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POLITICAL PRISONERS: THE LAW AND POLITICS OF PROTECTION

*David P. Forsythe**

I. INTRODUCTION

In the fall of 1975 the United States, in a much publicized step at the United Nations, introduced an abortive resolution calling for world-wide amnesty for political prisoners. Admittedly, this draft resolution was withdrawn because of crippling amendments, and it may well be that this American initiative was launched more to deflect criticism to others than to help political prisoners. But it seems to be the case—at least from a Western perspective—that political prisoners are becoming a more salient subject in world affairs. The concept of political prisoners has existed for quite a while.¹ In the last decade and a half, however, non-governmental organizations (NGO's) such as Amnesty International have tried to arouse public concern on behalf of persons detained without benefit of due process of law as generally found in Western democracies.² More quietly, other non-governmental organizations such as the International Committee of the Red Cross have made regular prison visits and trial observations for these persons.³

These non-governmental efforts seem to have rekindled interest in political prisoners. The American draft resolution of 1975 probably would not have been offered but for this renewed interest in

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1. See, e.g., P. PAPADATOS, *LE DELIT POLITIQUE: CONTRIBUTION À L'ÉTUDE DES CRIMES CONTRE L'ÉTAT* (1955); R. RODIER, *LE DELIT POLITIQUE* (1931); P. SORNAY, *ÉVOLUTION RECENTE DE LA NOTION DE DELIT POLITIQUE EN DROIT INTERNE* (1936); Graven, *La Notion actuelle de delit politique dans l'état fonde sur le droit*, 1 *REVUE DE DROIT INTERNATIONAL DE SCIENCES DIPLOMATIQUES ET POLITIQUES* 37 (1958).

2. Amnesty International publishes an Annual Report giving the details of its activities.

3. The ICRC is the Swiss organization within the international Red Cross movement responsible for protection functions of that movement. It is to be distinguished from the League of Red Cross Societies, which is a federation of national Red Cross societies with an international secretariat.

A quantitative and analytic study of ICRC protection of political prisoners is found in J. MOREILLON, *LE COMITE INTERNATIONAL DE LA CROIX-ROUGE ET LA PROTECTION DES DETENUS POLITIQUES* (1973) [hereinafter cited as MOREILLON]; cf. D. FORSYTHE, *PRESENT ROLE OF RED CROSS PROTECTION* 31 (1975).

political prisoners. Even more demonstrative of this interest has been the effort of the United States Congress to legislatively compel the Executive to pay attention to the subjects of human rights and political prisoners. Congress has tried to make security assistance dependent upon avoidance of political prisoner detention or gross violations of human rights through amendments to the Foreign Assistance Act.⁴ In view of this renewed interest in political prisoners, it is the purpose of this article to explore the following questions. What indeed is a political prisoner? What importance do political prisoners have in world politics from the point of view of either power relationships or humanitarian concerns? What protection exists in international law and diplomacy for the political prisoner? What changes in the international legal order—if any—are desirable and feasible?

II. DEFINING POLITICAL PRISONERS

There is much confusion as to the meaning of the concept "political prisoner." There are those who say there is no such thing, especially governments responding to inquiries.⁵ There are also those who say a political prisoner is a political prisoner, which is not the inane statement it appears to be. This is the official position of the International Committee of the Red Cross (ICRC), which has no formal definition of a political prisoner. It is the collective belief of the ICRC that both governments and individuals realize the targets for projected visits by the ICRC. It is thus more important for the ICRC to enter the places of detention than to discuss exactly what category of person is detained there.⁶

Beyond these two non-definitions, there remain two analytic schools of thought on the question of identifying who is a political

4. In the 1973 Foreign Assistance Act, Congress said that economic and military assistance should be denied to any country "which practices the internment or imprisonment of that country's citizens for political purposes." 22 U.S.C. § 2151 (Supp. 1974). In 1974 Congress said that the ". . . President shall substantially reduce or terminate security assistance to any government which engages in a consistent pattern of gross violations of internationally recognized human rights . . ." although some extenuating circumstances were allowed. 22 U.S.C. § 2304 (Supp. 1974). In 1975 both Houses were debating bills that would maintain this general orientation to political prisoners and human rights in the Foreign Assistance Act.

5. Moreillon found this the most prevalent governmental response among negative responses to ICRC requests to visit political prisoners. MOREILLON, *supra* note 3.

6. Interviews with ICRC officials, Geneva, 1973-75.

prisoner. The first of these is the "persecuted individual" school. This approach defines a political prisoner as one more persecuted than persecuted by a government because of that person's "political" beliefs. Most of the NGO's working in support of human rights take this approach. Certain problems are inherent in this approach. It is not always easy to determine what a "political belief" is. Does religious belief become political if a Russian Jew desires to emigrate to Israel and he is blocked by the Soviet Government, perhaps because that emigration would imply dissatisfaction with the way of life that the government represents? And if so, is there any difference between that Russian Jew and an atheistic Russian Latvian, who desires to emigrate but is also blocked? It is also difficult to distinguish persecution from prosecution. The law will usually be brought into play by an executive decision. That is, generally the executive must first decide to prosecute in order for the law to be applied. Thus, there is usually the prior question of *whether* to prosecute, which is a point of decision-making not controlled by the law, but rather controlling the application of the law. At times it is analytically difficult to say that an executive decision reflects an intent to persecute rather than simply an intent to apply the law.⁷ Moreover, the "persecuted individual" approach tends to equate a political prisoner with anyone denied justice, which makes the term so sweeping as to reduce its precise utility. Finally, there is the question of the significance of violence. Does a political prisoner forfeit that status through use of violence against a government? Amnesty International has attempted to make a distinction in its operations: it "adopts"—*i.e.*, seeks the release of—only those who have not engaged in violence. There is some dissatisfaction within Amnesty International on this question, particularly on the part of those trying to apply the distinction to areas like Latin America where the tradition of violent politics is widespread.⁸

7. The process of decision-making with regard to whether or not extradition laws are to be applied to political criminals is discussed in O'Higgins, *Disguised Extradition: The Soblen Case*, 27 MOD. L. REV. 521 (1964). Of course one can establish retrospectively that the application of a law in a certain way and toward selective targets constitutes persecution.

