

respect to the homeless. There is a right to housing, and the plight of the homeless is becoming one of the great disgraces in the United States today.

We often forget that the basic question on human rights is how we can help people most effectively whose human rights have been violated or are under threat. That will always be the big question. It leads to a question of priorities. One priority is that we try to learn from civil liberties and civil rights fights in this and other countries. There is as yet a dearth of pertinent discussion of that history. We still think it is great to go to the Supreme Court. Yet, have we ended segregation in schools? Indeed not. Have we significantly affected it? Maybe. It was not enough to get *Brown v. Board of Education*. We had to seek legislation, and we must get busy with legislatures again.

In this country the story of international human rights progress has been mostly a congressional history. It began with the statutes of 1974-76. There would not have been any Carter human rights policy without those statutes. A few Congressmen were almost geniuses in the field, notably Don Fraser.

I will not spend additional time on torts, because so much remains to be done with regard to use in courts of international law on more significant matters, such as those concerning conventional and nuclear warfare. We ought to raise that question in courts again even though it was not done very successfully during the Vietnam years. There still is a role for the adversary system. If you want a model, a young colleague and I have filed a brief in the *Greenham Commons* case raising this point: regarding crimes against humanity that are threatened, are judges accomplices? (I wish that could have been the title of today's discussion. If you want the answer, you must read quite a bit about crimes against humanity.) It was not discussed much during Vietnam. For example, it was not discussed in Telford Taylor's book.

I hope that fairly soon we can have a rerun of *Judgment at Nuremberg*. We might get it established that crimes against humanity are wrong, and that judges ought to say so. If they do not, we may have movies called *Judgment in Washington*.

REMARKS BY W. MICHAEL REISMAN*

Rather than criticizing the diverse judgments in *Tel-Oren*, I will concentrate on the lessons that may be learned from the case so that implementation of human rights can be enhanced. It has been difficult to establish human rights norms and even more difficult to create institutions for implementing them, for, to put it bluntly, effective institutions would not serve the interests of all of those currently managing the affairs of states. In some states, there is a strong popular demand for human rights, and it is reflected to a large degree in the behavior of government. In other states there is no such popular demand. In a distressingly large number of states, official power is maintained by the systematic abuse of what we refer to as human rights. A significant segment of the effective elites of the planet are not only not committed to human rights; they are positively threatened by them. Unfortunately, in the intricacies of contemporary international politics, relatively good governments believe they must sometimes rely upon and curry favor with unsavory ones. The international political costs of denouncing human rights violations become prohibitive, and they are criticized "discreetly" and "diplomatically" or ignored.

Those committed to extending and implementing fundamental human rights proclaimed in key international documents thus face two related problems. While the norms are universal in aspiration and, in a verbal sense, in reach, they are far from

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universal in support they can expect from national elites. Related to this melancholy fact is the reluctance or resistance of many of these same elites to establish effective institutions for implementing and policing international human rights. Witness the pattern of states whose leaders will sign any human rights document as long as there is no implementation system.

Despite these obstacles, a conjunction of circumstances has led to the proclamation of a rather comprehensive code of international human rights. Great effort has gone into creation of specialized human rights agencies. But precisely because of elite ambivalence or resistance, most of these institutions have been marked by ineffectiveness. The special challenge to the international human rights lawyer has been to find an existing set of institutions to which private individuals, not affiliated with the state apparatus, may have access, which may be enlisted to implement recognized international norms.

In the United States, human rights lawyers have sought to enlist domestic courts as functional international human rights enforcers for many reasons. These courts are in continuous operation and they are effective, in the sense that they are coordinated with the political branches of their governments. If they render a judgment, it can be effectuated with regard to any property or persons within their jurisdiction. In countries such as ours in which national courts have been major agents for protection and extension of civil liberties, courts appear to recommend themselves with even greater force for a coordinate international role.

But the assignment of multiple roles to a single institution may create certain types of conflicts of interest, for institutions are by definition specialized, and there is a limit to their elasticity. The custodians of an institution may be expected to lend and bend their institutions to desirable ancillary functions which were not originally intended but, above all, they will be concerned with the limits of elasticity, that point at which the ancillary function begins to undermine the continued efficacious discharge of their primary or manifest function and its contribution to the good working of government.

