

## International Human Rights: An Overview: Annual Vanderbilt Address to the New Jersey Alumni of Harvard Law School

*The Honorable James R. Zazzali* \*

The more I read the papers,  
The less I comprehend,  
The World and all its capers,  
And how it all will end.<sup>1</sup>

The events of the last one hundred years have been anything but capers. Rather, the twentieth century was one of the bloodiest in human history. Thus, a discussion of international human rights seems appropriate.<sup>2</sup> I will not address recent federal executive actions or decisions of the federal courts concerning those matters.<sup>3</sup> All I seek to do is to provide an overview of what is currently occurring in our world—humanity’s perils and accomplishments. I hope to create a heightened awareness of both the challenges in respect of international human rights and the organizations that confront those chal-

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\* Chief Justice, Supreme Court of New Jersey. This speech was delivered on November 15, 2006 as the Annual Vanderbilt Address to the New Jersey Alumni of Harvard Law School.

I wish to offer thanks for the input and suggestions of: Sir Nicholas Bratza, Great Britain’s representative on the European Court of Human Rights; The Honorable John J. Gibbons, former Chief Judge of the United States Court of Appeals for the Third Circuit; John Shattuck, former Assistant Secretary of State for Democracy, Human Rights, and Labor, and current CEO of the John F. Kennedy Library Foundation; Jeffrey Laurenti, Senior Fellow at The Century Foundation; Ambassador William vanden Heuvel, former Deputy U.S. Permanent Representative to the United Nations; Professor Robert Williams of Rutgers-Camden School of Law; Professor Elizabeth Defeis of Seton Hall University School of Law; and my law clerks, Gregory L. Acquaviva, Jonathan Marshfield, and Colin M. Newman.

<sup>1</sup> IRA GERSHWIN, *OUR LOVE IS HERE TO STAY* (1938).

<sup>2</sup> The ever-increasing importance of international law was recently illustrated by the unanimous decision of the Harvard Law School faculty to require first-year law students to enroll in at least one comparative or international law course. *See* Harvard Law School, *HLS Faculty Unanimously Approves First-Year Curriculum Reform* (Oct. 6, 2006), [http://www.law.harvard.edu/news/2006/10/06\\_curriculum.php](http://www.law.harvard.edu/news/2006/10/06_curriculum.php).

<sup>3</sup> *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

lenges. If I am successful, my hope is that you will become more informed citizens and more involved advocates.

Over the last two decades, particularly in the years before I served on the Supreme Court of New Jersey, I developed an interest in human rights issues—one that sparked this speech. One of my great regrets is that I had to decline invitations to serve on the United States delegations to the United Nations Commission on Human Rights (“United Nations Commission”); the responsibilities of a large family and a law firm prevented me from going to Geneva for six weeks. However, I have served on the United States delegations to the International Labor Organization (“ILO”) and the United Nations Educational, Scientific and Cultural Organization (“UNESCO”).

By way of an outline, I first will briefly recount the major international atrocities of the twentieth century. Next, I will provide an overview of the agencies and mechanisms that address human rights, devoting specific attention to several significant decisions issued by the European Court of Human Rights. Then, to illustrate that human rights is not simply a problem for the rest of the globe, I will discuss human rights concerns in the United States. Finally, I will address the progressive efforts of New Jersey in protecting the human rights of individuals through our State’s Constitutional protections.

## I.

The twentieth century was a violent time in mankind’s history. Niall Ferguson, author of *The War of the World*, described the 1900s as “without question the bloodiest century in modern history.”<sup>4</sup> The tragedies of the century are well documented.<sup>5</sup> The century’s atrocities began in the decades before 1920 when King Leopold of Belgium presided over a holocaust in the Congo, where his slave labor system killed an estimated ten million people.<sup>6</sup> During and after World War I, the Ottoman Turks committed genocide against the Armenian Christian minority.<sup>7</sup> Then came the mass-murdering dictators. “Not counting deaths inflicted in battle, [Joseph] Stalin was responsible for the deaths of over 42 million people (1929–1953); Mao [Zedong], over 37 million (1923–1970); [and Adolf] Hitler, over 20 million

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<sup>4</sup> Simon Sebag Montefiore, *Century of Rubble*, N.Y. TIMES, Nov. 12, 2006, § 7 at 14 (reviewing NIALL FERGUSON, *THE WAR OF THE WORLD* (2006)).

<sup>5</sup> See, e.g., Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?* 54 EMORY L.J. 97, 100–01 (2005).

<sup>6</sup> See *id.* at 98.

<sup>7</sup> *Id.* at 98–99.

(1933–1945) . . . .”<sup>8</sup> Although the exact number of deaths will never be known, some estimate that World War II consumed thirty-five to sixty million lives.<sup>9</sup> The Holocaust epitomized the worst of those tragedies and “stands without parallel as the most wicked act in all history.”<sup>10</sup> We need only mention Cambodia, Bosnia, Rwanda, and Darfur to update the list. In fact, a two-volume *Encyclopedia of Genocide* has now been published.<sup>11</sup>

Mankind has thus witnessed unparalleled slaughter and cruelty over the last century. So what has humanity done about it? Various associations have been created to tackle the problem. International war crimes tribunals have been established on an ad hoc basis in response to violations of the laws of war and other serious violations of international humanitarian law.<sup>12</sup> Following World War I, a fifteen-member commission appointed by the Allies recommended to the Paris Peace Conference that violations of “the laws and customs of war and the laws of humanity” be punished.<sup>13</sup> The Treaty of Versailles provided for the trial of the Kaiser Wilhelm II of Hohenzollern because of his “supreme offense against international morality.”<sup>14</sup> That treaty also required trials of other Germans accused of violating the laws and customs of war before allied tribunals.<sup>15</sup> Ultimately, however, the Allies did not hold any such proceedings, and the Kaiser was never put on trial.<sup>16</sup> Instead, a dozen defendants accused of war

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<sup>8</sup> *Id.* In addition to Stalin, Zedong, and Hitler, other modern dictators include Pol Pot, whose regime killed almost two million of Cambodia’s eight million citizens, Idi Amin, who oversaw the slaying of 400,000 Ugandans, Saddam Hussein, who killed an estimated 290,000 Iraqis, Jean-Claude Duvalier, who is believed to have killed an estimated 60,000 Haitians, Alfredo Stroessner, who killed approximately 200,000 people during his thirty-five year reign over Paraguay, and Slobodan Milosevic, whose four ethnic-cleansing wars led to the deaths of an estimated 200,000. John Yaukey, *Saddam’s Evil Matched, Surpassed*, ASBURY PARK PRESS, Dec. 30, 2006, at A5.

<sup>9</sup> Barbara Lee, *Preempting Democracy: The Bush Administration vs. the World*, 7 AFR.-AM. L. & POL’Y REP. 29, 30 n.3 (2005).

<sup>10</sup> Montefiore, *supra* note 4.

<sup>11</sup> ENCYCLOPEDIA OF GENOCIDE (Israel W. Charny ed., 1999).

