI) and annulled a regulation of the Council of the European Union implementing resolutions of the U.N. Security Council and decisions of its Sanctions Committee that called for the freezing of the assets of Yassin Abdullah Kadi, a resident of Saudi Arabia, and those of the Al Barakaat International Foundation, established in Sweden. In 2001, the Sanctions Committee had designated both Mr. Kadi and Al Barakaat as being associated with al-Qaeda.<sup>98</sup>

In December 2001, Kadi and Al Barakaat instituted proceedings before the Court of First Instance and originally requested annulment of European Council Regulation No 467/2001 of March 6.<sup>99</sup> Subsequently, they requested the annulment of European Council Regulation No 881/2002 of May 27, 2002, imposing certain specific measures against certain persons and entities associated with Osama bin Laden, the al-Qaeda network, and the Taliban, which replaced Regulation No 467/2001.

The petitioners argued that the Council of the E.U. lacked competence to adopt the regulation and that the regulation infringed several of their fundamental human rights, that is, the right to respect for property, the right to be heard before a court of law, and the right to effective judicial review.<sup>100</sup> On September 21, 2005, the CFI rejected all the claims of Kadi and Al Barakaat and upheld the validity of the regulation.<sup>101</sup>

With respect to the claim that the E.U. lacked competence to adopt the regulation, the Court of First Instance (CFI) ruled that it had no jurisdiction to review the validity of the regulation in question or, indirectly, the validity of the relevant U.N. Security Council resolution because the E.U. regulation implemented a U.N. Security Council resolution adopted under Chapter VII of the U.N. Charter. Such Security Council resolutions are binding upon E.U. member states and prevail over their obligations under the E.C. treaty because of Article 103 of the U.N. Charter.<sup>102</sup> According to the CFI, the one exception to this lack of jurisdiction was if the regulation at issue infringed *jus cogens* norms. The CFI concluded, however, that the restrictive measures provided in the challenged resolution did not infringe any of the Appellant's fundamental rights protected by *jus cogens* norms.

Kadi and Al Barakaat appealed the CFI's judgment in November 2005. Their appeal was based on three grounds. First, they contended that the regulation at issue lacked any legal basis in E.C. law. Second, they alleged that because the regulation directly prejudiced the rights of individuals and prescribed the imposition of individual sanctions, it had no general application, which is required by Article 294 of the E.C. Treaty. Third, and last, they argued the regulation violated their fundamental rights.

The European Court of Justice (ECJ) dismissed the first two grounds of appeal as unfounded. This part of the ECJ judgment will not be discussed further. As to the third ground of the appeal, the ECJ disagreed with the CFI's holding that it had no jurisdiction to review the internal lawfulness of the regulation and upheld, for the first time, the ECJ's full competence to review E.C. acts implementing U.N. Security Council resolutions. The Court stated:

The Community judicature must . . . ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of measures which, like the contested regulation, are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.<sup>103</sup>

The primary rationale for the ECJ's decision was the unique status of the legal order established by the E.C. Treaty. In the Court's view, "the review by the Court of the validity of any Community Measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the E.C. Treaty as an autonomous legal system which is not to be prejudiced by an international agreement."<sup>104</sup> The Court emphasized, however, that "the review of lawfulness thus to be ensured by the Community judicature applies to the Community act purporting to give effect to the international agreement at issue, but not to the international agreement as such."<sup>105</sup> The Court added that, because the contested Security Council resolution was adopted under Chapter VII of the U.N. Charter, "it is not, therefore, for the Community judicature . . . to review the lawfulness of such a resolution . . . even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*."<sup>106</sup> The autonomy of the legal order established by the E.C. Treaty was further highlighted when the ECJ held that "any judgment by the Community judicature deciding that Community measure intended to give effect to . . . a [UNSC] resolution is contrary to a higher rule of law in the Community Legal Order would not entail any challenge to the primacy of that resolution in international law."<sup>107</sup>

Turning to the issue of whether the appellants' fundamental rights had been violated, the ECJ disagreed with the Court of First Instance and held the rights to be heard and to effective judicial review were "patently not respected."<sup>108</sup> The Community regulation provided no procedure for communicating the evidence justifying the inclusion on the list. Moreover, the Council of the E.U. never informed the Appellants of the evidence against them that justified including them on the list. As a result, the Appellants were not able to defend their rights before Community courts, so the regulation also infringed the right to an effective legal remedy.<sup>109</sup>

As to the right to property, the ECJ stated that, although the "restrictive measures imposed by the contested regulation constitute restrictions of the right to property which might, in principle be justified,"<sup>110</sup> . . . "the contested regulation, in so far as it concerns Mr. Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property right must be regarded as significant, having regard to the general application and actual continuation of the freezing of funds affecting him."<sup>111</sup> Accordingly, in the view of the Court, the freezing of funds "constitutes an unjustified restriction of Mr. Kadi's right to property."<sup>112</sup>

Significantly, the ECJ authorized the European Community to maintain the regulation in force for three months to allow the Council of the European Union to remedy its deficiencies. The Court's purpose in doing so was to prevent the Appellants from avoiding the application of the freezing of their assets in the event that freezing of their assets proved to be justified.

In response to the Court's judgment, the Commission of the European Communities communicated the narrative summaries of reasons provided by the U.N.

Sanctions Committee to Kadi and Al Barakaat and gave them an opportunity to comment on these grounds in order to make their point of view known. Upon receiving comments from the Appellants, the Commission examined them and found that “given the preventive nature of the freezing of funds and economic resources,” the listing of Appellants was justified because of their “association with the al-Qaeda network.”<sup>113</sup> The Commission further held that the regulation would enter into force on December 3, 2008, be published in the Official Journal of the European Union, and apply from May 30, 2002.<sup>114</sup>

Not surprisingly, the ECJ’s decision in *Kadi* engendered a substantial amount of commentary – some highly positive, some highly critical, and some in between.<sup>115</sup> Jack Goldsmith and Eric Posner, in an op-ed piece in the *Wall Street Journal*,<sup>116</sup> contended that “Europe’s commitment [to international law] is largely rhetorical. Like the Bush administration, Europeans obey international law when it advances their interests and discard it when it does not.”<sup>117</sup> To support their thesis, the authors refer to the *Kadi* case as an example and state that in that case the ECJ “[R]uled that the Security Council resolution was invalid.” However, as noted previously, the ECJ made no such ruling. Rather, it studiously avoided commenting on the Security Council’s resolution and confined its ruling to the E.C. resolution, which purported to implement the Council’s resolution, holding that the E.C. Council had no authority under E.U. standards of rights protection and, as noted by de Burca, “treating the U.N. system and the E.U. system as separate and parallel regimes, without any privileged status being accorded to U.N. Charter obligations or UNSC measures within E.C. law.”<sup>118</sup>

To be sure the ECJ’s decision blocked E.U. member states from implementing the Security Council’s resolution requiring them to freeze the assets of persons or entities on the Council’s list and thereby to be in violation of their duties under the U.N. Charter, but this impediment lasted only the approximately three months it took the Commission of the European Communities to afford Kadi and Al Barakaat the opportunity to present their defense, as required by the ECJ’s decision. After they had done so, the Commission found their defense unconvincing, and the regulation it issued resulted in their being placed on the E.C.’s list of persons and entities whose assets would be frozen pursuant to the Security Council’s resolution.

Pressure continues to be brought against the Security Council to induce it to create a procedure to protect the due process rights of individuals and entities whose assets may be frozen because of a determination by the Security Council that they are supporters of al-Qaeda and the Taliban. For example, on December 29, 2008, a majority of the Human Rights Committee, in response to a communication submitted to the committee under the Optional Protocol to the International Covenant on Civil and Political Rights, expressed its view that Belgium had violated several articles of the Covenant.<sup>119</sup> Prior to its consideration of the merits of the claims made in the communication, the committee ruled that the communication was admissible.<sup>120</sup> Adopting a position reminiscent of that of the European Court of

Justice in the *Kadi* decision, a majority of the Human Rights Committee acknowledged that “the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism.” But “the Committee was competent to admit a communication alleging that a State party had violated the rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party.”<sup>121</sup>

As to the merits of the communication’s claims, a majority of the committee found that Belgium had violated Article 12 of the Covenant, which protects the right to travel freely.<sup>122</sup> Belgium had frozen the assets of the authors of the communication after their names were placed on the Consolidated List of the United Nations Sanctions Committee. The placement of the authors’ names on the sanctions list prevented them from traveling freely. Although recognizing that Article 12 of the Covenant permits the restriction of the right to travel on national security grounds, the Human Rights Committee noted that Belgium had first transmitted the authors’ names to the Sanctions Committee, and this took place before the authors could be heard. Also, the Human Rights Committee took note that a criminal investigation initiated against the authors by the Public Prosecutor’s Offices was dismissed and that the Belgian authorities’ request that the authors’ names be removed from the Sanctions Committee’s list showed that the restrictions on the authors’ rights to leave the country were unnecessary to protect national security or public order.