8. Interviews with Amnesty International officials, London, 1973. There is a legal tradition that defines a political crime as an illegal use of violence against the state. Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247 (1933); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

A second approach to a definition of political prisoner is the "government security" school. This approach equates the adjective "political" with security. Under this approach, any person detained for constituting a threat to the security of the government becomes a political prisoner. It can be argued that ICRC practice is based on this approach. In addition, the Henry Dunant Institute of the International Red Cross Movement has used this conceptualization in a study for the Swiss Government on the subject of political prisoners.⁹ The "government security" approach is also represented by certain legal traditions in the West which define political crime as illegal action directed against state security.¹⁰ There are two important problems in this definitional approach. The first of these is "the frame-up." A government may regard a person as a threat to its security and detain him under a law that has nothing to do with security, such as income tax laws, or immigration laws. United States former Attorney General Richard Kleindienst has said:

There is enough play at the joints of our existing criminal law—enough flexibility—so that if we really felt that we had to pick up the leaders of a violent uprising, we could. We could find something to charge them with and we would be able to hold them that way for a while.¹¹

Hence, many political prisoners are detained under non-security laws. A second, and related, problem is that some political prisoners are detained under quasi-security charges. In these cases the logic of the law relates to security but not to the actual wording of the law itself. For example, under the Greek junta there was a law prohibiting the spread of rumors likely to cause anxiety among the people. It required an analysis of the logic of the law and its application to determine its quasi-security nature. The law was part of a larger law intended to protect the security of the Greek armed

9. The present writer was a consultant to that Institute in the preparation of that report. HENRY DUNANT INSTITUTE, *POLITICAL PRISONERS: THE FORGOTTEN PEOPLE* (1972).

10. In addition to the literature cited in note 8 *supra*, see S. SINHA, *ASYLUM AND INTERNATIONAL LAW* (1971) [hereinafter cited as Sinha]; I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* (1971); Harvard Research in International Law, *Extradition*, 29 AM. J. INT'L L. 15 (Supp. 1935). The judicial definition of what constitutes a political or security crime varies from legal tradition to legal tradition.

11. Quoted in Dershowitz, *The Role of Law During Times of Crisis*, in *CIVIL DISORDER AND VIOLENCE* 132 (Clor ed. 1972).

forces and was applied to a number of Greek citizens who criticized the Greek Government.¹²

In retrospect, there is confusion as to the meaning of the term political prisoner, confusion that is both inherently real and intentionally produced. There is an analytical "fuzziness" because reasonable men can honestly differ on the subject. Perhaps the classic example of difficulty is determining whether conscientious objectors are political prisoners under any approach.¹³ Also, many legal prosecutions can be viewed as persecution in defense of excessive governmental claims to security, depending upon one's point of view as to the normal extent of human rights. A case in point concerns differing views on the permissibility of joining an opposition political party. Finally, any violation of law may be said to threaten the security of a government if such violation becomes widespread throughout society. The government may then be regarded as incapable of maintaining order, a view which erodes one type of governmental support.¹⁴ Beyond this real fuzziness, governments can manipulate law to avoid clear categories of detainees. Overt security charges can be by-passed in favor of more technical harassment. And the process of applying the law may give a meaning to the logic of the law not found in its *prima facie* meaning.

These real or manufactured conceptual ambiguities have a practical impact on the question of *who* determines the status of a prisoner. Conceptual problems exacerbate the problems of authority. Governments are generally reluctant to permit outside determination of issues that may undermine the authority of the government or increase the authority of a non-national institution. Governments are especially reluctant to permit such determination when the issue raised implies governmental persecution or touches upon governmental security.¹⁵ The jurisdictional problem

12. International Herald Tribune, June 19, 1972, at 5.

13. For arguments that conscientious objectors are political prisoners, see May, *Conscientious Objection: A Human Right*, AMNESTY INT'L; Schaffer & Weissbordt, *Conscientious Objection as A Human Right*, 9 REV. INT'L COMM'N JUR. (1972). For an argument that only some conscientious objectors are political prisoners, see the report to the Swiss Government by the Henry Dunant Institute, *supra* note 9.

14. This point is well made in Schafer, *Criminology: The Concept of the Political Criminal*, 62 J. CRIM. L.C. & P.S. 380 (1971).

15. Peter Archer has noted the basic problem in concise terms, "Human Rights are about protecting the individual from his government," quoted from *Action by Unofficial Organizations on Human Rights*, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 160 (Luard ed. 1967) [hereinafter cited as LUARD].

is exacerbated when the attempt to penetrate governmental authority is not precisely delimited.

III. INTERNATIONAL IMPORTANCE OF POLITICAL PRISONERS

Despite the conceptual and related jurisdictional difficulties, the term political prisoner continues to be used to describe aspects of world politics. Indeed, notwithstanding the conceptual difficulties, there seem to be important aspects of world politics that can *only* be described as pertaining to political prisoners. It is evident that governments do regard a type of detainee as special—special in the sense of being different from other prisoners. In general, he is different because he is viewed by the government as a direct or indirect threat to the government, and therefore he is persecuted. Viewed in these terms, political prisoners gain both in numbers and in importance.

There are three main reasons accounting for the growing numbers of political prisoners. The first stems from the domestic instability of the newer states. Attempts at self-government after independence have often fragmented the unity generated during the independence movements, simply because of the varied options available as to goals, structures, and specific policies. In many cases, the concept of a loyal opposition is absent in the political culture. Thus the government tends to equate dissent with an attack on the government, especially if that dissent takes the form of a formal opposition movement.¹⁶

Secondly, there is the pattern of frequent foreign involvement in these situations of domestic instability, leading at times to international civil war. There has been a major change in the nature of violent international politics. Whereas traditional world politics were viewed as state-to-state transactions, conflicts are now increasingly located within states, with various forms and degrees of unofficial international involvements. The challenging faction may be indigenous to the state but acting with some type of foreign support. A characteristic behavioral pattern is for the challenging faction to engage in terrorism or guerrilla warfare. The government tends to respond with sweeping measures of detention to curtail violence. While the original domestic instability may lead to governmental charges of subversion, suspicion of foreign participation

16. This same governmental tendency is known in "older" as well as newer states, but it seems more prevalent in the newer states. See e.g., Aihé, *Preventive Detention in Nigeria*, 9 REV. INT'L COMM'N J. 68-74 (1972).

in the domestic stability may produce charges of treason. In both "pure" domestic instability and domestic instability accompanied by foreign involvement, a general pattern is for the government to engage in administrative detention—detention without specific charge. Most municipal law outside the Marxist world permits this practice during special times—*e.g.*, war, civil war, insurrection, or national emergencies. Thus in legal terms the detainees are neither prisoners of war under international law nor prisoners under *droit commune* (regular municipal law). Hence "pure" and "international" domestic instability produces security prisoners through charges of some form of subversion or treason, or increasingly in the form of administrative detention for security reasons.

There is, however, a third reason for the growing number of political prisoners. It has become fashionable to pay at least lip service to democratic values and the protection of human rights. Yet some political elites remain authoritarian in fact behind the legal facade of democratic protection. This combination of *de jure* protection of human rights and *de facto* authoritarianism becomes workable for the elite via the declaration of a national emergency that suspends constitutional protections. In the context of widespread international domestic instability, these claims to utilize national emergency provisions have a certain *prima facie* plausibility. The result is detention under exceptional laws (*loi d'exception*) that have become unexceptional. It suffices to note that the government on Taiwan has had a national emergency declared continually since 1949. The constitutional histories of Nicaragua and Colombia reveal similar patterns.

