

1989

## New Directions in Human Rights and Human Rights in the World Community

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### Recommended Citation

Carliner, David (1989) "New Directions in Human Rights and Human Rights in the World Community," *NYLS Journal of Human Rights*: Vol. 7 : Iss. 1 , Article 18.

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## BOOK REVIEWS

HUMAN RIGHTS IN THE WORLD COMMUNITY - ISSUES AND ACTION. By Richard Pierre Claude and Burns H. Weston, Editors. Philadelphia: University of Pennsylvania Press, 1989. Pp. 376. \$49.94 Cloth; \$19.95 Paper.

NEW DIRECTIONS IN HUMAN RIGHTS - By Ellen Lutz, Hurst Hannum, and Kathryn J. Burke, Editors. Philadelphia: University of Pennsylvania Press, 1989. Pp. 192. \$34.95.

Reviewed by David Carliner\*

Whether it is true, as has been said, that we are "in the midst of the human rights revolution,"<sup>1</sup> the internationalization of human rights has been accomplished. Although the principle of what has been described as "humanitarian intervention"<sup>2</sup> has ancient origins,<sup>3</sup> the establishment of the United Nations with human rights provisions in its charter,<sup>4</sup> the Universal Declaration of Human Rights<sup>5</sup> and the creation of implementing organs within the United Nations,<sup>6</sup> have created new stages upon which to act out the historic drama for the achievement of what the peoples of the world regard as their rights.

As the editors of *Human Rights in the World Community* state: "No longer can it be said, in the late twentieth century, that the state may treat its own citizens however it may wish,

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1. See D'Amato, *International Human Rights At The Close of the 20th Century*, 22 INT'L L. 167 (1988).

2. See INTERNATIONAL PROTECTION OF HUMAN RIGHTS 139 (L. Sohn & T. Buergenthal eds. 1973).

3. *Id.* at 139-43.

4. HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTIONS 333 (R. Claude & B. Weston eds. 1989) (quoting United Nations Charter of 1945 arts. 1, 2.7, 13, 55, 56, 62, 73-74, 75-85) [hereinafter HUMAN RIGHTS].

5. G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

6. HUMAN RIGHTS, *supra* note 4, at 7, 22, 48, 54-55, 79, 153, 174, 197.

unaccountable to the international community beyond. No longer can it be said internationally that 'the king can do no wrong.'<sup>7</sup>

The discussion is contained in an assembly of excellent articles and introductory commentary on the theory and practice of human rights and the remedies for wrongs. Within the prodigious explosion of writings dealing with the multifaceted subject of human rights, the work edited here by Richard Pierre Claude<sup>8</sup> and Burns H. Weston<sup>9</sup> is a major and luminous contribution. Written to fulfill a resolution adopted by the UNESCO International Congress on teaching human rights, held in Vienna in 1978,<sup>10</sup> this book should be a reference work in every place where decisions are made affecting the many aspects of human rights.

The collection begins with two brilliant essays. The first, *Human Rights* by Weston,<sup>11</sup> sketches the historical development of human rights from its origins, in the Western World, including naturalistic Hellenic Stoic philosophy, through the political philosophers of the seventeenth and eighteenth centuries, ultimately, to the "essentially universal acceptance of human rights in principle' such that 'no government dares to dissent from the ideology of human rights today'.<sup>12</sup> It goes on to discuss the "demand for a global redistribution of power, wealth and other important values,"<sup>13</sup> such as self determination, social and economic development, the right to a healthy environment and to national and international

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7. HUMAN RIGHTS, *supra* note 4, at 5.

8. Richard Pierre Claude, Professor of Government and Politics at the University of Maryland, founding editor of the seminal journal, UNIVERSAL HUMAN RIGHTS (1979) and its successor, HUMAN RIGHTS QUARTERLY. *Id.* at 363.

9. Burns H. Weston, Professor of Law at the University of Iowa and member of the Board of Editors of the American Journal of International Law. *Id.*

10. *Id.* at xiii.

11. *Id.* at 12.

12. *Id.* at 15. The essay reviews the differing definitions of human rights including civil-political, socio-economic, and what is described as the "third generation" of collective rights. *Id.* at 18.

13. *Id.*

peace.<sup>14</sup> There is a brief run-through of the international law precepts for the treatment of aliens, the treaties and humanitarian interventions for the protection of Christian minorities and the suppression of slavery.<sup>15</sup> The chapter closes with an outline of the role of the United Nations and regional organizations in implementing human rights concerns.<sup>16</sup> The essay deals primarily with western-oriented issues, with the virtual absence of any reference to the wellsprings for human rights in the Asian, Islamic and African cultures.<sup>17</sup>

An essay by Richard A. Falk<sup>18</sup> on the *Theoretical Foundations of Human Rights*<sup>19</sup> observes that in most respects national sovereignty at the state level is very strong. Such national sovereignty:

[r]estricts the potential scope for applying rules of international law to those subject matters where governments give their consent to be bound . . . with a high degree of compliance. The protection of human rights is in a very special category. . . . At the heart of the matter is the peculiar status of enforcement in international society. Given the absence of community enforcement capabilities, the system depends on voluntary patterns of compliance, the effectiveness of which depends, in turn, on perceived self-interest . . . [However], human rights are different, at least for many governments . . . [S]ome governments have

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14. *Id.*

15. *Id.*

16. *Id.* at 21-27.