<sup>12</sup> See generally Nina Bang-Jensen, et al., *Tribunal Justice: The Challenges, The Record, And The Prospects*, 13 AM. U. INT’L L. REV. 1541 (1998).

<sup>13</sup> Regina Horton, Note, *The Long Road to Hypocrisy: The United States and the International Criminal Court*, 24 WHITTIER L. REV. 1041, 1043 (2003).

<sup>14</sup> Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT’L & COMP. L. 415, 418 (1998).

<sup>15</sup> *Id.* at 418–19.

<sup>16</sup> See *id.* at 419.

crimes were prosecuted before the German Supreme Court in Leipzig and received only light sentences.<sup>17</sup>

That's one of those bad breaks in history. Had the Allies been more effective in prosecuting World War I criminals, then they may have changed the landscape of horror that was plowed in World War II.<sup>18</sup> In any event, the Nuremberg tribunal established after World War II is the most significant war crimes tribunal in history.<sup>19</sup> Also, the International Military Tribunal for the Far East, commonly known as the Tokyo Tribunal, was created by order of General Douglas MacArthur.<sup>20</sup> Beyond those two attempts, in my view the whole effort was an exercise in minimalism—at least until recently.

## II.

In reaction to the violence afflicting the world, numerous courts, committees, conventions, and other organizations evolved to address the grave concerns that have faced, and continue to confront, humanity. Indeed, the rise of such organizations is a silver lining in the cloud of dark atrocities of the past one hundred years. As one commentator recently stated, “[t]he emergence of the morality of human rights makes the moral landscape of the twentieth century a touch less bleak.”<sup>21</sup> I will now recount some of the important work that has occurred, and continues to occur, to combat human rights violations across the globe.

The United Nations began with a mandate for “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>22</sup> To be sure, the United Nations in 1945 was well ahead of its time, and ahead of most of its member states. We now, at least, have norms and institutions. The norms are set out in a host of declarations and conventions enacted over the years.<sup>23</sup> The most important of those

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<sup>17</sup> Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. INT'L L. & COM. REG. 407, 412 (2001).

<sup>18</sup> Lippman, *supra* note 14, at 421.

<sup>19</sup> See Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 346–47 (1999).

<sup>20</sup> Cosmos Eubany, Note, *Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 HASTINGS INT'L & COMP. L. REV. 103, 106 (2003).

<sup>21</sup> Perry, *supra* note 5, at 101.

<sup>22</sup> U.N. Charter art. 1, para. 3.

<sup>23</sup> See generally CENTER FOR THE STUDY OF HUMAN RIGHTS, COLUMBIA UNIVERSITY, 25+ HUMAN RIGHTS DOCUMENTS (2001).

documents is the Universal Declaration of Human Rights adopted by the United Nations in 1948. Largely because of Eleanor Roosevelt's efforts,<sup>24</sup> it is widely considered the Magna Carta of human rights declarations.<sup>25</sup> That said, let's delve into recent developments in the enforcement of those norms.

Since the end of World War II, the international community has had limited success in preventing genocide. It is essential for the international community to prevent and punish individual violations of human rights, before those violations escalate into mass tragedy and genocide. An international convention to prevent and suppress genocide was adopted by the United Nations in 1948.<sup>26</sup> President Harry S. Truman signed the international convention in 1949, and after it languished on Capitol Hill for nearly four decades, the convention was eventually ratified by the United States Senate in 1988.<sup>27</sup>

Indeed, after the Cold War's end, there were opportunities to confront genocide—opportunities that were not subject to deadlocks in the U.N. Security Council.<sup>28</sup> But those opportunities were missed, and we saw the resurgence of genocide in Europe and Africa.<sup>29</sup> Because the politically divided United Nations was not as effective as it hoped to be, other institutions and agencies began enforcing those norms and obligations.

I believe that, at least for the present, the European Court of Human Rights ("European Court") is the most significant of all human rights groups. Some would argue that a discussion of efforts to

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<sup>24</sup> Editorial Comments, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 670 (1985).

<sup>25</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 17, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>26</sup> See John K. Setear, *Treaties, Custom, Iteration, and Public Choice*, 5 CHI. J. INT'L L. 715, 725 n.34 (2005) (internal citation omitted); see also Sarah H. Cleveland, Crosby and the "One-Voice" Myth in U.S. Foreign Relations, 46 VILL. L. REV. 975, 985 n.83 (2001).

<sup>27</sup> Setear, *supra* note 26, at 725 n.34. Although the Universal Declaration of Human Rights was in effect at the time, the United States did not become a party to the declaration until the Senate's action in 1988.

<sup>28</sup> See Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2259 n.4 (1997) (noting "the Cold War paralysis that had for years beset the [United Nations Security] Council"); Nicole M. Procida, Note, *Ethnic Cleansing in Bosnia-Herzegovina, A Case Study: Employing United Nations Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide*, 18 SUFFOLK TRANSNAT'L L. REV. 655, 656 (1995) (stating that the termination of the Cold War afforded an opportunity to circumvent political stalemates).

<sup>29</sup> See Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501 (1996) (discussing genocides in Yugoslavia and Rwanda).

protect international human rights can start and stop with the European Court. Indeed, not too much else is happening in the remainder of the globe. The European Court, also known as the Strasbourg Court, deals generally with individual complaints<sup>30</sup> and serves a population of approximately eight hundred million people.<sup>31</sup> It is a direct result of World War II<sup>32</sup> and provides for limited sanctions against non-compliant member states. A State can be expelled if the State refuses to comply,<sup>33</sup> but States generally comply with the European Court's decisions by paying monetary judgments.<sup>34</sup> Moreover, the European Court is empowered to order limited injunctive relief. In any event, the member States generally agree to play by the rules.<sup>35</sup> Although some may argue that there are insufficient mechanisms to enforce the European Court's decisions, there also is the power of public disclosure—the enormous embarrassment that results from adverse findings against a State. It is called international public opinion.

There is a six-month statute of limitations on any complaint (with exceptions).<sup>36</sup> Ninety percent of the complaints are dismissed after a three-judge review.<sup>37</sup> The court dealt with just fewer than 30,000 complaints this past year,<sup>38</sup> yet a backlog of 80,000 cases re-

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<sup>30</sup> For a general overview of the European Court's history and operation, see European Court of Human Rights, Historical Background, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited Dec. 13, 2006).

<sup>31</sup> A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT'L L. 45, 109 (1999).

<sup>32</sup> See Scott Morris, *Europe Enters a New Millennium with Gays in the Military While the United States Drowns in Don't Ask, Don't Tell: Twin Decisions by the European Court of Human Rights*, 9 AM. U. J. GENDER SOC. POL'Y & L. 423, 426 n.24 (2001) (discussing the history of the European Court of Human Rights).

<sup>33</sup> See generally Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law*, 38 COLUM. J. TRANSNAT'L L. 515, 552–54 (2000).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 552.

