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Cover Page Footnote
The author wishes to thank Professor Richard Pierre Claude of the University of Maryland for his critical comments, advice, and support during the writing of this article. The author is indebted to Professor Joseph B. Kelly of the Dickinson School of Law and Professor Noyes E. Leech of the University of Pennsylvania for their valuable guidance while he attended those institutions. Last, the author expresses his appreciation for to the government of the Democratic and Popular Republic of Algeria for its financial support of his education in the United States.
An Analysis of the 1984 Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Ahcene Boulesbaa*

I. Introduction

The achievement of social progress and a better standard of life for all citizens of the world depends upon both a recognition of the inherent dignity and worth of each human being and a resolute observance of human rights. Likewise, friendly relations and cooperation among nations also depends upon the general acceptance and recognition of the inherent dignity of the individual and the necessity of honoring human rights.

The signatory nations of the United Nations recognized and committed themselves to the promotion and encouragement of

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* Legal Counsel to Director, International Relations Office, University of Maryland, College Park, MD; J.D. 1976, University of Constantine Law School (Algeria); M.C.L. 1978, The Dickinson School of Law; LL.M. 1980, University of Pennsylvania; Ph.D. Candidate 1986, University of Maryland. The author's work experience includes a position as Administrative Judge, Superior Court of Constantine (Algeria) 1975-76 and a position as in-house legal counsel to B.M.S., Inc., Philadelphia, PA 1981-82. The author wishes to thank Professor Richard Pierre Claude of the University of Maryland for his critical comments, advice, and support during the writing of this article. The author is also indebted to Professor Joseph B. Kelly of the Dickinson School of Law and Professor Noyes E. Leech of the University of Pennsylvania for their valuable guidance while he attended those institutions. Last, the author expresses his appreciation to the government of the Democratic and Popular Republic of Algeria for its financial support of his education in the United States.


2. Article 55 of the Charter of the United Nations states: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

   c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

   U.N. CHARTER art. 55, para. c.
human rights when they endorsed the Charter of the United Nations. Debate yet rages among those nations, however, concerning the extent of each member's obligation to enforce human rights principles. On one side is the position that the pledges of the member nations impose upon them the legal obligation to enforce and police human rights both within their own borders as well as within the domestic territories of other member nations. Under this theory actions enforcing human rights must be taken by states individually as well as in conjunction with the United Nations organization. Nations opposing this theory assert that the Charter provisions dealing with human rights merely preclude member nations from violating those rights within their own borders. The Charter, they insist, does not allow any member nation or the United Nations organization to interfere with the domestic jurisdiction of any other member nation.

Nations supporting the latter non-interference principle point to Article 2 paragraphs 4 and 7 of the Charter to buttress their argument. Article 2 paragraph 4 states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ." Paragraph 7 of that same Article contains what is often referred to as the "domestic jurisdiction" clause: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to

3. The Preamble to the Charter of the United Nations provides: WE THE PEOPLE OF THE UNITED NATIONS DETERMINED . . . to reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women . . . . to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS . . . HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS. U.N. CHARTER preamble.

In addition to the Preamble, under chapter 1 of the Charter, Article 1 paragraph 3 states: "The Purpose of the United Nations are: . . . To achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ." U.N. CHARTER art. 1, para. 3. See also U.N. CHARTER art. 55.


6. U.N. CHARTER art. 2, paras. 4 and 7. See also U.N. CHARTER art. 56 which states: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." (For the pertinent text of Article 55, see supra note 2.) The delegations involved in drafting the Charter insisted that Article 56 did not grant the United Nations organization the authority to interfere with the internal affairs of its members. Article 2, paragraph 7, precluding the United Nations from interfering in the domestic affairs of any member nation, was held to limit the scope of Article 56. Schachter, The Charter and the Constitution: The Human Rights Provisions in American Law, 4 VAND. L. REV. 643, 646-53 (1951); Lillich, supra note 5, at 39. For more information regarding Article 2, paragraph 7, see infra text accompanying note 8.

7. U.N. CHARTER art. 2, para. 4.
settlement under the present Charter.

This principle of non-interference in matters essentially within the domestic jurisdiction of other states is one of two major obstacles inhibiting the international enforcement and implementation of human rights. The other major obstacle is known as the declaration of competence requirement. International legal instruments governing the enforcement of human rights cannot bind a state party unless that party formally recognizes the competence of the organization in charge of supervising the implementation of the instrument to deal with questions concerning the internal affairs of that party state. These two obstacles, the non-interference principle and the declaration of competence requirement, have heretofore effectively neutralized any international mechanism established to promote and enforce human rights.

The need to have an effective enforcement mechanism is acute. This is particularly true when the violation of human rights involves

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9. See, e.g., United Nations Economic and Social Council, Commission on Human Rights, Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1984/L.2, at art. 21, para. 1 [hereinafter cited as Draft Convention Against Torture]. Article 21 states: A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. See also International Covenant on Civil and Political Rights, at art. 41, adopted December 16, 1966, entered into force March 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) [hereinafter cited as International Covenant on Civil and Political Rights]; 1 K. Vasak, The International Dimensions of Human Rights, 35-36 (1982).
10. Many scholars have commented on the ineffectiveness of enforcement mechanisms. Theo Van Boven, former director of the United Nations Division of Human Rights has commented that "[t]he methods for tackling violations of human rights are still in their infancy and often inadequate to deal with the problems faced." T. Van Boven, People Matter: Views on International Human Rights Policy 35 (1982). See also Watson, A Realistic Jurisprudence of International Law, 1980 Y.B. World Affairs 265 (1980); Watson, Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law, 1979 U. Ill. L.F. 609 [hereinafter cited as Legal Theory]. Professor Watson holds that the international legal system is not and never will be a supranational type of legal order. International law will therefore never have the hierarchical coercive type of enforcement power characteristic of domestic systems of law. Professor Anthony D'Amato, author of D'Amato, The Concept of Human Rights in International Law, 82 COLUM. L. REV. 1110 (1982) [hereinafter cited as D'Amato], views the problems of enforcement from a totally different perspective. He argues that although the international legal system does not have a hierarchical order, it does possess a flexible enforcement mechanism allowing for the horizontal imposition of sanctions. Thus when one nation feels its entitlements have been violated, whether those entitlements involve human rights or some other right, that nation can "declare the nation that violates an entitlement a temporary outlaw. . . .[T]he nation or nations [may then] . . . retaliate . . . by in turn disregarding one or more of the outlaw nation's entitlements." Id. at 1120. For more on the Watson/D'Amato debate see infra notes 81-90 and accompanying text.
torture. Present political conditions in various parts of the world make torture one of today's major human rights issues. Torture is the ultimate offense against the dignity of man. It may never be justified under any circumstances. Torture violates international legal and political commitments and thwarts those efforts for harmony and cooperation among nations that are so necessary to the maintenance of peace and world order.