17. The omission of Asian and African countries, save for South Africa, is even more striking elsewhere in this comprehensive text book and particularly remarkable with the topical awareness of these issues on the entire African continent, and in places such as Iran, the Indian Peninsula, China and the Philippines, among other countries. *Id.* at 28.

18. Richard A. Falk is a Professor of International Law and Practice at Princeton University. *Id.* at 30.

19. *Id.* at 29.

an interest in subscribing to the norms even when there is absent any serious intention to comply, and vice versa: some have an interest in avoiding subscribing even when their intention to comply is evident.<sup>20</sup>

Falk outlines a framework of six normative logics which define "the tension between normative aspirations and political constraint . . . ." <sup>21</sup> but in which it is "[e]mphasized that the protection of human rights . . . is an outcome of [the] struggle between opposed social forces and cannot be understood primarily as an exercise in law-creation or rational persuasion."<sup>22</sup>

The predominate of the logics is the statist<sup>23</sup> in which . . . the most substantial contributions to the realization of human rights arise from the internal dynamics of domestic politics. Far more significant than imposing human rights policies from outside is an effective commitment of their protection arising from within the body politic . . . [T]he achievement of human rights is a matter primarily for domestic reform . . . Of course, there are connections between domestic political changes and external stimuli. The point, however, is that a repressive structure of governance cannot be transformed by marginal, voluntary remedial steps taken under pressure from without of the sort associated with human rights initiatives . . . .<sup>24</sup>

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20. *Id.*

21. *Id.* at 29.

22. *Id.* at 30.

23. *Id.* at 30-32.

24. *Id.* at 31.

Other normative logics are posed as relevant, such as the hegemonial in which powerful states impose their will on weaker states;<sup>25</sup> the naturalist which supports the doctrine that "certain rights inhere in human nature and should be respected by all organized societies";<sup>26</sup> the supranationalist which is the exercise of authority through the United Nations;<sup>27</sup> and the transnational, a term used to describe international human rights organizations which can initiate "a stimulus in one state so as to have an impact elsewhere."<sup>28</sup> The final logic is the populist, "taken in Rousseau's sense of [the people] being the ultimate repository of sovereign rights"<sup>29</sup> in which it is the role of the people in the human rights context to mobilize "[p]ublic awareness about certain categories of abuse. It is a moral logic based on declaring what is right, as such, drawing its inspiration from naturalist logic."<sup>30</sup> Populism is a protean logic that can act either independently or to reinforce the thrust of any of the other logics . . . .<sup>31</sup>

Falk concludes "[t]hat the cause of human rights in the present world system is overwhelmingly dependent on the . . . governing process at the state level."<sup>32</sup> However, perhaps in answer to the search for a unified field theory of human rights Falk has suggested a "configurative, problem solving approach."<sup>33</sup> This approach is that

A balance among ordering logics is important as  
a check against tendencies to abuse authority .

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25. *Id.* at 32.

26. *Id.* at 33.

27. *Id.* at 36.

28. *Id.* at 37.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 38.

33. M. MCDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 67 (1977)

. . . [T]he positive direction of global reform at this historical stage seems to require a simultaneous strengthening of supranational (global and regional), naturalist, transnational, and populist logics at the expense of the statist and hegemonial logics . . . [S]trengthening the naturalist, logic may be the most important emphasis at this point in the transition process . . . to orient other ordering logics around emergent values, . . . [to build a] social consensus . . . needed if a beneficial form of world order is to be brought into being some time early in the twenty-first century.<sup>34</sup>

The editors present a well-structured assembly of articles on human rights issues. The first chapter, entitled, Basic Decencies and Participatory Rights<sup>35</sup> discusses genocide,<sup>36</sup> torture,<sup>37</sup> the range of civil rights,<sup>38</sup> discrimination based on race, sex, and religion,<sup>39</sup> refugees and immigrants,<sup>40</sup> and the rights of indigenous peoples to preserve their environment and cultural heritage.<sup>41</sup> A separate chapter, entitled Basic Human Needs, Security Rights and Human Governance,<sup>42</sup> addresses the mix between civil and political rights with what are

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34. HUMAN RIGHTS, *supra* note 4, at 39.

35. *Id.* at 45.

36. LEO KUPER, THE SOVEREIGN TERRITORIAL STATE: THE RIGHT TO GENOCIDE. *Id.* at 56-64.

37. MATTHEW LIPPMAN, THE PROTECTION OF UNIVERSAL HUMAN RIGHTS: THE PROBLEM OF TORTURE. *Id.* at 65-72.

38. RICHARD B. LILICH, CIVIL RIGHTS. *Id.* at 73-83.

39. JACK GREENBERG, RACE, SEX, AND RELIGIOUS DISCRIMINATION IN INTERNATIONAL LAW. *Id.* at 84-93.

40. ANIMESH GHOSAL AND THOMAS M. CROWLEY, REFUGEES AND IMMIGRANTS: A HUMAN RIGHTS DILEMMA. *Id.* at 95-102.

41. CHRISTIAN BAY, HUMAN RIGHTS ON THE PERIPHERY: NO ROOM IN THE ARK FOR THE YANOMAMI? *Id.* at 104-10.

42. *Id.* at 115.

regarded as social and economic rights.<sup>43</sup> Such rights are defined as requiring "the intervention of government . . . to bring about the realization of those values."<sup>44</sup>

The subject of action on the human rights agenda reviews *International Approaches to Implementation*<sup>45</sup> in which the United Nations is described as "more than a whimper."<sup>46</sup> Additionally, an appraisal is made of the regional human rights regimes;<sup>47</sup> the supranational institutions established in Europe, the Americas and Africa to vindicate human rights,<sup>48</sup> and the *Helsinki-Agreement and Human Rights*.<sup>49</sup>