These three reasons for the growing numbers of political prisoners are well summarized by a former acting president of the ICRC, Jacques Freymond: "Finally, since 1945, and despite the solemn proclamation of the Declaration of the Rights of Man, the number of political detainees locked up in the course of internal troubles—or more simply through a measure of precaution—by the challenged governments has not ceased to grow."¹⁷

It is impossible to say exactly how many political prisoners there are at a given time. Disagreements on definitions lead to disagreements on whom to count; the figures of the ICRC and Amnesty International, for example, do not match. Even if there were a consensus on whom to count, frequently there are no reliable fig-

17. Freymond, *Confronting Total War: A "Global" Humanitarian Policy*, 67 AM. J. INT'L L. 672 (1973).

ures. In some cases the government does not admit that political prisoners exist; thus there are no official figures. It is doubtful if any Westerner really knows how many political prisoners there are in the Soviet Union. In some cases the official governmental figures are given inconsistently.¹⁸ In some cases the figures are vague.¹⁹ In some cases the figures change overnight, as when general detention measures are put into effect or when political amnesties are declared as in Argentina, Jordan, Morocco, and the Sudan. In some states there is a more or less constant turnover of the prison population: people are detained, interrogated, released, and detained again.

Even though it is not now possible to formulate any precise global figure for the number of political prisoners, it is possible to produce a range of figures for certain regions and for certain states. These figures indicate both the scope of political detention and the relative differences among states. As of early fall 1973, one could be rather confident in ranking the Western states in terms of numbers of political prisoners: Turkey, the United Kingdom, Spain, Portugal, and Greece were the top five. The top figure was in the range of several thousand, the low figure was less than one hundred.²⁰ Information outside Western Europe is less certain. The press is more restricted, and the ICRC and Amnesty International are more often rejected. There are several places where international conflict has drawn concerted press attention; as a result, the figures on political prisoners in these instances have been more reliable. In early 1975, for example, it was possible to establish a reasonable range for the number of political prisoners in several Asian states: 65,000 to 100,000 in South Vietnam; 55,000 to 60,000

18. In Indonesia after the attempted Marxist *coup* and resulting widespread detention, the figures pertaining to detainees given by the presidency did not match the figures given by the foreign ministry. See AMNESTY INT'L, ANNUAL REPORT (1972-73).

19. This was the case after the military *coup* in Chile in 1973. It is interesting to note that the new military government invited not only the ICRC but also Amnesty International into the country in an effort to respond to charges of excessive detention and mistreatment. Later, an ILO investigation was also permitted, but a United Nations mission was denied.

20. Interviews, Geneva and London, 1973. See also *Survey of Political Imprisonment*, AMNESTY INT'L July 1972; Int'l Comm'n Jur., *The Rule of Law in Turkey*, May 1973; Thompson, *Human Rights in Greece—1973*, AMNESTY INT'L March 1973; AMNESTY INT'L, ANNUAL REPORT (1972-73). United Kingdom Government, *Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism*, (March 1972).

in Indonesia; and 40,000 to 45,000 in Bangladesh. These three countries rank as the top three nations in the world in terms of numbers of political prisoners held, with the exception of China.²¹

To some extent the simple "numbers game" is misleading. It does provide some idea of the scope of detention, which is useful. But in the quest for a quantitative overview, it may be more important to note percentages and patterns than numbers. In the past, the number of political prisoners in Uruguay and Sri Lanka was small compared to the number in the Asian states listed above. But as a percentage of the population, political detainees are quite numerous. Also, it may be more meaningful to observe the frequency of *coup d'états* in the Third World and the accompanying political detention than to count sheer numbers. A cumulative analysis of constant instability and detention in Morocco or Ghana may be more meaningful than a macroanalysis of numbers at a given point in time.

Numbers, however, are not the most significant characteristic of political prisoners in world politics. It is often not the number of political prisoners that is important, but who they are. The strategic significance of the detainees is more important than their numbers. In South Vietnam, many of the political prisoners were important to the future polity of that region, whether as neutralists or as members of the National Liberation Front. Thus North Vietnam and the NLF maintained an interest in them because of their interest in the future of South Vietnam. Hence the question of political prisoners was an important one in the conflict among the Vietnamese parties. In Israeli-occupied territory, the detainees constitute one of the central issues in the Arab-Israeli conflict.²² Israeli detention policies have been one of the main arguing points in the conflict since the 1967 war, and it is unlikely that Arab-Israeli relations will improve while Israel implements policies criticized by the ICRC.²³ On the other hand, certain Arab states have long detained Jews for questionable reasons, despite ICRC state-

21. It is very difficult to establish reliable figures for the rural areas of, say, the Philippines, where detention is surely extensive.

22. The legal status of detainees in Israeli-occupied territory is unclear. The ICRC and the UN view them as civilian detainees protected by the Fourth Geneva Convention of 1949. Israel has refused to categorize them in that way. Logically, if they were not civilian detainees within the meaning of the Geneva Conventions, they must be political prisoners. Many cannot be regular prisoners under Israeli municipal law, for they are not Israeli citizens.

23. ICRC, *The Middle East Activities of the International Committee of the Red Cross: Parts I and II*, INT'L REV. RED CROSS (Aug. & Sept. 1970).

ments of concern.²⁴ In Greece after the 1967 *coup d'etat*, the fate of political prisoners was the primary reason for Greek friction with the Council of Europe, friction which led to the withdrawal of Greece from the Council and to a continuing discussion whether the members of the Common Market should impose economic sanctions on that government. In these and other situations, the subject of political prisoners was at the center of complex issues comprising an important international conflict.

Political prisoners have become important not only because of humanitarian concerns, but also because of strategic concerns such as their impact on voting and military patterns. In some cases both concerns are present. This was the situation in Greece, where a concern for the treatment of the detainees was accompanied by criticism about the authoritarian government. In other situations, it is a more humanitarian concern that makes the situation one of international importance. During the early 1970's in the United States, there seemed to be a genuinely humanitarian interest in the question of whether the United States should trade extensively with the Soviet Union while that regime was detaining indigenous critics of the regime.²⁵ There was also general humanitarian concern about the fate of political prisoners in Chile after the *coup* in 1973, even by some sympathetic to the military junta. This same question has been raised persistently regarding Western trade with the Republic of South Africa in light of extensive detention practices there. There are other examples of conflict in world politics that would seem to indicate that a humanitarian concern in the so-called "quality of life" is on the increase. There is reason to believe that "quality of life" pertains to more than environmental improvement in the physical sense of pure water and clean air.²⁶

In the context of humanitarian concern, there seems to be an increasing awareness of questionable reasons for detention. In Sri Lanka 14,000 people were arrested at one time, 12,000 of whom were eventually released without any charges having been

24. *Id.* at 508.

25. Here, too, there probably was some mixture of non-humanitarian motives. Those who were generally critical of the Soviets or who wanted to encourage immigration to Israel might be tempted to raise the question of Soviet treatment of Jews in the Soviet Union.