<sup>36</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35, para. 1. The limitations period begins to run from the date of the last judgment by the contracting State. The limitations period is structured to work hand-in-hand with the requirement that plaintiffs exhaust “domestic remedies.” *Id.*

<sup>37</sup> See European Court of Human Rights, Survey of Activities 2005, at 32, available at [http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/2005\\_SURVEY\\_COURT\\_.pdf](http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/2005_SURVEY_COURT_.pdf) (last visited Dec. 13, 2006); see generally Paul Mahoney, Symposium, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN. ST. INT'L L. REV. 101 (2002) (providing statistics for the European Court).

<sup>38</sup> European Court of Human Rights, Survey of Activities 2005, at 32, available at [http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/2005\\_SURVEY\\_COURT\\_.pdf](http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/2005_SURVEY_COURT_.pdf).

mains.<sup>39</sup> Over sixty percent of the court's disputes arise in central and eastern Europe, especially Russia, Turkey, the Ukraine, and Poland.<sup>40</sup> Unfortunately, there are indications that there may be increasing non-compliance, particularly by Russia in the case of Chechnya.<sup>41</sup>

But what does the European Court do? What does it decide? To further illustrate, allow me to employ the case-law method and provide some specific examples. One caveat: I am not expressing agreement or disagreement with any of these opinions.

#### Dudgeon v. United Kingdom<sup>42</sup>

Northern Ireland did not criminalize homosexual relations between consenting females, but it did criminalize homosexual relations between consenting males. Dudgeon was a homosexual male who resided in Northern Ireland. However, he was never prosecuted for homosexual activity. In fact, Northern Ireland had not prosecuted anyone under that legislation for a significant period of time. Instead, for whatever reason, he sought a declaratory judgment. Because the European Convention grants every individual the right to "respect for his private . . . life,"<sup>43</sup> the court held that the legislation proscribing male homosexual relations violated the European Convention. According to the court, Dudgeon was suffering an unjustified interference with his right to respect for private life.

#### Soering v. United Kingdom<sup>44</sup>

Soering was a German national who moved to the United States. The Commonwealth of Virginia charged him with murdering his girlfriend's parents, and he was detained in the United Kingdom. The United States sought to have him extradited in accordance with a bilateral extradition treaty between the two nations. The United Kingdom issued an order releasing Soering to United States custody. Soering applied to the European Court, alleging that the death penalty, as applied in Virginia, violated the European Convention, and thereby prohibited his extradition. The European Court agreed and held that the United Kingdom could not extradite Soering without

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<sup>39</sup> *Id.* at 33.

<sup>40</sup> *Id.* at 34–37.

<sup>41</sup> Human Rights Watch, EU: Challenge Russia on Human Rights Abuses (Nov. 23, 2006), <http://hrw.org/english/docs/2006/11/23/russia14661.htm>.

<sup>42</sup> 4 Eur. Ct. H.R. 149 (1981).

<sup>43</sup> European Convention on Human Rights, Nov. 4, 1950, § 1, art. 8, ¶ 1.

<sup>44</sup> 11 Eur. Ct. H.R. 439 (1989).

violating the European Convention, because the average time spent on death row was six to eight years. The court deemed that to be inhuman treatment.

*Jersild v. Denmark*<sup>45</sup>

A television reporter in Denmark produced a documentary describing the racist attitudes of a group of young people. The documentary included interviews with the youths and various scenes depicting them shouting racist comments about immigrants and ethnic groups. The reporter was convicted by Danish authorities of aiding and abetting the dissemination of racist remarks. The reporter applied to the European Court, alleging violations of his right to freedom of expression as guaranteed under the European Convention. The European Court held that his prosecution was not “necessary in a democratic society” and, therefore, the government’s actions violated the European Convention.

*McCann v. United Kingdom*<sup>46</sup>

The British Special Air Service shot and killed three United Kingdom nationals on the island of Gibraltar. The victims’ parents appealed to the European Court, arguing that the United Kingdom violated their children’s rights under the so-called “right to life” provision of the European Convention.<sup>47</sup> The shooting was the result of an investigation into a suspected terrorist attack by the Irish Republican Army (“IRA”). The intelligence assessment was that a car bomb would be detonated by remote control. The three victims were under prior surveillance as a suspected IRA active service unit.

When the victims arrived in Gibraltar, authorities deduced that they planned to detonate the car bomb. Indeed, they were observed abandoning a car in Gibraltar. At that point, authorities decided to arrest them. When ordered to stop, each victim reached for something in his pocket, and all three were shot and killed because law enforcement feared that they were reaching for remote detonators. None of the victims possessed such a remote detonator or weapons, and the car under observation did not contain any explosives. However, the victims had placed sixty-four kilograms of explosives in another car, some distance away, which authorities later discovered.

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<sup>45</sup> 19 Eur. Ct. H.R. 1 (1995).

<sup>46</sup> 21 Eur. Ct. H.R. 97 (1995).

<sup>47</sup> European Convention on Human Rights, Nov. 4, 1950, § 1, art. 2, ¶ 1.



In a ten-to-nine vote, the European Court held that the soldiers who committed the shootings acted with an honest and justified belief that such actions were necessary. However, the European Court held that those responsible for planning and administering the operation violated the European Convention because they made no attempt to avoid the killings. Additionally, those in charge violated the European Convention because they were reckless in their assumption that the men were about to detonate a bomb.

*Goodwin v. United Kingdom*<sup>48</sup>

Christine Goodwin is a United Kingdom national who underwent a “sex re-assignment.” Goodwin appealed to the European Court because certain United Kingdom laws did not recognize Goodwin’s post-operative gender. Consequently, Goodwin was denied various rights including the right to marry and claim social security benefits. The European Court held that the United Kingdom must grant Goodwin legal status as a female and provide Goodwin with access to all rights to which females are entitled. Moreover, the right to marry could not be denied Goodwin because of his/her transsexual nature.

*T. & V. v. United Kingdom*<sup>49</sup>

Some of you may recall this matter. T. and V. were convicted in Britain for the abduction and murder of a two-year-old boy. The defendants were ten years old at the time of the offense. They argued that their trial before an adult court amounted to degrading and inhuman treatment in violation of the European Convention. The European Court held that the defendants were denied their right to a fair trial because, by virtue of their age, they were unable to understand the nature of the proceedings.

*Kalashnikov v. Russia*<sup>50</sup>

Kalashnikov was a Russian prisoner who was convicted and imprisoned for embezzlement and misappropriation of property. Kalashnikov was detained with twenty-three other inmates in a cell that was less than two hundred square feet large. Because there were only eight bunk beds, the prisoners slept in shifts. The toilet was in plain view of all and was within three feet of the dining table. There

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<sup>48</sup> 35 Eur. Ct. H.R. 18 (2002).

<sup>49</sup> 30 Eur. Ct. H.R. 212 (2000).

<sup>50</sup> 36 Eur. Ct. H.R. 34 (2002).

was no air-conditioning or heat, and the cell was infested with insects. Kalashnikov contracted various diseases and infections. He argued that the prison conditions he was subjected to violated the European Convention's provisions prohibiting inhuman or degrading treatment. The court unanimously held that those conditions violated the European Convention.