Article 17 of the Covenant recognizes the right of everyone to protection against arbitrary or unlawful interference with privacy, family, home, or correspondence, and against unlawful attacks on honor and reputation. The Human Rights Committee accepted the authors’ arguments that their full contact details had been made available to everyone through their inclusion on the Sanctions Committee’s list and the availability of the list on the Internet. Even though Belgium was not competent to remove the authors’ names from the United Nations and European lists, it was responsible for the presence of the authors’ names on those lists. Accordingly, in the Human Rights Committee’s view, Belgium had violated Article 17 of the Covenant.

Lastly, under Article 2, paragraph 3(a) of the Covenant, Belgium was bound to provide the authors with an effective remedy. Again recognizing that Belgium was not itself competent to remove the authors’ names from the Sanctions Committee’s list, the Human Rights Committee was “nevertheless of the view that the State Party has the duty to do all it can to have their names removed from the list as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal. The State Party is also obliged to ensure that similar violations do not occur in the future.”<sup>123</sup> The committee requested Belgium to provide it, within 180 days, with information about the measures taken “to give effect to the present Views. The State party is also invited to publish the present Views.”<sup>124</sup>

In an individual dissenting opinion, Ruth Wedgwood expressed her view that the Human Rights Committee should have ruled the communication of the authors inadmissible. In her view, the “authors are complaining about the actions and

decisions of the United Nations Security Council, not the acts of Belgium. Security Council resolutions have established administrative measures to prevent the financing and facilitation of international terrorism. These sanctions extend to ‘any individuals, groups, undertakings or entities associated with Al-Qaida, Usama bin Laden or the Taliban,’ including those ‘who have participated in financing, planning, facilitating, recruiting for, preparing, perpetrating, or otherwise supporting terrorist activities or acts.’<sup>125</sup> Under Articles 48 (2) and 25 of the U.N. Charter, Belgium was obligated to carry out these Security Council decisions.

Despite the impediments to its efforts to ensure that assets of individuals or entities whose names are on the Sanctions Committee’s list are frozen represented by the *Kadi* decision and the views of the Human Rights Committee, as well as the increasing criticism of the Sanctions Committee’s failure to provide those whose assets are frozen an opportunity to defend themselves, at this writing, the Security Council has not yet adopted procedures that provide meaningful protection for those whose names appear on the Sanctions Committee’s list beyond initially a “humanitarian exception” to allow targeted individuals to keep the funds necessary for their basic living expenses.<sup>126</sup> The Security Council did introduce a “delisting” procedure that allows targeted individuals and entities to submit a request for delisting to the Sanctions Committee, either through their states of residence or citizenship or through a “U.N. focal point” in the U.N. Secretariat.<sup>127</sup> The delisting procedure still leaves the decision whether to delist in the hands of the Sanctions Committee, and has led to greater efforts to establish a more meaningful review system, such as a review panel within the Security Council itself.<sup>128</sup>

Whatever form a more “meaningful” review system may take, either of the initial decision to place names on the Sanctions Committee’s list, or to delist them, it is unlikely it will involve a court in the process, especially in light of the view of powerful member states of the Security Council, such as the United States, that the process is an essentially administrative procedure not requiring the kinds of due process protection afforded in criminal cases. Also, the International Court of Justice does not have jurisdiction over nonstate claims, and, as we have seen in Chapter 2, has become a highly controversial institution. It appears that a review panel within the Security Council is about as far-reaching a proposal as one could expect to have any realistic chance of adoption.<sup>129</sup>

Most recently, the Committee has indicated that it will vet all 513 names currently on its sanctions list for al-Qaeda and the Taliban by June 2010.<sup>130</sup> Reportedly, the committee also hopes to devise a process for people and entities to directly challenge inclusion on the list, which has been the subject of complaints and about thirty court cases.<sup>131</sup>

At this writing (December 24, 2009), the Security Council has devised such a procedure. Specifically, on December 17, 2009, the Council adopted a resolution<sup>132</sup> that, as reported by the *New York Times*, will “provide some recourse for individuals or organizations who believe they were unfairly blacklisted after being accused of supporting Al Qaeda or the Taliban.”<sup>133</sup> To this end, the resolution creates an

“ombudsperson” to hear complaints from those who believe they have been singled out erroneously.<sup>134</sup> The resolution does not, however, empower the ombudsperson to recommend whether a name should remain on the list or not. Reportedly, “[s]everal Security Council members – including France, China and Russia – felt that giving individuals the right to even raise questions about a council decision was radical enough. Allowing the ombudsman to make recommendations would be going a step too far in setting a precedent for second-guessing the Council’s decisions, according to diplomats and others familiar with the negotiations.”<sup>135</sup> It remains to be seen whether the limited powers of the ombudsperson will be sufficient to satisfy judges that persons or organizations challenging their inclusion on the list have received sufficient due process.

#### THE HIGH COMMISSIONER FOR HUMAN RIGHTS

The time would seem propitious to examine the record of the post of the High Commissioner for Human Rights, with the announcement on March 8, 2008, that Louise Arbour, an active and controversial High Commissioner, would retire and the appointment on July 24, 2008, of Navanethem Pillay, a South African judge, to replace her.

As noted by Henry J. Steiner et al.,<sup>136</sup> for more than forty years, starting in 1947, various proposals had been advanced to create the post of U.N. High Commissioner for Human Rights. The reasons such proposals got nowhere for so long were compelling: “The Soviet Union and its allies were strongly opposed, most developing countries were very wary, and the West was most enthusiastic when it was clear that the proposal was unlikely to be taken up.”<sup>137</sup> Equally compelling were the factors that resulted in the Vienna World Conference in 1993 approving of such a proposal. They included “the demise of the Socialist bloc and associated post-Cold War optimism, the election of the Clinton Administration in the U.S. which was keen to find new ideas in the human rights area, and, curiously, the opposition of the then U.N. Secretary-General, Boutros Boutros-Ghali which reassured nervous governments that any appointee would be kept under a tight rein.”<sup>138</sup>

Judge Pillay is the sixth High Commissioner appointed.<sup>139</sup> It is generally agreed that Mary Robinson and Louise Arbour have been the most dynamic.<sup>140</sup> Each was also controversial, and some of the reasons they were controversial are explored in the following.

#### *Mary Robinson*

Mary Robinson was appointed in 1997 as the second High Commissioner. A former president of Ireland and a human rights activist, her tenure contrasted sharply with that of the first occupant of the office, José Ayala Lasso, who was sharply criticized for failing to take forceful action.<sup>141</sup> No such criticisms were made of Mary Robinson. To the contrary, her appointment was widely praised by human rights NGOs,

especially when she promised to “stand up to bullies” and to be a “moral voice” favoring human rights and aiming to “narrow the gap” between civil and political rights, on the one hand, and economic and social rights on the other.<sup>142</sup> Indeed, when asked to identify the most serious form of human rights violations in the world, she consistently replied, “extreme poverty.”<sup>143</sup> She also pressed to see that trafficking in persons would be addressed as a human rights issue. Early in her tenure she condemned the governments of Algeria and the Democratic Republic of the Congo for human rights abuses.

Initially, the United States was enthusiastic about Robinson’s appointment. U.S. President Bill Clinton called Robinson a “splendid choice” and offered her the full support of his administration.<sup>144</sup> The honeymoon period was brief, however, and Robinson’s relationship with the United States soon took a turn for the worse. Reportedly, Robinson’s conflicts with the United States were primarily in three areas: (i) her views on the Israel-Palestine conflict; (ii) her defense of and the allegedly detached way in which she presided over the Durban “World Conference against Racism”; and (iii) her criticism of U.S. conduct in its war against terror, especially her condemnation of U.S. treatment of prisoners in Camp X-Ray at Guantanamo Bay.<sup>145</sup>

Also, throughout her tenure Robinson was one of the most prominent critics of U.S. administration of the death penalty, and critical comments she made about the U.S. “unsigned” of the ICC Statute, as well as her refusal to consider reforms of the U.N. Human Rights Commission’s election process, exacerbated tensions with the Bush administration.