The 1984 Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is an attempt by the nations of the world to create a system through which torture can be prevented. In developing this system the drafters had to formulate a method for dealing with the issues of non-interference and the declaration of competence requirement that previously limited and indeed crippled other international human rights agreements. In many ways the enforcement mechanism set forth in the Draft Convention is a positive response to these issues. In others the Convention is still limited by those persistent problems that plagued past agreements.

This article will review specific provisions of the Draft Convention Against Torture. Those sections that resolve the conflicting interests at the heart of the non-interference and declaration of competence principles will be highlighted. Those provisions in which the drafters were unable to reach an effective compromise will also be analyzed. The article will focus in one section upon the current Watson/D'Amato debate regarding the existence or non-existence of world-wide enforcement power. Finally, the article will propose further methods through which nations can enforce and promote human rights throughout the world.

13. Torture, even when supervised by physicians, may never be justified. The medical profession recognizes this fact. Health professionals, particularly physicians, are under the ethical obligation primum non nocere (above all do no harm) not to assist any government, directly or indirectly, that practices torture and/or psychiatric confinement. For a complete discussion of the unethical involvement of doctors in torture and psychiatric abuse see The Breaking of Bodies and Minds 1-21 (E. Stover & E. Nightingale 1985). The December 18, 1982 resolution of the United Nations General Assembly also explicitly prohibits such participation and assistance by members of the health profession. 37 U.N. GAOR Annexes Vol. 11, 12 Doc. A/37/727.
16. See supra note 10. See also infra text accompanying notes 81-90.
II. The Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Draft Convention Against Torture is a codification of customary international law as that law relates to the prohibition of torture.\(^1\) The first article of the Draft establishes the scope of the Convention by defining the term “torture.” Following this clarification the Draft then sets forth a system for enforcement. This system can roughly be divided into two categories. The first category calls for action to be taken by the party states individually. The second defines the power of the organization of party states as a whole and establishes a method whereby that organization can take action to enforce the Draft Convention’s prohibitions against torture.

To understand this enforcement system, it is necessary to understand the Convention’s definition of torture and how the drafters came to agree upon that definition.

A. The Definition of Torture under the Draft Convention of 1984

Article I of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as

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

This is the definition upon which the drafters compromised. It is not, however, completely satisfactory. Its weakpoint is in the fact that it covers only intentional governmental actions. It does not cover gross negligence or negligence of the government. Nor does it apply to actions taken by individuals who are not government officials. The Draft Convention would give the party states significantly more authority if, as in the International Convention on the Elimination of all Forms of Racial Discrimination,\(^1\) it provided for protection

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2. Draft Convention Against Torture, supra note 9, at art. I.
against bodily harm whether inflicted by government officials, intentionally or negligently, or by any individual, group, or institution.

In addition, Article I of the Convention excepts from its definition of torture inflictions of pain or suffering "inherent in or incidental to lawful sanctions." It fails, however, to explain what acts constitute "lawful sanctions." A state can therefore argue that certain acts causing pain or suffering are "inherent in or incidental to lawful sanctions" in that system of government and thus do not constitute torture as defined in Article I of the Convention.20

The Canadian delegation to the working group on the Draft Convention complained about the ambiguity of the "lawful sanctions" exception in Article I.21 Anthony William of England also expressed dissatisfaction and claimed that the vagueness of the definition would only make implementation of the Convention less effective.22 He proposed that the Draft definition be improved. Other delegations in the working group also expressed the opinion that "torture" should have been given a more precise definition particularly since the Convention made torture a criminal offense. The representative from Uruguay even queried whether, under the definition adopted, any sanction causing pain or suffering could be considered lawful.23

Notwithstanding these reservations, the Draft Convention's definition was not changed. As the Draft Convention of 1984 now stands the "lawful sanctions" provision remains unclarified24 and actions into force January 4, 1969).

20. The Draft Convention easily could have been more precise in its definition of "lawful sanctions" by borrowing the language adopted by the United Nations General Assembly in its Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975). Article I of that Declaration simply states that "the exclusion of acts inherent in or incidental to lawful sanctions" must be consistent with the Standard Minimum Rules for the Treatment of Prisoners. (The Standard Minimum Rules were adopted August 30, 1955). First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Annex 1(A), U.N. Doc. A/CONF.6 (1956). Article 31 of the Minimum Rules provides that "Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences." Id. at art. 31. Article 32(2) of those same Rules states that no punishment shall be inflicted that "may be prejudicial to the physical or mental health or a prisoner." Id. at art. 32, para. 2.


23. Id. at 10 (question by Mr. Ballesteros).

24. In the event questions concerning the extent of the exception arise in the future, the parties involved in the dispute will perhaps rely on the interpretations given to similar provisions in other international human rights documents. For example, in the Greek Case [1969] Y.B. Eur. Conv. on Human Rights I (Eur. Comm. on Human Rights), the European Commission of Human Rights interpreted a provision analogous to the "lawful sanctions" exception contained in Article I of the Draft Convention as follows:

[All] torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such
volving torture committed by individuals remain outside the scope of the Convention.