The editors also examine certain National Approaches to Implementation.<sup>50</sup> They review *Human Rights and Foreign Policy*<sup>51</sup> as a construct, with the essays following, except for a summary of the Philippine Constitution of 1987,<sup>52</sup> focusing only on the United States. These include *Humanitarian Intervention and American Foreign Policy*,<sup>53</sup> the "Fate of General Legislation"<sup>54</sup> enacted by Congress, in dealing with "Human Rights in U.S. Foreign Policy"<sup>55</sup> and a review of the break-

43. DAVID LANE, HUMAN RIGHTS UNDER STATE SOCIALISM. *Id.* at 123-33. RAJNI KOTHARI, HUMAN RIGHTS AS A NORTH-SOUTH ISSUE. *Id.* at 134-41. PHILIP ALSTON, INTERNATIONAL LAW AND THE RIGHT TO FOOD. *Id.* at 142-50. HENN-JURI UIBOPUU, THE INTERNATIONALLY GUARANTEED RIGHT OF AN INDIVIDUAL TO A CLEAN ENVIRONMENT. *Id.* at 151-58. YORAM DINSTEIN, SELF-DETERMINATION AND THE MIDDLE EAST CONFLICT. *Id.* at 159-65. KATARINA TOMASEVSKI, THE RIGHT TO PEACE. *Id.* at 168-76.

44. *Id.* at 115.

45. *Id.* at 183.

46. TOM J. FARER, THE UNITED NATIONS AND HUMAN RIGHTS: MORE THAN A WHIMPER. *Id.* at 194-206.

47. BURNS H. WESTON, ROBIN ANN LUKES AND KELLY M. HNATT, REGIONAL HUMAN RIGHTS REGIMES: A COMPARISON AND APPRAISAL. *Id.* at 208-19.

48. *Id.* at 208.

49. The author of the essay is A. H. Robertson. *Id.* at 220-25.

50. *Id.* at 229.

51. The author of the essay is Evan Luard. *Id.* at 240-49.

52. *Id.* at 230-32.

53. The author of the essay is Jack Donnelly. *Id.* at 251-62.

54. DAVID P. FORSYTHE, CONGRESS AND HUMAN RIGHTS IN U.S. FOREIGN POLICY: THE FATE OF GENERAL LEGISLATION. *Id.* at 264-71.

55. *Id.*



through, pioneering decision in *Filartiga v. Pena-Irala*<sup>56</sup> in the United States Court of Appeals for the Second Circuit.<sup>57</sup>

The final chapter discusses the implementation of human rights through the efforts of non-governmental organizations, reviewing the activities of the NGOs in information-processing, advocacy, developing human rights norms and influencing policy, providing legal, medical and humanitarian assistance and developing moral condemnation and praise<sup>58</sup> based upon a need of government "to give decent respect for the opinion of mankind."<sup>59</sup> Case histories are narrated dealing with the "Foundation of Western Support for the Human Rights Movement in the Soviet Union,"<sup>60</sup> "Strategies for Divestment"<sup>61</sup> by United States businesses in South Africa, and, of particular significance in the context of Falk's complementary relationship of the populist to the statist logic, "The Human Right to Participate in Armed Revolution and Related Forms of Social Violence."<sup>62</sup>

Each of the essays in the collection is an insightful contribution to the overall analysis of human rights in the world as a "community" with international relationships and structures. Except for the essay on the "Human Right to Participate in Armed Revolution,"<sup>63</sup> the editors have omitted any discussion of the "internal dynamics of domestic politics"<sup>64</sup> and the related concept that "the protection of human rights . . . is an outcome of struggle between opposed social

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56. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

57. RICHARD P. CLAUDE, THE CASE OF JOELITO FILARTIGA IN THE COURTS. HUMAN RIGHTS, *supra* note 4, at 272-81.

58. *Id.* at 291-98.

59. *Id.* at 296.

60. RICHARD N. DEAN, NONGOVERNMENTAL ORGANIZATIONS: THE FOUNDATION OF WESTERN SUPPORT FOR THE HUMAN RIGHTS MOVEMENT IN THE SOVIET UNION. *Id.* at 299.

61. MARY C. GOSIGER, STRATEGIES FOR DIVESTMENT FROM U.S. COMPANIES AND FINANCIAL INSTITUTIONS DOING BUSINESS WITH OR IN SOUTH AFRICA. *Id.* at 312.

62. JORDAN J. PAUST, THE HUMAN RIGHT TO PARTICIPATE IN ARMED REVOLUTION AND RELATED FORMS OF SOCIAL VIOLENCE: TESTING THE LIMITS OF PERMISSIBILITY. *Id.* at 323.

63. *Id.*

64. *Id.* at 31.

forces . . . .<sup>65</sup>

What might have followed the introductory essays is the editors' own suggestion that Falk's framework be systemically applied to various countries, among nineteen which have been profiled in depth in the *International Handbook of Human Rights*.<sup>66</sup> Given the undeniable premise that "the protection of human rights largely depends on the outcome of the struggle between opposed social forces,"<sup>67</sup> it would have been instructive to explore the relationship of Falk's normative logics in countries such as the Philippines, Poland, Uruguay, Portugal, Spain, Israel, Korea, Iran, Pakistan, South Africa, Uganda, Liberia, Greece, Argentina, and the Soviet Union. Major changes have occurred in each of these countries, including governmental shifts from both those described as authoritarian and those described as totalitarian, without the pivotal influence of international human rights law. Without doubt the norms of international human rights law and the other normative logics, defined by Falk, have achieved improvements in human rights conditions and in securing victories of those who have been victimized. However a basic change in the human rights condition requires that reliance be placed on the "populist" logic, as witnessed by the recent developments in the Soviet Union, Poland, The German Democratic Republic and Hungary.