The World Conference against Racism and Robinson’s role in it have been the subjects that have engendered the sharpest criticism of Robinson’s tenure, criticism that has not been limited to that from the Bush administration. It was held in Durban, South Africa, on August 31–September 9, 2001, concluding two days prior to the fateful al-Qaeda attack on September 11.<sup>146</sup> Although the U.S. government had originally planned to have Secretary of State Colin Powell participate in the conference, in the end it withdrew from the conference because allegedly it was unable to prevent the conference from turning into an “anti-American, anti-Israeli circus.”<sup>147</sup>

According to Tom Lantos, a Democratic congressman from California and member of the House International Relations Committee, who participated as part of the U.S. delegation to the conference, the initial plans for the conference were promising, in significant part because Mary Robinson:

developed a clear vision to unify and energize the global dialogue on race in the years leading up to the convening of the conference. Her vision focused on bringing the world together to overcome fear – fear of what is different, fear of the other, and fear of the loss of personal security. In her public statements, Robinson made a compelling case that racism and xenophobia are on the rise by tying its current manifestations to growing economic and social dislocations caused by globalization. As a way to move forward, she repeatedly challenged the international community to shift its focus away from viewing diversity as a limiting factor and to



discern the potential for mutual enrichment in diversity. She hoped the conference would not only serve as a catharsis for victims' groups to relieve their grievances but could also initiate a lasting dialogue between civil societies and governments focused on finding solutions to overcome hate. Robinson's public pronouncements prior to the conference also reflected an understanding that no nation is free of racism, and that all share responsibility for eradicating this pervasive and universal evil.<sup>148</sup>

In 1999, the General Assembly's Third Committee, which covers social, humanitarian, and cultural issues, decided that the conference would be held in Durban, South Africa, in 2001, and should be preceded by regional meetings in Strasbourg, France; Santiago, Chile; Dakar, Senegal; and Tehran, Iran. Each regional meeting was to draft a declaration and plan of action on racism that would ultimately be combined into a single set of documents to be ratified in Durban. According to Lantos, "[d]evelopments at the first three regional meetings suggested that Robinson's best hopes for the Durban conference were possible" and "[t]he documents that emerged from them attempted to tackle a range of vexing issues from the legacy of slavery to the need to confront the global resurgence of anti-Semitism."<sup>149</sup> These favorable developments, however, came to an abrupt end in Tehran, where, in Lantos's view, so did Robinson's effectiveness as a manager. Lantos was especially critical of Robinson's alleged failure to take forceful action in Tehran when the Iranian government barred Israeli passport holders and Jewish nongovernmental organizations, as well as Australia and New Zealand, two strong supporters of Israel, from attending. Moreover, the declaration and plan of action agreed to by the delegates to the Tehran meeting "amounted to what only could be seen as a declaration by the states present of their intention to use the conference as a propaganda weapon attacking Israel. Indeed, the documents not only singled the country out above all others – despite the well-known problems with racism, xenophobia, and discrimination that exist all over the world – but also equated its policies in the West Bank with some of the most horrible racist policies of the previous century. Israel, the text stated, engages in 'ethnic cleansing of the Arab population of historic Palestine,' and is implementing a 'new kind of apartheid, a crime against humanity.' It also purported to witness an 'increase of racist practices of Zionism' and condemned racism 'in various parts of the world, as well as the emergence of racist and violent movements based on racist and discriminatory ideas, in particular, the Zionist movement, which is based on race superiority."<sup>150</sup>

At the end of the Tehran meeting, according to Lantos, "Robinson made no visible effort to confront the breakdown that had occurred in the global dialogue that she had done so much to nurture."<sup>151</sup>

Despite considerable efforts, especially by the U.S. delegation, after the Tehran meeting to overcome this breakdown, these efforts were unsuccessful. As a result Secretary Powell decided to withdraw the U.S. delegation from the conference, which, according to Lantos, had become a "diplomatic farce."

After the United States departed from the conference, the European Union attempted to reach a compromise position. The “compromise, for which South Africa claimed authorship, removed some of the anti-Israeli language, but contained Mary Robinson’s longed-for language that recognized the ‘plight of the Palestinian people under occupation,’ language that clearly would have been unsatisfactory to the United States. Not only does the final document single out one regional conflict for discussion, it does so in a biased way: the suffering of the Palestinian people is highlighted, but there is no discussion of the Palestinian terrorist attacks on Israeli citizens.”<sup>152</sup>

It should be noted that Lantos does not assign sole or even primary blame for the breakdown in the Durban conference to Robinson. Primary blame he assigns to several member states of the Organization of the Islamic Conference (OIC), and he is critical as well of the Bush administration for its unilateral approach to world problems – although not, in this case, to the race issue – the radicalism of many foreign NGOs at the conference, the allegedly inadequate response thereto by U.S.-based NGOs, and the unwillingness of European allies to take a strong stand. Moreover, some commentators have come to Robinson’s defense and responded to Lantos’s criticisms, leveling a few of their own while defending the results of the conference.<sup>153</sup>

It is worth noting that, in addition to the issue of anti-Israel statements and anti-Semitism at the conference and in the conference’s documents, another emotional issue at the conference was whether there should be reparations paid to African states because of their suffering from slavery and colonialism. According to Lantos, however, substantial progress was being made toward a compromise on these issues in the form of language to express regret short of apology or reparations, such as “deep regret and profound remorse” when OIC (Organization of the Islamic Conference) delegates drafted a “nonpaper” for consideration by the conference that “was dripping with hate.” Lantos reportedly met twice with Robinson and urged her publicly to “denounce it in order to salvage the conference.” But “[i]nstead of insisting that it was inappropriate to discuss a specific political conflict in the context of a World Conference on Racism, she spoke of the ‘need to resolve protracted conflict and occupation, claims of inequality, violence and terrorism, and deteriorating situation on the ground.’”<sup>154</sup> In Lantos’s view, “Robinson’s intervention . . . represented the *coup d’grace* on efforts to save the conference from disaster”<sup>155</sup> and “negotiations on mutually acceptable language to express regret for slavery and colonialism quickly unraveled.”<sup>156</sup>

#### *Louise Arbour*

In addition to Mary Robinson, Louise Arbour has been the High Commissioner for Human Rights commonly described as both dynamic and controversial. A former Supreme Court judge in Canada, and previously the Chief Prosecutor of the

United Nations tribunals for war crimes in Yugoslavia and Rwanda, Ms. Arbour came into the office with impressive credentials and high expectations – a situation similar to that of Mary Robinson. Upon her resignation after four years as High Commissioner, Arbour received high praise from leading human rights NGOs like Amnesty International<sup>157</sup> and Human Rights Watch.<sup>158</sup> Specifically, she was given credit because “she sharpened the profile of the high commissioner’s office, not only by almost doubling its annual budget to nearly \$100 million and widening its presence in the field, but also by persistently raising her own voice.”<sup>159</sup>

To others, however, Arbour’s outspokenness and persistently raising her own voice were their primary bases for sharp criticism. The Bush administration, in particular, objected to her frequent complaints about its use of torture, secret arrests, and disregard of international law as part of its campaign against terrorism. Zimbabwe’s justice minister, Patrick Chinamasa, reportedly said that she had “turned her office into a ‘deified oracle which spews out edicts we all must follow.’” Some supporters of Israel reportedly called her “an idiot.”<sup>160</sup>

Ironically, Arbour herself reportedly did not regard naming and shaming as the High Commissioner’s most effective tool, and admitted that she often turned to quiet diplomacy. In her words, “On my travels, I can see presidents and prime ministers and foreign ministers. A lot of nongovernmental organizations don’t have this kind of access. But that calls for a different tone of interaction. There’s no point in screaming if you cannot compel anything.”<sup>161</sup>

At the same time, Arbour’s assertiveness reportedly has resulted in her being admitted to places like refugee camps and prisons, or being able to see political prisoners or rape victims, “to the discomfort of her official hosts.”<sup>162</sup> Assertiveness has its limits, however, as Arbour learned when North Korea and Myanmar refused to let her into their territories. In response to a request to visit Tibet, China told her it was not the right time. Sri Lanka, although allowing her to visit, refused her request to open a field office there, and Pakistan kept postponing her trip, finally offering a date three days before she was to leave office. She accepted and later admonished the country’s president, Pervez Musharraf, and other high-ranking officials about human rights issues, including disappearances and the lack of judicial independence.