B. Methods of Enforcement — Actions to be Taken by Individual Governments

The powers and responsibilities imposed on individual governments to ensure the enforcement of the principles established under the Draft Convention are set forth in Articles 5 and 7. Article 5\textsuperscript{25} outlines a system of universal jurisdiction based on the place of torture, the nationality of the offender, the presence of the offender in the territory of a state party, and the nationality of the victim. Under Article 5, state parties are required to take any measures necessary to establish jurisdiction over persons accused of offenses condemned in the Draft’s Article 4.\textsuperscript{26} Under Article 7\textsuperscript{27} state parties are

\textit{Id.} at 186.

25. Draft Convention Against Torture, \textit{supra} note 9, at art. 5. Article 5 as finally adopted is as follows:

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

\begin{itemize}
\item[(a)] When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
\item[(b)] When the alleged offender is a national of that State;
\item[(c)] When the victim is a national of that State if that State considers it appropriate.
\end{itemize}

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

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

\textit{Id.}

26. Article 4 of the Draft Convention provides as follows:

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

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

Draft Convention Against Torture, \textit{supra} note 9, at art. 4.

27. Draft Convention Against Torture, \textit{supra} note 9, at art. 7, paras. 1 and 2. Article 7 reads:

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

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In
also obligated to prosecute any person accused of torture over whom they have jurisdiction. This prosecution is to take place in the same manner as the prosecution of an individual accused of violating the laws of that state. In the event a state either cannot or will not try such a person in its own courts, the state is then obligated under that same Article 7 to extradite the individual to another state party for prosecution. The purpose of the universal jurisdictional system established by Articles 5 and 7 is to eliminate any potential havens for alleged torturers.

The first drafts of these articles were submitted by the Swedes in 1981. Substantial debate arose in the 1981 session over specific language contained in these drafts. But in 1982 certain delegates to the working group responsible for drafting the Convention began to consider the more serious question of whether a system of universal jurisdiction should be included at all. They reasoned that the difficulties involved in transferring evidence from the country where the crime had been committed to the state of arrest and trial would make such a system inoperable. In reply, other delegations asserted that universal jurisdiction was essential to the success of the Draft Convention. The Convention was intended to deal with situations in which torture comprised a portion of state policy. Without the universal jurisdiction provisions of Articles 5 and 7 such torture would go unpunished because the state in question would not, by definition, prosecute its own officials for complying with state policy.

The differences in the positions expressed by the various delegations and the need for an effective Convention supported world-wide led the Brazilian representative to propose a modified system of universal jurisdiction in the 1983 session of the working group. Under the Brazilian proposal, a state would be required to exercise universal jurisdiction: when the alleged offenses had been committed in any

the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

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

Id. at para. 1.
territory under its jurisdiction or on board a ship or aircraft registered within that state; when the alleged offender was a national of that state; or when the victim was a national of that state if the state considered it appropriate. However, if the state had no jurisdiction based on these criteria but had within its territory a person it believed should be prosecuted for crimes of torture, that state was under an obligation to notify other states which would have jurisdiction and entertain any requests made by those states for extradition. In the event states having jurisdiction did not request extradition within 60 days, the state having the offender in its custody was required to establish its own jurisdiction over the case. The proposal was considered by some of the representatives to be a good basis for compromise. They recommended that all delegations study it carefully.

At the 1984 session a breakthrough took place. During the time between the 1983 and 1984 sessions, all of the dissenting delegations had changed their positions to endorse the inclusion of a system of universal jurisdiction in the Draft Convention. Thus, Articles 5 and 7 in their current form were adopted by the working group. Under these Articles, a state finding an alleged torturer within its territory is obligated to either prosecute that individual or extradite him to another party state for prosecution when the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state, when the alleged offender is a national of that state, or when the victim is a national of that state and the state considers it appropriate.

33. Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1984/L.2, 5 (1984). The representative of Uruguay stated that his delegation continued to have its doubts, basically from a juridical point of view, about the inclusion of universal jurisdiction in the Draft Convention, but that it did not wish to stand in the way of consensus on the question.

The representative of Australia stated that his government was committed to the early negotiation of a commitment for as strong a convention as possible. It was for this reason that the Australian government had therefore joined the growing consensus in support of universal jurisdiction. The Chinese representative thought that the basic spirit of the Brazilian proposal (see supra text accompanying note 30) was that the exercise of jurisdiction by a state having jurisdiction under one of the enumerated criteria should have priority over the exercise of jurisdiction based exclusively on the presence of an alleged offender in the territory of that state party. Although this principle was not clearly stated in the form that the provisions eventually took, the Chinese found the universal jurisdiction provisions as adopted by the working group to be acceptable. See generally id.
34. For the text of Article 5, see supra note 25. For the text of Article 7, see supra note 27.
35. Draft Convention Against Torture, supra note 9, at art. 7, para. 1.
36. Id. at art. 5, para. 1(a).
37. Id. at art. 5, para. 1(b).
38. Id. at art. 5, para. 1(c).
The system of universal jurisdiction and the obligation of party states to prosecute offenders or extradite them to another party state for prosecution circumvent the problems previously encountered as a result of the principle of non-interference in the domestic affairs of states and the declaration of competence requirement. Under Articles 5 and 7 of the Draft Convention, states may comfortably apply only those rules established under their own legal systems to the case at hand. As a result of the use of the prosecuting state's system of justice, international criminal justice standards of treatment do not need to be harmonized with any domestic principles of criminal jurisprudence unique to that state. The system of universal jurisdiction and the corresponding obligation to prosecute do nothing to threaten the sovereignty of a party state. The cooperation of all states in the protection of human rights is therefore encouraged. The result is a realistic method of enforcement of internationally accepted human rights principles.

C. Methods of Enforcement — Actions to be Taken by the Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

1. Establishment of the Committee Under the Draft Convention: Article 17.—The success of an international agreement cannot depend alone on the method of enforcement adopted. A supranational supervisory committee must also be appointed to coordinate the implementation and policing of the terms of the agreement.

