CHAPTER 13

INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL CRIME

TEST YOUR KNOWLEDGE: TRUE OR FALSE?

1. The Nuremberg trials were a landmark development in the evolution of international criminal law and human rights.
2. The Universal Declaration of Human Rights was the first major international human rights document in the twenty-first century to be binding on all nations.
3. The difference between positive human rights and negative human rights is that positive human rights create obligations on governments and negative human rights create obligations on individuals.
4. Humanitarian law is the body of law that addresses the global obligation toward refugees.
5. Torture is permitted under international criminal law where there is a "ticking time bomb."
6. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are identical to the Bill of Rights of the U.S. Constitution.
7. The Alien Tort Claims Act authorizes undocumented individuals to sue U.S. citizens in federal court.
8. Child soldiers are prohibited under international law and are outlawed by every country across the globe.

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9. Corporations doing business abroad are concerned with financial profit and have little role or interest in protecting the human rights of workers.

Check your answers at the end of this chapter.

INTRODUCTION

The twentieth century witnessed an unprecedented growth in the global law of human rights. The events of World War II inspired the creation of the United Nations and the drafting of a number of significant international human rights agreements. In 2002, following more than a century of agitation, the world community agreed to establish an international criminal court.

These developments, however significant, have not led to the achievement of universal human rights and social justice. Human rights are notoriously difficult to protect in a world comprising independent and sovereign nation-states whose governments are guided by their own self-interests. The international legal community also lacks strong mechanisms to enforce human rights.

This chapter outlines the development and structure of the international human rights regime. We then briefly examine several case studies of human rights protection, child soldiers, the plight of textile workers, drones, and torture. As you read the chapter, consider the factors that complicate the enforcement of international human rights.

THE EVOLUTION OF THE INTERNATIONAL LAW OF HUMAN RIGHTS

We start our discussion of the growth of global law with events following the aftermath of World War I. The death and destruction in this war between 1914 and 1918 are almost beyond comprehension. More than six thousand men died each day, and the number of deaths totaled over nine million. The total casualty figure for both sides was roughly twenty-five million. Each side sent waves of men across open fields to their death. Great Britain alone suffered over nine hundred thousand casualties. The war witnessed the introduction of airpower, the machine gun, poison gas, tanks, and sophisticated artillery (N. Ferguson 1999; Keegan 1998; Tuchman 1962).

Following the war in 1919, the United States, Great Britain, France, Italy, and Japan and the other Allied powers convened a commission to determine responsibility for the war. The commission found that the defeated Entente powers of Germany and Turkey had engaged in barbarous and bloody acts of unlawful warfare, and the commission took the unprecedented step of calling for the prosecution before international tribunals of those enemy leaders and combatants responsible for war crimes (Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1920).

With the Versailles peace treaty of 1919, the Allied powers forced Germany to agree to hand over accused war criminals for prosecution before Allied and multinational tribunals. Article 227 took the unprecedented step of stating that Kaiser William II, the German monarch, was to be "publicly arraigned" for a "supreme offense against international morality and the sanctity of treaties." The

Allies feared these trials would destabilize the newly instituted democratic government of the Weimar Republic and lost their will to bring defeated enemy combatants and leaders to trial. In the end, only twelve individuals were brought to trial before a domestic German criminal court. Six of the defendants were acquitted, and three of the six were sentenced to prison terms of less than one year.

Despite the fact that international trials were not conducted following World War I, the trials that were conducted proved important because, in the past, countries that violated the law of war merely paid compensation to the victimized state, and individuals were not held accountable for their criminal acts (Willis 1982).

United States Army, WW II Signal Corps Photograph Collection

PHOTO 13.1 The Nuremberg trials are a landmark event that is credited with establishing the foundation for international human rights and international criminal law. On October 1, 1946, twelve defendants were sentenced to death, hanged, and cremated, and their ashes were dropped in the Isar River. Three defendants were sentenced to life imprisonment, four were sentenced to prison terms ranging from ten to twenty years, and three were acquitted.

World War I inspired the formation of the ill-fated League of Nations in 1920 and the signing in 1928 of the Kellogg-Briand Pact, in which sixty countries renounced war as a mode of resolving conflicts. Renewed enthusiasm developed over efforts to revive the idea of an international criminal court. This idealism soon was overwhelmed by the rise of the Third Reich in Nazi Germany and the aggression of Japan in the Pacific. Following World War II, there was strong sentiment in favor of executing the leaders of Nazi Germany without trial. The United States prevailed in its insistence on convening an international tribunal at Nuremberg in 1944 to prosecute Nazi military and civilian officials (Mettraux 2008). This was followed by the convening of an international tribunal in Tokyo (Boister and Cryer 2008).

The Nuremberg trials stand as one of the most significant legal events in modern law. The tribunal, composed of judges from the United States, Great Britain, France, and the Soviet Union, convicted of international crimes eighteen leading Nazis, twelve of whom subsequently were executed. Nuremberg established a number of important principles that were the foundation for the international law of human rights and international criminal law.

Principles established by the **International Military Tribunal at Nuremberg** include the following:

Individual liability. Individuals are liable for international crimes regardless of whether they are military, governmental leaders, or low-level combatants.

International crimes. International crimes include war crimes, crimes against humanity (offenses against civilians), and crimes against peace (initiating or waging a war of aggression).

Superior orders. Superior orders are not a defense to criminal liability but may be considered in mitigation.

Supremacy of international law. An individual is liable for committing an international crime even in those instances in which the act is legal under domestic law.

The Nuremberg decision established the legal principles that were relied on to prosecute alleged Nazi and Japanese war criminals throughout Europe and the Pacific. Trials also were held by the Allied powers in Germany, including twelve trials conducted by the United States of leading Nazi doctors, lawyers, diplomats, and concentration camp officials. A number of governments continue to pursue alleged war criminals and to bring these perpetrators to the bar of justice (Appleman 1954). One of the most famous and controversial trials took place in 1961 when Israel prosecuted and convicted Adolf Eichmann, who was a leading figure in the extermination of six million Jews and an equal number of non-Jews in the concentration camps (Arendt 1963). Germany, in an effort to demonstrate its rejection of the events of World War II over the past decades, has actively prosecuted Nazi war criminals.

The prosecutions following World War II focused on criminal offenses committed during wartime and did not discuss the rights of individuals during periods of peace. These trials, however, established the foundation for the recognition of international human rights.

13.1 YOU DECIDE

The defense of duress provides that an individual who commits a crime under the threat of serious bodily harm is excused from criminal responsibility. The defense traditionally was not available under the common law to an individual who kills another person although it might be considered in mitigation of punishment. Civil law countries are divided on this question, and some countries, along with the International Criminal Court, recognize duress as a defense when the crime is proportionate to the threatened harm. In 1995, Dražen Erdemović, a low-ranking member of the Bosnian Serb army, was involved in an ethnic conflict against Bosnian Muslims and Bosnian Croats following the breakup of Yugoslavia. A number of unarmed, civilian Muslim men were detained by Serb forces and transported to an open field. These men ranged in age from 17 to 70 and, under the law of war, were classified as either unarmed civilians or prisoners of war. In either case, they were legally required to be treated in a humanitarian fashion. Erdemović was ordered to participate in the execution of the detainees, which resulted in the killing of an estimated 1,200 individuals over a period of five hours. Erdemović admitted at his trial to killing between 10 and 100 individuals. He claimed that when he resisted participation, "they told me: 'If you're sorry for them, stand up, line up with them and we will kill you too.'" Erdemović was concerned about his wife and child and complied with the order. He testified he would have been killed had he failed to participate, having witnessed another soldier killed for resisting orders. The detainees would have been killed even if Erdemović had refused to participate. Erdemović was the only low-level participant in the slaughter who was charged and convicted by the International Criminal Tribunal for the former Yugoslavia, which considered Erdemović's duress defense in *Prosecutor v. Erdemović*, Case No. IT-96-22-A (Oct. 1997).

How would you rule as a judge?

THE UNITED NATIONS AND HUMAN RIGHTS

The United Nations (UN) Charter establishes a number of lofty aspirations, including the maintenance of international peace and the respect for human rights and for fundamental freedoms for all people.

The Preamble to the UN Charter, the foundation instrument of the United Nations, recognized that the rights of individuals are recognized under international law. The preamble proclaims that the United Nations is formed:

> To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
>
> To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
>
> To promote social progress and better standards of life in larger freedom.

The newly established UN almost immediately took two significant steps in regards to human rights. First, on December 10, 1948, the members adopted a treaty that proclaimed that genocide was an international crime that all countries signing the treaty were obligated to prevent and to punish. The next day, the United Nations adopted the **Universal Declaration of Human Rights** as a "common standard of achievement for all people and all nations." The document in Article 1 proclaims that all human beings are "born free" and "equal in dignity and rights." This non-binding document articulates aspirations for countries to strive to achieve and is based on the notion that all human beings have certain rights that must be protected and provided for by the governments of the world regardless of their political system or ideology. These rights include equal right under the law, freedom of thought and religion, freedom of speech and assembly, equality under the law and the right to be presumed innocent, the right to marry and have a family, and the right to be prosecuted in a public trial that guarantees the rights of defendants. These types of rights are termed **negative rights** because they prohibit the government from interfering with individuals' freedom. The Universal Declaration of Human Rights also protects **positive rights** that impose certain obligations on governments toward individuals. This includes the right to work, the right to an adequate standard of living, and the right to an education (Berlin 2002).

The Universal Declaration had a profound impact on the international community, and its provisions have been recognized as a yardstick to measure the human rights performance of countries throughout the world. The declaration is the foundation for the development of human rights and inspired the drafting of a long list of human rights treaties.

In 1966, the UN adopted two treaties based on the Universal Declaration that member states were asked to make part of their own law. The **International Covenant on Civil and Political Rights** and the **International Covenant on Economic, Social and Cultural Rights** together with the Universal Declaration of Human Rights form what is termed the **International Bill**

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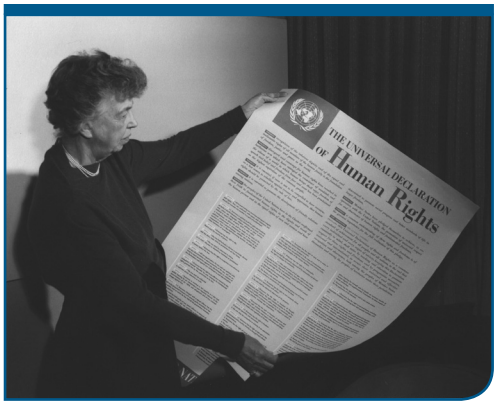

PHOTO 13.2 The Universal Declaration of Human Rights was adopted by the United Nations on December 10, 1948. Eleanor Roosevelt, the widow of American president Franklin Delano Roosevelt, chaired the eighteen-member multinational drafting committee and is credited with ensuring adoption of the historic document.

of Human Rights. In these three documents, the international community clearly established that people—wherever they live and whatever their ethnicity, race, gender, or class is—possess universally recognized human rights.

These instruments were the culmination of movement for human rights whose origins can be traced to the early days of the American and French republics. Together, they established the foundation for a long list of human rights treaties that have been adopted over the past sixty years that protect the rights of children, women, refugees, indigenous peoples and prisoners, migrant workers, and people with physical challenges. Other human rights treaties protect freedom of religion, prohibit torture and racial and other forms of discrimination, and criminalize the practice of disappearances, summary and arbitrary executions and killings, and the slave trade.

Human rights treaties fundamentally transformed international law, which traditionally was based on the notion that nation-states were sovereign and supreme within their territorial boundaries and individuals were "objects" rather than "subjects" of international law and lacked rights under transnational law.