We encounter here the limits of the functional elasticity of institutions. It is not unique to courts. Consider the venerable example of the immunity of diplomatic missions. Article 22(1) of the Vienna Convention on Diplomatic Relations provides: "The premises of the Mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." This international policy is, as the International Court said in the *Hostages* case, of "fundamental character." The reason for diplomatic inviolability is hardly recondite. Embassies are deemed indispensable to interelite communication. International law from earliest times has sought to protect that function. But inviolability also makes diplomatic premises attractive for purposes of asylum. When there are human rights violations, there will be a strong human impulse to use the premises accorded inviolability to spirit out human beings who would otherwise face severe and unlawful deprivations. But there are costs. That ancillary function will hardly endear the embassy in question to the host state. The net result of stretching the embassy to the ancillary function of asylum may be to undermine the effectiveness of diplomacy, which is the major purpose for the inviolability principle. In the short term, vigorous use of diplomatic asylum will sour relations between host state and embassy. In the longer term, it may erode the tolerance for inviolability itself and thus impede interelite communication.

States appear willing to use embassies for asylum purposes when the embassies in question are not performing diplomatic functions indispensable to the two states concerned, for then the reduced effectiveness of the embassy has little political cost. But as between states whose diplomatic and political connections require open and unob-

structed diplomatic communications, there is a strong impulse not to use embassies for purposes of asylum. Hence, many of the officials who may be committed to human rights will seek to protect the major function of embassies and struggle to prevent them from being turned into underground railways.

The same considerations apply to national courts with regard to international human rights matters. Judicial elasticity here appears to reach its boundary when the prosecution of a privately initiated suit draws the court into the path of the executive's conduct of foreign affairs, a collision which is definitional when the defendant is a foreign government or its agent, and the subject of the claim is its behavior in alleged violation of international law. A court's willingness to precipitate this collision is all the less likely when there is no explicit and politically meaningful indication of support from Congress. Even in a state in which there is wide popular support for international human rights, recognition of the executive's need for a freer hand in the conduct of effective diplomacy may press courts not to exercise their potential jurisdiction in human rights cases, because it would conflict with the discharge of one of the manifest functions of another branch of the same government. Hence, it should be no surprise that the same courts that may be quite vigorous in the pursuit of domestic civil rights will proceed more cautiously, if at all, internationally and, when pressed beyond what they believe they can responsibly supply, will react negatively and sometimes even viciously. In this regard, I would take exception to Professor Paust's etymological inquiry into U.S. judicial usage of the term "human rights." Though the normative content of the terms "human" and "civil" rights may be the same, there is an important contextual difference. The pursuit of civil rights involves U.S. courts' adjudicating between U.S. nationals and their federal and state governments; the situation changes in important ways when the defendant is a foreign government and the plaintiff is its national.

We might call this the *Le Louis* phenomenon, after the fascinating judgment of Sir William Scott, or Lord Stowell, as he later was. In that case a French slaver was picked up in international waters by a British flag vessel and brought in as prize. The Admiralty Court in London vacated the condemnation, even though England had by that time condemned slavery. Lord Stowell superordinated what he believed were the common interests in maintaining a certain type of public order of the oceans, in which no jurisdiction, other than that based upon treaty, could be exercised by flag vessels of one state over those of another. He believed that if British ships ignored the flag principle in favor of a higher principle, one of the basic struts of the public order of the oceans would be weakened.

It would be simplistic to say that Lord Stowell was in favor of slavery, as it would be outrageous to say that Learned Hand in *Bernstein* cultivated a secret passion to protect the Reich. In cases of this sort, judges will protect what they feel to be their primary institutional responsibility and will defer the human rights claim. I believe that, for reasons such as these, cases like *Filartiga* are unusual and unless other changes are made will prove to be only "temporary footholds," as Judge Wilkey said in another context. *Tel-Oren* is striking in that in the court of appeals, three judges, for different but equally jumbled international legal reasons, concluded that the case should not be pursued in their court. The government indicated the same preference for result in the brief of the Solicitor General; implicitly, the Supreme Court endorsed that result.

Like all of you, I am grieved by the drastically reduced role for the judiciary in human rights cases that emerges from *Tel-Oren* and some other recent decisions. In distinction from Professor Newman, I believe that national courts may yet be used as

fora for enforcement of international human rights. If we cannot harness those courts, the prospects of private initiation and effective enforcement of human rights are bleak. But securing a long-term extension of national jurisdiction in matters such as these will require more than simply persuading the judiciary on a case-by-case basis. Terms such as "separation of powers," "act of state," "political question," etc., are all indicative of decent judges' concern for discharging primary responsibilities to the state organization in which they are part. That concern must be addressed systematically.

The Foreign Sovereign Immunities Act of 1976 demonstrates that this can be done. From the time of the *Schooner Exchange*, U.S. courts have held that public acts of foreign governments, even when they violate domestic and/or international law rights of U.S. nationals, are inappropriate for adjudication in U.S. courts because, in one formula or another, the private initiation of such suits could impede the executive branch's constitutional mandate to conduct foreign relations with those same foreign states. The net result of this policy was to deny many U.S. citizens their days in court in cases in which U.S. jurisdiction was otherwise well founded.