Ocalan v. Turkey<sup>51</sup>

In 1999, Abdullah Ocalan was detained on suspicion of funding an armed gang in order to destroy the integrity of the Turkish State and instigate acts of terror. That same year, he was convicted and sentenced to death. For the first eight days of his detention, he was denied access to legal counsel. Ocalan was eventually permitted limited access to his attorney but was not shown the details of the charges against him until the day of his trial. The European Court held that the Turkish government violated Ocalan's right to be brought before a judge in a timely manner and the right to prepare a defense. Furthermore, the European Court held that the death penalty was impermissibly imposed because Ocalan had not received a fair trial.

Sahin v. Turkey<sup>52</sup>

Leyla Sahin was a medical student studying at Istanbul University and was refused admission to one of her academic examinations because she wore an Islamic headscarf. Sahin was eventually suspended for a semester because of her religious conviction concerning the wearing of a headscarf. The European Court held that Istanbul University's policies did not violate Sahin's rights because the policies served the legitimate aim of protecting the rights of others and sustaining order. Additionally, Istanbul University's policies were aimed at preserving the secular nature of educational institutions.

That decision contrasts with a recent article in *Newsweek*.<sup>53</sup> It appears that wearing headscarves is not only accepted on campus but is becoming a new trend among Muslim-American women. As one student at University of California, Berkeley said, "[b]eing an American and Muslim aren't two separate identities—we can be both at the same time."<sup>54</sup>

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<sup>51</sup> 37 Eur. Ct. H.R. 10 (2003).

<sup>52</sup> 41 Eur. Ct. H.R. 8 (2004).

<sup>53</sup> Matthew Philips, *Beliefwatch: School Veil*, NEWSWEEK, Nov. 13, 2006, at 14.

<sup>54</sup> *Id.*

Jalloh v. Germany<sup>55</sup>

German police officers forcibly administered an emetic to induce Jalloh to regurgitate a packet of suspected drugs. Jalloh was observed by German police exchanging plastic bags for money and, before he was arrested, swallowing a small plastic bag. He was subsequently taken to the hospital where four police officers held him down, and a doctor administered an emetic by inserting a tube through his nostril. Jalloh vomited a bag containing cocaine and was subsequently convicted of drug trafficking. The European Court held that the forcible administration of drugs violated the European Convention's prohibition on inhuman treatment and the right to a fair trial.<sup>56</sup>

A major contribution of the European Court has been the manner in which it has interwoven international law and domestic law—a somewhat unique development on the international scene. Another success of the European Court is that it has met surprisingly little resistance from European Union countries when the court asserts jurisdiction.<sup>57</sup> Perhaps the member nations look at the European Court as a safety valve. In a word, the efforts of the European Court are a model for all nations and regions.

Notably, in defining the scope of free speech rights, the European Court has relied on, and cited to, the New Jersey Supreme Court. In *Appleby v. United Kingdom*,<sup>58</sup> a public town square was converted into a private shopping center, and the private ownership prohibited all political speech.<sup>59</sup> In deciding the scope of free speech rights, the European Court extensively referenced our decision in *Uston v. Resorts International Hotel, Inc.*,<sup>60</sup> where we held that individuals may be entitled to free speech protections at privately-owned shopping centers.<sup>61</sup> I mention *Appleby* only because it suggests that the de-

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<sup>55</sup> App. No. 54810/00 (Eur. Ct. H.R. Nov. 7, 2006).

<sup>56</sup> On a personal note, when in London last summer, I had lunch with Great Britain's representative on the European Court, Sir Nicholas Bratza. As we concluded lunch, his cell phone rang. After he took the call, he departed to investigate a matter that arose in the Middle East. My point is this: almost all of the cases before the European Court appear to receive, directly or indirectly, the attention of all of the European Court's members, even though the annual caseload is significant.

<sup>57</sup> See Laurence R. Helfer & Ann-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 296–97 (1997).

<sup>58</sup> App. No. 44306/98 (Eur. Ct. H.R. Apr. 8, 2003).

<sup>59</sup> See generally *id.*

<sup>60</sup> 445 A.2d 370 (N.J. 1982).

<sup>61</sup> *Id.* at 375.

cisions of the New Jersey Supreme Court, and other state courts as well, can impact the international human rights debate.

#### *Other Regional Efforts*

Let's briefly examine the rest of the globe, a landscape where protection of human rights is not as encouraging as in Europe. First is the Inter-American Court on Human Rights created in 1979 to cover the Western Hemisphere.<sup>62</sup> Based in Costa Rica,<sup>63</sup> the court has heard two hundred cases in over twenty years of existence—roughly ten a year.<sup>64</sup> The United States has not ratified the Organization of American States (“OAS”) treaty, so the United States cannot nominate a person to the OAS court. The human rights tribunal landscape in the rest of world is even bleaker.

The Arab nations established a human rights commission in 1993, but the tribunal is not yet functioning.<sup>65</sup> Thus, it appears that, at least for the present, there may not be an organization in the Middle East that has the capacity—or the political will—to establish rights, remedies, and norms. This apparent lack of commitment to human rights and a lack of institutions addressing human rights in the Middle East are troubling.

Similarly, the Asia/Pacific region does not have a regional human rights tribunal. But there is an annual Asia/Pacific forum that focuses on human rights education, as well as economic and social rights.<sup>66</sup> If the human rights picture is blurred in the Middle and Far East, Africa is even less developed in that regard. Fortunately, there has been agreement concerning the establishment of an African Court of Human Rights. That proposed court is being merged with the African Court of Justice.<sup>67</sup>

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<sup>62</sup> See Christina M. Cerna, *The Inter-American System For the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 199 (2004).

<sup>63</sup> Douglass Cassell, *Recent Books on International Law: Edited by Richard Bilder*, 100 AM. J. INT'L L. 503, 504 (2006) (reviewing JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2003)).

<sup>64</sup> See Inter-American Court on Human Rights, *Jurisprudence: Decisions and Judgments*, <http://www.corteidh.or.cr/casos.cfm?&CFID=153840&CFTOKEN=36534461> (last visited Dec. 13, 2006) (listing all of the Inter-American Court on Human Rights Tribunal's cases).

<sup>65</sup> Bertrand G. Ramcharan, *Evolution of Human Rights Norms and Machinery* (2006), [http://www.scu.edu/ethics/practicing/focusareas/global\\_ethics/human-rights-norms.html#measures](http://www.scu.edu/ethics/practicing/focusareas/global_ethics/human-rights-norms.html#measures).

<sup>66</sup> See generally Pamela A. Jeffries, *Human Rights, Foreign Policy, and Religious Belief: An Asia/Pacific Perspective*, 2000 B.Y.U. L. REV. 885 (2000).

<sup>67</sup> Ramcharan, *supra* note 65.