The UN's initiatives in the field of human rights have been accompanied by a series of international treaties regulating the **humanitarian law of war**, including the Geneva Conventions of 1949 and 1977 and treaties regulating land mines, cluster bombs, and chemical, biological, and nuclear weapons. Regional human rights treaties based on the provisions of the Universal Declaration of Human Rights, along with human rights courts, have been established in Europe, Latin America, and Africa (Best 1980, 1994).

The treaties regulating the law of war—together with documents addressing terrorism, torture, genocide, and other acts carrying criminal penalties—constitute the field of **international criminal law**. These crimes against humanity and war crimes are so serious and severe that all signatory states are obligated to prevent and punish these acts when an offender is seized within their jurisdiction (Drumbl 2007; Ratner and Abrams 2001).

The UN demonstrated determination to punish crimes against humanity and war crimes when it established a special tribunal in 1993 to punish individuals responsible for serious violations of the humanitarian law in the former Yugoslavia and in 1994 when it established a tribunal to punish criminal acts in Rwanda. The UN subsequently established "mixed criminal tribunals" in Cambodia and Sierra Leone, staffed by national and international justices. The trend toward a uniform system of individual rights and criminal offenses culminated in 1998 with the Rome Statute of the International Criminal Court. This court began operation in 2002 and has brought indictments against individuals for activities in Uganda, the Congo, Sudan, and Kenya (Schiff 2008).

THE UNITED NATIONS HUMAN RIGHTS SYSTEM

As of 2012, 166 countries, including the United States, have ratified the International Covenant on Civil and Political Rights, and 160 nation-states have ratified the International Covenant on Economic, Social and Cultural Rights. The United States is a signatory to the Covenant on Civil and Political Rights although it has not entered into the Covenant on Social, Economic and Cultural Rights.

The Covenant on Civil and Political Rights protects a broad range of rights, including

1. The right to life
2. The right to be free from slavery or forced labor
3. The right to due process of law throughout the justice process
4. The right of incarcerated individuals to humane treatment
5. The right to freedom of movement and residence
6. The right to freedom of thought, conscience, and religion
7. The right to freedom of expression and peaceful assembly
8. The right to be free from discrimination

Each state party to the covenant "undertakes to respect and to ensure to all individuals within its territory . . . the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The covenant creates a committee for human rights, which receives reports from signatories. The covenant also provides that countries signing the covenant may authorize other signatory countries and individuals to file complaints with the Human Rights Committee that they are failing to protect rights protected under the covenant. Thirty-seven states have signed an optional protocol in which they pledge not to employ capital punishment against criminal offenders.

The rights articulated in the covenant are subject to at least two limitations. Various rights are drafted to provide for significant exceptions. Freedom of thought, conscience, and religion, for example, is "subject . . . to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals of the fundamental rights and freedoms of others."

Perhaps more significant is the division between rights that can be modified (e.g., **derogable rights**) and rights that may not be limited or violated (non-derogable) in "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." **Non-derogable rights** include freedom from slavery and torture, freedom from ex post facto punishment, and freedom of conscience. The document authorizes derogation of the freedoms of speech, assembly, equal protection, and due process rights.

The primary weakness of the covenant is the weak procedural protections. The drafters of the covenant feared that countries would not enter a human rights treaty with a strong international enforcement mechanism. States are obligated to submit reports at the request of the Human Rights Committee. However, these reports are requested infrequently and tend to be broadly worded and

general accounts of a country's human rights protections. In addition, no penalties are imposed on countries that fail to submit reports. The committee studies the reports submitted by states parties and makes "general comments" to the country. States may agree to allow other countries to file complaints against them with the Human Rights Committee and may separately agree to allow individuals to petition the committee to consider complaints against the country. The Human Rights Committee is charged with responsibility of helping the parties reach a compromise remedy. Forty-eight states participate in the interstate complaint procedure although a complaint has never been filed. Thirty-five countries participate in the individual complaint procedure.

An additional limitation on the international covenant, along with other human rights treaties, is states' filing of reservations to various provisions. The United States, for example, reserves the right to treat juveniles as adults rather than adhere to the requirement that juveniles shall be subject to separate judicial procedures and incarcerated in separate institutions (Joseph and Castan 2013).

The Covenant on Economic, Social and Cultural Rights protects a number of areas:

- Freedom from discrimination
- The right to work
- The right to just working conditions and compensation and the right to form unions
- The right to adequate housing
- The right to adequate food and clothing
- The right to marriage and family
- The right to mental and physical health
- The right to participate in cultural life
- The right to education
- Protection of children from exploitation

The Covenant on Economic, Social and Cultural Rights in the past has been criticized because signatory countries only commit to the progressive achievement of the rights in the treaty. In 2008, the UN General Assembly adopted an optional protocol, signed by a relatively small number of states, permitting a newly formed committee to receive complaints from individuals and groups who claim that their rights are not protected. The committee also is authorized to investigate the situation in countries.

The decision to divide human rights into two treaties reflected a disagreement between western democracies, which prioritized civil and political rights, and Russia and other socialist states, which stressed social and economic rights. The reality is that these two types of rights are interdependent. Civil and political rights mean very little to a starving and homeless individual with a substandard education. The healthy and well-fed individual likely will be frustrated by his or her lack of personal freedom and ability to participate in government decision-making.

In 2006, the UN formed the new forty-seven-member **Human Rights Council** to serve as the UN's primary body concerned with human rights. The council may consider complaints of situations involving consistent patterns of gross and reliably attested-to violations of human rights and fundamental freedoms. The council has the discretion to keep the matter under review and appoint an expert to investigate and to report back to the council for further action. There also is a provision for a universal review of the human rights performance of all countries in the world.

The Human Rights Council also appoints thematic rapporteurs, individual experts charged with investigating and studying important human rights concerns, including disappearances, summary or arbitrary execution, slavery, right to water, and freedom of religion.

We previously mentioned the war crimes tribunals for the former Yugoslavia and Rwanda established by the United Nations Security Council; the mixed national-international tribunals for Cambodia and Sierra Leone, Kosovo, and East Timor; and the important development of the creation of the International Criminal Court.

The global human rights system also includes a number of regional institutional arrangements. The European Court of Human Rights and the Inter-American Court of Human Rights are fully functioning institutions. The African Court on Human and Peoples' Rights is still in the initial phase of development.

Non-governmental organizations (NGOs) are an important part of the global human rights system. Groups like Amnesty International, Human Rights Watch, Human Rights First, and the International Committee of the Red Cross investigate and report on human rights violations around the world, help draft human rights treaties, and mobilize their membership to work on behalf of "prisoners of conscience" across the globe. Other groups like Doctors Without Borders work in war zones.

The transnational human rights movement has inspired countries across the globe to incorporate the protection of rights in either their constitution or their statutory law.

DOMESTIC ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS

Adopting high-minded treaties on human rights unfortunately does not mean that people around the world are able to enjoy these rights. The treaty must be signed by a country's executive (president or prime minister) and incorporated into the domestic legal system by the legislative branch. The next step is that the country must respect and enforce the right. The population must possess the capacity to take advantage of rights such as freedom of expression.

There may be resistance by portions of the local population to an international norm that conflicts with their customs and culture. A country may agree to adopt a democratic political system in which women are given the right to vote. This may be resisted by tribal elders and other men who view voting by women as contrary to the customary social order that reserves important decisions for men. Men may prohibit women from going to the polling station or may insist that they be given the authority to cast the vote of their wives or sisters.

Mindie Lazarus-Black studied the implementation of the 1991 Domestic Violence Act in Trinidad and Tobago (Lazarus-Black 2007). The act authorized the issuance of orders of protection to individuals physically or emotionally abused by family members or intimate partners. The Domestic Violence Act was particularly significant because the statute placed Trinidad at the forefront in the protection of the rights of women in the English-speaking Caribbean.

The statute, according to Lazarus-Black, was in large part a product of the expectations created by the international human rights movement that countries protect the rights of women, although the structure of the law reflected the politics and culture of Trinidad and Tobago.

Lazarus-Black finds that the law succeeded in many respects. She also concludes that the judicial process proved ineffective in providing women with orders of protection. Most applications for orders of protection were dismissed by magistrates or withdrawn by women. Lazarus-Black identifies a number of "court rites" that resulted in women who filed complaints feeling humiliated,

intimidated, and frustrated. "Court rites" are "events and processes that occur in and around legal arenas and that mostly operate to dissuade people from using the courts or interfere with their ability to exercise rights" (Lazarus-Black 2007: 163).

The difficulties of the legal process according to Lazarus-Black were compounded by the economic dependence of some women on men and by a culture that expected women and men to reconcile and to preserve and protect family unity and privacy and avoid "airing dirty laundry in public." Women were encouraged to accept the promise of men to refrain from future violence. As a result, orders of protection were issued "fairly rarely and only as a last resort." Lazarus-Black concludes that "court rites" conspire against law being a mechanism for protecting women in Trinidad and Tobago against domestic violence.

As Lazarus-Black illustrates, the *diffusion of international human norms* depends on the domestic acceptance and enforcement of various human rights.

Country. The country must accept the international human right.

Enforcement. Institutions within the country must enforce the right.

Individual. Individuals must embrace the right.

In December 2012, the U.S. Senate refused to ratify a convention that prohibited discrimination against people with physical challenges. Former Republican senator and presidential candidate Robert Dole, a wounded World War II veteran, came from his hospital bed to ask his former colleagues in the Senate to adopt the treaty. Senator Dole explained the document merely required all nations to accept the protections in the Americans with Disabilities Act. Only a handful of Republicans voted in favor of the treaty, explaining they feared that UN bureaucrats would become involved in dictating the policies of American state governments.

Are all human rights universal? Human rights purists insist that despite differences in social customs and practices, the Universal Declaration embodies the single standard of rights to which all people are entitled. The notion that women are entitled only to the rights recognized in their own culture may condemn women to a life without full control of their bodies in which they may be compelled to enter into arranged marriages at an early age, to be unable to gain custody over their children in the event of a divorce, to not have the same rights of inheritance as their brothers, and to be left destitute in the event of the death of their husband. It is convenient for men to claim that the denial of equal rights to women is a part of a culture rather than a practice intended to maintain male dominance.

On the other hand, how can we talk of a single standard for human rights in a world of over 190 countries and two billion people comprising a diversity of ethnic groups, religions, and races? Some people would find the American practice of the death penalty inhumane and barbaric. Various human rights instruments were drafted at a time when the world was composed of fifty-five predominantly western nations.

In 1947, the American Anthropological Association issued a report questioning the notion of universal human rights. The report argues that in the past, the concept of human rights was defined by the outlook of the North American and European countries that dominated the world. Today, the "rights of man . . . cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realization of the personalities of the vast numbers of human beings" (American Anthropological Association 1947: 543).

Consider the events surrounding Salman Rushdie. Article 19 of the Universal Declaration of Human Rights (UDHR) states that "everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." In 1989, this guarantee of freedom of speech clashed with the requirement in Islam that a believer who criticizes the religion or leaves the religion is an apostate (one who "turns away") who is subject to the death penalty. Ayatollah Khomeini, the Supreme Leader of Iran, issued a *fatwa* (religious ruling) that called on "zealous" Muslims to kill Anglo-Indian Muslim author Salman Rushdie in retribution for passages in Rushdie's book *Satanic Verse*s that the Ayatollah viewed as an attack on Islam. A bounty was placed on Rushdie that eventually reached $2.8 million to whomever killed the author. Rushdie spent almost ten years in isolation under the protection of British police before emerging from hiding. The Ayatollah viewed the human rights of freedom of speech, the prohibition on punishment without trial, and the right to freedom of thought as the creation of the law of human beings, which was subordinate to divine law. How would you strike the balance between universal rights and the requirements of Islam (Chase 1996)? In another incident in late 2005 and early 2006, global protests erupted over the Danish newspaper *Jyllands-Posten*'s publication of twelve satirical cartoons portraying the Prophet Muhammad. Many Muslims believe that it is *aniconism* or blasphemy to visually depict the human form. A bounty was placed on the head of one of the cartoonists and the newspaper's publisher, and the Danish embassies in Syria, Lebanon, and Iran were torched; in 2008, a bomb was ignited outside the Danish Embassy in Pakistan killing twelve people.