*New Directions in Human Rights*<sup>68</sup> is complementary to the work embracing the world community, although its title is more optimistic and pointed than the message of most of its essays. The subjects encompassed within the rubric "new

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65. *Id.* at 30.

66. INTERNATIONAL HANDBOOK OF HUMAN RIGHTS 6 (J. Donnelly & R. Howard eds. 1987).

67. HUMAN RIGHTS, *supra* note 4, at 30.

68. NEW DIRECTIONS IN HUMAN RIGHTS (E. Lutz, H. Hannum & K. Burke eds. 1989) [hereinafter NEW DIRECTIONS]. Ellen L. Lutz is a Consulting Attorney for the ACLU Foundation of Southern California. Hurst Hannum is Executive Director of The Procedural Aspects of International Law Institute and is editor of the GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (1984). Kathryn J. Burke is Supervising Research Attorney for the Superior Court of San Mateo County, California. *Id.* at 235-36.

directions" cover a broad scope of topics, however, with no fault on the part of the authors, there is, with the exception of the last two penultimate chapters, little direction taken to advance human rights in this sector of the world community.

The author of the essay on sovereignty,<sup>69</sup> while concluding that "[m]inorities and indigenous peoples must be given an effective means . . . to participate in the larger society . . . to maintain and develop those social and cultural attributes that are essential to the preservation of any community . . . ."<sup>70</sup> states that it "must be recognized that the ideal of the 'nation-state' . . . is not only impracticable but undesirable."<sup>71</sup> This concept is neither new nor a directional signal that seems to have been posted in the states formed since the establishment of the United Nations and the mapping of the borders of various countries at Versailles.

The discussion of the United Nations "machineries" on women's rights<sup>72</sup> has overlooked the engine and come up with fifteen ideas by which the Women's Commission and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) would benefit.<sup>73</sup>

The author of *Prospects for the Development of Intergovernmental Human Rights Bodies in Asia and the Pacific*<sup>74</sup> observes that

[The] cultural and political differences among the peoples of Asia and the Pacific are vast and, although common human rights issues can be identified that affect many of the nations of this area, it would be overly optimistic to expect that

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69. H. HANNUM, THE LIMITS OF SOVEREIGNTY AND MAJORITY RULE: MINORITIES, INDIGENOUS PEOPLES, AND THE RIGHT TO AUTONOMY. *Id.* at 3-4.

70. *Id.* at 19-20.

71. *Id.*

72. SANDRA COLIVER, UNITED NATIONS MACHINERIES ON WOMEN'S RIGHTS: HOW MIGHT THEY BETTER HELP WOMEN WHOSE RIGHTS ARE BEING VIOLATED? *Id.* at 25-46.

73. *Id.* at 43-44.

74. The author of the essay is Jon M. Van Dyke. *Id.* at 51-59.

these nations will all work together to solve these issues during the present generation . . . .<sup>75</sup>

In *Ways (in which) International Organizations Can Improve Their Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflicts*,<sup>76</sup> the author examines the role of the United Nations General Assembly and non-governmental organizations,<sup>77</sup> discusses four types of armed conflicts in which international humanitarian law is designed to limit human rights violations,<sup>78</sup> reviews the humanitarian work of the International Committee of the Red Cross and other organizations,<sup>79</sup> and concludes that the various concerned groups

have for some time been applying humanitarian law and human rights law to situations of armed conflict. They need to become more consistent and careful in using humanitarian law; they can also learn from the experience of the International Committee of the Red Cross how to be more effective in safeguarding human rights during periods of armed conflict.<sup>80</sup>

Immediately following is a review of the massacre by Christian Phalangists, who were under the command of the Israeli defense forces during Israel's military occupation of Lebanon in 1982, of Palestinian women and children in two refugee camps, Sabra and Shatila.<sup>81</sup> The author of the essay concludes that

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75. *Id.* at 52.

76. The author of the essay is David Weissbrodt. *Id.* at 63.

77. *Id.* at 63-64.

78. *Id.* at 72-76.

79. *Id.* at 78-79.

80. *Id.* at 92-93.

81. A. CASSESE, GENOCIDE AND THE INTERNATIONAL COMMUNITY: THE CASE OF SABRA AND SHATILA. *Id.* at 97-106.

[T]he Israeli military commanders exercised effective power over the Phalangist troops. It was their duty to prevent the massacre, which was both a war crime and genocide . . . [and that] after the massacre, it was Israel's duty to seek out and punish not only its own military commanders, who had done nothing to stop the killing, but also those directly responsible for the crimes . . . .<sup>82</sup>

The discussion on "Using International Human Rights Law on Behalf of the Poor"<sup>83</sup> reviews cases in which the International Covenants, Conventions, and Declaration of Human Rights and other "international norms and procedures"<sup>84</sup> have been invoked in various types of cases. Although no suggestion is made that "international human rights law or procedure *ipso facto* made, or will make, the difference between a favorable or unfavorable decision for poor people."<sup>85</sup> It is observed that "[s]ometimes the inclusion of human rights citations or the filing of a petition in an international forum may be the extra ounce needed to tip the scales in the claimants' favor."<sup>86</sup>

The discussion of the extradition of persons who have committed political offenses<sup>87</sup> is a competent and brief review

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82. *Id.* at 105. The author noted that

[U]nlike instances of wholesale slaughter elsewhere, however, in the case of Sabra and Shatila the Israeli Commission of Inquiry at least ensured that ethical and religious concerns did not disappear and that limited responsibility was assigned to some of the guilty parties . . . [but] . . . that the full potential of international law was not exploited.