With this in mind, the Swedish delegation proposed in 1978 that the Human Rights Committee established under Article 28 of the International Covenant on Civil and Political Rights be appointed to supervise the implementation and policing of the Draft

39. See supra text accompanying notes 7-10.

Moreover, the system of universal jurisdiction and the obligation to prosecute eliminate the need to enforce human rights norms through the retaliation by one state against another. See supra note 10 for a discussion of D'Amato's theory regarding international enforcement of state obligations. D'Amato himself admits that enforcement by retaliation could easily escalate into full scale war. D'Amato, supra note 10, at 1122. The enforcement method prescribed in Articles 5 and 7 of the Draft Convention would avoid this potential for war.

Convention against Torture. The Legal Counsel of the United Na-
tions advised against this, however, on the ground that the states
that would become parties to the Draft Convention would not neces-
sarily be the same as the parties to the International Covenant on
Civil and Political Rights.43 Several delegations agreed with the Le-
gal Counsel. In addition, it was asserted that it would be difficult to
use a structure to implement one convention that had been estab-
lished for the implementation of another. As these discussions pro-
ceeded, some speakers even broached the question of the advisability
of assigning extensive jurisdiction to any existing international body.
This latter group took the view that basic implementation procedures
could be assured by the individual signatory states within their own
legal systems. Yet another group considered it preferable to entrust
the task to a separate international body created specifically for the
implementation of the Draft Convention.

In view of these disagreements, Sweden submitted a revised
draft in 1981 which provided for the election by the state parties of a
committee composed of persons serving in an individual capacity
who “shall, so far as possible, be chosen among members of the
Human Rights Committee.”44 A number of delegates felt that this
revised Swedish text was a constructive proposal because it at-
tempted to ensure the independence of the Committee from govern-
mental instructions or pressures while at the same time avoiding the
difficulties previously pointed out by the United Nations Legal
Counsel.45

In 1982 the Chairman-Rapporteur also submitted a draft propos-
Sal. In an attempt to avoid establishing an entirely new committee
outside the structures already in existence for the protection of
human rights, he suggested that the machinery provided for in the
International Convention on the Suppression and Punishment of the
Crime of Apartheid46 might provide a constructive compromise. His

43. Report of the Working Group on a Draft Convention Against Torture and Other
(1982).
44. Report of the Working Group on a Draft Convention Against Torture and Other
Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1982/L.40, An-
45. See supra text accompanying note 43.
ishment of the Crime of Apartheid (Convention on Apartheid), the Chairman of the Commis-
sion on Human Rights appoints a group consisting of three members of the Commission on
Human Rights who are also representatives of state parties to the Convention on Apartheid.
Id. at art. 9. That group then considers reports submitted by states in accordance with Article
VII of that same Convention. Id. at art. 7. The machinery provided for in Article VIII permits
any state party to the Convention on Apartheid to call upon any competent organ of the
United Nations to take such action under the Charter of the United Nations as it considers
appropriate for the prevention and suppression of the crime of apartheid. Id. at art. 8.
draft recommended that a separate Committee Against Torture be established under the Convention. In addition he proposed that the members of the Committee be elected by secret ballot and that in nominating the candidates the state parties “bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights . . . .”\(^{47}\)

In 1983 the delegates resumed the discussion concerning the form of an international supervisory committee based on a set of revised draft articles submitted by the government of Sweden and on the proposal submitted by the Chairman-Rapporteur in 1982. Concentrating on the Chairman-Rapporteur’s proposal, the working

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1. There shall be established a Committee Against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of nine experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the states parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by states parties. Each state party may nominate one person from among its own nationals. State parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and are willing to serve on the Committee Against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of states parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the states parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of states parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election the Secretary-General of the United Nations shall address a letter to the states parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the states parties which have nominated them, and shall submit it to the states parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of four of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these four members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3.

6. For the filling of casual vacancies, the state party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals subject to the approval of the Committee.

7. The members of the Committee shall receive emoluments as well as compensation for their expenses while they are in performance of Committee functions, on such terms and conditions as the biennial meetings of states parties may decide. The states parties shall be responsible for these emoluments and expenses in the same proportions as their contributions to the general budget of the United Nations.

\textit{Id.} at 9-10.
group commented on paragraphs (1), (2), (6) and (7). As a result of these comments the Chairman-Rapporteur submitted minor revisions of some of these paragraphs. The main import of his draft proposal, however, remained the same.

It was during the 1983 session that some of the delegates first expressed the view that parties to the Draft Convention should have the option to accept or not accept the authority of any supervisory body created to implement the agreement as they chose. The delegation from the Soviet Union, for example, suggested that all the implementation provisions be included in an optional protocol. The Ukrainian Soviet Socialist Republic delegation, as a compromise measure, proposed that the implementation provisions be retained in the Draft Convention but that they be amended in such a way that the only parties to be bound would be those that made formal statements recognizing the need for a supervising body or those that formally recognized the competence of that body. As the 1983 session closed, however, the majority of the delegations took the position that the implementation provisions, including that establishing a supervisory body, should be mandatory upon all parties to the Convention.

When the working group of delegates returned in 1984, the representative from the Soviet Union announced that he would no longer insist on making all elements of the implementation system optional. He even stated that his delegation would accept a provision making the authority of the supervisory committee mandatory upon all party states.

48. Id. at 10-11.
49. The text for Article 17, paragraph 6 was revised to read:
   If a member of the Committee dies or resigns or for any other cause can no
   longer perform his Committee duties, the state party which nominated him shall
   appoint another expert from among its nationals for the remainder of his term,
   subject to the approval of the majority of the states parties. The approval shall
   be considered given unless half or more of the states parties respond negatively
   within six weeks after having been informed by the Secretary-General of the
   United Nations of the proposed appointment.
4a. Id. at 11. Cf. supra note 47.
50. The new text for Article 17, paragraph 7, was also revised:
   The expenses of the members of the Committee while they are in perform-
   ance of Committee duties shall be borne by the states parties in accordance with
   the schemes of apportionment to be determined by the biennial meetings of
   states parties.
51. Id. at 12. Cf. supra note 47.
52. Id. at 8.
53. Report of the Working Group on a Draft Convention Against Torture and Other
   Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1984/L.2, 9
54. The optional/mandatory debate was also raised in relation to the provisions calling
   for reporting by the party states to the supervisory committee. It was agreed in the 1984
   session that reporting, too, would be mandatory. Id. at 9-10. See also infra text accompanying
Additional minor revisions to the draft provision establishing the Committee Against Torture were then made and as amended the Chairman-Rapporteur's version was adopted by the delegates as Article 17 of the Draft Convention.