In both the *Satanic Verses* and cartoon controversies, there is a clash between freedom of expression and respect for one of the world's great religions. An influential Harvard professor, the late Samuel Huntington, made the controversial claim that the major divisions in the new world are based on deep differences in culture rather than on politics (Huntington 2007).

In the 1990s, Singapore and other Asian countries challenged the notion of universal human rights and claimed there was a unique Asian version of human rights, which differed from the western notion of human rights. Asian countries claimed they should be evaluated on a separate standard. The emphasis in the Asian conception of human rights is on economic development and an individual's obligation to serve society rather than on individual rights. Trust is placed in a small number of honorable men to direct economic development rather than rely on democratic procedures, which divide society. The emphasis is on consensus rather than on conflict. Should the global community accept that there are differing views on human rights?

■ CONFLICTING PERSPECTIVES ON INTERNATIONAL HUMAN RIGHTS

Numerous policy concerns and philosophical issues arise in discussing international human rights.

Civil and political and economic, social, and cultural rights. There is an ongoing debate on which rights are most important. The argument is that freedom and expression and right to vote mean very little to an individual who is starving and who lacks education. Rights inevitably benefit the wealthy, who, for example, can take advantage of the "right to travel" or the "right to own property."

Hierarchy of rights. The exercise of rights at times may conflict with one another. Does the right to be free from discrimination permit racial profiling by the police to maintain the right of individuals to be safe and secure? Does freedom of speech protect pornography, obscenity, or Holocaust denial?

Derogable rights. Human rights instruments provide that various rights are "non-derogable," meaning that these rights may never be violated. Other rights, such as freedom of speech and assembly, may be temporarily restricted when there is an officially proclaimed threat to the safety and security of the nation. The question is whether non-derogable rights such as freedom from torture or cruel, inhuman, or degrading treatment or punishment may be violated under emergency circumstances.

Rights and duties. The African Charter on Human and Peoples' Rights of 1986 provides that an individual has both rights and duties "towards his [or her] family, and society, and State and other legally recognized communities and the international community." It is argued that an emphasis on human rights inappropriately encourages people to focus on themselves rather than on the welfare of the community.

Sovereignty. States have a duty to protect human rights within their own territorial jurisdiction. What is the obligation of a state toward a state that grossly and persistently violates human rights, such as North Korea? Should states trade with a country that violates human rights or provide financial assistance? What if a refusal to provide financial assistance contributes to the death of children? Are states obligated to criticize another state's mistreatment of elements in the population or even consider armed intervention?

Private and public. Human rights address the actions of states in relation to individuals within their territorial jurisdiction. Women in many cases find their rights violated in the "private sphere." Examples are domestic violence in the home and sexual assaults on the job. Various commentators argue that governments are responsible for tolerating widespread domestic violence and sexual assaults and that these attacks constitute "state action" and a violation of the human rights of women. The question is whether it is fair to extend human rights laws to cover private acts of violence.

Reservations. States are entitled to file reservations and understandings to the provision of treaties. The United States, for example, filed a reservation to the International Covenant on Civil and Political Rights (ICCPR) reserving the right to treat juveniles as adults. Other nation-states may refuse to recognize reservations. Should nation-states be permitted to file reservations that undermine the protection of human rights?

Cultural. Claims of cultural differences often are invoked to justify acts such as arranged marriages of juvenile females to older males.

■ DOMESTIC COURTS AND HUMAN RIGHTS

U.S. federal courts have a unique global role in the international protection of human rights. In 1980, the U.S. Court of Appeals for the Second Circuit held that torts (e.g., personal injury suits) could be brought against violators of human rights norms under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The statute was adopted by the first U.S. Congress in 1789 and provides federal district courts with "original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States." This statute has been relied on by nationals of foreign countries to bring actions for financial damages against human rights violators

resident in the United States. In 1991, Congress adopted the Torture Victim Protection Act, 18 U.S.C. § 1250, which provides for civil actions for damages against individuals who, while acting under the authority of a foreign nation, engaged in torture or extrajudicial killings.

Well over twenty legal actions have been brought successfully under these two statutes in American courts against perpetrators who, when acting on behalf of a foreign government, committed kidnappings, genocide, torture, summary and arbitrary execution, and unlawful detention (*Filártiga v. Peña-Irala,* 630 F.2d 876 [2d Cir. 1980]).

The ATS is defended as an expression of American respect and protection for human rights and is based on the belief that human rights violators should not obtain a safe haven in the United States. The statute provides an opportunity for victims to draw attention to their plight and to receive compensation for the harm they have suffered; in addition, it establishes the principle that human rights violators will be brought to justice.

Critics claim that the ATS consumes judicial time and resources and that the United States should not be acting as a world police officer in adjudicating international crimes committed abroad. There is the added difficulty of obtaining witnesses and documents and recreating events committed in another country (Coliver 2006). In 2012, in *Kiobel v. Royal Dutch Petroleum*, the U.S. Supreme Court in a 5–4 decision rejected a claim brought by a group of Nigerian citizens for damages against Shell Petroleum asserting the company aided and abetted human rights abuses by the Nigerian government against individuals protesting against the pollution of the natural environment. The Court indicated that it was reluctant to approve of an extra-territorial law that involved American courts in the affairs of a foreign corporation doing business abroad. The act according to the Court was intended to apply violations of international law occurring on American soil although this presumption might be overcome if there is a strong link to U.S. territory.

In 2016, the U.S. Congress passed the Justice Against Sponsors of Terrorism Act that allows American citizens to sue a foreign country substantially involved in an act of terrorism within the United States. The law was intended to allow the victims and families of victims of 9/11 to sue Saudi Arabia in American federal court. Critics warned about the consequences of denying a foreign country sovereign immunity (exemption) from being brought to trial before a foreign (American) court and that other countries would retaliate by allowing their nationals to bring suit against the United States in their courts.

Various international criminal treaties also provide for **universal jurisdiction** over offenders. Signatory states are obligated to prosecute or extradite abroad an offender detained in their territory. The United States asserted jurisdiction under the Torture Act, 18 U.S.C. § 2340, to prosecute and ultimately convict Charles Emmanuel of torture committed in Liberia. The Torture Act establishes criminal jurisdiction in federal courts over acts of torture committed abroad by American citizens and nationals and individuals present in the United States. Emmanuel, an American citizen and son of former Liberian strong man Charles Taylor, headed a paramilitary group, the "Demon Forces," which engaged in "extraordinary cruelty and evil" in support of a rebel movement in Sierra Leone. Taylor ordered beatings, drownings, decapitations, sodomy, and the dripping of molten plastic onto the sexual organs of detainees.

Absent this type of assertion of universal jurisdiction over international crimes, perpetrators like Taylor and maritime pirates likely would not have been brought to the bar of justice because their state of nationality might have been reluctant or too weak and unorganized to prosecute them. The important case of Augusto Pinochet illustrates some of the issues that arise in the assertion of extra-territorial jurisdiction.

A country that wants to prosecute an individual who is located in another country files a request for extradition. The request must be supported by facts supporting the request. Pinochet led a military coup in 1973 that overthrew the democratically elected government in Chile and in the process killed President Salvador Allende. Once the military junta assumed power, there was a brutal and violent crackdown on students and other suspected left-wing supporters of Allende. Pinochet finally stepped down from power in 1990 and before leaving office ensured his own position by adopting a law exempting individuals from prosecution for crimes committed in service of the military regime.

Allende remained chief of the armed forces until 1997 when he assumed the role of "senator for life." He subsequently went to England for medical treatment. During his stay in England, a Spanish magistrate issued an arrest warrant for Pinochet and asked for his extradition to Spain. The Spanish magistrate based his request on the fact that twelve torture victims in Chile were Spanish nationals.

The English House of Lords held that despite the international immunity generally accorded to heads of state for crimes while in office, Pinochet's involvement in torture violated the law of nations, and he was subject to extradition to Spain. The English government of Margaret Thatcher was supportive of Pinochet and found he was too sick to be sent to trial in Spain. Pinochet returned to Chile where, despite threats to prosecute him, he lived out his remaining years as a free man (*Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, 1998 House of Lords*).

The Chilean government feared military unrest and a coup if it pursued cases against members of the junta and had little interest in seeing Pinochet prosecuted in Spain. Spain and the international community felt that Pinochet should be brought to the bar of justice despite the fact that prosecuting him in Spain would do very little toward satisfying the desire of the Chilean people for justice.

The event in England nonetheless revealed Pinochet's crime to the world, and Chilean prosecutors and judges were inspired to pursue hundreds of indictments against members of the Chilean military, including unsuccessful efforts to prosecute Pinochet. Roughly seventy former members of the Chilean military presently are incarcerated.

The Pinochet case is an example of transitional justice, or the challenge confronting a government that wants to reestablish the rule of law in a society that is emerging from the rule of a tyrannical, undemocratic regime.

In May 2016 in a landmark decision, the Extraordinary African Chambers of the Senegal judiciary convicted Hissène Habré, the longtime authoritarian ruler of Chad, of war crimes and the crimes against humanity of rape, sexual slavery, torture, and ordering the killing of forty thousand individuals. Habré is the first head of state to be convicted by a court of another country.

In South Africa, the government created a **truth and reconciliation commission**. Individuals who come forward and admit to their crimes before the commission may receive a pardon. A separate committee is authorized to provide compensation to the victims of these crimes. Individuals who receive a pardon are immune from criminal prosecution and civil suit. Despite the international condemnation of amnesties as a violation of a government's obligation to provide remedies for violations of human rights, the South African Supreme Court held that the interest in reconciling the various racial groups in South Africa justified the truth and reconciliation process.

The process of addressing past human rights violations is termed *transitional justice*. Experience indicates that the restoration of a belief in the rule of law is best achieved by a combination of criminal prosecutions, truth commissions, reparation programs, justice for women victimized by sexual abuse, reform of the police and military, and the creation of museums

and memorials. This holistic approach addresses the need for accountability by those responsible, shows concern for the victims, and advocates permanent reform of the institutions that failed to protect and to preserve human rights.

U.S. CONGRESSIONAL STATUTES AND INTERNATIONAL HUMAN RIGHTS

U.S. foreign policy historically has been based on a strong commitment to human rights. In 1978, President Jimmy Carter declared that human rights are the "soul of our sense of nationhood." The Bureau of Democracy, Human Rights and Labor Affairs (formerly known as the Bureau of Human Rights and Humanitarian Affairs) in the Department of State, headed by an assistant secretary of state, ensures that foreign policy decisions take human rights into consideration.

In 1974, Congress formally integrated human rights into U.S. foreign policy. An amendment to the 1961 Foreign Assistance Act establishes human rights as a primary goal of American foreign policy. Military assistance is to promote human rights and is not to be provided to countries that engage "in a consistent pattern of gross violation of internationally recognized human rights." The U.S. president may provide assistance to a country that violates human rights if the president certifies extraordinary circumstances exist or a country's human rights performance has improved. In making this determination, the president is to give special consideration to issues of religious freedom. The Department of State is required to prepare a report on the human rights conditions in any country receiving U.S. assistance.

This provision is repeated in provisions on developmental assistance adopted by Congress in 1995 prohibiting economic developmental assistance to countries that practice a "consistent pattern of gross violations of internationally recognized rights" although there is an exemption for assistance that benefits "needy people."

The 1988 Omnibus Foreign Trade and Competitiveness Act authorizes sanctions such as a denial of foreign assistance to countries that do not protect workers' rights. The president may act when a country engages in a "persistent pattern of conduct" that denies workers the opportunity to unionize or bargain for wages, fails to provide a minimum wage and worker safety, and exploits child labor.