*Id.* at 106.

83. S. ROSENBAUM, *LAWYERS PRO BONO PUBLICO: USING INTERNATIONAL HUMAN RIGHTS LAW ON BEHALF OF THE POOR*. *Id.* at 109-33.

84. *Id.* at 124.

85. *Id.*

86. *Id.*

87. D. SHELTON, *THE RELATIONSHIP OF INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW TO THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION*. *Id.* at 135-63.

of recent cases and treaty negotiations. It concludes that "[t]he courts and the legislature should take a new look at the political offense exception, maintaining it as a necessary protection of individual rights, while confining it to avoid shielding those committing common crimes or acts illegal under international law."<sup>88</sup> Whether this oar provides a sufficient rudder for litigants, the court, and the legislature is an open question.

The book redeems its title in the section which takes up Redressing Past Abuses of Human Rights.<sup>89</sup> An excellent essay, *The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance*,<sup>90</sup> dealing with the "criminal violation of human rights,"<sup>91</sup> reviews a relatively unpursued potential for prosecution of heinous crimes, notwithstanding the Nuremberg Trials and Eichman and Barbie in its wake.<sup>92</sup>

As the essay suggests, the state and individual responsibility for torture, extra-legal executions and disappearances, which are "serious violations of international law,"<sup>93</sup> should have resulted in "legal consequences."<sup>94</sup> The essay reviews possibilities for clarifying the area of law, specifically with regard to extra-legal executions and disappearances, and the strategies for imposing penalties and corrective actions.<sup>95</sup>

Similarly the essay on "Compensating Victims of Human Rights Abuses,"<sup>96</sup> which notes that "international law is silent

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88. *Id.* at 157.

89. *Id.* at 167-212.

90. The author of the essay is Nigel S. Rodley. *Id.* at 167-94.

91. *Id.* at 167.

92. See NEW DIRECTIONS, *supra* note 68, at 168, which lists Argentina and Iran. Other countries may include the Soviet Union, Guatemala, and Kampuchea.

93. *Id.* at 185.

94. *Id.*

95. *Id.* at 185-86.

96. ELLEN L. LUTZ, AFTER THE ELECTIONS: COMPENSATING VICTIMS OF HUMAN RIGHTS ABUSES. *Id.* at 193-212.

regarding the mechanics of implementing a fair compensation program"<sup>97</sup> is a new, so far, unprobed direction. The author has helped to point the way in establishing a legal foundation for a right to compensation by treaty and by customary international law and has proposed model compensation guidelines. These define the basis of claims, who can seek redress, the measure of damages, the source of compensation, and procedures for determining compensation to be paid to human rights victims.

The final chapter of the book is a tribute to Frank Newman, teacher, judge, scholar, and pioneer human rights activist to whom the collection of essays is dedicated. The authors were each nurtured by Professor Newman at the University of California School of Law. "The Frank Newman File,"<sup>98</sup> which details Newman's creativity in helping to design and to sue the United Nations and other organs for human rights issues, is a retrospective exhibition of "new directions in human rights" covering the span of Newman's work in the field, starting with the military coup in Greece in the late 1960's.<sup>99</sup> It is a fitting epilogue.

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97. *Id.* at 195.

98. THEO VAN BOVEN, CREATIVE AND DYNAMIC STRATEGIES FOR USING UNITED NATIONS INSTITUTIONS AND PROCEDURES: THE FRANK NEWMAN FILE. *Id.* at 215-30.

99. *Id.* at 216.

WHEN FREEDOMS COLLIDE: A CASE FOR OUR CIVIL LIBERTIES.  
By A. Alan Borovoy. Toronto, Canada: Lester & Orpen  
Dennys Publishers, 1988, Pp. 409. U.S. and Canada \$27.95.

Reviewed by Anne Jayne\*

For Canadians who watch the news on television, the face of A. Alan Borovoy is a familiar one. As the General Counsel of the Canadian Civil Liberties Association, he has spoken publicly on virtually every civil liberties issue that has attracted media attention in Canada. Whether the issue is pornography,<sup>1</sup> the enactment of new emergency powers legislation to replace the War Measures Act,<sup>2</sup> or the actions of police in raiding gay bathhouses,<sup>3</sup> Alan Borovoy can be seen on the nightly news or quoted in the morning papers, giving the position of the Canadian Civil Liberties Association on the issue. He acknowledges that he has felt frustrated by limitations imposed by the "twelve-second television clip" and he seeks, in *When Freedoms Collide: The Case for Our Civil Liberties*, to give the reader an understanding not only of his

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1. A. BOROVY, *WHEN FREEDOMS COLLIDE: A CASE FOR OUR CIVIL LIBERTIES* 255 (1988) [hereinafter *WHEN FREEDOMS COLLIDE*]. The Supreme Court of Canada struck down the Criminal Code provisions on abortion in 1988. See *R. v. Morgentaler*, Soling and Scott 1 S.C.R. 30 (1988). The federal government has indicated that it intends to introduce new legislation on abortion in the fall of 1989. Borovoy argues that the discussion of "when life begins" is not relevant. *WHEN FREEDOMS COLLIDE*, *supra*, at 255. The law does not require a person to give to another, even to his or her child, an organ, bone marrow, or blood. He concludes that, "[w]hatever rights fetuses should have, they do not include commandeering the power of the state to keep them in the bodies of their non-consenting mothers." *Id.* at 258.