2. The Functions of the Committee.

(a) The Reports of States and the Authority of the Committee to Make Comments and Suggestions on Such Reports: Article 19.—In addition to the establishment of the supervisory Committee Against Torture, many delegates felt that to facilitate implementation and enforcement of the Draft Convention it was necessary to

notes 57-63.

55. The working group decided to replace the words “nine experts” in paragraph 1 by “ten experts,” and to replace the word “four” in both parts of the second sentence of paragraph 5 by “five.” Id. at 9.

56. As finally adopted, Article 17 of the Draft Convention reads as follows:

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in the personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. State Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Draft Convention Against Torture, supra note 9, at art. 17.
require that each party state submit periodic reports to the Secretary-General of the United Nations detailing steps taken by that state to further human rights. As originally submitted by the Chairman-Rapporteur Burgers of the Netherlands, Article 19 stated:

1. The states parties undertake to submit to the Secretary-General of the United Nations reports on the measures they have taken to give effect to their undertaking under this Convention:
   (a) Within one year of the entry into force of this Convention for the state party concerned; and
   (b) Wherever any new measures have been taken; and
   (c) When the Committee so requests.

2. Such reports shall be considered by the Committee, which shall transmit them with such comments or suggestions as it may consider appropriate to the states parties. The Committee may also transmit such comments or suggests to the United Nations Commission on Human Rights along with copies of reports it has received from the states parties.

3. The states parties may submit to the Committee observations on any comments or suggestions that may be made in accordance with paragraph 2.\(^5\)

Among the comments made regarding this draft, the delegation from Australia pointed out that the text did not make clear whether the reports could lead to a dialogue between the Committee and the state party itself and if so, whether the party could respond to the Committee, thus giving that state an additional opportunity to express its own view.\(^6\) Taking this and other suggestions, the Chairman-Rapporteur submitted yet another draft which changed paragraphs 2 and 3 as follows:

2. The Secretary-General shall transmit the reports to all state parties.

3. Each report shall be considered by the Committee which may make such comments or suggestions on the report as it may consider appropriate, and shall forward these to the state party concerned, the state party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments or suggestions made by it in accordance with paragraph 3, together with the observations thereon received from


\(^6\) Id. at 15.
the state party concerned, in its annual report . . . . 59

This latest revision appeared to be accepted by all delegations in 1983. At the 1984 session, however, the Soviet representatives advised the group that the "comments or suggestions" provisions in paragraph 3 and the content of paragraph 4 were unsatisfactory. The Soviets felt that these paragraphs would give the Committee the power to interfere in the internal affairs of parties states. 60 In lieu of the "comments or suggests" language, the Soviets proposed that the phrase "general comments and suggestions" be used. 61 This proposal was in the same vein as a recommendation made by the Ukranian representative in 1983 to amend paragraph 1 of the draft Article 19 to read as follows: "The states parties which announced their recognition of the Committee's status undertake to submit to the Secretary-General . . . reports . . . ." 62

After much debate regarding the proposed replacement of the "comments or suggestions" language, the working group reached the consensus that their differences were political and could not be resolved. They therefore left the formulation of Article 19 to the General Assembly. The test of Article 19 as formulated by the General Assembly and incorporated into the Draft Convention Against Torture now reads:

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measure they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter, the States Parties shall submit supplementary reports every four years on any new measures taken, and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each Report shall be considered by the Committee which may make such general comments or suggestions on the report as it may consider appropriate and shall forward these to the

59. Id. (emphasis supplied).


State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with Article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.63

As originally drafted, the broad power to make "comments or suggestions" would have enabled the Committee to make specific as well as general comments at its discretion.64 The more restrictive "general comments" language adopted into the final version of Article 19 limits the Committee to making general comments only.65 The text of the Draft Convention therefore falls short of providing the Committee with adequate authority to fulfill all its assigned functions. It is, however, a political compromise made possible by the existence of similar language in other international agreements to which the states drafting the Draft Convention Against Torture were parties.66

(b) The Power of the Committee to Initiate Enquiries into Allegations of Torture: Article 20.—Another section of the Draft Convention sharply criticized for authorizing Committee interference in the internal affairs of the state parties is Article 20.67 As originally submitted by the Chairman-Rapporteur, Mr. Burgers of the Netherlands in 1983, Article 20 reads as follows:

1. If the Committee receives information from any source which in its view appears to indicate that torture is being systematically practiced in the territory of a state party, the Committee shall invite that state party to submit observations with regard to the information concerned.

63. Draft Convention Against Torture, supra note 9, at art. 19.
64. See supra text accompanying note 59.
65. Draft Convention Against Torture, supra note 9, at art. 19, para. 3.
67. Draft Convention Against Torture, supra note 9, at art. 20. The Soviet delegation expressed dissatisfaction with this article at the same time it objected to Article 19. See supra text accompanying notes 60-61. The Bulgarian delegation agreed with the Soviets, saying that the far-reaching powers of the Committee Against Torture provided for in the draft of Article 20 could easily lead to an unacceptable interference in the internal affairs of states. Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1984/SR.33, 3 (1984).
2. On the basis of all relevant information available to the Committee, including any observations which may have been submitted by the state concerned, the Committee may if it decides that this is warranted, designate one or more of its members to make a confidential enquiry and to report to the Committee urgently.

3. An enquiry made in accordance with paragraph 2 may include a visit to the territory of the state party concerned, unless the Government of that state party when informed of the intended visit, does not give its consent.