The International Financial Institutions Act requires the United States to promote human rights in making decisions on the financial assistance provided by international economic institutions by denying money to countries that engage in a "pattern of gross violations of internationally recognized human rights." The Female Genital Mutilation Act of 1996 instructs U.S. representatives of international banks to vote against loan funds to countries with a "known history" of FGM that do not have educational programs to combat the practice.

In 1993, Congress adopted the National Endowment for Democracy (NED) Act. The NED Act created a publicly funded, privately administered foundation to promote democracy.

In 2016, the U.S. Congress passed the Global Magnitsky Human Rights Accountability Act. The law, which expands the Magnitsky Act of 2012, is aimed at Russian officials and others complicit in the detention, torture, and death of Sergei Magnitsky, a lawyer who revealed corruption in Russia. The Global Magnitsky Human Rights Accountability Act authorizes the president to ban travel to the United States and to freeze the U.S. assets of individuals who suppress human rights, target whistle-blowers exposing corruptions, and target individuals who have engaged in corruption and bribery.

13.2 YOU DECIDE

Jeremy Bentham, in *Introduction to the Principles of Morals and Translation* (1789), questioned the entire notion that unwritten rights provided a foundation for law and famously wrote, "If any man knows of any let him produce them. . . . Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts" (quoted in L. Hunt 2007: 124–125).

Other commentators viewed the notion of human rights as threatening to a society based on class, privilege, and tradition. Edmund Burke, viewed as the inspiration for the modern conservative movement, writing in *Reflections on the Revolution in France* (1790), criticized the constant "praddling about the rights of men" and the "monstrous fiction of human equality." Human rights were a "dangerous fiction." "Individuals require the order, direction, and discipline of the established social order . . . [and] lack the capacity to exercise freedom wisely and rapidly will reduce the social order to social anarchy" (quoted in Waldron 1987: 29–45).

Bentham is alerting us to the fact that we should be concerned about what benefits society rather than be concerned about our own individual rights. We should be less concerned about whether we are being inconvenienced or whether our right to privacy is being violated when we are screened at the airport than with what is best for safety and security of society. The concern with rights undermines society.

What is your view?

Congress also has passed country-specific legislation that restricts assistance to specific countries such as Iran, Sudan, and various Central American and Latin American regimes. In some instances, the president is required to certify that a country receiving foreign aid meets certain human rights standards.

The United States also has imposed sanctions since 1990 on a number of countries, including Serbia, Libya, Haiti, Angola, Iran, Cambodia, and Cuba.

As we turn to several case studies of human rights, consider two questions raised by historian Lynn Hunt. First, should we care about individuals in other countries, and what motivates some people to be concerned about people in distant locations? Second, what accounts for the capacity of human beings to commit cruel and atrocious violations of human rights (L. Hunt 2007: 211)?

■ CHILD SOLDIERS AND THE HUMANITARIAN LAW OF WAR

P. W. Singer, an expert on the contemporary law of war, writes that the use of **child soldiers** is one of the central developments in the conduct of war. A child soldier, according to Singer, is any individual under age 18 who is engaged in combat or combat support as "part of the armed force or a group." He writes that child soldiers are used in three-fourths of the armed conflicts in the world.

The employment of children as combatants is contrary to the humanitarian law of war, which traditionally has treated children as deserving of special protection and provides that children may not be targeted by a military attack. Despite the requirements of the law of warfare, it is estimated

that three hundred thousand children currently are fighting or recently have participated in armed conflict. Twenty-three percent of the military organizations in the world are thought to employ children under age 15 in combat, and 18 percent use children age 12 and under. In Latin America alone since 1990, child soldiers have participated in conflicts in Colombia, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, and Peru (Singer 2006: 6–7, 16, 19, 30–31).

According to Child Soldiers International, in 2016, 71 percent of countries restricted military service to individuals 18 years of age or older. Approximately sixty armed paramilitary groups reportedly have committed to stop recruiting children under 18. The so-called Straight-18 standard, however, is not followed by all of the world's seven largest economic nations, several of which allow voluntary enlistment of individuals under the age of 18.

Pierre Holtz

PHOTO 13.3 Child soldiers under the age of 18 years old are used in combat in every region of the world. These children suffer long-term psychological and physical injury.

Thirty percent of child soldiers are young girls. Underage girls reportedly are part of the armed forces of fifty-five countries. Insurgent groups, in particular, make use of young women in combat and also require them to cook, clean, wash, and provide sexual services (Singer 2006: 22–23). During the civil war in Sri Lanka during the 1980s and 1990s, the insurgent Liberation Tigers of Tamil Eelam (LTTE) recruited suicide bombers between the ages of 10 and 16. Roughly half of these suicide bombers were females, called the "Birds of Freedom" (33).

There are an estimated twenty-five million refugee children in the world. Many of these children have grown up in conflict zones and have been surrounded by violence as part of their daily existence. They often have lost a parent or are orphaned and lack access to education, food, shelter, and medical care. These children lack a sense of personal identity and self-worth and are easily recruited into insurgent groups.

The use of child soldiers in combat is facilitated by the development of light, plastic weapons with a small number of moving parts, which enables adolescents to operate and care for highly lethal weapons (Singer 2006: 46–47).

Children are obedient, dependent, inexpensive to support, and easily recruited and socialized into committing severe acts of violence. They see the world in terms of good and evil and fight without regard to political ideology or political philosophy. They are indoctrinated into the militia group by having their heads shaved, their bodies fixed with tattoos, and the initials of the insurgent organization carved into their skin. In some instances, they are required to commit atrocities in their home villages to ensure they cannot return to their former lives and to desensitize them to violence.

Children typically lack a full understanding of danger, and their impulsiveness and recklessness on the battlefield is enhanced through narcotics and alcohol. Research indicates they are driven to continue to fight out of a sense of community and loyalty to their fellow soldiers. This concern rarely is reciprocated by insurgent leaders, who use the children as expendable cannon fodder or human shields (Singer 2006: 80–89).

Child soldiers suffer from injuries, disabilities, and psychological trauma. Disease, HIV, post-traumatic stress, and drug addiction are common. The children lack education and skills and find it difficult to reintegrate into society. Their psychological development has been short-circuited; they have not learned the lessons that children typically learn about fairness, sharing, concern for others, ethics, and trust.

The prevalence of internal conflicts across the globe and the need to recruit combatants have led to insurgent groups increasingly turning to the use of child soldiers. Children are particularly valuable to terrorist groups, which use them to infiltrate towns and cities without suspicion. The most alarming trend is the employment of child suicide bombers by terrorist groups in the Middle East, including ISIS in Iraq, Syria, and Turkey; the Taliban in Afghanistan; and Boko Haram in West Africa. ISIS uses social media to highlight the "Cubs of the Caliphate" training for terrorist missions and reciting ISIS propaganda. Child soldiers reportedly also are used by insurgent groups in India, Pakistan, Libya, the Philippines, Thailand, and Yemen. The most pressing issue is in South Sudan where over two million individuals have fled their homes. An estimated sixteen thousand child soldiers have been pressed into combat by warring guerrilla groups despite efforts by the United Nations to prevent their recruitment.

Child soldiers have a human right to be protected from military service. The UN Security Council has condemned the recruitment and use of child soldiers and has urged support for their rehabilitation on six occasions since 1998.

The Convention on the Rights of the Child of 1989 in Article 38 requires states parties to "refrain from recruiting any person who has not attained the age of fifteen into their armed forces." Article 38(2) requires states parties to take all "feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."

The 2002 Optional Protocol to the Convention expands the protection for children and requires countries to avoid conscripting or recruiting young people who have not "attained the age of eighteen years" or employing these young people in "hostilities." Article 1 provides that states parties shall take all feasible measures to ensure that members of their armed forces who "have not attained the age of eighteen years do not take a direct part in hostilities." Article 2 states that states parties shall ensure that persons who have not attained the age of 18 years are not "compulsorily recruited" into their armed forces. Article 4 provides that armed groups unaffiliated with a state shall refrain from recruiting or using in hostilities persons under the age of 18 years of age.

The Rome Statute of the International Criminal Court (ICC) in Article 8 follows the Convention on the Rights of the Child in criminalizing "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."

The Special Court for Sierra Leone jointly established by the United Nations and the government of Sierra Leone is given jurisdiction over "serious violations of international humanitarian law." Article 4(c) prohibits "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."

The first international prosecution for the recruitment and use of child soldiers was the conviction of Samuel Hinga Norman, a pro-government militia leader and minister of internal affairs for Sierra Leone. An estimated ten thousand child soldiers under age 15 were used by the various rebel factions fighting in Sierra Leone. During the conflict, roughly five hundred thousand individuals were killed, wounded, or forced out of the country as a result of the conflict between rebel and government forces.

In 2013, the Appellate Chamber for the Special Court for Sierra Leone affirmed the conviction of former Liberian leader Charles Taylor for participation in the planning of war crimes and aiding and abetting crimes committed by rebel forces in Sierra Leone. Taylor was held responsible for the recruitment and use of child soldiers to amputate limbs, commit acts of sexual violence, and perform support activities including guarding diamond mines, staffing checkpoints, and foraging for food.

In March 2012, Thomas Lubanga Dyilo, in the first trial conducted before the ICC, was convicted of being a co-perpetrator of the war crimes of conscripting and enlisting children under age 15 and using them to participate in hostilities. Dyilo was president of the Union of Congolese Patriots and commander-in-chief of the Patriotic Forces for the Liberation of Congo and used child soldiers in fighting other militia groups.

In *Dyilo*, the ICC held that children under 15 years old are incapable of informed consent and as a result there is no meaningful difference between recruiting and conscripting children and enlisting children who voluntarily enroll in the armed forces (*Prosecutor v. Dyilo*, International Criminal Court [2012], para. 618).

The evidence indicated that Dyilo, along with other officials, was responsible for the widespread recruitment of children under the age of 15 on an "enforced" and "voluntary" basis. Children were subjected to harsh training and severe punishments, and young girls were subject to sexual violence. They were used as bodyguards and were required to take a direct part in hostilities. Dyilo went so far establishing an elite, special armed unit comprising children younger than 15.

The Child Soldier Prevention Act (CSPA) was signed into law by President George W. Bush in 2008 and criminalizes individuals who command forces that recruit child soldiers. A child soldier is defined as any person under 18 years of age who "takes a direct part in hostilities as a member of governmental armed forces. The CSPA also was intended to prevent military assistance and arms transfers to countries using child soldiers. The State Department compiles an annual list of governments known to recruit and use children as soldiers called the Trafficking in Persons Report. This provision may be waived in the national interest. In September 2016, President Barack Obama despite criticism from human rights groups waived this provision in regards to Burma, Democratic Republic of Congo, Iraq and Nigeria, Somalia, South Sudan, and Rwanda.

Criminal prosecution to deter the use of child soldiers, however desirable, ultimately does not address the severe problem of the need to rehabilitate child soldiers and reintegrate them into society. The Lomé Peace Accord of 1999 ending the conflict between the rebels and the government of Sierra Leone is the only peace treaty that addresses child soldiers. The treaty requires the government to pay particular attention to the issue and to mobilize domestic and international resources to address the "disarmament, demobilization and reintegration process." Unfortunately, progress in rehabilitating child soldiers has been limited by the inadequate funding provided by the UN and by the international community.