2. 12 Measures Act, CAN. REV. STAT. ch. W-2 (1970), *repealed by* The Emergencies Act, CAN. REV. STAT. ch. 29 (1985). The War Measures Act was invoked in peacetime on October 16, 1970 in response to the FLQ crisis in Quebec. See Public Order Regulations, 1980, SOR/70-444, October 16, 1970.

3. *WHEN FREEDOMS COLLIDE*, *supra* note 1, at 115-17. The notes at the end of the volume indicate that "[r]eports of the simultaneous raids of four downtown Toronto steambaths on the night of February 5, 1981, will be found in 'Police arrest hundreds in steambaths,' Toronto Star, February 6, 1981, p.1. As a result of the raids, more than three hundred men were arrested as 'found-ins' and fewer than twenty-five were charged with keeping a bawdy house." *Id.* at 351 note.



view on a wide range of issues, but more importantly an understanding of the approach he takes in analyzing civil liberties issues. With this book, he hopes to have a more lasting impact on the way some readers, at least, think about civil liberties. Moreover, Borovoy, as a social activist, aims to have an effect not only on the way people think, but also on the way they act in working to promote civil liberties.

Borovoy begins with a discussion of his philosophical approach and returns to this theme from time to time in the subsequent review of specific issues.<sup>4</sup> While some readers will disagree with his philosophy or with his views on individual issues, Borovoy is to be commended for his efforts to make clear to the reader his own value preferences.

First and foremost, Alan Borovoy's foundation is his commitment to the democratic process. He acknowledges that democratic government may fall short of perfection.<sup>5</sup> The people do not always vote wisely. Democratically elected governments may take action that causes harm to individuals or to minority groups. Still, so long as the fundamentals of democracy are in place, including freedom of expression, speech, assembly, and the press, those who are aggrieved have a chance to bring about change by expressing their views and urging others to use the secret ballot to vote out of office those who have caused offense, and to elect others who might do better.

Borovoy does not approach the analysis of civil liberties issues with a single formula. He takes the view that these issues must be dealt with on a case-by-case basis, seeking the solution that represents the best available alternative, or perhaps, the least unpalatable alternative. Often, there is a conflict and a collision between two values. Civil liberties issues seldom represent a struggle between good and evil. Instead, Borovoy says, "we must face conflicts between good

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4. *Id.* at 3-13.

5. *Id.* at 19.

and good, right and right, bad and bad."<sup>6</sup> In this book, Borovoy examines a series of these collisions between values. We value both social harmony and freedom of expression: ought we to prohibit pornography or the expression of hatred against racial and religious groups? We value national security and personal privacy. However, does this merit the tapping of telephones or the opening of mail by the government?

This kind of collision between values is demonstrated in the present debate in Canada over the hate propaganda and false news sections of the Criminal Code. The Criminal Code prohibits the distribution of hate propaganda, which includes advocacy of genocide and incitement of hatred against any identifiable group in certain circumstances.<sup>7</sup> It also prohibits the dissemination of "false news"; it is illegal to publish a statement that one knows is false and that causes or is likely to cause injury or mischief to a public interest.<sup>8</sup> In recent years, one man was charged in Ontario under the false news sections for distributing publications claiming that the Holocaust never occurred.<sup>9</sup> Another man was charged in Alberta under the hate propaganda section for teaching the students in his high school science class that there was a worldwide Jewish conspiracy.<sup>10</sup> Many Canadians support the prohibition of racist expression and believe that it should not be protected by the Charter. Alan Borovoy, however, views such prohibitions as inherently vague, contending that blanket prohibitions may have the effect of suppressing legitimate political speech.

Borovoy notes that since the early 1960's when these

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6. *Id.* at 3.

7. Canadian Criminal Code, CAN. REV. STAT. §§ 318-320 (1985).

8. *Id.* § 181 (1985).

9. *R. v. Zundel*, [1987] 56 C.R.(3d) 1, 58 O.R.(2d) 129 (Ont. C.A.) (Retrial ordered). Zundel was convicted a second time. An appeal is pending.

10. *R. v. Keegstra*, [1984] 19 C.C.C.(3d) 254 (Alta. Q.B.). The conviction was overturned on appeal, as the Court of Appeal concluded that the hate propaganda section of the Criminal Code violated the freedom of expression under the Charter of Rights and Freedoms. *R. v. Keegstra*, [1988] 43 C.C.C.(3d) 150, 65 C.R.(3d) 289. Appeal to the Supreme Court of Canada is pending.

Criminal Code provisions were adopted, there have rarely been prosecutions against genuinely racist individuals.<sup>11</sup> For example, some young people were charged after they distributed leaflets with the words "Yankee Go Home" at a Toronto parade; the charges were later dropped.<sup>12</sup> Two French Canadians were prosecuted for distributing anti-French literature which they had distributed in an effort to generate a pro-French reaction during a local dispute over the funding of French language education. Their convictions were subsequently reversed on appeal.<sup>13</sup> In addition, investigations have been launched through police or custom officials of such materials as Leon Uris' novel, *The Haj*, a film on Nelson Mandela, and the film *Red Dawn*.<sup>14</sup> These actions indicate the wide sweep that such laws encourage.