4. After examining the report of its member or members submitted in accordance with paragraph 2, the Committee may transmit to the state party concerned any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee under this article shall be confidential.

Upon discussion among the delegations of the working group, paragraphs 1, 3, and 5 were revised in an attempt to require the Committee to first ascertain the reliability of the information, to ensure that the cooperation of the state party concerned was sought prior to the initiation of an enquiry, and to increase the importance of keeping the proceedings confidential. As amended and eventually adopted by the working group, the paragraphs appear as follows:

1. If the Committee receives information which appears to contain reliable indications that torture is being systematically practiced in the territory of a state party, the Committee shall invite that state party to submit observations with regard to the information concerned.

3. If an enquiry is made in accordance with paragraph 2, the Committee shall seek the cooperation of the state party concerned. In agreement with that state party, such an enquiry may include a visit to its territory.

5. All the proceedings of the Committee referred to in the paragraphs 1-4 shall be confidential. After such proceedings have been completed with regard to an enquiry made in accordance with paragraph 2, the Committee may at its discretion, decide to include a summary account of the results of the proceedings in its annual report . . .

Notwithstanding the strides the Draft Convention Against Torture made in the creation of a workable enforcement mechanism, state demands for absolute sovereignty and non-interference in do-

69. Id. at 16-17.
70. See supra text accompanying notes 25-41 (regarding the universal jurisdiction system).
Domestic affairs were not complete ignored or avoided. Article 20 is a prime example of how compromises resulting from these demands limited the extent of the enforcement provisions finally adopted.

One such compromise can be found in the confidentiality provision set forth in paragraph 5 of Article 20. Embarrassing public disclosure of human rights violations would undoubtedly be one of the most effective means of preventing state parties from perpetrating such crimes. Confidentiality and secrecy severely limit the very deterrence effect that the Convention is intended to have.

Another aspect of Article 20 that emanated from a desire to satisfy the self-serving interests of all the states is the fact that the Article provides exclusively for Committee initiation and supervision of enquiries. Nothing in this Article or any other article of the Convention provides for enquiries by nongovernmental organizations. The International Commission of Jurists and Amnesty International, for example, are both organizations that have been deeply involved in investigating, representing, and assisting the victims of human rights violations. Such organizations could play a highly constructive role in the implementation of this Convention if the delegates had provided for their participation. The delegates, however, were more concerned with preventing third party intervention in their states' internal affairs than creating the most effective enforcement mechanism possible.

The failure of the drafters to include private organizations in their program for enforcement and their provision for the confidentiality of Committee enquiries are not the only ways in which the potential effectiveness of the Draft Convention was impaired. The drafters included other provisions specifically limiting the authority of the Committee Against Torture.

(c) Limitations on the Power of the Committee.—Under Articles 21 and 22 of the Draft Convention, the competence of the Committee to receive and consider communications from a state party regarding human rights violations allegedly committed by another state is subject to a condition precedent. According to that condition precedent, the accusing state must itself have recognized the compen-
tence of the Committee to receive and consider allegations regarding its own human rights track record. In addition, paragraph 1 of Article 21 provides that: "No communications shall be dealt with by the Committee under this Article if it concerns a State Party which has not made . . . a declaration [recognizing the competence of the Committee]." Thus, under Article 21, if a victim of a human rights violation wishes to seek the intervention of a state, he or she must select a state party who has accepted the competence of the Committee Against Torture. And if that state consents to take the individual's case, the Committee can only consider the evidence submitted if the accused state party has also declared that it will accept the competence of the Committee.

Likewise, if an individual victim of torture or other cruel, inhuman or degrading treatment or punishment wishes to accuse a party state, his or her communication to the Committee will not be accepted unless the accused state has agreed to allow the Committee to accept communications from or on behalf of individuals subject to its jurisdiction. This requirement is set forth in Article 22, at paragraph 1:

A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communications shall be received by the Committee if it concerns a State Party which has not made such a declaration.

The effect of Articles 21 and 22 is to make the provisions of the Convention optional to all parties. Article 28 further emphasizes this option: "Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee . . . ." This failure to require mandatory acceptance of the competence of the Committee Against Torture neutralizes the power of enforcement that the innovative system of universal jurisdiction and other provisions of the

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74. Draft Convention Against Torture, supra note 9, at art. 21, para. 1, art. 22, para. 1. This is a version of the declaration of competence requirement mentioned supra at text accompanying note 9.


76. Draft Convention Against Torture, supra note 9, at art. 22, para. 1.

77. Draft Convention Against Torture, supra note 9, at art. 28.

78. See supra text accompanying notes 25-41.

79. See supra text accompanying notes 42-56 (regarding the reporting requirement of the states). See also supra notes 57-66 (regarding the power of the Committee to initiate
Convention would have had otherwise. As a result, states that practice torture under the authority of official policy and violate the accepted norms of conduct regarding human rights can ratify the Convention and look very good from a public relations point of view. Simultaneously, however, they can preclude the Committee from taking any action against them by simply not accepting its authority under Articles 21 and 22.

III. Enforcement Mechanisms — Will any Theory Really Work?

As stated earlier, world-wide mechanisms for tackling violations of human rights are currently inadequate. Debate rages over whether there will ever be any international legal system that will have the power to enforce the basic principles of human rights. The two main theoreticians in this area are Professors J.S. Watson and Anthony D'Amato.

Professor D'Amato stands for the proposition that although the international legal system is not a hierarchial order, organizations of states may horizontally impose sanctions upon state violators of human rights by ostracizing those states from the world community. Each state, under international law, is guaranteed certain rights or entitlements. In ostracizing a state the world community would simply ignore the state's entitlements.

Professor Watson argues that the violators of international human rights norms are quite possibly in the majority. The problem cannot therefore be disposed of by calling for cooperation among the states in designating the violator an international deviant, as proposed by Professor D'Amato.