13.3 YOU DECIDE

Omar Khadr, a Canadian national, was the youngest detainee at the U.S. terrorist detention facility at Guantánamo Bay, Cuba. Omar was accused of murder and attempted murder of Sgt. First Class Christopher Speer in Afghanistan in 2002. Khardar and his parents left Canada for Afghanistan and for a time allegedly lived in a compound with Osama bin Laden. The compound was attacked by U.S. troops, and Christopher Speer was killed during the assault by a grenade. Khadr was detained at age 15 and held in detention for two years before being permitted to consult with a lawyer and was in detention for three years before being charged in January 2006 with a criminal offense. Along with two other "child soldiers," Khadr was detained among the general adult population and was subject to the occasional shackling, enhanced interrogations, and threats. He was allowed to communicate with his family on only one occasion during this entire period. Khadr pled guilty in 2010, was sentenced to eight years in prison, and in 2012 was released to Canadian authorities and served the remainder of his sentence in Canada. In 2015, a Canadian court released Khadr on bail despite the opposition of the conservative Canadian government. A year later, the newly elected Canadian government decided against appealing Khadr's release, and he was set free. The Canadian government later apologized for abandoning Khadar in Guantánamo and paid him more than $10 million in compensation. Khadr was the first juvenile to be prosecuted for war crimes since World War II. In 2007, fifty-eight countries entered into the Paris Principles on Child Soldiers sponsored by the United Nations Children's Fund (UNICEF). The report summarizes the international law on the treatment of children and states that captured children should be treated as victims rather than perpetrators and must be treated in accordance with a framework of restorative justice and social rehabilitation, consistent with international law.

In December 2016, the International Criminal Court (ICC) opened the trial of Dominic Ongwen, a leader of the Lord's Resistance Army (LRA), a cult blamed for the deaths of one hundred thousand people and the abduction of sixty thousand children. He was charged among other acts for leading an attack in 2009 in the Congo, which resulted in the death of an estimated 350 civilians and the abduction of another 250 individuals, including 80 children. Ongwen faces a possible term of life in prison. Commentators have argued that in evaluating Ongwen's guilt and certainly his criminal sentence the ICC should consider that although Ongwen is 40 years of age, he was abducted and indoctrinated by the LRA at age 9.

Should children be prosecuted and punished for war crimes? In sentencing Dominic Ongwen, should the judges consider that he was abducted at an early age?

■ CORPORATIONS AND HUMAN RIGHTS

Over sixteen years ago, television personality Kathie Lee Gifford offered a tearful public apology when it was revealed that child workers in Honduras manufacturing her clothing line worked twenty hours a day. This incident starkly exposed a system of global sweatshops, in which workers toil for long hours with minimum pay. Countries that tolerate these types of factories are in violation of the International Covenant on Economic, Social and Cultural Rights, which provides that workers are entitled to a "decent living for themselves and their families . . . [and] safe and healthy working conditions."

The UN special representative on the issue of human rights and transnational corporations has noted that large multinational corporations have a significant impact on the lives of people across the globe and should respect the human rights of all peoples whose lives they affect. Global corporations comprise fifty-one of the one hundred largest economies in the world while countries comprise forty-nine of the one hundred largest economies. These corporations affect areas ranging from access to medicine to the protection of the environment to conditions of employment and invest in and indirectly support countries whose governments engage in the systematic violation of human rights.

In a globalized economy, U.S., Canadian, and European firms increasingly locate factories abroad or establish relationships with foreign manufacturers in the developing world. Workers abroad typically are paid lower wages, which means that the cost of production is lower than if the goods were manufactured in the United States. Consumers benefit from lower costs, and foreign workers gradually accumulate savings that can be used to buy homes or cars or help to send their children through university. In time, the members of this younger educated generation learn the skills necessary for economic development and help to develop a sophisticated economy. How realistic is this model of development?

In November 2012, a fire broke out at the Tazreen textile factory in Bangladesh, killing more than 117 workers. The fire was started by an electrical short circuit and quickly spread throughout the factory because of the fabric and yarn. Workers were caught in the blaze because the exit doors were locked shut. Firefighters battled the blaze for seventeen hours before putting out the fire.

Six months later, the Rana Plaza factory in Bangladesh collapsed, killing roughly 1,129 workers and injuring 2,500 in what is considered the most serious garment-factory accident in history. The owner had been warned the previous day to close the building because of cracks in the structure. In the five months following the building collapse at Rana, there were at least forty-one additional fires in Bangladesh. More than 400 workers have died and roughly 1,800 have been severely injured in fifty fires since 1990.

Bangladesh is the second-largest textile exporter of American and European brands in the world and has five thousand garment factories, which employ 4.5 million workers, 80 percent of whom are women. The $19 billion-a-year industry, which is second only to China in terms of apparel production, accounts for close to 80 percent of the country's exports, which are vital to the economy. Bangladesh is the United States' fifty-eighth-largest trading partner: Bangladesh exports to the United States total roughly $5.4 billion, and U.S. exports to Bangladesh total over $700 million. The minimum wage in Bangladesh is 32 cents an hour, and the average monthly wage in the industry is less than $40, which is far below what is required to support a family of four. At the same time, the cost of living has risen an average of 10 percent in each of the past two years. It is not uncommon for textile workers to work fourteen to sixteen hours a day, seven days a week.

The factory managers and owners of Tazreen and Rana along with various supervisors subsequently were arrested and face criminal homicide charges. The reality is that these conditions have existed in Bangladesh for decades.

At least twenty-five U.S., Canadian, and European companies and retailers contracted with textile manufacturers in the Rana Plaza complex. Foreign suppliers are under pressure to manufacture goods increasingly inexpensively in order to lower costs for consumers. They inevitably cut corners on wages and safety and pressure workers to produce at an increasingly rapid rate. A country that too closely regulates manufacturers takes the risk that corporations will contract with firms in countries that are less strict.

Governments in countries like Bangladesh lack resources and experience and cannot be relied on to inspect factories. North American and European companies traditionally have hired private monitoring companies to examine conditions at foreign factories. These private firms find it difficult to monitor the thousands of firms across the globe and can spend only a few hours on each audit. Foreign factories, when receiving notice of an inspection, unlock exit doors, remove the clutter from stairwells, tutor workers on how to respond to questions, and tell child workers to stay home.

In May 2012, a number of western firms doing business with Bangladesh manufacturers signed a binding agreement, the Accord on Fire and Building Safety in Bangladesh, to authorize independent fire safety experts to inspect their supplier factories in Bangladesh. These reports were to be available to the public. Foreign firms obligated themselves to pay suppliers prices sufficient to allow them to repair and renovate their factories and require suppliers to allow outside experts to educate workers on safety and workers' rights. The Accord provides for binding arbitration conducted by a steering committee composed of union and corporate representatives. The committee may impose fines on non-cooperative manufacturers, which are enforceable before the courts in the firm's state of incorporation.

A number of leading clothing firms, which are headquartered in Europe, joined the Accord, including PVH (the world's largest shirt seller), H&M (the leading exporter of textiles from Bangladesh), Carrefour and Tesco (the second- and third-largest retailers in the world), and Inditex (the world's leading fashion retailer). Each firm pledged at least $500,000 to fund the compensation.

Walmart, Gap, J. C. Penney, and a number of other North American firms refused to sign the Accord because of the provision imposing legally binding arbitration and preferred to form the Alliance for Bangladesh Worker Safety and to negotiate with their own suppliers on workers' wages and conditions of employment. The Alliance is empowered to impose financial penalties on non-conforming firms. The Accord and the Alliance established the goal of inspecting two thousand apparel factories. Inspectors have discovered and have begun to insist factories address crumbling buildings, flammable fabric storage areas adjacent to work spaces, and inadequate fire escapes (S. Greenhouse and Harris 2004). Bangladesh factories complain that while the costs of production have risen, global apparel firms have resisted paying the higher prices for goods, which are required to help the factories compensate for costs (Abrams and Sattar 2017).

The Asia Floor Wage Alliance, a coalition of labor and research groups, reports that the Accord identified 108,000 issues in roughly 1,600 factories, 60 percent of which have been corrected. The Alliance has repaired more than half of the issues that required repair at 600 factories. An example of the type of defect that needs to be addressed is the fact that as of 2015 close to seventy-nine thousand workers produced garments for one major U.S. firm in factories without adequate fire exits (Abrams 2016).

The Bangladesh government has part of its reform program announced an increase in workers' wages and greater protection for workers looking to unionize. Critics, however, note that wages have not risen as promised and point out that worker protests continue to be met with a violent response. An estimated 10 percent of garment workers are unionized, and in January 2017, protests over low wages led to the arrest of fourteen union leaders and to the firing of 1,400 activists (Abrams and Sattar 2017). The Asia Floor Wage Alliance found that workers at one factory worked nearly one hundred hours a week at poverty-level wages (Abrams 2016).

Workers interviewed in a study by the non-governmental organization Human Rights Watch report being subjected to verbal, physical, and sexual abuse; forced overtime and refusal to pay

overtime pay; withholding of pay in retaliation for a failure to meet production quotas; a denial of maternity leave; and dirty drinking water (Human Rights Watch 2015).

The family members of victims of Rana Plaza were promised short-term financial support if they were able to verify that their family member died in the fire. The Rana Plaza Donors Trust Fund has paid roughly $650 (U.S.) to 2,849 claimants, which is 40 percent of the total compensation due to each claimant. Victims of Tazreen have received $1,267 (U.S.), most of which has been spent by families on medical costs. Compensation to the workers has been slowed by the fact that a number of companies have failed to contribute or have contributed small amounts.

Conditions in the apparel industry in Indonesia, India, and Cambodia mirror conditions in Bangladesh. In Cambodia, workers producing goods for a well-known American company work ten to fourteen hours a day in extremely hot conditions without breaks or access to clean water, and as a result, workers experience "mass fainting." Workers may make as little as $140 per month, and workers who protested for an additional $20 a month reportedly were killed. In Indonesia, tens of thousands of workers reportedly sew garments in buildings without proper fire escapes (Abrams 2016).

The U.S. government spends roughly $1.5 billion a year at factories abroad. The government contracts with suppliers in countries, including Bangladesh, with a pattern of physical abuse of workers, dangerous working conditions, child labor, padlocked fire exits, and buildings on the verge of collapse (Chen 2014).

One of the most successful efforts to combat sweatshops has been student protests against the manufacture of university apparel by companies relying on sweatshop labor in the developing world. This consumer activism has led universities to contract with companies whose suppliers are certified by independent monitoring organizations as paying a fair wage and that provide safe and secure working environments.

Major businesses realize it is in their interest to assure consumers that their supplier factories have been audited and monitored. Americans buy an average of sixty-four garments a year, most of which are manufactured abroad. Opinion polls indicate consumers care about "ethical sourcing" and want to know the workers who manufacture their clothes are being treated fairly and humanely. A survey of over 1,100 American consumers found that 45 percent would pay more for clothing and footwear that is ethically manufactured. Thirty percent said they would pay up to 5 percent more, and 28 percent would pay up to 20 percent more. Do these attitudes match consumers' actions? A quarter of consumers said that they recently examined the origin of a consumer good. Other surveys indicate that students and millennials, perhaps because of their limited financial resources, go out of their way to avoid knowing the origin of products and are less likely to be willing to pay more for an ethically sourced product.

Nike received severe criticism over the conditions in an Indonesian plant in which workers earned 14 cents an hour and in a Vietnamese plant in which females were abused. Phil Knight, the CEO of Nike, in 1998 recognized Nike had become "synonymous with slave wages, forced overtime, and arbitrary abuse" and understood that the American consumer "doesn't want to buy products made under abusive conditions" (Cushman 1998: A1). Nike subsequently established itself as an industry leader in the humane treatment of workers by intensely monitoring suppliers and adopting a code of conduct, including a requirement that manufacturers adhere to a minimum wage for workers and a limitation on hours worked and by publishing a complete list of factories with which it does business (Nisen 2013).

This section has illustrated how, in the absence of government action, private corporations can come together to protect the rights of workers. Globalization with the outsourcing of manufacturing

abroad originally was portrayed as benefiting people throughout the world, providing jobs, income, and increased foreign investment and trade. The reality is there is an increasing global gap between rich and poor. Developing countries at the bottom of the economic ladder compete with one another to attract foreign investment and to create manufacturing jobs. The global bank Credit Suisse compiles a global wealth pyramid each year. The most recent data show that 0.7 percent of the world's adult population owns almost half of the world's wealth, while the bottom 73 percent have less than $10,000 each and account for 2.4 percent of global wealth. Despite the best intentions of large North American and European firms to protect the rights of foreign workers, labor rights inevitably are compromised by the desire of large retail stores to stock their stores with inexpensive goods to compete with the competition, maximize profits, and make their companies attractive to Wall Street investors.