26. The growing concern about international human rights is traced in Carey, *The International Legal Order on Human Rights*, in IV THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (Black & Falk eds. 1972); J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS (1970); V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES AND WORLD COMMUNITY (1970).

brought.²⁷ In Chile, after 1973, it was clear that the military government was detaining those who had directly supported the previous government.²⁸ The Indonesian Government officially stated that it could not prove illegal behavior by the largest number of its political prisoners.²⁹ There is indeed a humanitarian reason for saying that detention is questionable in such situations as these. There also seems to be an increasing awareness that the conditions of detention are questionable. A study by Amnesty International found torture of prisoners (defined primarily as the infliction of physical pain) to be present in sixty-three states and a matter of governmental policy in thirty-four of the 139 states surveyed.³⁰ At the least, conditions must necessarily be inhumane when large numbers of people are detained suddenly without expansion of the detention facilities and without advance planning. This is usually the case in the aftermath of general instability. Between these two poles of torture and massive overcrowding, there remains a broad area of questionable conditions of detention relevant to a large number of states today. It lies outside the scope of this article to list the suspected states or to detail the range of problems encountered.³¹

Despite conceptual difficulties, the term "political prisoner" refers to an important phenomenon in world politics. A special type of detainee exists in the eyes of governments; he is detained not so much because he violates a specific law but because he is regarded as a threat to the national legal order. He frequently becomes an administrative detainee, stripped of the rights of other detainees. His importance in world politics is likely to increase rather than decrease. On the one hand, international instability is likely to continue as a prevalent form of international conflict (and even "pure" domestic instability is likely to be characterized as international by someone involved). On the other hand, a concern with the quality of life, including human rights issues, is on the increase.³²

27. Interviews with Amnesty International Officials, London, 1973.

28. N. Y. Times, Oct. 14, 1973, § 1, at 11, col. 1.

29. The relevant governmental document is *Decision of the Commander of the Operational Command for the Restoration of Safety and Order*, KEPO28/KOPKAN/10/1968.

30. Becket, *Torture in the World*, reprinted in AMNESTY INT'L, REPORT ON TORTURE (1973).

31. See further the report to the Swiss government by the Henry Dunant Institute, *supra* note 9.

32. In the United States at the time of writing, the Senate had added an

IV. LEGAL PROTECTION

A search for instruments for the protection of political prisoners in international law reveals a curious paradox: the law that formalizes the nation-state system also seems to offer a principle for the protection of those who challenge the governments of that system. There *are* instruments of contemporary international law that seek to protect political prisoners, either explicitly, or implicitly. In many of these instruments, the idea of political prisoner is camouflaged. But the legislative history (*travaux préparatoires*) as well as the logic of the law indicates clearly that the intention is to regulate political prisoners. There are enough of these instruments so that one can argue that a principle of law exists. That is not to say that the intended protection is adequately applied.

The most explicit reference to political prisoners is found in an agreement signed between the Greek Government and the ICRC in 1967.³³ In this agreement, the ICRC was guaranteed access for one year to all places in Greece where those accused of political delicts or termed administrative deportees were held. Under the further terms of this agreement, the ICRC was to make certain confidential reports to the Government concerning the conditions of, but not reasons for, detention. In general the traditional process of ICRC inspection of detention conditions and reporting to authorities was endorsed. From the fall of 1969 to the fall of 1970, the ICRC implemented this agreement with some success.³⁴ After that year, the Greek Government exercised its option not to renew the agreement. Since that time, the ICRC has been unable to achieve any other formally binding guarantees for the inspection of detention conditions, except for a written agreement with the Chilean junta, which remains unpublished.

The idea of international regulation of those who commit "political crime" is found most publicly in that body of law known as

amendment to its draft foreign aid bill prohibiting foreign aid to Chile until civil liberties had been restored, and an administration proposal to give the Soviet Union "most-favored-nation" status in trade legislation was made conditional upon increased civil liberties in that country. Thus, there was tangible evidence of official concern with human rights.

33. The exact legal nature of this document is not clear, as the ICRC is a private corporation under Swiss law but is referred to as an NGO in general and by the Yearbook on International Organizations. Upon advice by legal scholars, the present writer considers the agreement part of public international law. The terms of the agreement are outlined in ICRC, *The ICRC in Action* (Nov. 1969).

34. The work of the ICRC has been criticized by J. BECKETT, *BARBARISM IN GREECE* (1970).

extradition treaties. There is a general form to these bilateral treaties. For present purposes it suffices to note that extradition treaties generally provide for the extradition of certain types of fugitives from the state-in-possession to the state-in-pursuit, with the exception of those who have committed political crime. The state-in-possession may grant asylum to these political criminals. The treaties themselves do not define the term "political crime."³⁵ Several lines of judicial interpretation in the West have defined political crime as an attack against the government, either individually or as part of an organized movement.³⁶ Be that as it may, the large body of extradition law implicitly establishes the principle that one who challenges a government is entitled to international protection. This body of law follows what has been factually possible because it protects the political *fugitive*—the *potential* political prisoner. By contrast, the ICRC-Greek agreement reached into domestic jurisdiction to regulate *actual* political prisoners.

Closely related to extradition law is refugee law. The Refugee Convention of 1951 and its 1967 Protocol also seek to protect the political fugitive. The difference in application of the two bodies of law is a matter of legal technicalities. The key phrase of the 1951 Convention states that it applies to one who:

As a result of events . . . and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁷

First of all, a person seeking protection under the Convention must be unable or unwilling to seek protection from his original state. Thus he seeks protection from the United Nations High Commissioner for Refugees rather than a state-to-state extradition treaty. Secondly, the High Commissioner's office must decide if there is a well founded fear of being persecuted.³⁸ As in extradition law, the

35. "The greatest conflict of interpretation centers around the definition of the 'political offense,' which is not defined in the treaties." Brown, *Extradition and the Natural Law*, 16 N.Y.L.F. 578, 581 (1970).

36. See notes 8 & 10 *supra*.

37. Convention Relating to the Status of Refugees, 189 U.N.T.S. 137.

38. There exists a confidential manual for the staff of the High Commissioner's Office; this section is based on that manual.

individual must be outside his state to receive protection. Unlike extradition law, refugee law pertains to general persecution and not just political persecution. Generally, it can be said that the High Commissioner's office has used the idea of political persecution to include political crime. Those individuals viewed by a government as political criminals are thus given protection by the United Nations as refugees.³⁹

Along with extradition and refugee law, one can observe the practice of granting political asylum, especially in Latin America. The question arises whether the practice of granting political asylum to political fugitives is so extensive that it has evolved into customary international law, establishing a right of political asylum independent of any particular legal instrument. A recent study has concluded that there is no such general right.⁴⁰ Additionally, if there is such a thing as regional customary law, there may be a right of political asylum in Latin American customary law. It is a widespread practice in that region for a second state to protect not only political fugitives, but political prisoners as well. In some Latin American states, the governmental authorities make arrangements for the "export" of political prisoners to an asylum state.