Undoubtedly there was widespread support in Canada for the two recent prosecutions under these sections of the Criminal Code as a way of discouraging the dissemination of anti-semitic material. However, like many other Canadians, Borovoy expressed concern about the platform that was given to these individuals. Before the trials, both defendants were obscure. During and after the trial, national publicity followed. It is not so much that these two individuals attracted followers to their cause; as Borovoy notes, Canadians are relatively resistant to the message of hate-mongers.<sup>15</sup> Rather, he says, the trials themselves, with accompanying media attention, constituted an affront to dignity and common

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11. WHEN FREEDOMS COLLIDE, *supra* note 1, at 42.

12. *Id.* As a note at the end of the volume states, "[f]or more on the 'Yankee Go Home' incident, see 'Hate literature charges against 3 to be dropped', *Globe and Mail*, July 4, 1975, p.1, and its editorial 'A law full of dangers,' July 2, 1975, p.6." *Id.* at 324 note.

13. *R. v. Buzzonga and Durocher*, [1979] 49 C.C.C.(2d) 369 (Ont. C.A.).

14. WHEN FREEDOMS COLLIDE, *supra* note 1, at 43. As a note at the end of the volume states, "[r]egarding the questionable investigations the anti-hate law has provoked, see 'Library won't ban Leon Uris book that Arab groups have called racist', *Toronto Star*, September 26, 1984, p. A6; 'Mandela film is screened for possible hate content', *Globe and Mail*, December 24, 1986, p. A14; and 'U.S. movie incites hatred lawyer charges', *Sunday [Toronto] Star*, September 2, 1984, p. A17." *Id.* at 324 note.

15. *Id.* at 49.

sense.<sup>16</sup>

For Borovoy, freedom of expression is a value that is entitled to particularly keen solicitude, as it is foundation for the democratic process. Despite the risks to society posed by those who would disseminate hate propaganda, the greater risk is the chilling of legitimate dissent.

Borovoy notes, in his introductory remarks, that he began work on this book in 1980. Two years later, most of the Canadian Charter of Rights and Freedoms took effect.<sup>17</sup> The provisions of the Charter are comparable to those in the Universal Declaration of Human Rights<sup>18</sup> or the United States Bill of Rights,<sup>19</sup> and are indeed similar to the earlier Canadian Bill of Rights. However, while the Canadian Bill of Rights was a legislative enactment, the rights and freedoms secured by the Charter were entrenched in written constitutional law. The Charter is part of the supreme law of Canada, not subject to alteration by the government of the day. The federal and provincial governments must comply with the Charter. For Canadians, this represented a significant departure from parliamentary supremacy.

Many civil libertarians welcomed the Charter with enthusiasm. Alan Borovoy did not. He discussed at some

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16. *Id.* at 48.

17. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act of 1982, was enacted by Schedule B of the Canada Act 1982 (U.K.), 1982, ch.11, § 155. Section 15 of the Charter, the equality rights section, took effect three years later on April 17, 1985. CONSTITUTION ACT part I, § 15(1)(2). The three-year delay was planned to allow provincial and federal governments to review legislation and make any necessary changes to bring statutory law into compliance with the equality rights section. Section 15 of the Charter of Rights and Freedoms reads:

(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of condition of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

*Id.*

18. G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

19. U.S. CONST. amends. I - X.

length his deep concerns about the entrenchment of the Charter in written constitutional law. He agrees that the action of the majority in restricting the fundamental rights of minorities can undermine the democratic process by preventing the aggrieved minority from attempting to achieve peaceful change.<sup>20</sup> However, constitutional rights do not enforce themselves: that job falls to the judiciary.<sup>21</sup> There is no great harm if courts can overrule the actions of the administrative side of the government, such as the police forces and welfare departments, but it is a different matter if the judges, who are appointed, are in a position to overrule the decisions of elected officials in the legislative branch.<sup>22</sup> Those who serve in the legislature are accountable to the electorate, appointed judges are not.

Those who supported entrenchment of fundamental rights and freedoms argued that the judges, with their secure tenure, would be better able to protect the rights of minorities than those who might fear losing the next election if they champion the rights of the minority. For Borovoy, however, the judges constitute a special elite<sup>23</sup> and in a democracy, he believes it no more justified to confer, on this elite, the power to overrule the legislature, than it would be to give such powers to any other elite, whether feudal aristocracy or revolutionary vanguard.<sup>24</sup> For all its shortcomings, the democratic method of electing representatives who are accountable to the people to govern the nation works better than any other.<sup>25</sup>

Before Canada entrenched these fundamental rights and freedoms into a written constitution, thereby entrusting the judiciary with the job of protecting these rights, it was possible

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20. WHEN FREEDOMS COLLIDE, *supra* note 1, at 200.

21. *Id.* at 201.

22. *Id.*

23. *Id.* at 201-02.

24. *Id.* at 202.