Are we able to monitor the goods we purchase even if we make a good faith effort? There perhaps is no industry as exploitative of workers as the Thai fishing industry. Numerous sources document the use of trafficked workers who work long hours at minimal pay and according to reports are beaten, drugged, shackled, and denied adequate food and sleep and only receive minimal pay. The catch finds its way into the seafood purchased by global grocery chains and is a major source of food for American pets and livestock (Urbina 2015).

Would you be willing to pay more to increase the standard of living of workers in the developing world? Is it realistic to ask businesses that are devoted to making a profit and paying investors to be concerned about conditions of employment?

13.4 YOU DECIDE

Students on more than three hundred campuses are demanding their universities disinvest their endowment funds from firms in the fossil fuels industry. The students object to the institutions of higher education making a profit from investments in companies involved in the release of carbon associated with the risk of global warming. As a result of student activism, twenty-eight universities have disinvested or have pledged to disinvest from investments in oil, natural gas, and coal, and others such as Yale have begun to partially disinvest or have begun to study the issue. The University of Ottawa has become the first Canadian university to disinvest, and a number of English universities have disinvested.

The disinvestment effort is reminiscent of earlier efforts to persuade universities to disinvest from apartheid South Africa, tobacco companies, and companies doing business in Sudan, which continues to be accused of committing genocide in Darfur.

A handful of small colleges have divested themselves of the stocks of oil companies and other carbon-related stocks. Unity College in Maine, a small school specializing in environmental science, directed its relatively small $14.5 million endowment to investments that limited the institution's exposure to fossil fuel stocks. Unity College president Stephen Mulkey explained that delaying a shift from an oil-based economy condemned the next generation to an unlivable planet. Unity began to disinvest in 2011 and completed the process in 2014 without reportedly harming the performance of its stock portfolio.

Activists note that disinvestment from carbon-related stocks will not jeopardize the "bottom line" because

these stocks constitute a relatively small part of most college endowments. In the long run, it is shortsighted of college trustees to believe that these stocks will continue to prove profitable, and it makes business sense to disinvest before it is too late. The disinvestment campaign also argues that a university committed to scientific integrity cannot continue to hold stock in companies that are "wrecking" the global environment and that it is "wrong to profit from that wreckage."

Most university boards of trustees have resisted calls for disinvestment, explaining their obligation is to maximize profits to build the endowment. Oil stocks in the past have outperformed other stocks. A large endowment allows colleges to fund student scholarships, loans, and grants. It is estimated the California Public Employees' Retirement System allegedly lost $2 billion when disinvesting from South Africa and from tobacco stocks.

University officials point out that disinvestment will hurt endowments without impacting the cause of climate change. Corporate profits will not suffer because oil companies are extremely profitable and have little problem attracting investors. Institutions of higher education already are combating climate change through research and teaching. The best approach, according to administrators, is for students to work to change corporate policy.

According to administrators, the fundamental reason for resisting disinvestment is that universities are devoted to freedom of expression and tolerance and should not make investment decisions based on social and political considerations. The bottom line, as Harvard president Drew Faust wrote in October 2013, is that "the endowment is a resource, not an instrument to implement social or political change."

As of 2017, forty-one cities, seventy-two religious institutions, four foundations, and other investors have disinvested portfolios worth an estimated $50 billion.

In September 2012, the UN Intergovernmental Panel on Climate Change, a global group of climate scientists, concluded there is a 90 percent to 100 percent certainty that "climate change is the greatest challenge of our time. . . . It threatens our planet, our only home."

Should your college or university divest from the fossil fuels industry?

■ DRONES AND COUNTERTERRORISM

The humanitarian law of war places strict restrictions on aerial attacks. Attacks must be directed at military targets and may not target civilians or civilian objects. An attack on a military object, which may cause collateral damage to civilians, is justified where the military advantage from the attack outweighs the harm to civilians. There is a continuing debate whether the targeted assassination of terrorists who pose a threat to the United States is justified despite the risk that civilians may be killed. What of the killing of a terrorist bomb maker who is surrounded by his or her family (Jaffer 2016)?

President Obama initiated more **drone** strikes outside the area of immediate combat in his first year than President George W. Bush undertook during his entire presidency. Obama carried out 563 strikes in Pakistan, Somalia, and Yemen during his two presidential terms as compared to 57 strikes during President Bush's eight years in office.

American law prohibits the government from engaging in assassination and murder abroad. Anwar al-Awlaki, however, was viewed by the Obama administration as waging war on the United States, and his name was listed on a "kill or capture" list compiled by the Obama administration.

President Obama stated that al-Awlaki had taken a "lead role in planning and directing the efforts to murder innocent Americans" and characterized the cleric's killing as a "major blow"

struck against al Qaeda's "most active operational affiliate." Al-Awlaki's podcasts calling for Jihad against the West had inspired terrorists across the world, and he was thought to have encouraged Major Nidal Malik Hasan's killings of twelve American soldiers at Fort Hood in Texas. Al-Awlaki assumed an "operational role" and allegedly coordinated the unsuccessful effort of Umar Farouk Abdulmutallab to blow up a jetliner over Detroit in 2009. Al-Awlaki also was suspected of directing the effort to use printer-cartridge bombs to bring down cargo planes, and he inspired a plot to bomb the New York City subway system in 2009 as well as Faisal Shahzad's attempt in 2010 to ignite a car bomb in Times Square in New York City. While living in the United States, al-Awlaki also appears to have had connections with some of the individuals responsible for the September 11, 2001, attack on the World Trade Center.

The American drone strike also killed Samir Khan, aged 25, an American from Charlotte, North Carolina, who was editor of *Inspire*, al Qaeda's online magazine. Khan had written that he was proud to be a traitor to the United States and published articles instructing individuals how to construct bombs.

Al-Awlaki was born in New Mexico to Yemeni parents. He returned to Yemen at age 7 for schooling and came back to the United States to earn an engineering degree at Colorado State University. He was drawn to religion and was appointed imam of mosques in San Diego, Denver, and the Virginia suburbs of Washington, D.C. He became disillusioned with the United States and in 2004 migrated back to Yemen where his political activism landed him in jail for a year. His familiarity with American values and culture allowed him to craft a message that was available on websites, Facebook, and CDs that appealed to young, aspiring Jihadists in the United States and in Europe.

An unfortunate aspect of reliance on drones is that a number of the victims were not active al Qaeda operatives. An October 2012 UN report on drone attacks concluded that more civilian casualties resulted from drone attacks than the United States was willing to admit. The report documented 330 drone attacks in the northwest tribal areas in Pakistan since 2004, which resulted in the death of four hundred civilians. A heavily cited Amnesty International report in October 2012 documented nineteen civilian deaths in 2 drone attacks launched in Pakistan in 2012.

The Obama administration disputed the claim that non-militants who were in the vicinity of drone strikes were victims of drone strikes and claimed that only a handful of innocent individuals have been killed in such attacks. International law recognizes that the infliction of "collateral damage" is justified when the importance of the military objective outweighs the injury civilians and damage to civilian property.

The use of drones without the permission of the government whose territory is the target of the attack also violates the country's sovereignty. On the other hand, these governments often have welcomed the drone attacks and have proven themselves incapable of combating terrorism.

"Signature strikes" target terrorist training camps, and "personality strikes" target individuals. Al-Awlaki had been placed on the list of al Qaeda operatives to be killed or captured. Administration insiders stated he had been placed on the list following an in-depth review of the evidence. The debate over the justifiability of killing al-Awlaki according to critics centered on the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable searches and seizures. The question was whether the "assassination" of al-Awlaki constituted a reasonable use of deadly force to apprehend a U.S. citizen. His killing without trial based on evidence that was not revealed to the public also was alleged to violate the constitutional protection of due process of law. A year before al-Awlaki's death, his father had brought a case in federal court in an unsuccessful attempt to call a halt to the government's pursuit of his son.

The Obama administration's legal justification for killing al-Awlaki was set forth in a secret White House memo and was based on the argument that al-Awlaki posed an imminent threat based on his involvement in various terrorist plots. Congressional legislation that was passed following September 11, 2001, authorized the president to capture or kill individuals and terrorist groups who posed a threat to the national security of the United States both inside and outside the zone of combat. There was little possibility of capturing al-Awlaki because he had relocated to a remote and inaccessible part of Yemen; the only alternative was to kill him through the use of a drone. Then attorney general Eric Holder later stated that the United States would pursue terrorists who posed an ongoing threat to the United States within the borders of other countries with the permission of the country or in those instances in which the country was unable or unwilling to apprehend the suspect.

In May 2012, Fahd Mohammed Ahmed al-Quso, involved in the bombing of the American warship the U.S.S. *Cole*, was killed in a drone attack in Yemen. Several weeks later, a drone strike in Pakistan's tribal region targeted and killed Abu Yahya al-Libi who was named deputy leader of al Qaeda following the death of Osama bin Laden.

President Obama and his then chief counterterrorism advisor John Brennan reportedly were involved in selecting the individuals to be targeted in drone attacks. Brennan characterized the selection process as careful, deliberate, and responsible.

Critics assert that the United States has been using drones against individuals who did not pose a threat and that the attacks were provoking a backlash against America in Pakistan, Yemen, Somalia, and other countries. The drones according to critics create resentment and fear because at times they hover over an area for as long as a month while tracking terrorists A 2012 Pew Research Center poll found that only 17 percent of Pakistanis endorsed U.S. drone strikes in their country, even if carried out in coordination with the Pakistani government against leaders of extremist organizations. Ninety-four percent of Pakistanis believed that drone strikes were killing "too many" innocent people.

Some commentators argue the United States is obliged to insert troops on the ground to combat terrorists rather than rely on technology. Attacks undertaken without the consent of the country on whose territory terrorists are located violate a country's sovereignty.

The dilemma is that drone attacks are effective in targeting individual terrorists although the accompanying civilian casualties turn popular opinion in target countries against the United States. On the other hand, terrorists who situate themselves among the civilian population violate the prohibition against combatants situating themselves among civilians.

In May 2012, President Obama announced that in the future his administration would rely less heavily on drones. He stated the preference when possible was to detain, interrogate, and prosecute terrorists. The president explained the United States only targets individuals who pose a "continuing and imminent threat to the American people" when the government on whose territory the terrorist is located is incapable of addressing the threat. Drone strikes only were authorized when there was a "near certainty" that the terrorist target was "present" and a "near certainty" that non-combatants would not be killed or injured. President Obama stressed that "near certainty" is the "highest standard we can set."

President Obama asserted that the program had taken "dozens of high skilled" terrorist leaders and dangerous terrorists off the battlefield and that the drone program was waged as a last resort in self-defense.

President Obama conceded that civilians had been killed in drone strikes although the casualties were much lower than reported in the media. He stated that the civilian casualties were tragic, but

a failure to confront terrorists risked an even greater number of casualties of foreign citizens and of Americans at home and abroad. In 2016, a report by the director of American intelligence reported that between 2009 and 2015 there were 473 strikes resulting in between 2,372 and 2,581 combatant deaths and 64 to 116 non-combatant deaths. The report noted that non-governmental organizations placed non-combatant casualties at 200 to more than 900.

President Obama challenged the notion that reliance on traditional modes of warfare would limit civilian casualties. Airpower and missiles are less precise than drones and likely would result in more civilian casualties. Sending in troops may lead to fire fights that endanger the local population and risk escalation into a major conflict.