*United Nations Efforts*

After the Cold War, the United Nations attempted to find an analogue to Nuremberg. Therefore, it created two ad hoc international tribunals: the International Tribunal for Yugoslavia<sup>68</sup> and the International Criminal Tribunal for Rwanda.<sup>69</sup> Although those two tribunals were limited in scope and mandate, the latter achieved the first ever genocide conviction before an international criminal tribunal under the lead of American prosecutor Pierre-Richard Prosper.<sup>70</sup> Both are important undertakings because they re-opened the discussion and the debate. Additionally, a limited number of hybrid ad hoc courts, mixed United Nations-national courts, were established recently in Sierra Leone<sup>71</sup> and Cambodia.<sup>72</sup> However, we will likely not see another ad hoc court like Rwanda or Yugoslavia. The reason is because the International Criminal Court ("ICC"), which I will discuss in a few moments, is now established as a permanent, on-going court.<sup>73</sup>

*The United Nations High Commissioner for Human Rights*

The United Nations High Commissioner for Human Rights is a public advocate for human rights. The first High Commissioner was an Ecuadorian diplomat, Jose Ayala-Lasso, who served from 1994 to 1997.<sup>74</sup> The second, and most prominent and outspoken High

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<sup>68</sup> See International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty/> (last visited Dec. 13, 2006). The Yugoslavia Tribunal has about 1000 employees on staff, 16 judges, and a \$275 million budget. See Andrea Kupfer Schneider, *Barriers to Peace in the Middle East: The Day After Tomorrow: What Happens Once a Middle East Peace Treaty is Signed?*, 6 NEV. L.J. 401, 409 n.46 (2005).

<sup>69</sup> See International Criminal Tribunal for Rwanda, <http://69.94.11.53/> (last visited Dec. 13, 2006).

<sup>70</sup> U. S. Dep't of State, Biography—Pierre-Richard Prosper, <http://www.state.gov/outofdate/bios/p/4417.htm> (2004).

<sup>71</sup> See Special Court for Sierra Leone, <http://www.sc-sl.org/about.html> (last visited Mar. 4, 2007). According to the tribunal's website:

The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

*Id.*

<sup>72</sup> See Peter Valek, Note, *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?*, 26 MICH. J. INT'L L. 1223, 1247 (2005).

<sup>73</sup> See *infra* notes 81–102 and accompanying text.

<sup>74</sup> Christina M. Cerna, *A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner For Human Rights*, 10 AM. U.J. INT'L L. & POL'Y 1265, 1268 (1995).

Commissioner, was the former president of Ireland, Mary Robinson, whose term ended in 2002.<sup>75</sup> The current High Commissioner is Louise Arbour of Canada, former Chief Prosecutor for the International Criminal Tribunals for Yugoslavia and Rwanda, and a former Justice on the Supreme Court of Canada.<sup>76</sup> She was appointed in 2004.<sup>77</sup> The organization's most noteworthy contributions have been to provide a voice for victims, to launch investigations into gross human rights violations, and to spearhead the human rights movement by interacting and cooperating with other bodies and organizations such as the United Nations Security Council and the ICC.<sup>78</sup> Despite some progress, the High Commissioner's office is developing, and receives only meager allocations from the United Nations' regular budget, supplemented by voluntary contributions.<sup>79</sup> That reflects adversely on its staffing structure and on its ability to plan and act independently. Fortunately, a plan has been initiated to double the Commissioner's regular budget in five years.<sup>80</sup>

#### *International Criminal Court*

The ICC "is the first ever permanent, treaty based international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished."<sup>81</sup> Formed in 2002,<sup>82</sup> the court has potential. The ICC tries only those accused of the gravest, most vile crimes—genocide, crimes against humanity, and war crimes.<sup>83</sup> Located in The Hague in the Netherlands,<sup>84</sup> there

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<sup>75</sup> Fionnuala Ni Aoláin, *Looking Ahead: Strategic Priorities and Challenges for the United Nations High Commissioner for Human Rights*, 35 COLUM. HUM. RTS. L. REV. 469, 479 (2004).

<sup>76</sup> Press Release, ReliefWeb, UN SG Appoints Louise Arbour of Canada High Commissioner for Human Rights (Feb. 20, 2004), <http://www.reliefweb.int/w/rwb.nsf/s/AF6547EBE3EC789649256E4300080994>.

<sup>77</sup> Other High Commissioners include Sergio Vieira de Mello, who served in 2003, and Bertrand G. Ramcharan, who served as interim commissioner from 2003 to 2004.

<sup>78</sup> Ramcharan, *supra* note 65.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> International Criminal Court, Historical Introduction, <http://www.icc-cpi.int/about/ataglance/history.html> [hereinafter International Criminal Court, Historical Introduction] (last visited Dec. 13, 2006).

<sup>82</sup> Amy Cook, *Will You Whisper or Will You Scream?*, 20 C.B.A. RECORD 6 (Feb./Mar. 2006). The ICC was established by the Rome Statute of the International Criminal Court in July 1998. The Statute became effective on July 1, 2002. International Criminal Court, Historical Introduction, *supra* note 80.

<sup>83</sup> International Criminal Court, Historical Introduction, *supra* note 81.

<sup>84</sup> Cook, *supra* note 82.

are 103 member states.<sup>85</sup> Whereas the two ad hoc United Nations tribunals for Yugoslavia and Rwanda were established within the United Nations Security Council's framework, the ICC was created as a completely new and independent international organization.<sup>86</sup>

Once a State becomes a party to the ICC, the State accepts the ICC's jurisdiction with respect to defined crimes—crimes that are already prohibited under international law.<sup>87</sup> The ICC does not replace national courts, but rather, complements national criminal jurisdictions.<sup>88</sup> The ICC may be the world's best hope to prosecute human rights violations.

Significantly, a review conference will be held in 2009 during which the definition of aggression will be among the agenda items.<sup>89</sup> The difficulty in prosecuting the crime of aggression, in contrast to other grave crimes, is that no international convention has yet defined precisely what the term "aggression" constitutes. Therefore, the ICC first must adopt an agreement defining aggression and the conditions under which the ICC can exercise its jurisdiction over that crime. That provision must be adopted by a super-majority vote of the States—seven-eighths of them.<sup>90</sup>

Importantly, under the ICC, if a defendant is a head of state or is a member of a government or parliament, the defendant is not exempted from criminal responsibility.<sup>91</sup> Military commanders and superiors will also be held liable for criminal offenses committed by forces under their effective command and control.<sup>92</sup> Again, the ICC may exercise its jurisdiction with respect to genocide, crimes against humanity, and war crimes, either when the situation is referred to the prosecutor by a State party or by the Security Council, or when the ICC Prosecutor opts to initiate an investigation on the basis of infor-

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<sup>85</sup> International Criminal Court, About the Court, <http://www.icc-cpi.int/about.html> [hereinafter International Criminal Court, About the Court] (last visited Dec. 13, 2006).

<sup>86</sup> International Criminal Court, Historical Introduction, *supra* note 81.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> International Criminal Court, Frequently Asked Questions, <http://www.icc-cpi.int/about/ataglance/faq.html#faq7> [hereinafter International Criminal Court, Frequently Asked Questions] (last visited Dec. 13, 2006).

<sup>90</sup> Kenneth Roth, *Is America's Withdrawal from the New International Criminal Court Justified*, 15 WORLDWIDE (July 1, 2002), available at <http://hrw.org/english/docs/2002/07/17/usint12892.htm>. That future review conference reminds me of "study commissions" that governments, including federal, state, and local governments, often establish when they need time before deciding on an issue.