Looking to the source of the enforcement problem, Professor Watson argues that the inability to force compliance with human rights standards can only be explained by the fact that 1) human rights are not currently subject to the jurisdiction of international law, or 2) the structures of the present international legal system are inadequate into allegations of violations).

80. The Draft Convention would be more effective if, for example, the drafters had adopted a mandatory system of implementation similar to that provided for in Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights of 1966:

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.


81. See supra note 10 (statement of Theo Van Boven).

82. D'Amato, supra note 10, at 1120.

83. Id. See also supra note 10.
so ineffective as to be completely worthless. The proponents of human rights, he states, have failed to perceive the discrepancy between international law as they pronounce it and social-political reality. It is only in the actual practice of states that the rules governing the international legal system can be found, and the actual rules do not comport with those that the human rights proponents assert exist. In addition, Professor Watson complains that human rights proponents have failed to question the validity and effectiveness of the international legal system. Under Watson's theory, mere establishment of norms for the protection of human rights are inefficacious and invalid because of the lack of state to state reciprocity. The creation of a supranational legal system, he asserts, is a meta-legal question.

In short, the world has been attempting to apply a sanction-oriented philosophy in a system based on consent and reciprocity. This is a fact that has been dealt with in only a few studies on human rights — too few, in Professor Watson's opinion. The world must recognize and acknowledge the lack of political power behind international law. As Professor Watson put it, "If international law is to succeed in having any normative function at all, it is essential that it first perform an accurate descriptive function." For it is only by realizing exactly how the current international legal system operates, that changes can be implemented to create efficacious and valid international agreements.

The Draft Convention Against Torture takes several new steps in this direction. The implementation of a universal system of jurisdiction is but one example. Further action could be taken, however, by groups interested in promoting human rights. The following proposals incorporate Professor Watson's criteria and standard and, if adopted, would promote the validity and efficacy of human rights norms.

IV. After the Draft Convention — Recommendations for the Protection of Human Rights

As stated in the introduction to this article, two major obstacles have inhibited the operation of past international human rights agreements: the principle of non-interference and the requirement that states formally recognize the competence of whichever supervis-

84. Legal Theory, supra note 10, at 612.
85. Id. at 610.
86. Id.
87. Id. at 626.
88. Id. at 621.
89. Id. at 635.
90. See supra text accompanying notes 25-41.
The adoption of a system of universal jurisdiction under Articles 5 and 7 of the Draft Convention Against Torture did much to address the fear at the heart of the non-interference principle — that international standards of conduct would be imposed upon a party state against its will and contrary to its best interests. That fear was not alleviated enough, however, for the delegates to exclude a declaration of competence requirement from the final draft of the Convention. The consequence of this requirement is that notwithstanding the acceptance of the universal system of jurisdiction, the Draft Convention Against Torture faces the same handicaps as previous international human rights agreements. Without mandatory requirements, the provisions of the Draft Convention will be, strictly speaking, unenforceable.

This does not mean, however, that the Draft Convention has no hope of being effective. Its most positive contribution to the promotion of human rights ideals is its establishment of internationally accepted standards of conduct. Using those standards, international organizations could promote human rights world-wide using two vastly different methods: they could persuade individual states to incorporate those human rights standards into their domestic legal systems, and they could encourage groups of states to use non-military force to coerce other states into honoring basic human rights principles.

A. The Incorporation of Human Rights Standards into the National Legislations of States

Article 10 of the Draft Convention states:

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be

91. See supra text accompanying note 10.
92. See discussion supra at text accompanying notes 25-41.
93. Draft Convention Against Torture, supra note 9, at arts. 20, 21 and 22. See also discussion supra at text accompanying notes 77-80.
94. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, entered into force Sept. 3, 1953, 213 U.N.T.S. 222, at art. 25, para. 1 (1955) (stating that complaints will be entertained only against states that have recognized the competence of the commission established under this convention); American Convention on Human Rights, signed Nov. 22, 1969, entered into force July 18, 1978, O.A.S. T.S. No. 36, at 1 O.A.S. Off. Rec. OEA/Ser. L./V/II. 23 doc. 2/rev. 6 at art. 45, para. 2 ("Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration."); Resolution of the Economic and Social Council of the U.N. of May of 1970, adopted May 27, 1970, 48 U.N. ESCOR, Supp. (No. 1A) 8 U.N. Doc. E/4832/Add. 1 (1970) (requiring the express consent of the state implicated in a gross violation of human rights).
involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. 98

The Draft Convention under this Article encourages the incorporation into all levels of a state's government the basic human rights principles set forth by the Convention.

In the United States this gradual incorporation of international human rights standards into the domestic legal system has occurred through the passage of statutes 99 and the flow of common law jurisprudence. 97 The Alien Torts Claims Act (ATCA), for example, was amended in 1976 to provide federal jurisdiction over torts occurring in violation of the law of nations. 98

As for case law, the United States Supreme Court ruled in 1900 in the Paquete Habana 99 case that "[i]nternational law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction . . . ."100 The Second Circuit deviated slightly from this principle in 1975 and 1976 in the cases of ITT v. Vencap, Ltd. 101 and Dreyfus v. Von Finck. 102 In ITT, plaintiff, a Luxembourg investment trust, sued a Bahamian corporation for fraud, conversion, and corporate waste. The Second Circuit held that the ACTA did not confer jurisdiction over wrongs that are merely of concern to the parties involved. The ACTA instead confers jurisdiction over wrongs that are of international concern and violative of international law. 103 In Dreyfus the court refused to apply international law when the violation at issue occurred between nationals of

95. Draft Convention Against Torture, supra note 9, at art. 10, para. 1.
98. Judicial Act of 1789, ch. 20 § 9, 1 Stat. 73, 77 (1789). The Act, as amended, can be found in 28 U.S.C. § 1350 (1976). The pertinent portion of the Act states:

And be it further enacted, that the district courts . . . shall also have cognizance, concurrent with the courts of the several states, or the circuit courts as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or treaty of the United States.

Id.