The FBI has begun to deploy drones for surveillance in the United States, and the U.S. Border Patrol uses drones to monitor the U.S.-Mexican border. A number of state legislators have passed legislation restricting the ability of the police to use drones other than to combat terrorist threats. The Trump administration has significantly expanded the definition of a "war zone" to allow the use of drones against "terrorist" groups without presidential approval in a number of countries.

13.5 YOU DECIDE

The Japanese during World War II abducted or deceived two hundred thousand women into sexual slavery to serve the needs of Japanese soldiers. Women as young as twelve in Korea, China, the Dutch East Indies, Taiwan, Malaysia, Burma, and the Philippines were detained and transported to "comfort houses" in Japanese-occupied Asian countries. An estimated 70 percent of comfort women were from Korea, which was occupied by Japan between 1910 and 1945. Roughly 25 percent of the women survived, an estimated forty of whom remain alive in South Korea.

The so-called comfort women system was instituted following the "rape of Nanking" in 1937 to 1938 in which Japanese troops within a six- to eight-week period massacred more than three hundred thousand civilians and raped more than eighty thousand women in the most brutal and unimaginable fashion. The thinking of Japanese military officials was that by providing sexual slaves the atrocities that fueled anti-Japanese sentiment and retribution by occupied populations could be prevented and order and discipline could be maintained among Japanese troops. There also was a fear that uncontrolled sexual assaults would lead to soldiers contracting venereal disease, which would be spread throughout the Japanese population on the soldiers' return home.

In 1996, the United Nations issued a report on the comfort women, which included graphic testimony.

Lee Ok-sun recounted that at the age of 13 she was kidnapped by a Japanese soldier and beaten and raped multiple times at a police station. She then was taken to a Japanese army barracks where as many as four hundred Korean women were forced to serve as sex slaves for over four thousand Japanese soldiers. Each of the women was required to provide sex to as many as forty men per day. Lee was beaten when she protested, and matchsticks were held to her private parts until she complied. She watched one young woman who protested be stripped, beaten, tied, and rolled over onto a board of nails and then beheaded. Another Korean woman contracted venereal disease and according to Lee was sterilized by a hot bar being stuck in her private parts.

Hwang So-gyun describes at the age of 17 being promised a factory job by the head of her village and instead finding herself subjected to sexual slavery. Young women who contracted venereal disease were killed, and Hwang stated that a young woman who resisted was beheaded in front of the other women and cut into small pieces.

Many of the comfort women who were not killed died during poorly performed abortions or as a result of malaria, weakened conditions, or near-starvation diets and starvation.

Other than a 1948 Indonesian trial and conviction of Japanese officers and operators of "comfort houses," none of the Japanese involved in sexual slavery during World War II were prosecuted. A rising tide of feminist activism in South Korea and in Japan in the late 1970s led to the public disclosure and discussion of the "comfort women" as an example of the continued exploitation of women in Asia. In 1991, three comfort women agreed to publicly discuss their past brutalization, which led to over two hundred former comfort women coming forward.

In 1991, over thirty comfort women filed a legal suit for compensation in Japan. The lawsuit led to the uncovering of a number of documents that detailed the Japanese Army's sexual exploitation of the "comfort women." In response, in early 1992, Prime Minister Miyazawa Kiichi expressed his regrets before the South Korean National Assembly for Japan's "mistaken national policy" during World War II. The Japanese Diet resisted compensation and instead in 1992 established a privately funded Asian Women's Fund that "in atonement" would promote awareness of the comfort women and provide financial support for projects that address issues of concern both to comfort women and to contemporary women.

The South Koreans viewed Prime Minister Miyazawa's apology as a personal gesture rather than as a formal governmental apology from the Japanese Diet and insisted on reparations from the Japanese government to individual victims rather than a fund addressing public policy. South Korea also objected that Japan continued to place primary responsibility for sexual slavery on independent operators rather than on the Japanese military.

In 1997, the U.S. Congress passed a joint resolution calling on Japan to formally apologize to and pay reparations to the victims of Japanese atrocities including the comfort women.

In December 2015, at the urging of President Barack Obama, Japan and South Korea announced a "final and irreversible settlement" in which Japan accepted "deep responsibility," offered a formal apology to the South Korean women, and established an $8.3 million "old age fund" to care for the women. South Korea also agreed to consult on removing a bronze statue of a "young comfort woman" from in front of the Japanese embassy in Seoul, South Korea. Some of the former comfort women, however, continue to reject the settlement because of Japan's failure to admit "legal responsibility" and to specify that the payments are in reparation for injury to the women. Statutes were erected in protest in front of Japanese diplomatic buildings throughout the world.

When should a country apologize to another country or to a segment of the population for past human rights violations? Consider a 2009 congressional resolution that states that "the United States, acting through Congress . . . Apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by the citizens of the United States; and Urges the President to acknowledge the wrongs of the United States against Indian tribes in the history of the United States in order to bring healing to this land."

Should a government apologize and pay reparations for past violations of human rights?

TORTURE AND CRIMES AGAINST HUMANITY

Torture—cruel, inhuman, or degrading punishment—is prohibited under the UDHR and ICCPR and regional human rights treaties as well as under the primary documents regulating the humanitarian law of war. The International Covenant on Civil and Political Rights provides that freedom from torture is a non-derogable right. The universal condemnation of torture has resulted in torture being considered *jus cogens*, or a norm of international law that may not be violated under any circumstances. Torture also is considered to be outlawed as matter of customary law. This means that the prohibition on torture is so strong that it is prohibited even when a country has not formally entered into a treaty prohibiting the practice.

Torture committed in conjunction with armed conflict is a war crime. Torture also is a crime against humanity when committed in an organized, widespread basis by a government against a civilian population.

The 1984 **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** is a comprehensive document prohibiting the state practice of torture, which has been ratified by 155 countries. The Convention defines torture as any act by which "severe pain or suffering, whether physical or mental," is intentionally inflicted by a "public official" for a purpose such as obtaining information. Torture does not "include pain or suffering arising inherent in or incidental to lawful sanctions" such as imprisonment or the death penalty. The definition of torture has three primary components:

1. The intentional infliction of severe mental or physical suffering
2. by a public official
3. for a specific purpose.

Torture is used for various purposes. The 1984 Convention lists the "purposes" for which torture should not be employed. These include the following:

Punishment. The infliction of pain in retribution or to deter future acts of violence.

Confessions and intelligence. The abuse of individuals to obtain admissions of criminal conduct or to obtain information.

Coercion and deterrence. The maiming or incapacitation of an individual to eliminate him or her as a threat and to deter other individuals.

Discrimination. The use of torture as an expression of discrimination against a group because of race, religion, gender, sexual preference, or any other reason.

The Convention also prohibits acts of cruel, inhuman, or degrading treatment or punishment that do not constitute torture.

The treaty on torture provides for universal jurisdiction over torture. A signatory is obligated to prosecute or extradite when an offender is found within its jurisdiction, an offender or victim is a national of the state, or the crime is committed within the state's jurisdiction. Article 2(2) provides that "No exceptional circumstances . . . may be invoked as a justification of torture."

An important provision prohibits extraditing or returning an individual to another nation-state "where there are substantial grounds for believing that he would be in danger of being subjected to torture." This provision has become relevant when a nation-state sends an individual back to a country with a documented history of torture, even when the receiving nation-state pledges to guarantee the offender's safety and security. Great Britain has been brought before the European Court of Human Rights on two occasions by individuals confronted with extradition to Middle Eastern countries.

Torture includes the infliction of severe physical or psychological pain. Acts of torture typically are applied in combination with one another. Acts viewed as torture include the following:

Physical. Waterboarding, electric shock to various parts of the anatomy, beatings, stress positions, and sexual abuse.

Manipulation of the environment. Subjecting individuals to intense heat or cold, long periods of sleep deprivation, and sensory deprivation.

Psychological. Mock executions, destruction of sacred religious objects, use of psychotropic drugs, threats to family members, or abuse of family members.

Torturers prefer interrogation methods that do not result in physical injury because it enables them to deny having abused detainees.

U.S. federal courts have held that the torture violates "universally accepted norms of the international law of human rights" and have ruled that claims of torture may be brought under the Alien Tort Claims Act when torture is committed by private individuals as well as by government officials (*Kadic v. Karadzic*, 70 F.3d 232 [2d Cir. 1995]).

Despite the prohibition on torture, torture is practiced throughout the world by at least half of the states ratifying the Convention Against Torture and is as prevalent as when the Convention was adopted in 1984 (Rejali 2009: 22). An extreme example is a photo archive of fifty-five thousand images of torture and execution committed by the Syrian government that, in January 2014, was leaked to the international media. According to experts, the photos indicate that torture was systematic and widespread and reminiscent of the abuses of Nazi Germany. According to Amnesty International, detainees in intelligence branches in Syria have described being subjected to *dulab* (forcibly contorting the victim's body into a rubber tire) and *falaqa* (flogging on the soles of the feet), electric shock, rape, the pulling out of their fingernails and toenails, scalding with hot water, and burning with cigarettes. There also is evidence of mass extermination of detainees.

Countries customarily deny they are using torture, and the practice of torture typically is undertaken in secret outside of the formal legal system. The torturers detain and abuse individuals and in many cases do not process detainees through the legal system and are able to act without the restraints of judicial supervision. Torture often is undertaken in conjunction with the practice of disappearances. Individuals are kidnapped off the street by unidentified individuals, and the government claims no knowledge or responsibility for the individual's disappearance. There is evidence that death squads have been employed by President Rodrigo Duterte in the Philippines to kidnap and kill thousands of drug dealers, drug users, and political opponents of the regime (Villamor 2017).

Once torture is initiated, it is difficult to stop. Individuals suspected of opposition to the government who are subjected to torture invariably are willing to provide whatever the interrogator wants to

hear to halt their abuse. They will provide the names of other alleged terrorists to authorities. These individuals, in turn, will identify more alleged terrorists. As the list of terrorists grows, the regime will become increasingly fearful and detain individuals involved in increasingly minor acts of protest.

In one of the earliest cases involving allegations of torture, Ireland brought a complaint against Great Britain before the European Court of Human Rights alleging torture against members of the Irish Republican Army who were fighting for an independent Northern Ireland. The European Court found that Great Britain used "five techniques" in combination against detainees:

1. *Wall-standing:* Requiring detainees to remain in a spread eagle stress position for hours at a time.
2. *Hooding:* Placing a thick bag over detainees' heads other than when interrogated.
3. *Noise:* Continuous loud and irritating noise.
4. *Sleep deprivation:* Preventing detainees from sleeping.
5. *Deprivation of food and liquids:* A reduced, subsistence diet.

The European Court held the five techniques constituted cruel and degrading treatment but lacked the necessary severity and cruelty to constitute torture. The tribunal did not explain the basis for the decision. Other courts, in determining whether torture has occurred, have considered the length and nature of the mistreatment, the physical condition and age and gender of the victim, and the surrounding circumstances of the victim's incarceration.

In 1996, in *Aydin v. Turkey*, the European Court of Human Rights held that a 17-year-old female victim suspected of collaboration with Kurdish separatists and detained for three days had been tortured. The defendant was "blindfolded, beaten, stripped, placed inside a tire and sprayed with high pressure water, and raped . . . and paraded naked in humiliating circumstances" (*Aydin v. Turkey*, ECHR 1997-VI, [1997]). In *Prosecutor v. Akayesu*, a trial chamber of the International Criminal Tribunal for Rwanda found in an often-cited passage that rape was a form of torture: "Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with consent or acquiescence of a public official or other person acting in an official capacity" (*Prosecutor v. Akayesu*, Case No. ICTR-96-4-T).

The prohibition on torture as noted is absolute: torture is never justified. A number of commentators ask whether torture should be prohibited when confronted with a "ticking time bomb" in which decision-makers confront an immediate emergency and believe a catastrophe may be averted by torturing a detainee with knowledge of the location of the bomb. Is it not justified in torturing a single individual to save hundreds of lives? How certain must officials be that torture will yield the required information? What if torturing the individual will reveal the names of other individuals who know the location of the bomb? Will this lead to a "slippery slope" in which torture may be undertaken in non-emergency situations, such as planning an attack on the United States? Does it make little sense to prohibit torture under all circumstances?