<sup>91</sup> International Criminal Court, Historical Introduction, *supra* note 81.

<sup>92</sup> *Id.*

mation received.<sup>93</sup> But if the matter is being considered by the State that has the problem, then the ICC cannot prosecute unless the State is “unable or unwilling to investigate or prosecute.”<sup>94</sup> For example, a State may be deemed unwilling if its formal proceedings are a sham or if the State is otherwise shielding an evildoer from criminal responsibility.<sup>95</sup> A State may be unable to investigate or prosecute when its legal system has collapsed.<sup>96</sup>

The ICC may impose a maximum specified term of imprisonment of thirty years.<sup>97</sup> Life imprisonment is available only in exigent circumstances.<sup>98</sup> A recent major focus of the ICC is the Congo. Do you recall what I said above about King Leopold’s assault on the Congo over one hundred years ago? The French always have an apt phrase: “Plus ça change, plus c’est la même chose.” (“The more things change . . . .”)<sup>99</sup>

The United States has had a complex policy toward the ICC. Despite the Clinton Administration’s reservations in the 1990s, the United States signed onto the treaty establishing the ICC in 2000.<sup>100</sup> President George W. Bush, however, rejected the treaty two years later.<sup>101</sup> The Bush Administration viewed the ICC as a danger to United States officials and military personnel promoting American interests abroad. A principal objection was that the treaty establishing the ICC would permit the court, in certain circumstances, to assert jurisdiction over nationals of other States that had not ratified the treaty, provided the state in whose territory the crimes occurred consented to the ICC’s jurisdiction and other preconditions were satisfied. The response from those who support the ICC is that that was precisely the point: to be able to hold legally accountable a future Saddam Hussein or an African dictator organizing genocide, who of course would never ratify the treaty. And the surrebuttal is the argument of the United States that the rejected feature exposed multinational peacekeeping forces operating in a country that has joined the treaty to the ICC’s jurisdiction even if the country of the individual

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<sup>93</sup> *Id.*

<sup>94</sup> International Criminal Court, Frequently Asked Questions, *supra* note 89.

<sup>95</sup> International Criminal Court, About the Court, *supra* note 85.

<sup>96</sup> International Criminal Court, Frequently Asked Questions, *supra* note 89.

<sup>97</sup> International Criminal Court, Historical Introduction, *supra* note 81.

<sup>98</sup> *Id.*

<sup>99</sup> That familiar quotation is attributed to the French journalist and novelist Alphonse Karr. THE COLUMBIA WORLD OF QUOTATIONS (Robert Biggs et al. eds., 1996).

<sup>100</sup> See Roth, *supra* note 90.

<sup>101</sup> *Id.*



peacekeeper has not joined the treaty. In any event, United States opposition to the ICC is now embodied in federal legislation.<sup>102</sup>

*Human Rights Council*

The Human Rights Council is the successor to the United Nations Commission on Human Rights. The Human Rights Council, with its predecessor, deployed human rights experts to report on problem situations.

Replacing the fifty-four-member United Nations Commission with the forty-nine-member Human Rights Council, the United Nations attempted to address legitimate concerns, including the ease with which rights-abusive countries could be elected to the United Nations Commission.<sup>103</sup> Eighty percent of the Human Rights Council's membership consists of bona fide democracies, compared to barely sixty percent of the old United Nations Commission.<sup>104</sup> Nonetheless, only seven nations of the "Western Group" are on the Council.<sup>105</sup> Renegade nations will still be elected, but now Human Rights Council members are subject to intensive "peer-review" scrutiny of their own records, potentially creating contentiousness and polarization within the Human Rights Council. There is also criticism that members are elected by only a simple majority vote, like the old United Nations Commission.<sup>106</sup> The Secretary General had proposed a more stringent two-thirds requirement for election.<sup>107</sup>

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<sup>102</sup> See 22 U.S.C. § 7423 (2000 & Supp. IV 2004). However, the Bush Administration's opposition to the ICC may be waning. See Jeffrey Laurenti, *The Best and the Worst of 2006: The World*, ASCRIBE.ORG, Jan. 2, 2007, <http://www.ascribe.org/cgi-bin/ behold.pl?ascribeid=20070102.142644&time=14%2054%20PST&year=2007&public=1> (noting that "the Republican Congress dropped its ban on military cooperation with ICC countries that reject a special exemption for American suspects, and [President George W.] Bush himself waived the mandated cut-off of aid to them.").

<sup>103</sup> See generally Caroline McHale, Note, *The Impact of U.N. Human Rights Commission Reform on the Ground: Investigating Extrajudicial Executions of Honduran Street Children*, 29 FORDHAM INT'L L.J. 812 (2006).

<sup>104</sup> See UN Human Rights Council, Membership of the Human Rights Council by Year, <http://www.ohchr.org/english/bodies/hrcouncil/year.htm> (last visited Dec. 13, 2006).

<sup>105</sup> *Id.*

<sup>106</sup> See Brett Schaefer & Nile Gardiner, *The Right Decision on the U.N. Human Rights Council*, THE HERITAGE FOUNDATION, Apr. 6, 2006, <http://www.heritage.org/Research/InternationalOrganizations/wm1031.cfm>.

<sup>107</sup> Human Rights Council, Explanatory Note by the Secretary-General, <http://www.un.org/largerfreedom/add1.htm> (last visited Dec. 13, 2006).

## III.

With the rest of the world's efforts to protect human rights as a backdrop, let us now focus briefly on the United States. You are aware of some of our nation's responses to international challenges and organizations. Those responses—whether you agree with our government's position or not, whether you are of an isolationist or international mind, whether you are unilateral or universalist—are interesting when we consider our nation's history. Indeed, the Chief Justice of the Supreme Court of the United States, John Marshall, repeatedly affirmed the importance of international law in American jurisprudence.<sup>108</sup> The tradition continues.<sup>109</sup> Over the last two or three years, there have been multiple cases referencing international or foreign law.<sup>110</sup> However, the use of international law by federal courts is not without debate. For example, under the proposed Feeney Bill, if a judge uses foreign law, it could be the grounds for impeachment.<sup>111</sup>

To be sure, the United States is not immune on the subject of human rights issues. Therefore, I will address some alleged—and I emphasize alleged—human rights issues in the United States. First, this year there was a “shadow report” issued by a coalition of 142 United States non-governmental organizations and thirty-two individuals alleging serious human rights violations in America.<sup>112</sup> The report was sent to the United Nations Human Rights Committee in the summer of 2006.<sup>113</sup> Among other things, the report alleges abuse in state prisons and complains of the incarceration of children in adult prisons and jails.<sup>114</sup> I am not vouching for that report. I men-

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<sup>108</sup> Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1040 (2004) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

<sup>109</sup> See, e.g., *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

<sup>110</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing a decision of the European Court of Human Rights); *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

<sup>111</sup> Law.com, *Rely on Foreign Law, Risk Impeachment*, Mar. 12, 2004, <http://www.law.com/jsp/article.jsp?id=1078368977064&specArtType=newsInBrief>.