Arbour was especially concerned about what she called “a very serious erosion” of safeguards against human rights abuses in the United States. Controversy over alleged U.S. human rights abuses in the “war on terror” apparently led the presidents or prime ministers of some countries, when questioned about their own human rights records, to respond, “Why aren’t you in Guantanamo? Why are you coming here?” Conversely, when she raised some human rights issues with a group of U.S. congressional aides, they complained, “Why aren’t you criticizing Myanmar instead of spending your time criticizing the United States?”<sup>163</sup>

Arbour also had some provocative comments to make about the Human Rights Council, which we examined in Chapter 2. She reportedly stated that “pure politics” often seemed to dominate the council’s proceedings. Although she welcomed

the Council's new policy of universal periodic review under which every U.N. member state's human rights record would be reviewed every four years, she complained about regular attempts in the Council to gain control of her office.<sup>164</sup> She noted further that the Council's work had often been paralyzed and distorted by regional groups, especially the Organization of the Islamic Conference and African regional groups in the United Nations, "which not only have focused overwhelmingly on Israel's treatment of Palestinians but also have blocked discussion of such topics as sexual identity, female genital cutting and so-called honor killings," topics that these regional groups wish to avoid because their record on them is poor.<sup>165</sup>

It appears clear that Arbour was as least as much an activist during her tenure as Mary Robinson was during hers. One commentator, based on a report by U.N. Watch issued in December 2008, declared that "Arbour criticized governments of all types during her tenure: both in free countries and in dictatorships, as well as everything in between."<sup>166</sup> At the same time she was accused of having "mistaken priorities," especially in the Middle East. According to the U.N. Watch report, "in 2007–2008 the High Commissioner 'published four strong criticisms of Israel; one moderate criticism of Egypt; four moderate criticisms of Iran; three strong criticisms of Iraq (which . . . could also be criticisms or considered criticisms of the U.S.); and one weak statement regarding Lebanon.' Not one of those criticisms was directed at Saudi Arabia, a country in which this very week a women was jailed for driving a car. Additionally, she did little or nothing to stop her own organization and the Human Rights Council's craven obsession with Israel."<sup>167</sup>

As indicated previously, there is little doubt that human rights NGOs greatly favor an activist for the High Commissioner position. There is substantial doubt, however, as to how effective an activist approach by the High Commissioner is in promoting human rights and in protecting potential victims of human rights abuses from injury. As noted by Felice D. Gaer of the Jacob Blaustein Institute for the Advancement of Human Rights:

The advantage of independence in human rights is the ability to point to wrongs as they occur – to "tell the truth" and thus to stigmatize unforgivable action and to demand its correction. That is what NGOs continually demand of public officials who work on "human rights." But in intergovernmental (and governmental) bodies, the key to effectiveness is, in general, to be able to change behavior and reach negotiated agreements, rather than to speak out and to pass judgment according to unbending standards.

One must therefore ask: although speaking out is usually prioritized as an ideal in the field of human rights, is it always, or even usually, the most effective course of action? We would benefit from a study of violations that the high commissioner or the secretary-general, using his good offices, has identified – either publicly or privately – to see what approach has, in fact, been most effective in improving human rights. . . .

Michael Ignatieff has reminded us that human rights is itself “a politics, one that must reconcile moral ends to concrete situations and must be prepared to make painful compromises not only between means and ends, but between ends themselves. Whether and how the high commissioners made such choices, and with what results, remains a key question that must be carefully examined in order to determine the effectiveness of different approaches to leadership in human rights. The results of such an examination would provide, in turn, a guide for the protection activities of future high commissioners.<sup>168</sup>

Sadly, the careful examination called for by Gaer remains to be taken. Moreover, as we have seen previously in this chapter and in previous chapters, the unexamined premise that an activist approach of speaking out is the ideal, largely prevails not only in the Office of the High Commissioner but also in the Human Rights Council and the Human Rights Committee, and, indeed, in most parts of the U.N. human rights infrastructure.

It is not surprising that human rights NGOs would favor an activist, “mobilization of shame” approach because this is their standard *modus operandi*, and they have often enjoyed considerable success in employing it. But as suggested by Felice Gaer, this approach may well not be the most effective in an intergovernmental context, and empirical comprehensive studies of this issue appear to be sorely lacking.

#### *Naventhem Pillay*

It is too early to tell whether Judge Pillay will follow the activist approach of Mary Robinson and Louise Labour. Unfortunately for Judge Pillay, the first major challenge she faced in her new position was acting as the Secretary-General of Durban II, otherwise known as the Geneva Conference, a follow-up conference to the discredited Durban conference, in such a way that Durban II would avoid the grave problems and unhappy outcome of Durban I. Long before she became the High Commissioner, others had made strenuous efforts to avoid a repeat of Durban I, including the removal of controversial statements about Israel in the draft document for the Geneva Conference; along with statements about what constitutes defamation of religion – a position strongly supported by Muslim states – and about compensation for slavery. But a reference in the draft document that endorsed the communiqué that emerged from Durban I resulted in the United States deciding to boycott the Geneva Conference, along with Germany, Italy, Poland, the Netherlands, New Zealand, and Australia. Canada and Israel announced months before the Geneva Conference that they would not attend.<sup>169</sup>

At the Geneva Conference itself, which began on April 20, 2009, the proceedings were severely disrupted when Mahmoud Ahmadinejad, the president of Iran, excoriated Israel as a “cruel and repressive racist regime,” at which point twenty-three diplomats from the European nations attending the conference walked out. The speech also drew a rare rebuke from U.N. Secretary-General Ban Ki-Moon, who

reportedly stated that “I have not experienced this kind of destructive proceedings in an assembly, in a conference, by any one member state.” For her part, Judge Pillay reportedly criticized Mr. Ahmadinejad for “grandstanding” from a United Nations dais and said his performance should not be an excuse to derail the important topic of the conference. After noting that the president’s remarks were outside the scope of the conference, she added that: “This is what I would have expected the president of Iran to come and tell us: how he is addressing racial intolerance in his country.”<sup>170</sup>

From this statement one can surmise that Judge Pillay will speak her mind, as did High Commissioners Mary Robinson and Louise Arbour, when the situation calls for it, as it surely did in Geneva. But perhaps conferences along the lines of the Geneva Conference should have hard and fast rules prohibiting criticism of individual countries in order to concentrate instead on cooperative efforts to eliminate or at least limit the problems they address. Continuation of the inflammatory statements characteristic of proceedings in the Human Rights Council or the General Assembly might be expected at a conference chaired by Libya and having Cuba and Iran as chairs but they serve only to undermine the goals of the conference. Indeed, remarks along the lines of those of the president of Iran should be sanctioned by expulsion of the country he represents from the conference. Moreover, because the tenor of President Ahmadinejad’s speech was in keeping with remarks he made in the past, he should not have been selected as a headline speaker of the conference.

We shall return to human rights in the United Nations in the concluding section of this chapter. But first we turn to the institution that has been regarded as the gold standard for human rights programs: the European Court of Human Rights and Fundamental Freedoms.

#### THE EUROPEAN COURT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The significance of the European Convention for the Protection of Human Rights and Fundamental Human Rights, which created the European Court of Human Rights and Fundamental Freedoms, has been aptly identified by Steiner, Alston, and Goodman as follows:

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed in 1950 and entered into force in 1953. The ECHR is of particular importance within the context of international human rights for several reasons: it was the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights systems; it has generated a more extensive jurisprudence than any other part of the international system; and it now applies to some 30% of the nations in the world . . .

The impetus for the adoption came from three factors. It was first a regional response to the atrocities committed in Europe during the Second World War and an affirmation of the belief that governments respecting human rights are less likely to wage war on their neighbors. Secondly, both the Council of Europe, which was set up in 1949 (and under whose auspices the Convention was adopted), and the European Union (previously the European Community or Communities, the first of which was established in 1952) were partly based on the assumption that the best way to ensure that Germany would be a force for peace, in partnership with France, the United Kingdom, and the other European states, was through regional integration and the institutionalization (sic) of common values. This strategy contrasted sharply with the punitive reparations-based approach embodied in the 1919 Versailles Treaty after the First World War.