After almost half a century of individual, uncoordinated efforts to persuade courts to change the sovereign immunity approach had failed, a different tack was taken. U.S. merchants and traders formed an efficient coalition. Sufficient pressure could then be mounted and brought to bear on the executive branch and Congress to strike a historic compromise. For a limited catalogue of actions, the executive agreed that claims of sovereign immunity would henceforth be referred to courts without the political detour and often termination at the Department of State.

Congress endorsed the arrangement, foreign governments were put on notice through a relatively clear statutory instrument, and the courts could then act responsibly in cases in which the political element was manifest and potentially important with the assurance that it was now national policy for such jurisdiction to be exercised. With the agreement of the political branches, the functions of the courts in this sensitive area were redefined more broadly. This is not to say that the act has resolved all the problems in claims of this sort. Given the political and economic dimensions of international business, the problems are in some ways insoluble. But the act has resulted in an enhanced judicial jurisdiction for privately initiated claims.

A comparable strategy must be undertaken by those committed to international protection of human rights. Rather than uncoordinated and individual assaults on courts about the country, a coordinated lobby should be formed with a national constituency. It should bring pressure to bear on the executive branch and Congress to secure a statutory regime establishing or clarifying judicial jurisdiction for certain human rights torts. To continue to insist that this has already been done by section 1350 is to engage in a sterile, scholarly controversy whose outcome, it is now plain, will not influence court behavior. There are times when courts should lead other branches; a case like *Brown* may be our judiciary's finest hour. But it is clear that our courts are loathe to lead in international human rights. Hence a different strategy is indicated.

The selection of the particular human rights most appropriate for enforcement in national courts and, in particular in U.S. courts, should be made with great care. It is unlikely and unrealistic to expect that every component of the emergent international human rights code can be enforced in U.S. courts. Much more will be gained in the next two decades if a few types of violations come to be deemed nationally justiciable.

We cannot assume that alleged "core" violations or the most heinous violations are necessarily appropriate for national adjudication. In choosing targets for judicial implementation in the United States, it would be prudent to test the utility of the judicial

strategy by at least three factors: (1) the actual degree to which effective elites about the globe concur in characterizing the behavior in question as socially pernicious; (2) the extent to which those in the United States charged with executive responsibilities can and are willing to accept the political costs of judicial implementation of matters which cut against external political relationships; (3) the extent to which such suits would seriously harm the economy, foreign policy and orderly judicial administration in the United States. For it may well be that costs will be so heavy that human rights judicial jurisdiction may have to be very carefully circumscribed. All these questions are matters which should begin not in confrontation but in dialogue with the Executive and Congress where a thorough and responsible policy analysis may be undertaken. If the current administration is not sympathetic to the program, it may be commenced with Congress.

Unfortunately, the structure of the international human rights bar in the United States does not lend itself to this strategy. It is a largely voluntary bar, contributing its own time and energy to most cases that are prosecuted. It is dispersed about the country and tends to operate in episodic fashion, when a case appears which a well-meaning attorney believes can contribute to some human rights objective. International human rights lawyers in the country are a potentially large group, but they do not command the resources of major corporations and, hence, are unable to form something comparable to a "Rule of Law Committee." Yet if the problem is appropriately understood, these obstacles can be surmounted. A national, coordinated effort can bring about an historic change.

If this coordinated approach is not undertaken, the episodic judicial strategy currently pursued will fail and, indeed, will ultimately become counterproductive, as human rights activists become more resentful of judicial resistance and judges more resentful of what they believe are unreasonable and impossible claims being made upon their own jurisdictions. That would be tragic, for U.S. judges are our natural allies and not our enemies.

Tel-Oren does have lessons for us. They are not, I believe, the lessons that Judges Bork and Robb declaim, for almost a decade of adjudication in sovereign immunity matters demonstrates that U.S. courts can play a role in matters that have a potential for international political disruption and for complicating the executive's conduct of foreign affairs. The key lesson of *Tel-Oren* is rather that an attempt to establish an effective human rights jurisdiction must incorporate all three branches, on the order of the Foreign Sovereign Immunities Act, and must choose the particular norms appropriate for judicial implementation with great care.

COMMENTS BY CORNELIUS FLINTERMAN*

Tel-Oren raises the intriguing but difficult question of the proper role of domestic courts in adjudicating claims relating to international human rights violations which have occurred fully outside the territory of that state. In a week's time many European countries will have celebrated the 40th anniversary of the end of World War II. That war was fought to restore human rights, governmental freedom and democracy in continental Europe. The name, among others, of President Franklin Roosevelt, who was at the same time a champion of economic rights within the United States, will be forever linked with this cause. The name of Roosevelt, this time Eleanor Roosevelt, is also connected with that great legal document—the Universal Declaration of Human Rights, adopted in 1948.

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