<sup>112</sup> See United States Human Rights Network, *Media Highlights Summary*, <http://www.ushrnetwork.org/pubs/Media%20Highlights%20Summary.pdf> (last visited Dec. 13, 2006); see also Larisa Alexadrovna, *'Shadow' Human Rights Report to Accuse United States of Violating International Human Rights Treaties*, THE RAW STORY, July 6, 2006, available at [http://www.rawstory.com/news/2006/Shadow\\_human\\_rights\\_report\\_to\\_accuse\\_0706.html](http://www.rawstory.com/news/2006/Shadow_human_rights_report_to_accuse_0706.html).

<sup>113</sup> See United States Human Rights Network, *supra* note 112.

<sup>114</sup> See *id.*

tion the shadow report and its allegations of human rights violations in the United States simply to suggest that the issue is in play in our own backyard. How we resolve it is another matter.

Allow me to focus on a few of aspects of the report. The report discusses United States prisons. It cites one state, which houses approximately ten percent of our nation's prison population, as an example of gross prison mistreatment, alleging abuse, neglect, discrimination, and denial of due process.<sup>115</sup> Prisoners allegedly are subjected to violence based on their gender, race, economic status, age, and sexual orientation.<sup>116</sup> According to the report, United States legislation, such as the Prison Litigation Reform Act, effectively prevents countless prisoners from seeking redress in federal court.<sup>117</sup> Those laws prevent prisoners from having access to courts, allegedly reducing courts' ability to remedy human rights violations.

Further, the report extensively addresses the rights of children and their need for special protection. The shadow report refers to circumstances where children as young as ten years old were forced into adult criminal proceedings and subsequently incarcerated in adult penitentiaries.<sup>118</sup> "More than 9,000 children are housed in adult prisons and jails and more than 4,000 children per year enter the adult system."<sup>119</sup>

#### IV.

With that background, let me discuss the situation in the Garden State. Professor Elizabeth Defeis of Seton Hall Law School, the school's former dean, spearheaded a project called *International Human Rights and New Jersey . . . A Perspective*.<sup>120</sup> Her thesis, at least in part, is that the New Jersey Constitution in some ways is closer to the international guarantees contained in the Universal Declaration of Human Rights than it is to the nation's federal law.<sup>121</sup> I agree. As I make this presentation, forgive my reference to my personal experience on this issue, but such references may be informative.

To start, there are some noteworthy and interesting coincidences by way of an historical backdrop. James Madison proposed to

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<sup>115</sup> See *id.* (noting prison conditions in California).

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> See Alexandrovna, *supra* note 112.

<sup>120</sup> ELIZABETH DEFEIS, PROJECT DIRECTOR, INTERNATIONAL HUMAN RIGHTS AND NEW JERSEY . . . A PERSPECTIVE: LEARNER'S GUIDE (2004) (on file with author).

<sup>121</sup> *Id.* at 17.

the first Congress in June 1789 in New York City, amendments to the United States Constitution to guarantee personal liberties—the Bill of Rights.<sup>122</sup> Five months later and thirty miles south, New Jersey was the first state to ratify it,<sup>123</sup> doing so in Perth Amboy.<sup>124</sup> The second coincidence is that in 1948, the United Nations debated and adopted the Universal Declaration of Human Rights.<sup>125</sup> Just one year before, New Jersey adopted and debated a new constitution at its Constitutional Convention.<sup>126</sup> The New Jersey Constitution provided, by way of example, expansive individual rights, such as equal rights for women,<sup>127</sup> the right to be free from discrimination,<sup>128</sup> and a child's right to a thorough and efficient education.<sup>129</sup>

As the New Jersey Constitution is written, and as our Supreme Court has interpreted it, New Jersey law often provides more protection to individuals than federal law. Take education for example. The United Nations Declaration states: "Everyone has the right to education."<sup>130</sup> Subsequent conventions have codified that right for ratifying countries. But in *San Antonio Independent School District v. Rodriguez*,<sup>131</sup> the Supreme Court of the United States rejected the ar-

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<sup>122</sup> Elizabeth Defeis, *Universal Declaration of Human Rights: A Standard for States*, 28 SETON HALL LEGIS. J. 259, 268 (2004).

<sup>123</sup> *Id.* at 268–69. Both houses unanimously passed a bill ratifying the Bill of Rights. Governor William Livingston then signed the Act. *Id.*

<sup>124</sup> *Id.* at 268. The New Jersey Legislative Council and General Assembly both met in Perth Amboy to consider the proposed amendments to the United States Constitution. *Id.* at 268–69.

<sup>125</sup> See Universal Declaration of Human Rights, *supra* note 25.

<sup>126</sup> Stewart G. Pollock, *Celebrating Fifty Years of Judicial Reform Under the 1947 New Jersey Constitution*, 29 RUTGERS L.J. 675, 681 (1998).

<sup>127</sup> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, ¶ 1. Although New Jersey's voters rejected a proposed equal rights amendment for women to the federal constitution in 1974, those rights were already guaranteed by the 1947 Constitution. Robert F. Williams, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* 17 (1990).

<sup>128</sup> "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin." N.J. CONST. art. I, ¶ 5.

<sup>129</sup> "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. VIII, § VI, ¶ 1.

<sup>130</sup> Universal Declaration of Human Rights, *supra* note 25, art. 26, ¶ 1.

<sup>131</sup> 411 U.S. 1 (1973).

gument that education is a fundamental right.<sup>132</sup> Yet, as I just mentioned, the New Jersey Constitution provides for a “thorough and efficient education.”<sup>133</sup> With *Robinson v. Cahill*,<sup>134</sup> *Abbott v. Burke*,<sup>135</sup> and their progeny, we have had thirty years of progress in implementing the right to education for all of our children.

Now look at shelter and housing. The United Nations Declaration says: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . .”<sup>136</sup> But, in 1972, the Supreme Court of the United States, in *Lindsay v. Normet*,<sup>137</sup> held that there is no constitutional guarantee of access to dwellings.<sup>138</sup> New Jersey has held in the *Mt. Laurel* cases that, under our state Constitution, housing and shelter are necessary for the general welfare.<sup>139</sup> Indeed, New Jersey towns must provide their fair share of affordable housing.<sup>140</sup>

Further, New Jersey’s protection of privacy is also expansive. In *In re Quinlan*,<sup>141</sup> the New Jersey Supreme Court held that the right to privacy includes the right to die.<sup>142</sup> In cases involving search and seizure, we have addressed the right to privacy. There is, for example, Justice Clifford’s opinion in *State v. Hemptele*,<sup>143</sup> holding that a person

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<sup>132</sup> *Id.* at 37. The Court stated, “this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.” *Id.* at 40.

<sup>133</sup> N.J. CONST. art. VIII, § VI, ¶ 1.

<sup>134</sup> See *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973), *cert. denied sub nom. Dickey v. Robinson*, 414 U.S. 976 (1976); *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975), *cert. denied sub nom. Klein v. Robinson*, 423 U.S. 913 (1975); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976); *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976); *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976).