Thus, the Preamble to the European Convention refers (perhaps somewhat optimistically at the time) to the “European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law” but this statement also points to the third major impetus towards a Convention – the desire to bring the non-Communist countries of the countries of Europe together within a common ideological framework and to consolidate their unity in the face of the communist threat. “Genuine democracy” (to which the Statute of the Council of Europe commits its members) or the “effective political democracy” to which the Preamble of the Convention refers, had to be clearly distinguishable from the “people’s democracy” which was promoted by the Soviet Union and its allies.<sup>171</sup>

Although, as might be expected, some decisions of the European Court have been sharply criticized, especially by losing state parties, on the whole the record of compliance with the court’s decisions has been quite extraordinary. Indeed, “[a]ccording to [Thomas] Buergenthal [a human rights expert now a judge on the International Court of Justice] the decisions of the European Court are routinely complied with by European governments. As a matter of fact, the system has been so effective in the last decade that the Court has for all practical purposes become Western Europe’s constitutional court.”<sup>172</sup>

More recently, however, this enviable record has come under serious strain. In particular, the Court has faced a dramatic increase in the number of individual applications to it. The main cause of this increase has been “the enlargement of the Council of Europe. It now has 46 member states, bringing to 800 million the total number of citizens with the right to make an application to the Court.” Despite reforms introduced to cope with this problem,<sup>173</sup> “the current Convention system cannot cope with this level of caseload. The number of applications which can be disposed of is far exceeded by the number of new applications made, resulting in a growing backlog of cases: by the end of 2003, some 65,000 applications were pending before the Court.”<sup>174</sup>

Among the new members of the Council of Europe contributing to the backlog of cases before the Court was the Russia Federation. The application of Russia to

join the Council of Europe posed serious problems for the Council. Mark Janis has nicely framed these problems:

On 28 February 1996, Russia acceded to the Statute of the Council of Europe, becoming the Council's thirty-ninth member. . . . Russia's accession followed an extensive debate within the Council of Europe about the suitability of the applicant for membership, and occurred despite an unfavourable Eminent Lawyers Report prepared at the request of the Bureau of the Parliamentary Assembly. The report concluded "that the legal order of the Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the statute of the Council and developed by the organs of the European Convention on Human Rights." As a condition of joining the Council of Europe, Russia has promised to ratify the Convention for the Protection of Human Rights within one year of its accession to the Statute of the Council. . . .

The decision in February 1996 to admit Russia to the Council of Europe is commonly viewed as a result of giving greater weight to political factors than legal criteria, a realistic judgment given the importance of integrating post-Communist Russia into the more democratic liberal realm of Western Europe.

No matter how politically rational the decision to admit Russia to the Council of Europe, it must be recognized that Russia's accession will result in two important and probably negative consequences for the "legality" of the Strasbourg human rights system. First, the participation of Russia increases the possibility that European human rights law will both be disobeyed and be seen to be flouted. . . .

[T]hree aspects of Russia's accession are particularly troubling for the future of compliance with Strasbourg law. First, at the present time, as the Eminent Lawyers Report makes clear, Russia falls short of the usual standard of the rule of law and the protection of human rights. Second, given Russia's lack of experience in promoting human rights at the level of municipal law, it is likely that a great many violations of European rights law will be committed there, and that they will not be remedied domestically. Third, the same political importance of Russia that has prompted the Council of Europe to accept its admittance will make it especially difficult for Strasbourg to force the Russian government to comply with adverse findings.

The other significant consequence for the system of European human rights law posed by Russia's accession is likely to be a new challenge to what, along with Hart, we can call Strasbourg's "internal point of view." Given the difficulties of Russia effectively complying with European human rights law in its municipal legal order and of Strasbourg imposing its decisions upon the Russian government, there will be a strong temptation for the Strasbourg institutions to fashion a two-tier legal order, which would allow lower than normal expectations for Russia. This will have the likely benefit of enabling Russia's continued participation in the system, but it will threaten the perception of Hart's "officials, lawyers or private persons" that Strasbourg law "in one situation after another [is a guide] to the conduct of social



life, as the basis for claims, demands, admissions, criticism or punishment. viz., in all the familiar transactions of life according to rules.”

These probable challenges resulting from Russia’s accession come at an awkward moment for Strasbourg. Not only is the ambit of European human rights law being widened to reach out to the former Soviet bloc, but the potency of Strasbourg law is being deepened by ever bolder Court judgments against national governments. This deepening, a welcome advance on international legal control, is proceeding just when the basic tenets of European unity are under increasing assault by nationalistic sentiments across Europe. . . . Hence, there is a danger that the failure of Russia to comply with European human rights law domestically and to obey the decisions of the Strasbourg institutions and the creation of a two-tier human rights system to accommodate Russia will give the governments of the existing member states all the more latitude in weakening their own commitment to the Strasbourg system. This all serves as a reminder that the “breakthrough” of Strasbourg law to genuine legal obligation may not be forever.<sup>175</sup>

Janis’s comments were written in 1997. Sadly, they apply with equal, if not greater, force today. The number of cases pending against the Russian Federation constitutes the largest percentage of cases pending before the court. As of January 1, 2008, the Russian percentage was 26 percent.<sup>176</sup> Moreover, in numerous judgments, the European Court has ruled against the Russian Federation, and many of these judgments remain unexecuted.<sup>177</sup>

One of the steps taken to mitigate the overload of the European Court caused by ever increasing numbers of case filings was the adoption of a new protocol, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as part of a comprehensive reform package by the Committee of Ministers of the European Council in May 2004. A report reviewing the working methods of the European Court of Human Rights summarized Protocol No. 14’s three main provisions:

It allows for a single judge, assisted by a nonjudicial rapporteur, to reject cases where they are clearly inadmissible from the outset. This replaces the current system where inadmissibility is decided by Committees of three judges, and will increase judicial capacity. Protocol 14 also provides for Committees of three judges to give judgments in repetitive cases where the case law of the Court is already well established. . . . Repetitive cases are currently heard by Chambers of seven judges, so this measure will also serve to increase efficiency and judicial capacity. Thirdly, Protocol 14 introduces a new admissibility criterion concerning cases where the applicant has not suffered a “significant disadvantage” provided that the case has already been duly considered by a domestic tribunal, and provided that there are no general human rights reasons why the application should be examined on its merits.<sup>178</sup>

The future of Protocol No. 14, however, is problematic. As noted by the authors of the recently published second edition of a leading U.S. casebook on human rights:

9. Protocol No. 14 will not enter into force until it has been ratified by all forty-seven High Contracting Parties. By 2006, all state parties had signed Protocol No. 14 and all but one – the Russian Federation – had ratified it. In December 2006, the Russian Parliament, the State Duma, refused to ratify the treaty. The chair of the Duma's Legislation Committee justified the rejection by pointing to the Protocol's single-judge screening procedures, which he claimed were inconsistent with collegial decisions of Russian domestic courts. The chair also stated that the protocol was "not in the interests of Russia." . . . According to some commentators, recent judgments upholding challenges to extrajudicial killings, disappearances, and other gross human violations by the Russian military in Chechnya have soured the relationship between the Russian government and the ECHR. In addition, "given that complaints against Russia now constitute by far the largest portion of the backlog of cases pending before the Court, the question is whether the Russian authorities are genuinely committed to facilitating the efficient determination of cases by the Court."

What actions should the Council of Europe and the others (sic) High Contracting Parties take in response to Russia's refusal to ratify Protocol No. 14? Is it realistic to expect Russia to ratify the protocol given the pronounced geographic disparities in the Court's case load? More generally, how should the Council of Europe respond if Russia consistently refuses to comply with the ECHR's judgments? Would "the protection of democracy, human rights and the rule of law. . . be better served in the long term by expelling Russia [from the Council] for such gross and flagrant violations, or by retaining it in spite of them."<sup>79</sup>

These questions pose in sharp relief the issues posed by Janis in 1997. Their resolution will require numerous "hard choices" to be made if the European Court of Human Rights is to continue the success it has enjoyed as the premier protector and promoter of human rights and fundamental freedoms in Europe.

#### SOME CONCLUDING OBSERVATIONS

The primary focus of this chapter has been on U.N. activities with respect to human rights, including human rights issues arising out of U.N. efforts to combat the financing of terrorism. To this observer, the United Nations achieves its greatest success when its goal is to assist member states that sincerely wish to improve their human rights records but need outside assistance in order to do so. In such cases, the work of the Human Rights Committee, for example, in examining the reports of the state parties to the International Covenant on Civil and Political Rights and interacting with representatives of the states presenting their reports may make a real contribution to the promotion of human rights. When it comes to dealing with states that regularly violate the rights of their citizens, as well as the citizens of other states, the United Nations has been less successful. Under such circumstances politics often interfere with effective action and generate considerably more heat than light.

The proceedings of the Human Rights Council and the breakdown of the Durban I and II conferences are salient examples.