Extradition treaties, the Refugee Convention, and the granting of asylum usually pertain to the political fugitive. There are other instruments of international law that follow the pattern of the ICRC-Greek accord in that the law seeks to regulate the political prisoner within a state, not just the fugitive who has managed to escape the control of the challenged government. One of these instruments is the Protocol to the 1973 Paris Accords on Indochina. This Protocol, which was patterned after provisions in the 1954 Geneva Accords on Indochina, was entitled "Prisoners and Detainees" and applied to "interned civilian personnel" in the Vietnam conflict. It is stated:

The term "civilian internees" is understood to mean all persons who, having in any way contributed to the political and armed struggle between the two parties, have been arrested for that reason and have been kept in detention by either party during the period of hostilities.⁴¹

This wording can only mean that those who have challenged one

39. Interviews with High Commission officials, Geneva, 1973.

40. SINHA, *supra* note 10.

41. 68 DEP'T STATE BULL. 175 (1973).

of the parties by either armed or non-armed means, and who are civilians not entitled to prisoner-of-war protection, are to be protected. The Protocol clearly pertains to political prisoners. It is stipulated that not only are detention conditions to be adequate, but also that the "civilian internees" are to be returned to the other party. Despite the non-observance of this instrument, it is important to note the extent to which the international protection attempted to reach into domestic jurisdiction. The Protocol states that even if an individual has been tried and sentenced under municipal law, but falls under the terms of the Protocol, such prosecution shall not delay or prevent the return of that individual to the other party. Thus the instrument attempted to reach into the on-going process of municipal law in order to release the political prisoner from his penalty.

A similar line of development is occurring at the time of writing in the Geneva Diplomatic Conference on Humanitarian Law, held in four sessions during 1974-77. In particular, the movement to add a protocol to Common Article Three of the Four Geneva Conventions of 1949 contains efforts similar to those of the 1973 Paris Accords and its Protocols. In terms of legal theory, political prisoners in civil war situations are already protected by Common Article Three, which is a noteworthy law because it has been the most widely accepted legal provision imposing a duty on states to treat their *own* nationals in keeping with international standards. There is no doubt, however, that Common Article Three is vague in the standards it establishes; as one author has termed it, Common Article Three consists of "affectionate generalities."⁴² Wide recognition of this problem has led to an effort to make the protection of the Article more specific. This effort is marked by several trends. Most important for present purposes is the trend that would specify exactly who is entitled to protection in civil wars. The ICRC draft protocol has employed the term, "those detained by reason of the conflict." The ICRC has sought to explain the term by suggesting that it pertains not only to traditionally organized and operating armed forces not of foreign origin, but also to guerrillas and terrorists and even non-combatants who have some alleged role in the conflict. The similarity between the ICRC draft protocol and the 1973 Paris Accords is obvious. By the late 1970's, it is possible that this part of the effort to supplement the Geneva

42. Farer, *Laws of War 25 Years After Nuremberg*, 583 INT'L CONCILIATION 32 (1971).

Conventions of 1949, which is directed *inter alia* to extending the protection over political prisoners in civil wars,⁴³ will be binding law for a number of states.

Nuremberg Principle Six, is another part of the law of war that touches upon political prisoners. This document defines certain international crimes and stipulates that a crime against humanity consists of: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime."⁴⁴ Thus political "enslavement" and "persecution" become crimes when accompanied by the commission of aggression or a war crime. If the Nuremberg Principles are part of international law,⁴⁵ then political prisoners are protected by the "law on the books" if they are detained by the aggressor party, or by a party in an international war which commits crimes of war.

Finally, there is the European Convention on Human Rights. This regional Convention, binding fifteen states, not only stipulates how states are to treat their citizens, but also creates regional machinery to supervise the implementation of the Convention.⁴⁶ One of the most important and controversial parts of the Convention is article 15, under which a signatory state may deviate from its obligations under the Convention in times of "war or other public emergency threatening the life of the nation."⁴⁷ Some of the most important cases in the history of the Convention's application center on the right of a state to detain persons through exceptional measures under this article, and to treat them in exceptional ways during detention. These cases include the Cyprus case, the Greek case, and the Northern Ireland case. Of the 5,519 individual petitions filed with the European Commission of Human Rights during the period from 1955 to 1972, many deal with the question of whether the detainee is a political prisoner—a prisoner detained because of political persecution. Many of these allegations about

43. The intent of the ICRC efforts is clear. Interviews with ICRC officials, Geneva, 1973.

44. See S. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 166 (1972).

45. *Id.*

46. See, *Note on the Results Achieved Under the European Convention on Human Rights, 1953-1972*, B (72) 00, (Oct. 1972).

47. COUNCIL OF EUROPE, DIRECTORATE OF INFORMATION, EUROPEAN CONVENTION ON HUMAN RIGHTS (1952), as quoted in 45 AM. J. INT'L L. 24 (Supp. 1951).

persecution are linked to the issue of governmental security. In Western Europe, therefore, there is an on-going process of regional supervision of governmental detention policies. The application of the Convention, however, does manifest some problems from the point of view of protection of political prisoners. The proceedings of the regional machinery operate very slowly, as the Cyprus and Northern Ireland cases indicate. Sometimes no authoritative decision is reached, as in the Cyprus case. Sometimes a state may flaunt the decision of the regional machinery without sanction, as in the Greek case. The trend in individual petitions is for the Commission to give a large benefit of doubt in favor of governmental policies. Ninety-eight per cent of the total number of individual petitions have been rejected at the first stage.

In review, we have identified a specific ICRC-Greek treaty protecting political prisoners in one state for one year. We have found that extradition treaties, international refugee law, and, possibly, customary Latin American law publicly protect the potential political prisoner by affording protection to the political fugitive. We have noted that the 1973 Paris Accords and the ICRC draft protocol to Common Article Three of the 1949 Geneva Conventions both seek to protect the political prisoner from his own government during a civil war.⁴⁸ We have mentioned Nuremberg Principle Six and its statement that political detention and persecution is a crime against humanity when practiced by aggressor states and states committing war crimes. We have also noted the regional protection available to political prisoners in Western Europe. We shall discuss the difficulty of translating this "law on the books" into specific and factual protection for political prisoners in the conclusion.

V. DIPLOMATIC PROTECTION

In addition to the contents of international law mentioned above, there are other international efforts directed toward the protection of political prisoners. While these efforts may have a legal base, and while claims may be made that governments should respond to these efforts, this second attempt at protection is more diplomatic and quasi-legal than legally binding. First, there are events at the United Nations, and secondly, there are efforts by certain non-governmental organizations.