<sup>135</sup> See *Abbott v. Burke*, 790 A.2d 842 (N.J. 1985); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Abbott v. Burke*, 748 A.2d 82 (N.J. 2000); *Abbott v. Burke*, 751 A.2d 1032 (N.J. 2000); *Abbott v. Burke*, 790 A.2d 842 (N.J. 2002).

<sup>136</sup> Universal Declaration of Human Rights, *supra* note 25, art. 25, ¶ 1.

<sup>137</sup> 405 U.S. 56 (1972).

<sup>138</sup> *Id.* at 74 (“We are unable to perceive in [the United States Constitution] any constitutional guarantee of access to dwellings of a particular quality.”).

<sup>139</sup> See generally *S. Burlington County NAACP v. Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

<sup>140</sup> See *S. Burlington County NAACP v. Mt. Laurel*, 456 A.2d 390 (N.J. 1983).

<sup>141</sup> 355 A.2d 647 (N.J. 1976).

<sup>142</sup> *Id.* at 663.

<sup>143</sup> 576 A.2d 793 (N.J. 1990).

has a right of privacy in his garbage.<sup>144</sup> And in 2005, in *State v. McAllister*,<sup>145</sup> I concluded, on behalf of the New Jersey Supreme Court, that a citizen has a right of privacy in one's bank accounts, and that law enforcement cannot demand and receive information in those bank accounts without satisfying the requirements for the issuance of a subpoena *duces tecum*.<sup>146</sup>

I previously mentioned the shadow report delivered to the United Nations that focused on the rights of prisoners and the rights of children.<sup>147</sup> The European Court has rendered a significant decision in respect of prison conditions in Russia.<sup>148</sup> We have had similar problems in New Jersey and have addressed those issues responsibly. Notably, in the 1980s and 1990s, the Public Advocate brought actions in federal court concerning conditions in the county correctional institutions in Monmouth, Essex, and Bergen Counties, as well as in the Newark Street Jail. The United States District Court for the District of New Jersey appointed me and another attorney as Special Masters, charging us with the duty to investigate those conditions, issue a report, and make recommendations.<sup>149</sup> I will cite one interesting example because it parallels the case in Russia that I referenced above, *Kalashnikov*.<sup>150</sup>

In Monmouth County's correctional institute, there was a room roughly twelve feet by twenty feet that housed over eighteen inmates. Unlike even in the Russian prison, there were no beds—only sleeping bags, back-to-back.<sup>151</sup> There was the added excitement of mice running over inmates when they were asleep—or attempted to sleep. Subsequently, the county built a new jail. Thus, when given the opportunity, New Jersey met the challenge and confronted the need for reform.<sup>152</sup>

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<sup>144</sup> *Id.* at 810.

<sup>145</sup> 875 A.2d 866 (N.J. 2005).

<sup>146</sup> *Id.* at 875–77.

<sup>147</sup> See *supra* notes 112–119 and accompanying text.

<sup>148</sup> *Kalashnikov v. Russia*, 36 Eur. Ct. H.R. 34 (2002).

<sup>149</sup> See *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417, 1419 n.2 (D.N.J. 1984).

<sup>150</sup> See *supra* note 50 and accompanying text.

<sup>151</sup> See generally *Monmouth County Corr. Inst.*, 595 F. Supp. at 1421–22.

<sup>152</sup> Lack of recreation was a major problem at the Monmouth County Correctional Institution at the time. In my original draft of my report to the federal court, I inserted in a footnote, the following recommendation: "Because recreational facilities at the jail are woefully inadequate, I recommend that the Rumson Country Club and the Spring Lake Golf and Country Club make their facilities available once each summer to the inmates free of charge." I leave it to the reader to discern whether

The shadow report further emphasized that, as a matter of human rights, children are entitled to greater protection in the United States.<sup>153</sup> We are, said the report, forcing children as young as ten into adult criminal proceedings.<sup>154</sup> And we are incarcerating them in adult penitentiaries.<sup>155</sup> Yearly, it is said, we are transferring thousands of children into the adult system and warehousing them there.<sup>156</sup>

What does New Jersey do? We have taken a number of steps to protect our children. For example, we have concluded that when the prosecution wants to try a juvenile as an adult, the juvenile may present evidence on the question of whether there is probable cause that the juvenile committed the offense at a waiver hearing.<sup>157</sup> Furthermore, we have taken steps to ensure that juveniles are separated from adults when incarcerated.<sup>158</sup>

The previously referenced shadow report further addresses the problems confronting immigrants.<sup>159</sup> I do not intend to enter that debate here. Suffice it to say that only six months ago we heard an appeal concerning an illegal alien who was severely injured while riding as a passenger in an uninsured automobile.<sup>160</sup> The only issue was whether he was a resident and therefore able to recover under our statutory construct. We held that the alien could make a claim for payment against the Unsatisfied Claim and Judgment Fund<sup>161</sup> precisely because he was a resident who lived here, worked here, paid taxes here, and stayed out of trouble here.<sup>162</sup> But we took pains to note that immigration issues were, and are, for the federal government.<sup>163</sup>

## V.

To sum up, and as the refrain at Disney World puts it, “it’s a small world after all.” Sadly, it is becoming a more dangerous world as well. Repeated human rights violations are a prelude to genocide.

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that suggestion was serious or mischievous. In any event, my wise wife suggested that I delete it, and I complied.

<sup>153</sup> United States Human Rights Network, *supra* note 112.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *See id.*

<sup>157</sup> State v. J.M., 866 A.2d 178, 186 (N.J. 2005).

<sup>158</sup> *See State ex rel. S.S.*, 869 A.2d 875, 876 (N.J. 2005).

<sup>159</sup> *See* United States Human Rights Network, *supra* note 112.

<sup>160</sup> Caballero v. Martinez, 897 A.2d 1026, 1058 (N.J. 2006).

<sup>161</sup> N.J. STAT. ANN. § 39:6-61 to -91.

<sup>162</sup> *Caballero*, 897 A.2d at 1033.

<sup>163</sup> *Id.* at 1031.

Genocide, in turn, can contribute to wars and even world wars. And, without ending on too sobering a note, the next world war may be the last world war.

The success of the struggle for human rights depends in large measure on advocacy from outside. Governments do not do enough. But there are non-governmental organizations that are doing a great deal: Amnesty International, Freedom House, Human Rights First, Human Rights Watch, the Red Cross, the United States Committee for Refugees and Immigrants, and others. Those organizations have shown that the protection of human rights is not simply a problem in poor countries governed by tyrants, but grave abuses occur even in the most progressive nations.

Individuals can also do more. Most citizens are not well informed about, or active concerning, national issues, much less international challenges. As I said at the outset, I urge you, as leaders of the bar and in the community, to become more informed and more involved. Trite, but true, it's still better to light one candle than to curse the darkness.<sup>164</sup>

Thank you and good luck.

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<sup>164</sup> JOHN BARTLETT, FAMILIAR QUOTATIONS 981b (Emily Morrison ed., Boston: Little, Brown and Co. 14th ed.) (1968).