The United Nations has been especially ineffective in dealing with the most egregious violations of human rights. In such cases, coercive action, including mandatory economic sanctions and perhaps armed force, may be required, but these are seldom employed. The continuing failures to prevent the atrocities in Darfur, Zimbabwe, or Myanmar are current prominent examples. The actions of human rights NGOs are more likely to be effective than those of U.N. human rights bodies in responding to the worst offenders.

The temptation to withdraw from United Nations human rights bodies, such as the Human Rights Council, can be substantial, but to give in to this temptation is, in my view, a mistake. The Obama administration is right to decide to run for membership in the Human Rights Council, even though the Council has many faults as we saw in Chapter 2. States of good will and a desire to protect and promote human rights should not give up the struggle to do so. This is especially true of the United States and other developed states that have the resources, in terms of financial and human capital, to make a difference.

Similarly, it would be a grave error, in my view, to expel Russia from the Council of Europe for its poor human rights record and its failure to abide by the judgments of the European Court of Human Rights. Here, too, the struggle should continue to convince Russia that the promotion of democracy, human rights, and the rule of law is in its own best interest. It is time to move away from the triumphalism that accompanied the collapse of the Soviet Union and toward exploring every possible avenue to improve cooperation between Russia and the West. A return to the days of the Cold War is in no one's interest.

#### Notes

1. A leading coursebook in the field, HENRY J. STEINER, PHILIP ALSTON, and RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* (3rd ed. 2008), comprises 1,462 pages.
2. See e.g., JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* (2007); DAVID COLE and JULES LOBEL, *LESS SAFE, LESS FREE* (2007); JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007); MICHAEL E. TIGAR, *THINKING ABOUT TERRORISM: THE THREAT TO CIVIL LIBERTIES IN TIMES OF NATIONAL EMERGENCY* (2007); JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006); DAVID COLE, *ENEMY ALIENS* (2003); DEBORAH N. PEARLSTEIN, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 *IND. L.J.* 1255 (2006). For a collection of essays debating both sides of the enemy combatant cases, see *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION* (Peter Berkowitz ed., 2005).
3. See JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 335–38 (2004).
4. See Article 1(3) of the U.N. Charter.
5. For an example of Dinstein's negative attitude toward the United Nations, see Yoram Dinstein, *Anti-Semitism, Anti-Zionism and the United Nations*, 17 *ISRAEL Y.B. HUM. RTS.* 15 (1987).

6. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002).
7. *Id.* at 1940.
8. Ryan Goodman and Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003).
9. *Id.* at 173.
10. Oona Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT'L L. 185 (2003).
11. See Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925 (2005).
12. *Id.* at 926.
13. Oona Hathaway, *supra* note 6, at 2023.
14. *Id.* at 2024.
15. Ryan Goodman and Derek Jinks, *supra* note 8, at 182.
16. Oona Hathaway, *supra* note 10, at 199.
17. Reservations to the Convention on Genocide, International Court of Justice, Advisory Opinion, 1951, 1951 ICJ 15.
18. As of May 6, 2009, the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "Convention on Genocide") had 140 state parties.
19. Article VIII of the Convention on Genocide provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."
20. Article IX of the Convention on Genocide provides: "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."
21. The U.S. reservation reads: "That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in every case."
22. On February 26, 2007, in Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), the Court held, by a vote of 13 to 2, that Serbia had not committed genocide in violation of its obligations under the Convention. By a vote of 12 to 3 the Court found that Serbia had nonetheless violated its obligation to prevent the Crime of Genocide pursuant to Article 1 of the Convention. For an Introductory note to the Judgment by Antoine Ollivier, see Antoine Ollivier, *The Judgment of the International Court of Justice in the "Genocide" Case Between Bosnia and Herzegovina v. Serbia and Montenegro*, 46 ILM 185 (2007). For the text of the Judgment, see 46 ILM 188 (2007). On November 18, 2008, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, the Court, by various votes, rejected the various objections of Serbia to the jurisdiction of the Court, which was based on Article IX of the Convention. A summary of the Court's judgment, prepared by the Court, can be found at [www.icj-cij.org](http://www.icj-cij.org).
23. See, e.g., the Human Rights Committee, established by Article 28 of the International Covenant on Civil and Political Rights, entered into force March 23, 1976, 999 U.N. T.S. 171. Under Article 40(1) state parties "undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights." Pursuant to paragraph 4 of Article 40, the Committee studies the reports submitted by the state parties and transmits these reports and "such

general comments as it may consider appropriate” to the state parties. The language of Article 40 does not spell out very clearly what powers the Committee has in dealing with state reports. But the current practice of the Committee is to adopt so-called Concluding Observations, consisting of an assessment of the state’s human rights situation in light of the information provided in the state’s report, the answers the Committee received to the questions posed by its members during the examination of the report, and information available from other sources, especially human rights NGOs. The Committee transmits its concluding observations to the state party concerned shortly after the hearing.

24. See, e.g., Article 41 of the International Covenant on Civil and Political Rights.
25. See, e.g., Article 41 (1) (e) of the International Covenant on Civil and Political Rights.
26. See, e.g., Article 42 of the International Covenant of Civil and Political Rights.
27. Article 14 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination.
28. Optional Protocol to the International Covenant on Civil and Political Rights, entered into force, Mar. 23, 1976, 999 U.N.T.S. 302. Article 1 of the Optional Protocol provides that: “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is a Party to the present Protocol.”
29. For discussion, see Natalia Schiffrin, *Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights*, 92 AM. J. INT’L L. 563 (1998). Parts of this article are excerpted in MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW* 384 (3rd ed. 2005), followed by notes and questions.
30. See HENRY STEINER et al., *supra* note 1, at 918. The eight U.N. treaty bodies are as follows:
  - ESCR Committee: Committee on Economic, Social and Cultural Rights (ICE-SCR);
  - CERD Committee: Committee on the Elimination of Racial Discrimination (International Convention on the Elimination of all Forms of Racial Discrimination);
  - CEDAW Committee: Committee on the Elimination of Discrimination Against Women (CEDAW Convention);
  - CAT Committee: Committee Against Torture (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment);
  - CRC Committee: Committee on the Rights of the Child (Convention on the Rights of the Child);
  - CMW Committee: Committee on the Protection of All Migrant Workers and Members of Their Families);
  - CRPD Committee: Committee on the Rights of Persons with Disabilities (Convention on the Rights of Persons with Disabilities);
  - CED Committee: Committee on Enforced Disappearances (International Convention for the Protection of All Persons from Enforced Disappearances).
31. *Id.* at 919.
32. See Oona Hathaway, *supra* note 6, at 2025.
33. See especially, Louis Henkin, *US Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 80 AM. J. INT’L L. 341 (1995).

34. See U.S. Department of State, Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights.
35. Concluding Observations of the Human Rights Committee: United States of America, paragraph 267, 53rd Sess. of Committee, U.N. Doc.CCPR?C/79/Add.50 (1995).
36. Article 6(5) of the Covenant provides: "Sentences 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." The U.S. reservation to this provision states 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 persons below eighteen years of age." Article 7 of the Covenant provides: "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." The U.S. reservation to Article 7 states: "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, Eight and/or Fourteenth Amendments to the Constitution of the United States."
37. Concluding Observations, *supra* note 35, para 279.
38. Prior to the United States becoming a party to the Covenant in 1992, the U.S. Supreme Court held that the execution of persons younger than sixteen at the time of their offenses was an unconstitutional violation of the Eighth Amendment to the Constitution, which prohibits cruel and unusual punishment. *Thompson v. Oklahoma*, 487 US 815 (1988). The very next year, however, the Court upheld the death penalty for defendants aged sixteen and seventeen against claims that their execution would violate the Eighth Amendment. *Stanford v. Kentucky*, 492 US 361 (1989). Finally, in *Roper v. Simmons*, 543 US 551 (2005), the Court held that executions of persons under eighteen violated the Eighth Amendment to the Constitution.
39. General Comment No 24, General Comment on Issues Relating to Reservations Made Upon Ratification or Accessions to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc, CCPR/C21/Rev.1/Add.6(1994). General Comment No. 24 may most conveniently be found in 15 HUM. RTS. L.J 422-464 (1994).
40. See *id.*, para 18, 15 HUM. RTS. L.J. at 467.
41. See Observations of the United States and the United Kingdom on General Comment No. 24 (52) relating to reservations, 16 HUM. RTS. L.J. at 423.
42. See General Comment No. 24, *supra* note 39, para 12, 15 HUM. RTS. L.J. at 466.
43. Observations of the United States and the United Kingdom, *supra* note 41, 16 HUM. RTS. L.J. at 423.
44. In pertinent part, Article 19 of the Vienna Convention on the Law of Treaties provides: "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty."
45. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 415 (2000).
46. See HENRY STEINER et al., *supra* note 1, at 1143-44.
47. Article 20 (4) (b) of the Vienna Convention provides: "An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by