48. This statement is obviously based on the premise that the war in Vietnam was a civil war.

At the United Nations, there are several developments related to the protection of political prisoners. Probably the most significant, though definitely the least known, is the work of the Committee on Crime Prevention and Control which has produced the United Nations Standard Minimum Rules for the Treatment of Prisoners (hereinafter referred to as Rules).⁴⁹ These Rules providing standards for detention date back to studies at the League of Nations; hence the Rules now represent some forty years of collective experience. The Rules have been approved by ECOSOC and recommended to states for implementation. A United Nations report, however, indicates that the Rules have not received much attention from states.⁵⁰ The Committee on Crime Prevention has held a series of conferences to call attention to the Rules and to revise them. One of the revisions has been to state explicitly that the Rules apply to political prisoners as well as to regular prisoners of municipal law. This change was officially adopted at the 1970 meeting of the Committee on Crime Prevention and Control.⁵¹ The Rules establish minimum international standards for the detention of individuals, and some of the specific Rules pertain not just to the conditions of detention but to the reasons for detention as well. Unfortunately, many of the Rules are vague, as is the case with the important Rule 55, which states:

There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to insure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of correctional services.⁵²

The Rule simply calls for some type of national inspection in keeping with whatever national laws and regulations exist. There is no

49. The evolution of the Rules is concisely presented in *The Standard Minimum Rules for the Treatment of Prisoners in the Light of the Recent Developments in the Correctional Field*, U.N. Doc. A/C. 43/3 at 1 (1970). See also Fry, *Human Rights and the Law Breaker*, in UNESCO, HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 247 (1950).

50. U.N. Doc. A/C. 43/3 *supra* note 49, at 40. Only 44 states replied to the Secretariat's request for information on the implementation of the Rules. Eleven of those 44 seemed to display no changes in laws or regulations based on the Rules.

51. 29 INTERNATIONAL REVIEW OF CRIMINAL POLICY 55; U.N. Doc. E/AC 57/8 (1971). *Report of the Secretary-General on the Meeting of the Working Group of Experts on the Standard Minimum Rules for the Treatment of Prisoners*, held at UN headquarters, Sept. 25-28, 1972, Feb. 2, 1973, at 2-15.

52. U.N. Doc. A/C. 43/3 (1970).

requirement that the inspectors be independent from the direction of the penal system, or that inspection take place at stated intervals. Nevertheless, the implementation of the Rules, taken as a whole, would greatly improve the conditions of detention in many states. Increased serious attention to the Rules, coupled with the existing move to apply the Rules to political prisoners as well as to regular prisoners, would be the most positive step that could be taken with regard to political prisoners. Given the lack of state interest in the Rules, however, the available protection is more potential than actual.

A second United Nations body, the Human Rights Commission, has rarely dealt with the subject of political prisoners *per se*.⁵³ It has from time to time debated detention policies in specific states such as Greece and Haiti. It has also created special investigative committees with regard to the detention policies of both Israel and South Africa. Overall, however, it has displayed no *general* interest in protecting political prisoners. It has successfully recommended to its parent ECOSOC that individuals should be allowed to petition the Commission, and the resulting change in procedure is now in effect. Its early operation does not support the assumption that radical changes will follow in the Commission's defense of human rights; the identification of three states by a working group of the Commission because of violations of human rights was met with procrastination.⁵⁴ The United Nations Commission on Human Rights has been more important as a drafter of documents than as an actual protector of human rights. Some of these studies and documents relate implicitly to political prisoners.⁵⁵ Many of the ideas found in these studies manifest themselves in the 1966 Covenant on Civil and Political Rights, now binding on parties to it.⁵⁶ It is a widespread view that even though the Covenant is now binding, its provisions will be less than satisfactory, and the inter-

53. See literature cited at note 26 *supra*; Hoare, *The UN Commission on Human Rights* in LUARD, *supra* note 15, at 59.

54. See also International Commission of Jurists, *Gross Violations of Human Rights* mimeo, 1973.

55. Two of the earlier studies that dealt indirectly with political prisoners were: Study of the Right of Everyone to Be Free From Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN 4/826/Rev. 1 (1974); and Study of the Right of Arrested Persons to Communicate . . . , U.N. Doc. E/CN 4/996 (1969). See also, *Detained Persons and the Protection of Their Human Rights*, 26 INTERNATIONAL REVIEW OF CRIMINAL POLICY 9 (1968).

56. See Korey, *The Key to Human Rights—Implementation*, 1968 INTERNATIONAL CONCILIATION 570.

national system of supervision will be quite weak.⁵⁷ Hence there is little reason to believe political prisoners will be adequately protected by the diplomatic or legal work of the United Nations Human Rights Commission. The same conclusion appears to hold true with regard to both the Draft American Convention on Human Rights⁵⁸ and the move within the United Nations to establish a High Commissioner for Human Rights.⁵⁹

Thirdly, the General Assembly itself has shown some interest in political prisoners when this subject has been related to alleged colonialism. Such colonialism is of interest to the Afro-Asians, who are frequently supported by the Marxists. One effort by the Assembly has been to declare that "freedom fighters" struggling against colonialism or for national liberation are to be granted the status of prisoners of war. That position was first adopted in 1968 at the United Nations Tehran Conference on Human Rights and subsequently affirmed by Assembly resolutions. Since Western states and the white governments in Africa did not support the resolution, and since the problem of defining "freedom fighters" is compounded by the question of which organ should make that definition, there is little likelihood that this effort will result in applied protection even though it has been provisionally adopted as law.⁶⁰ A second Assembly effort has been to create special committees to investigate certain situations. Aspects of these situations relate to the subject of political prisoners. There is the special committee on decolonization (the Committee of 24), and the special committee on Israeli-occupied territory. In general it can be said that these special committees have not secured the cooperation of the states being investigated and have not been able to produce changes in those states' detention policies.

Therefore, with regard to detention questions, the overall record of the United Nations is not very impressive. Recent events are indicative of the general pattern. In 1975, the General Assembly, acting on the recommendation of the Third Committee, adopted

57. See literature cited in note 26 *supra*.

58. The draft American Convention on Human Rights is analyzed in the report to the Swiss Government by the Henry Dunant Institute, *supra* note 9. The effort of the Inter-American Commission on Human Rights is well analyzed in A. SCREIBER, *THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS* (1970).

59. See R. CLARK, *A UNITED NATIONS HIGH COMMISSION FOR HUMAN RIGHTS* (1972).

60. See Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. INT'L L. 77 (1975).

several resolutions concerning human rights. One resolution took a stand against torture of detainees, defined torture broadly, and asked the United Nations Commission on Crime Control to begin steps toward establishing a code of conduct for law enforcement officials.⁶¹ Another resolution asked the Commission on Human Rights to make a study of more precise principles against torture which might be established.⁶² Whereas the Assembly was willing to adopt general resolutions and ask for further studies, states in the Third Committee explicitly voted to avoid a vote on a Chilean draft resolution that would have called for a study of how to create a permanent body to investigate all violations of human rights. The Third Committee, and later the Assembly, then adopted a strongly worded resolution on human rights pertaining only to Chile.⁶³ Therefore the United Nations continues to support vague or general measures and to direct specific concern to carefully selected targets, while avoiding the creation of machinery that might lead to equitable implementation of human rights.