25. *Id.*

to consider how well the judiciary had performed in other countries which have incorporated a bill of rights into a written constitution. He suggests that the experience of the United States is particularly worthy of consideration.<sup>26</sup> However, to Borovoy the record is not impressive.<sup>27</sup> In some instances the United States Supreme Court has acted to protect civil liberties,<sup>28</sup> but there were many occasions on which the Court failed to do so.<sup>29</sup> Even though the decisions in recent years on the civil rights of black people has been relatively positive, those decisions were preceded by many Supreme Court decisions that utterly failed to protect the rights of this minority.<sup>30</sup> Nor has the Court acted during times of emergencies to protect the civil liberties of vulnerable minorities. For example, he notes that the Court declared constitutional the forced relocation of Japanese-Americans during World War II.<sup>31</sup> Additionally, the Court upheld the validity of the Smith Act,<sup>32</sup> which outlawed groups who conspire to overthrow the government.<sup>33</sup>

Even if the Supreme Court has been more progressive in recent years, it is hardly reassuring, as the Court can easily

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26. *Id.* at 203.

27. *Id.* at 203-05.

28. *Id.* at 204. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

29. WHEN FREEDOMS COLLIDE, *supra* note 1, at 204-05. Borovoy discusses the series of cases dealing with regulation of employment, beginning with *Lochner v. New York*, 198 U.S. 45 (1905) (New York statute limiting work week to 60 hours in bakeries); *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923) (minimum wages for female workers); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (Kansas law prohibiting employers from demanding that employees agree not to join unions); *Adair v. United States*, 208 U.S. 161 (1908); *Adams v. Tanner*, 244 U.S. 590 (1917). Eventually, the Supreme Court of the United States began to reverse its position. *West Coast Hotel v. Parris*, 300 U.S. 379 (1937).

30. WHEN FREEDOMS COLLIDE, *supra* note 1, at 204. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("separate but equal" transportation systems); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

31. WHEN FREEDOMS COLLIDE, *supra* note 1, at 203. See *Korematsu v. United States*, 323 U.S. 214 (1944).

32. Smith Act, ch. 439, title I, §§ 2, 3, 5, 54 Stat. 670, 671 (1940) (codified as amended at 18 U.S.C. § 2385 (1982)).

33. WHEN FREEDOMS COLLIDE, *supra* note 1, at 203.

change directions in the future.<sup>34</sup> It is not invariably the case that the courts protect the disadvantaged minority against the powerful majority. There have been occasions in the United States when the legislature has attempted to protect those who are vulnerable and the courts have struck down the legislation as being constitutionally invalid.<sup>35</sup>

Despite his opposition to entrenchment of the Charter, however, Borovoy urges readers to attempt to use the Charter for the promotion of civil liberties in Canada.<sup>36</sup> He is concerned that the Charter will be used not only to protect the disadvantaged and secure the rights of oppressed minorities, but will also be used by those with power and influence to advance their own interests.<sup>37</sup> Borovoy is not optimistic that only good things will come from Charter litigation. He has long warned civil liberties activists against concentrating too heavily upon test cases, including Charter challenges, because this approach places the decision-making power in the hands of one of the most conservative elements in Canadian society - the judiciary. He urges readers to continue to press for the protection of civil liberties and human rights through political advocacy as well.<sup>38</sup> Coalition-building and political advocacy are not only cheaper than litigation, but they promote grassroots participation in the political process, rather than shutting out those most concerned about an issue by handing over the case to a few lawyers and a judge.<sup>39</sup>

The best way to ensure protection of civil liberties is through the enactment of legislation specifically addressing particular problems.<sup>40</sup> The courts are more likely to

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34. *Id.* at 206.

35. *Id.* at 204-05.

36. *Id.* at 212.

37. *Id.* at 206-08.

38. *Id.* at 213.

39. Personal communication with Alan Borovoy, General Counsel of the Canadian Civil Liberties Association (November 1987).

40. WHEN FREEDOMS COLLIDE, *supra* note 1, at 212.

implement the will of the legislature when presented with such specific legislation.<sup>41</sup>

For Borovoy, there must be a balance between thought and action. So far as possible, action should be based on thoughtful analysis, but it will often be the case that action must be taken even though the available information is inadequate. He tells the story of an exchange that he heard at a conference between a radical professor and a liberal lawyer. The professor referred disparagingly to the lawyer as a "disjointed incrementalist," as the lawyer approached problems on a "piecemeal" basis instead of developing a broad theoretical base.<sup>42</sup> Borovoy was intrigued by the label "disjointed incrementalist," which he regarded as a rather sensible approach to take in life. In dealing with one problem area at a time, it is possible to seek a solution which is appropriate in the circumstances, considering the costs of the remedy. This "disjointed" method, Borovoy believes, is more apt to take into account the needs of the people who are affected. For those who work on civil liberties and human rights at the grassroots level, he believes that it is important to keep in mind that a remedy which may appear merely "incremental" from a historical perspective may in fact have a profound impact on the lives of the people concerned.<sup>43</sup> Moreover, major social change may be the result of the cumulative effect of many small changes. While Borovoy does not think that "disjointed incrementalism" is the only approach one should take, he is convinced that it may be the best alternative in some circumstances.<sup>44</sup>

This book presents a fine overview of a broad range of contemporary Canadian issues: anti-hate sections in the Criminal Code; pornography; the powers of the new Canadian Security Intelligence Service; the powers of the police; public

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41. *Id.* at 212-13.

42. *Id.* at 310.

43. *Id.* at 311.

44. *Id.*



inquiries and pre-trial publicity; commercial liberty; the administration of the welfare system; involuntary civil commitment; and anti-discrimination legislation. Borovoy extends his concerns beyond domestic civil liberties matters and embarks on the topic of war and peace. Alan Borovoy speaks from the perspective of a civil liberties activist who has spent a considerable amount of time on the barricades during his twenty years of work with the Canadian Civil Liberties Association. This is a valuable and useful book for those who work for justice.