- the objecting State.” Article 21 (3) of the Vienna Convention provides: “When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservations relates do not apply as between the two States to the extent of the reservation.”
48. The United States had been requested to submit its second report to the Committee on September 7, 1998, and its third report on September 7, 2003. The consolidated reports were examined by the Committee in a public session on July 17, 2006. See Christina M Cerna, *Introductory Note to the Concluding Observations of the Human Rights Committee with Regard to the Second and Third Report Submitted by the United States and the Comments of the US Government on these Concluding Observations*, 47 ILM 586 (2008).
  49. *Id.* at 587. The Concluding Observations of the Human Rights Committee may be most conveniently found at Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America*, 47 ILM 598 (2008).
  50. *Id.* The response of the United States may be most conveniently found at Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, United States of America, Addendum, United States Responses to Selected Recommendations of the Human Rights Committee*, Oct. 10, 2007, 47 ILM 589 (2008).
  51. Christina M. Cerna, *supra* note 48, at 587.
  52. *Id.* at 586. According to Christina Cerna, human rights activists sought to interest C-SPAN, National Public Radio, and PBS television in covering the hearing on the first report, but failed in their mission. *Id.* at 587, endnote 1.
  53. The Committee considered the fifth periodic report of the Russian Federation at its 2144th, 2145th, and 2146th meetings, held on October 24 and 25, 2003. See Human Rights Committee, *Concluding Observations of the Human Rights Committee: Russian Federation*. 06/11/2003. CCPR/79/RUS. (Concluding Observations/Comments).
  54. *Id.* at 2. The two cases were *Griden v. Russian Federation* and *Lantsov v. Russian Federation*.
  55. *Id.*
  56. *Id.* at 3.
  57. *Id.* at 5.
  58. Country Reports on Human Rights Practices for 2006, Vol. I, Report submitted to the Committee on Foreign Relations U.S. Senate and the Committee on Foreign Affairs, U.S. House of Representatives, by the Department of State, April 2008, at 1641.
  59. Amnesty International Report 2008, at 247.
  60. Freedom in the World 2008, the Annual Survey of Political Rights & Civil Liberties, Freedom House, at 583.
  61. *Id.*
  62. Amnesty International Report, *supra* note 59, at 247–48.
  63. Country Reports on Human Rights Practices for 2006, *supra* note 58, at 1641–42.
  64. It worth noting that, in 2007, Hathaway published an article as a follow-up to her *Yale Law Journal* article. In this article, which examines the practices of more than 160 countries over several decades, she finds that, because domestic institutions are so central to treaty enforcement, states with robust domestic rule of law might shy away from committing to international treaties precisely because treaty commitments will be effective. Thus, the very factors that lead countries to comply with treaties can cause those same states not to commit.
  65. See Oona Hathaway, *supra* note 6, at 2024.

66. *Id.*
67. *Id.*
68. *Id.*
69. Article 5 provides: "A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council."
70. Hans Corell, then Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, noted in 1996 that the Secretary-General of the United Nations had recognized the need for an international convention dealing with terrorist fundraising. See Hans Corell, *Possibilities and Limitations of International Sanctions Against Terrorism*, in COUNTERING TERRORISM THROUGH INTERNATIONAL COOPERATION 243, 253 (Alex P. Schmidt ed., 2001).
71. International Convention for the Suppression of the Financing of Terrorism, 2179 UNTS 232, entered into force on April 10, 1992.
72. For discussion of civil suits in U.S. courts against terrorists and the sponsors of terrorism, see John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 TEX. REV. LITIG. 315 (2009).
73. S.C. Res. 1373, UN SCOR, 56th Sess. UN Doc. S/1373 (2001).
74. See Ilias Bantekas, *Current Developments: The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 326 (2003).
75. *Id.* at 326.
76. S.C. Res 1373, *supra* note 73, para 8.
77. See Eric Rosand, *Security Council Resolution 1373, The Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM.J. INT'L L. 333, 335 (2003).
78. *Id.* at 335.
79. *Id.* at 340.
80. *Id.*
81. See S.C. Res 1535 (March 26, 2004).
82. See Counter-Terrorism Committee, *Human Rights*, Jan. 30, 2009, <http://www.un.org/sc/ctc/rights.html>.
83. S.C. Res. 1624 (Sept. 14, 2005).
84. Counter-Terrorism Committee, *supra* note 82.
85. S.C. Res. 1805 (March 20, 2008).
86. Counter-Terrorism Committee, *supra* note 82, at 2.
87. S.C. Res. 1214 (Dec. 8, 1998).
88. See Eric Rosand, Alistair Millar, and Jason IPE, *Human Rights and the Implementation of the UN Global Counter-Terrorism Strategy: Hopes and Challenges* 4-5 (Jan. 2008).
89. *Id.* at 5.
90. *Id.*
91. U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council: Report of the United Nations High Commissioner for Human Rights in the Protection of Human Rights on the Protection of Human Rights and Fundamental Rights While Countering Terrorism,"* A/ HRC/L4/ 88, March 9, 2007, quoted in *Id.*
92. Committee on Legal Affairs and Human Rights, Council of Europe, "Provisional Draft Report on U.N. Security Council and European Union Blacklists," November 12, 2007, para 4, <http://assembly.coe.int/ASP/APFfeaturesManager/defaultArtSiteView.asp?ID=717>, quoted in *Id.*



93. Eric Rosand et al., *supra* note 88, at 5.
94. For information regarding the role of the Focal Point for De-Listing, see <http://www.un.org/sc/committees/dfp.shtml>; Security Council Resolution 1730, annex.
95. See Stefan Barriga, statement at the Open Debate of the Security Council: Briefings by the Chairpersons of the Counter-Terrorism Committee, 1267 Committee, 1540 Committee, May 27, 2007, <http://www.liechtenstein.li/pdf-fl-aussenstelle-newyork-dokumenteterrorismsecuritycouncil-delisting-2007-22.pdf>.
96. Eric Rosand et al., *supra* note 88, at 6.
97. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, Judgement of the Court of Justice in Joined Cases C-40205 P and C-40205 P; for the full text of the judgment, see <http://curia.europa.eu/juris/cgi-bin/gettext.pl?where=&lang=en&lang=en&nu>
98. See the Consolidated List, available at <http://www.un.org/sc/committees/1267/consolist.shtml>.
99. For an excellent summary of these proceedings, see Dr. Misa Zgonec-Rozeij, *Kadi & Al Barakaat v. Council of the EU & EC Commission: European Court of Justice Quashes a Council of the EU Regulation Implementing UN Security Council Resolutions*, ASIL INSIGHTS, Oct. 28, 2008, Vol. 12, Issue 22, <http://www.asil.org/insights081028.cfm>.
100. OJ 2002 C 56, at 16; OJ 2002 C 191, at 26.
101. Judgments of the CFI of September 21, 2005, in Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the EU and Commission of the EC (Al Barakaat CFI Judgement), Case T-306/01, and Yassin Abdullah Kadi v. Council of the EU and the Commission of the EC (Kadi CFI Judgement), Case T-315/01 (OJ 2005 C 281, at 17).
102. Article 103 of the U.N. Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
103. ECJ Judgment, *supra* note 1, at para. 326.
104. *Id.*, para 316.
105. *Id.*, para 286.
106. *Id.*, para 287.
107. *Id.*, para 288.
108. *Id.*, para 334.
109. *Id.*, para 349.
110. *Id.*, para 366.
111. *Id.*, paras 368–69.
112. *Id.*, para 370.
113. See Commission Regulation (EC) No 1190/2008 of 28 November 2008, amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the al-Qaeda network and the Taliban, Official Journal of the European Union, L 322/25., paras (6) and (7).
114. *Id.* Article 2. Professor Grainne de Burca has suggested that: "It seems that the Security Council on October 21, 2008, provided the E.U. presidency, on an 'exceptional' basis, with some information on Kadi and A-Barakaat, which was relied on by the Commission to justify Regulation 1190/2008." See Grainne de Burca, *The EU, The European Court of Justice and the International Legal Order after Kadi*, Fordham Law Legal Studies