On the other hand, there are several NGO's whose activities in the area of human rights and political prisoners merit analysis. The ICRC's long concern with political prisoners has been accelerated as of the late 1960's, when personnel and policy changes led to greater ICRC involvement in the effort to protect political prisoners.⁶⁴ It is clear that there has been a steady increase in the number of political prisoners visited with the permission of the detaining government by the ICRC with a view to regulating the conditions of detention.⁶⁵ Several problem areas can be identified as key points of analysis for assessing the impact of these ICRC visits. First of all, it is clear that the ICRC does not oppose detention except on humanitarian grounds. Only such grounds as age or health prompt ICRC requests for release. There are some who argue that this approach lends legitimacy to repressive policies. The ICRC is unified in defending the wisdom of its basic strategy, from the point of view of a humanitarian concern for the individu-

61. UN Res. A/3452.

62. UN Res. A/3453.

63. III U.N. CHRONICLE 55 (1976).

64. See MOREILLON, *supra* note 3. The present author disagrees with some of Moreillon's findings and is at present in the process of making a different interpretation.

65. From 1958 to 1973, the ICRC reported visits to political prisoners in 65 states, entailing 1,300 visits (a visit is one survey of one installation regardless of number of people or days involved) with over a hundred thousand people seen. *International Rev. of Red Cross ICRC* at 25 (Jan. 1973).

als detained. Secondly, the ICRC seeks interviews with the detainees without governmental witnesses, but has in the past consented to conduct prison visits in the presence of governmental officials. There is now some discussion within the ICRC as to the wisdom of this approach. On the one hand, it is believed that some situations are so deplorable that visits under any conditions are desirable. On the other hand, there is the opinion that the ICRC should take an "all-or-nothing" stand. There is yet a third view that sees the question resolved on the basis of regions: where the ICRC is not well known, it may have to agree to governmental restrictions until it can demonstrate its manner of operation. Thirdly, there is the issue of intervals of visits. There is agreement that frequency of visits is governed by the particulars of each situation. But it is evident that spacing of visits can prevent the ICRC from keeping track of individuals and situations. The Republic of South Africa has, at times, denied visits by the ICRC so that no visits were made during a particular year. In other cases, it seems the ICRC itself has been somewhat slow to follow up previous visits because of lack of manpower and/or resources. Serious ICRC supervision of detention conditions seems to necessitate, at a minimum, visits to all places of detention once every four months. The ICRC's average falls short of this figure.⁶⁶ Fourthly, the ICRC is primarily concerned with detention after interrogation and before trial. Rare is the government that permits the ICRC to see prisoners during interrogation, and rarely does the ICRC officially concern itself with judicial proceedings. There are critics who maintain that the ICRC does not protect political prisoners when they need it most.⁶⁷

In sum, the ICRC has had to buy its way into national prisons at the price of not questioning the reasons for detention, not supervising interrogation, and at times not having private interviews. The ICRC has been able in many cases to provide the political prisoner with material and psychological support, to organize family visits and family support, and at times to effect a release or to

66. Statement based on an analysis of the figures contained in MOREILLON, *supra* note 3.

67. As for judicial observation, the ICRC has on occasion followed a defendant into the courtroom, as in the Israeli-occupied territory. As for interrogation observation, the ICRC used to follow the "four wall theory," reporting only what can be observed within the four walls while talking to a prisoner or an official. This policy, because of methods of interrogation such as electrical shock and beatings on the soles of the feet, which do not leave marks, proved inadequate and has been altered.

protest against mistreatment. Despite the fact that the number of ICRC visits is growing and that the ICRC has been more successful than any other organization in getting into prisons to see political prisoners, there are those (some within the ICRC) who believe the ICRC is not really doing serious work on the question. One member of the ICRC, however, has made an effort to quantitatively evaluate the impact of ICRC visits to political prisoners. His conclusions do show material benefit to political prisoners visited by the ICRC.

There are other NGO's, in addition to the ICRC, concerned with political prisoners. These groups rarely carry out prison visits. Their main role is two-fold: to observe "political" trials and to publicize certain situations. For example, Amnesty International, in the period between 1961 and 1970, only got into the prisons of five states and was not able to hold any private interviews with the detainees. But it requested permission to attend trials on twenty-two occasions and received nineteen favorable responses. At the same time, Amnesty International was publishing "white papers" on political prisoners in the Soviet Union, South Vietnam, Greece, Portugal, Iran, the United Kingdom, and elsewhere. It was seeking the release of certain detainees both through its international secretariat and its national groups. It was also compiling draft conventions on prevention of torture and other subjects. In broader perspective, one can note that the observance of "political" trials is a growing interest to all of these NGO's. In the period from 1952 to 1973, the Marxist International Association of Democratic Lawyers sent observers to ninety-eight trials, all in the West or states aligned with the West. The International Commission of Jurists attended thirty-three trials, one-third of them in Africa. A group called the Belgian League for the Defense of Human Rights attended twenty-nine trials.⁶⁸ It is very difficult to evaluate the impact of these groups. In particular, it is extremely difficult to establish a cause-and-effect relationship in NGO observance of trials. How can one say if the presence of the NGO representative results in a more equitable trial or not? And how can one say whether NGO publicity causes the government to change its policies or perhaps to defend them more strongly? Obviously these NGO's do not operate in a vacuum, and a governmental policy can be attributed to any one of several factors.

It is probable that these NGO's and the ICRC benefit each other.

68. International Institute of Human Rights, *Trial Observation by NGO's*, mimeo, 1973.

When the more public NGO's are focusing on a situation, the ICRC may have a better chance of being allowed in by the government, as the government may decide to accept "the lesser of two evils." While that publicity continues, the ICRC may be in a better bargaining position with the government, as the threat of an ICRC withdrawal would work to the advantage of the other NGO's who could publicly claim that the ICRC had substantiated their arguments. It is clear that both the ICRC and the other NGO's, in general, support the United Nations Rules and seek their application. The ICRC and Amnesty International, in particular, have been as interested in drawing attention to the Rules as has the United Nations Committee on Crime Prevention and Control.

VI. CONCLUSION

The concept of "political prisoner" leads to definitional problems not completely solvable. There is no definition free from problem, and therefore there is no adequate legal basis for a general approach to legal protection of political prisoners. Insofar as one needs to use the concept, it may be preferable to use "political prisoner" as a synonym for security prisoner. Such usage avoids the connotation that "political prisoner" *ipso facto* implies persecution, a connotation unacceptable to governments. In that governments persecute in defense of their security interests, such usage encompasses persecution without incurring automatic governmental opposition to the entire subject of protection of political prisoners. There remains the problem of securing governmental interest in the international regulation of subjects touching upon governmental security. And there is still the problem of the "frame-up" under non-security charges of the individual who allegedly constitutes a threat to the government. All that is suggested at this point is that the "security prisoner" approach has fewer drawbacks as a conceptual tool than the "persecuted individual" approach. It is also more consistent with trends in judicial interpretation of extradition treaties.