99. 175 U.S. 677 (1900). At the out-break of the Spanish-American war, the United States captured two fishing vessels owned by Spanish subjects. The crews of each vessel had been fishing off the coast of Cuba and claimed they had no knowledge of the war or the American blockage. In Paquete Habana the United States Supreme Court applied the established common law rule and held that fishing vessels and their cargoes are exempt from capture as prizes of war.
100. Id. at 700.
101. 519 F.2d 1001 (2d Cir. 1975).
103. 519 F.2d at 1015.
the same sovereign. The Second Circuit implicitly overruled these decisions in 1980, however, when it decided the Filartiga v. Pena-Irala case. The main issue in Filartiga was whether torture was a violation of the law of nations, therefore giving the federal courts jurisdiction of the action under the Alien Tort Claims Act. The District Court had followed ITT and Dreyfus in holding that the Alien Tort Claims Act should be construed narrowly to exclude from its ambit cases dealing with a state’s treatment of its own nationals. The Second Circuit overruled, noting that “torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”

The United States Alien Tort Claims Act and the Filartiga case both illustrate how, when international human rights standards are adopted into a domestic system of jurisprudence, human rights norms can be implemented and enforced. International organizations interested in enhancing human rights would be more effective if they placed less faith on the power of supranational organizations and agreements and concentrated their efforts on promoting the legislative adoption of human rights norms into the domestic laws of individual states.

B. Interstate Coercion Through Non-Military Force

The U.N. Charter prohibits the threat of the use of force only when such methods violate the Charter or the purposes espoused by the Charter. The promotion of human rights, however, is one of

104. 534 F.2d at 30-31. In Dreyfus, the plaintiff, a Swiss citizen and resident, sued to recover from West German citizens and residents for allegedly wrongful confiscation of property in Nazi Germany. The court ruled that violations of international law do not occur when the aggrieved party is a national of the acting state and held that the plaintiff failed to state a cognizable claim since at the time of the alleged wrongdoing he was a citizen of Germany. See generally id.


106. 630 F.2d at 880. For the text of the Alien Tort Claims Act see supra note 98.

107. 630 F.2d at 880.

108. Id.

109. The legal system in the United States also illustrates how imperative it is to the enforcement of human rights that international norms find their way into domestic legislation rather than relying on international treaties and agreements. Article VI of the United States Constitution declares that treaties made under the authority of the United States are “the supreme Law of the Land.” Most international agreements to which the United States is a party, however, are unratified by the United States Senate as required by the Constitution of all treaties. These agreements are therefore not treaties or the supreme law of the land unless they are self-executing. No human rights agreement to which the United States is a party is self-executing, nor has the Senate ratified any of these agreements. Therefore, the terms of these agreements, rather than being mandatory, are merely instructive upon courts in the United States. Comment, After Tel-Oren: Should Federal Courts Infer a Cause of Action Under the Alien Tort Claims Act?, 3 Dick. J. Int’l L. 281, 289 (1985).

110. U.N. Charter, art. 2, para. 4. See also JULIUS STONE, AGGRESSION AND WORLD
the major purposes underlying the Charter of the United Nations.\textsuperscript{111} The U.N. Charter therefore authorizes the Security Council to recommend economic sanctions to give effect to its decisions.\textsuperscript{112} The countries of the United Nations, by signing the Charter, dedicated themselves to the establishment of conditions under which justice and the respect for human rights can be promoted and enforced under numerous international treaties and other agreements. The international community is therefore under a moral and legal obligation to use economic coercion against violators of human rights.

The use of non-military economic force for the purpose of enforcing human rights is not a breach of international law but a fulfillment of the obligations arising under the United Nations Charter and other international treaties. The world community, through the United Nations Security Council, has the right to assert and maintain international obligations and world order. Indeed, if the world community neglected this duty, gross violations of human rights could trigger revolution and military retaliations.\textsuperscript{113} World peace would thus be endangered. The Security Council therefore would be well within its powers if it characterized any gross violation of human rights as a "breach" and a "threat" to world peace and a contravention of international law. Upon such characterization, the Council would have the authority to invoke Article 41\textsuperscript{114} of the Charter against the violators and demand that other signatory states implement whatever measures the Council decided were necessary.

The world community has the power, through economic sanction, to promote and enforce human rights. International organizations dedicated to the advancement of human rights should encourage all states to work together to force implementation of the basic human rights standards contained in such documents as the Draft Convention Against Torture.

V. Conclusion

The founders of the United Nations had a vision. In that vision...
they saw the world community proceed through the post-war period in a step by step progression toward a closely knit society dedicated to the goals of peace, human rights, and social development. During much of the history of the United Nations, however, progress toward these goals has been crippled by politically inspired barriers involving domestic jurisdiction, the associated principle of non-interference, and declaration of competence requirements.

The Draft Convention Against Torture is an attempt to circumvent these political barriers. In the area of jealously guarded domestic jurisdiction, the system of universal jurisdiction substantially resolves state concerns regarding the potential loss of control over domestic legal systems. The delegates to the Convention were unable, however, to eliminate the declaration of competence requirements. These requirements effectively paralyze the enforcement mechanisms incorporated into the Draft Convention, even those pertaining to the universal system of jurisdiction.

The world is not without hope, however. Perhaps someday state governments will have enough faith in enforcement mechanisms such as the universal jurisdiction system to forego the declaration of competence requirements. In addition, there are the proposals set forth in this article for increasing the efficacy and validity of established human rights norms.

If international organizations campaign properly, the international human rights standards embodied in documents such as the Draft Convention will become part of the domestic laws of the world community and therefore be enforced within each state. The world community also has within its power the ability to coerce, via economic sanctions, any state found in violation of human rights norms to comply with those norms. These proposals are a careful reply to both Professors D'Amato and Watson because they produce and operate within the functions of a supranational legal system without requiring the establishment of an international governing social structure.

Through the combined use of these methods of persuasion and enforcement, the inherent dignity and worth of each human being may be promoted throughout the world and each citizen will reap the benefits of greater social progress and a better standard of life.