- Research Paper No. 1321313, to be published in the *Harvard International Law Journal*, Vol. 1, No. 51, 2009.
115. For an extensive listing of commentary on the Kadi decision, as well as a probing analysis of its implications for international law and international institutions, *see Id.*
  116. Jack Goldsmith and Eric Posner, *Does Europe Believe in International Law?* WALL ST. J., Nov. 25, 2008, at A.15.
  117. *Id.* For similar arguments challenging the assertion that the European and American approaches to international law are so different from one another, *see* Robert J. Delahunty, *The Battle of Mars and Venus: Why do American and European Attitudes to International Law Differ?*, St. Thomas Law School Working Paper Series No 1744 (2006), <http://law.bepress.com/cgi/viewcontent.cgi?req=8181&context=expresso>.
  118. *See* Grainne de Burca, *supra* note 114, at 52.
  119. *See* International Covenant on Civil and Political Rights, Human Rights Committee, VIEWS, Communication N. 1472/2006, 29 December 2008.
  120. *Id.*, para 7.2.
  121. *Id.*
  122. Article 12 provides:
    1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement 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.
  123. *See* Human Rights Committee, International Covenant on Civil and Political Rights, VIEWS, Communication No. 1472/ 2006, 29 December 2008, para 12.
  124. *Id.*, para 13.
  125. *See* Individual Opinion(dissenting) of Ms. Ruth Wedgwood, *Id.*, Individual Opinions on the Committee's Decision on Admissibility, at 29.
  126. *See* S.C. Res. 1452 (Dec. 20, 2002).
  127. *See* S.C. Res. 1730 (Dec. 19, 2009) and S.C. Res. 1735 (Dec. 22, 2006).
  128. *See* Eric Rosand et al., *supra* note 88, at 6.
  129. Reportedly, Denmark, Liechtenstein, Sweden, and Switzerland are the U.N. member states pushing the hardest for a review panel within the Security Council. *Id.*
  130. *See* Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, Open briefing on 1 July 2009, <http://www.un.org/sc/committees/1267/latest.shtml>.
  131. *See* Neil MacFarquhar, *Security Council Panel to Vet All Entries on Terrorism List*, N.Y. TIMES, July 15, 2009, at A9, col. 3.
  132. S.C. Res. 1904 (Dec. 17, 2009).
  133. *See* Neil MacFarguhar, *U.N. Measure Offers Recourse to Blacklisted*, NY TIMES, Dec. 18, 2009, at A18, col. 1.
  134. S.C. Res. 1904, *supra* note 132, operative paras 20–28.
  135. Neil MacFarguhar, *supra* note 133.
  136. *See* HENRY J. STEINER et al., *supra* note 1, at 874.
  137. *Id.*
  138. *Id.*

139. The High Commissioners, in the order of their appearance and the years they served, are (1) José Ayala-Lasso (Ecuador) 1994–1997, (2) Mary Robinson (Ireland) 1997–2002, (3) Sergio Viera de Mello (Brazil) 2002–2003, (4) B.G. Ramcharan, acting-HC (Guyana) 2003–2004, (5) Louise Arbour (Canada) 2004–2008, (6) Navanethem Pillay (South Africa) 2008–present.
140. It should be noted that Sergio Viera de Mello was a highly regarded international civil servant who was expected to be an excellent High Commissioner, but tragically died in Iraq as a result of a bombing of the U.N. headquarters there.
141. See, e.g., ARYEH NEUER, *WAR CRIMES, BRUTALITY, GENOCIDE, TERROR, and the STRUGGLE for JUSTICE* 232–24 (1998).
142. Felice D. Gaer, *Book Review: The United Nations High Commissioner for Human Rights: The Challenges of International Protection*, by Bertrand G. Ramcharan, 98 AM. J. INT'L L. 391 (2004).
143. UNITED NATIONS DEVELOPMENT PROGRAMME, *POVERTY REDUCTION and HUMAN RIGHTS: A PRACTICE NOTE iv* (2003), quoted and cited in RALPH G. STEINHARDT, PAUL L. HOFFMAN, and CHRISTOPHER N. CAMPOVO, *INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES and MATERIALS* 1285–86 (2009).
144. Kareem Fahim, *The Education of Mary Robinson*, VILLAGE VOICE, <http://www.villagevoice.com/issues/0517/fahim.php>.
145. Ian Williams, *Mary Robinson Interview*, SALON MAGAZINE, <http://www.salon.com/people/interview/2002/0726maryrobinson>.
146. A considerable part of this discussion of the Durban Conference is drawn from JOHN F. MURPHY, *supra* note 3, at 327–28.
147. Tom Lantos, *The Durban Debacle: An Insider's View of the UN World Conference Against Racism*, 26 FLETCHER FORUM WORLD AFF. 32 ((2002).
148. *Id.* at 33.
149. *Id.* at 34.
150. *Id.* at 36
151. *Id.*
152. *Id.* at 48.
153. See especially, Gay McDougall, *The World Conference Against Racism: Through a Wider Lens*, 26 FLETCHER F. WORLD AFF. 135 (2002).
154. Tom Lantos, *supra* note 147, at 42–43.
155. *Id.* at 44.
156. *Id.*
157. Amnesty International reportedly said that Arbour had been “a champion for human rights and that replacing her would not be easy.” See Marlise Simon, *Departing Rights Official Raised Volume on Issues*, N.Y. TIMES, July 6, 2008, at A 13.
158. Kenneth Roth, executive director of Human Rights Watch, reportedly said that “Ms. Arbour had been principled and outspoken . . . and that “[our] hope is that the next commissioner not be excessively inclined to practice quiet diplomacy when outspokenness is called for.” *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. See Steven Edwards, *Arbour to Quit UN Job; Rights Commissioner Frustrated by Politicking*, THE GAZETTE (Montreal), Feb. 28, 2008, at A13. According to this article, Algeria,

China, and Cuba led an effort to gain as much control as possible over who's hired and the work they do. "It is part of a wider campaign that has seen them structure the council's rule so that only Israel can easily be singled out for criticism when the body – of which Canada is a member – meets. Arab and Muslim countries lobbied for Israel to be made the exception."

165. *Id.*
166. See Pablo Brum, *An Evaluation of the United Nations High Commissioner for Human Rights*, [http://www.Cadal.org/includes/printable.asp?id\\_nota=2457](http://www.Cadal.org/includes/printable.asp?id_nota=2457).
167. *Id.*
168. Felice Gaer, *supra* note 138, at 391, 395.
169. See Neil MacFarquhar, *Iranian Calls Israel Racist At Meeting in Geneva*, N.Y. TIMES, Apr. 21, 2009, at A 4.
170. *Id.*
171. HENRY STEINER et al., *supra* note 1, at 933–34.
172. See Dinah Shelton, *The Promise of Regional Human Rights Systems and in THE FUTURE of INTERNATIONAL HUMAN RIGHTS* 365–66, 369–70, 373, 377, 390–91, 393, 396 (Burns Weston & Stephen Marks eds., 2000), reproduced in part in RICHARD B. LILLICH, HURST HANNUM, S. JAMES ANAYA, & DINAH L. SHELTON, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS of LAW, POLICY, and PRACTICE* 619, 624 (2006).
173. For an overview of some of these steps, see LOUIS HENKIN et al., *HUMAN RIGHTS* 657–70 (2nd ed. 2009).
174. See paragraph 10 of Joint Committee on Human Rights of the House of Lords and the House of Commons, Protocol No. 14 to the European Convention on Human Rights, First Report of Session 2004–05 (December 2004). As of January 1, 2008, there were nearly 80,000 pending applications. Registry of the European Court of Human Rights, Survey of activities, 2007 at 3 (2008).
175. See Mark Janis, *Russia and the "Legality" of Strasbourg Law*, 8 EUR. J. INT'L L. 93 (1997), reproduced in MARK JANIS, RICHARD S. KAY, and ANTHONY W. BRADLEY, *EUROPEAN HUMAN RIGHTS LAW* 109–11 (3rd ed. 2008).
176. Registry of the European Court of Human Rights, Survey of Activities, 2007, at 3, 54 (2008).
177. See Interim Resolution CM/ResDH (2009) 43, Execution of the judgements of the European Court of Human Rights in 145 cases against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy, adopted by the Committee of Ministers of the Council of Europe on March 19, 2009.
178. See the Right Honorable the Lord Wolf, Review of the Working Methods of the European Court of Human Rights 12 (Dec. 2005), <http://echr.coe.int/ECHR/Resources/Home/LORDWOOLFREVIEWONWORKINGMETHODS.PDF>.
179. See LOUIS HENKIN et al., *supra* note 173, at 670.