Unfortunately, difficulties in using "political prisoners" as a legal concept are matched by the reality of growing numbers of political prisoners—meaning security prisoners. There is every reason to believe the pattern of international conflict evident in the last two decades will continue for some time to come: domestic instability and international involvement in that domestic instability. Hence much detention will occur not simply for violation of law, but for constituting a threat to the entire national legal order.

And those detained will be the focus of international interest for either strategic or humanitarian reasons, or for both.

The very existence of large numbers of detainees whose rights to procedural due process have been negated indicates the fallacy in relying upon national law to protect political prisoners. As Cedric Thornberry has said, "However perfect may be internal guarantees of civil liberty, experience underlines the fallibility of purely domestic constraints."⁶⁹ Yet international legal protection is hardly more durable. The ICRC-Greek agreement was limited to one state and one year. The Paris Accords did not resolve the problem of political prisoners in South Vietnam; the government charged the political prisoners with technical violations under municipal law, thereafter falsely claiming that all political prisoners under the Paris Protocol had been released.⁷⁰ The European Convention on Human Rights is implemented in a very slow process; in the Northern Ireland case, there has been a need for ICRC visits to those detained by the British while the litigation drags on. Common Article Three has been too vague in the past, and a new protocol will be accompanied by problems of implementation such as rights to detention inspection. Nuremberg Principle Six relating to political enslavement and persecution as crimes against humanity only applies to aggressor states and to states committing war crimes. The difficulty of securing authoritative definitions of those latter crimes is remote enough to make the protection of Nuremberg Principle Six highly theoretical. Under extradition treaties and the Refugee Convention, the individual must escape governmental control to obtain international protection.

On the other hand, the legal philosophy or principle found in all these efforts at protection, *i.e.* that one regarded as a threat to a government should not be left at the mercy of that government, may alone give legal basis to a new approach at protection. It may be feasible to apply that principle to administrative detainees through new international law. That move would offer protection to one of the more numerous types of political prisoners. At the same time, such a development might focus attention on the more general problem of political prisoners and lead to some increased emphasis on the application of the United Nations Rules as a more general solution to the problem of inequitable detention. Adminis-

69. International Human Rights Standards in Emergency Situations, paper presented at a Conference of the British Institute of Human Rights, Nov. 11, 1972, mimeo.

70. The International Herald Tribune, July 17, 1973, at 6.

trative detainees are the most easily identifiable type of political prisoner. Held without specific charge (and therefore not part of *droit commune*—regular municipal law), they are usually detained either totally illegally or under exceptional municipal law that pertains to national emergencies threatening the security of the government. As the legal director of the ICRC has said, “When detention is the result of an administrative decision, without any charge being preferred and without trial, there is no room for doubt [that the individual is a political prisoner].”⁷¹

Legal protection for administrative detainees is not only possible from a definitional standpoint, but may also be the most feasible protection. Where administrative detention occurs, there is at least enough concern with human rights so that special law is required for exceptional detention. Therefore the state that protects human rights in its constitution and requires special provision for deviation may be more inclined to agree to international regulation of at least the conditions of detention during the time when the special provisions are in effect. It may be a reality of world politics that where an authoritarian regime does not even require special legal provisions for extensive detention, there can be no realistic prospect of aiding that regime’s political prisoners through international law. On the other hand, where a regime endorses the protection of human rights during times of “normality,” there would seem to be greater prospect of providing some protection to political prisoners during times of national emergency.

On the basis of this type of reasoning, certain parties in Switzerland drafted a measure in the mid 1970’s calling for an international convention for the protection of political prisoners. The proposed convention called for automatic ICRC inspection of all places of detention where administrative detainees were found, while leaving ICRC protection of other types of political prisoners to negotiated agreements. The question of the causes of detention was to be left to authoritative bodies already in existence, such as the European Commission on Human Rights. An optional protocol was suggested, allowing a state to agree to automatic ICRC visits to all detainees after any change of government in the signatory state. The authors of the proposal thought that the protocol would be attractive to many political elites in Latin America, Africa, and Asia, who might “purchase” some protection for themselves in the

71. Statement by Claude Pilloud on the Protection of Political Detainees, to the American Society of International Law’s Panel on Humanitarian Problems and International Law, mimeo, at 1, Oct. 15, 1970.

event of a *coup d'état* in the future at the price of ICRC visits during the present time, after a re-election of the current regime.⁷²

It is important to note that the Swiss proposal was part of a longer report that recommended not just a new convention on administrative detainees but also increased attention to the United Nations Rules. Without an effort to apply the Rules, the focus on administrative detention would probably only lead to a demise in the use of administrative detention and the wrapping of the political prisoner in the web of municipal law, from which it would be more difficult to extract him under international standards.

There are *raisons d'état* why a government could be interested in improved treatment of political prisoners. Most fundamentally, the security of the government rests on the people's confidence in its ability to adjust interests into a reasonable and workable complex of compromises. The government that engages in arbitrary and unreasonable detention only encourages alienation rather than confidence. The government that detains for unjustifiably long periods in overcrowded conditions only provides a fertile recruiting and socializing ground for the alienated opponents of the government. The government that engages in extensive detention diverts scarce resources from economic development. And the government that engages in questionable detention may endanger its relations with other states who are concerned about blemishing their foreign image. The fundamental question becomes to what extent will governments perceive these reasons, and, perhaps with a degree of humanitarianism, give them some importance in relation to other state interests.

The subject of political prisoners nicely illustrates the competing perspectives and competing authorities in contemporary world politics. There are the "power realists and the planetary humanists,"⁷³ who are simply the modern versions of those who primarily pursue order and those who seek justice. The power realists wish to subsume human rights to other concerns such as placating the military establishment or furthering trade. The planetary humanists

72. Interviews, Geneva, 1973-75. Elements in the Swiss parliament, in journalistic circles, and in the Red Cross had long been interested in the subject, thus confirming the opening of this essay—*viz.*, there had been an increase in Western interest in political prisoners.

73. Brzezinski, *U.S. Foreign Policy: The Search For Focus*, 51 FOREIGN AFFAIRS 708 (1973).

argue that real order can only be built on a commitment to justice. Interacting with these perspectives is the question of whether a stable international system can be built on extensive claims to domestic jurisdiction, or whether international authorities should defend and work for the individual at the expense of national authorities.⁷⁴ In short, the subject of political prisoners is eminently characteristic of world politics in the last third of the twentieth century. The subject is likely to be with us for some time to come.

74. The conflict is treated in Coplin, *International Law and Assumptions About the State System*, 17 *WORLD POLITICS* 615 (1965).