The United States and Enhanced Interrogation

Following the attack on the United States of September 11, 2001, the George W. Bush administration announced that al Qaeda and Taliban detainees would not be recognized as lawful prisoners of war

under the Geneva Conventions and instead would be considered **enemy combatants** who were entitled to limited legal protections.

The administration grew frustrated over the lack of intelligence regarding al Qaeda, and the White House, together with the CIA, made plans to use alternative interrogation methods against high-level detainees. The Office of Legal Counsel (OLC), the office in the Department of Justice that provides legal guidance to the executive branch, was asked to draft a memo clarifying the meaning of the terms *torture* and *cruel, inhuman, or degrading treatment*.

The memo from Assistant Attorney General Jay S. Bybee to White House Counsel Alberto Gonzales of August 1, 2002, concluded that an interrogation technique had to meet a high standard to constitute unlawful torture:

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.

The memo also asserted that the president as commander-in-chief possessed unrestricted power and authority to combat the enemy and this authority could not be restricted by Congress. In 2004, the OLC, in response to public and media criticism, rescinded the 2002 memo's definition of torture.

A separate August 2002 memo from the OLC approved of fifteen interrogation methods, including solitary confinement, hitting a detainee's head against the wall ("walling"), cramped confinement in a box filled with insects, stress positions, sleep deprivation, removal of clothes, denial of food and water, shackling to the floor, rectal feeding, cold temperatures, loud music, and waterboarding. These techniques, applied individually or in combination, were once again approved in memos drafted in 2005 from the Department of Justice.

The most controversial interrogation technique was **waterboarding**. The detainee is strapped to the bed, with feet elevated and forehead and eyes covered. A cloth is placed over his or her nose and mouth and water is poured onto the cloth causing the individual to struggle to breathe and to feel he or she is being suffocated by the water. Abu Zubaydah, director of terrorist operations for al Qaeda, reportedly was waterboarded 83 times. Khalid Sheikh Mohammed (known as "KSM"), a mastermind behind the attacks of 9/11, was waterboarded 183 times.

Although the OLC concluded waterboarding did not constitute torture, American military officers were convicted by a war crimes tribunal for employing the "water cure" during the American-Philippine war. Following World War II, Japanese military officers were convicted of the water torture of American prisoners of war, and American domestic courts have convicted police officers for employing water torture (Rejali 2009: 461–465).

Debate continues over whether the enhanced interrogation program yielded valuable intelligence, particularly whether intelligence produced led to the killing of Osama bin Laden. Most trained interrogators insist that building a relationship between a prisoner and a detainee is the most effective method of obtaining information. They assert that individuals subjected to abuse will provide interrogators with whatever they want to hear to halt the abuse. The George W. Bush administration insisted that a number of terrorist plots were uncovered as a result of enhanced interrogation, including a plan to hijack a passenger plane and fly the aircraft into a building in Los Angeles.

The practice of torture was associated with extraordinary rendition. This involves turning foreign nationals detained in American custody over to another country for interrogation. In other

instances, individuals living abroad are detained and kidnapped and transferred to the United States or to another country for interrogation and in some instances to stand trial. The process often is undertaken without consulting the country on whose territory the detention takes place, and the detention and rendition take place without using the formal legal extradition process. There are documented instances of individuals who have been detained in secret "black sites" or in foreign prisons and tortured.

Although the U.S. Constitution does not extend to non-citizens abroad, extraordinary rendition violates the Convention Against Torture prohibition on turning an individual over to another country where there are "substantial grounds" for believing there is a "danger" that the individual will be subjected to torture. The European Parliament issued a report critical of the extraordinary rendition program and documented the involvement of fifteen European countries in the U.S. extraordinary renditions program.

In one well-documented case, Maher Arar, a Canadian citizen and Syrian national, was mistakenly identified during a stopover in New York as a terrorist sympathizer and was sent to Syria where he was detained and tortured for almost a year.

In 2005, Congress amended the Detainee Treatment Act to prohibit the use of cruel, inhuman, or degrading treatment by government personnel and to prohibit military interrogators from employing interrogation techniques not authorized under the Army Field Manuals. The manuals, for example, prohibit the use of dogs, hooding, forced nakedness, hypothermia, mock executions, electric shocks, and waterboarding.

President Obama, on taking office, stated that terrorist detainees would be accorded the rights of prisoners of war, the employment of enhanced interrogation would be halted, and the United States would adhere to the requirements of the law of war as set forth in the U.S. Army Field Manuals. He also formed a specialized enhanced interrogation team trained in safe and effective methods of interrogation. The Department of Justice announced criminal charges would not be pursued against CIA personnel involved in the enhanced interrogation program.

In 2015, the Senate Select Committee on Intelligence issued a comprehensive report on the CIA's detention and interrogation program and found no evidence that enhanced interrogation had proven effective in obtaining information from detainees. Confronting these individuals with information proved to be the most effective interrogation technique. According to CIA records, seven of the thirty-nine CIA detainees known to have been subjected to enhanced interrogation failed to provide intelligence. Other detainees provided accurate information before or without having been subjected to enhanced interrogation (Senate Intelligence Committee 2014).

President Donald Trump in his first days in office stated that although he believes in the effectiveness of enhanced interrogation and of waterboarding, which he described as "just short of torture," he would follow the view of his military advisors that interrogation is more effective when the interrogator is armed with a "pack of cigarettes and a six pack of beer."

Keep in mind there has been continuing opposition to enhanced interrogation within the U.S. government. FBI interrogators, for example, stressed that interrogation is most successful when a close relationship of trust is established between an interrogator and a detainee.

There is continuing debate whether terrorists brought to trial before U.S. civilian courts should be read their *Miranda* rights before their interrogation. The Obama administration has adopted the position that these individuals may be interrogated initially without the *Miranda* rights in order to uncover evidence that may jeopardize public safety. Following the initial interrogation, the accused receives the *Miranda* rights informing him or her of the right to a lawyer and the right to remain silent.

Statements made under torture are considered unreliable and generally inadmissible into evidence before **military commissions** and federal courts.

A 2006 survey of 1,767 soldiers in the Multi-National Force in Iraq conducted by the Army surgeon general found 36 percent of soldiers and 39 percent of Marines believed that torture should be permitted to gather information from insurgents. Forty-one percent of soldiers and 44 percent of Marines approved of torture to save the life of a soldier or marine. Forty-six percent of soldiers and 32 percent of Marines would report the torture of a civilian. General David H. Petraeus, commander of U.S. forces in Iraq at the time, advised against combatants permitting their emotions to lead them to commit "hasty, illegal actions" (Rejali 2009: 472–473). Should the United States use waterboarding to interrogate suspected terrorists?

A 2016 Pew poll on public attitudes toward torture found that 58 percent of Americans favored torture against suspected terrorists to gain information on planned attacks as compared to a global figure of 40 percent supporting the use of torture in these circumstances. The American public ranks sixth in the world in the survey on the percentage of the public supporting torture against suspected terrorists. The countries in which a greater percentage of the public supports torture are Uganda (78 percent), Lebanon (72 percent), Israel (62 percent), Kenya (62 percent), and Nigeria (61 percent).

13.6 YOU DECIDE

The Israeli Supreme Court in *Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, in September 1999, issued a judgment on the legality of interrogation methods employed by the Israeli Security Agency against Palestinian detainees. These techniques were adopted during a period of Palestinian violence directed against Israel. Between 1996 and 1998, roughly 121 Israelis died and 700 were injured as a result of terrorist violence, including kidnapping, hijacking, and the planting of explosives and murders. The Israeli security service relied on several interrogation methods, which allegedly yielded a number of convictions of important terrorists and provided valuable intelligence that resulted in the prevention of potentially lethal attacks against civilians. The most controversial method of questioning was the "*Shabach* position." In *Shabach*, a "detainee's hands are tied behind his back, [and] he is seated on a small and low chair whose seat is tilted toward the ground. One hand is tied behind the suspect, and placed inside the gap behind the chair against the back support. His second hand is tied behind the chair against its back support." A heavy bag is placed over the suspect's head, falling down to his shoulders. Loud music continuously is piped into the room. The suspects are secured in this position for lengthy periods of time and are periodically interrogated. The Israeli Supreme Court held that the *Shabach* position violates the suspect's "dignity" and "right not to be degraded and not to be submitted to sub-human conditions in the course of his detention of the sort likely to harm his health and . . . his dignity."

The Israeli Supreme Court refused to approve of the use of the *Shabach* method or the use of force or torture during interrogation. The justices did hold that an interrogator prosecuted for the abuse of a detainee who believed the abuse was justified to prevent an imminent and immediate threat might, after the fact, rely on the necessity defense. Necessity or the "choice of evils" provides a justification defense in those instances in which the harm caused by the defendant's criminal act is outweighed by the harm the defendant

intended to prevent. Should a court recognize the defense of necessity to torture?

Harvard law professor Alan Dershowitz criticizes the decision of the Israeli Supreme Court on the grounds that an interrogator who feels that torture is required to respond to a threat is required to speculate on whether a court will recognize the defense of necessity. An incorrect analysis may result in a criminal conviction and possible imprisonment. Dershowitz argues for an alternative method: the use of "torture warrants." Prior to subjecting a detainee to torture, a prosecutor would apply for a warrant from a judge authorizing a limited application of torture for a specified purpose (e.g., obtaining confessions or intelligence). The judge would issue the warrant where the prosecutor can support the application for a warrant based on probable cause (e.g., "beyond a moral certainty"). The use of "torture warrants" would ensure that torture was limited and restricted and subject to judicial monitoring and oversight.

Do you agree with Professor Dershowitz?

CHAPTER SUMMARY

The twentieth century witnessed the development of the global law of human rights. The events of World War II led to the Nuremberg trials, which established the principle that individuals possess international duties that transcend the demands of their country and that individuals who violate international law may be held criminally liable. The international community established the United Nations to maintain international peace and to work toward international social justice.

The UN was responsible for the drafting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, along with other human rights documents. The international community has drafted a number of treaties regulating the humanitarian law of war, and in 2002, following over a century of agitation, the world community agreed to establish an international criminal court.

There are various layers of human rights protection. At the international level, the UN relies on state self-reports and investigations and with the consent of a member state on interstate and individual complaints. The UN also has been involved in creating various specialized war crimes tribunals. Europe, Latin America, and Africa have regional human rights courts, and domestic courts also are involved in protecting human rights.

A review of case studies of child soldiers, labor rights, drones, and torture illustrates the difficulty of overcoming the political, economic, and social factors that impede the enforcement of international human rights.

CHAPTER REVIEW QUESTIONS

1. Discuss the significance of the International Military Tribunal at Nuremberg.
2. What is the importance of the Universal Declaration of Human Rights?
3. Distinguish between the type of rights protected in the International Covenant on Civil and Political Rights and type of rights protected in the International Covenant on Economic, Social and Political Rights. How do the procedures provided in these two conventions to enforce human rights differ from one another?
4. What is the role of the Human Rights Council in protecting human rights?
5. Discuss the role of domestic courts and institutions in protecting international human rights.

6. What is the relationship between international human rights and domestic enforcement of human rights? Discuss the challenge of enforcing international human rights in a world of pluralistic sovereign nation-states.
7. Describe how the protection of international human rights is incorporated into U.S. congressional statutes.
8. Discuss the role and limits of international and domestic law in protection of child soldiers and textile workers, and in limiting the use of drones and torture.

TERMINOLOGY

child soldiers
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
derogable rights
drone
enemy combatants
Human Rights Council
humanitarian law of war
International Bill of Human Rights
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
international criminal law
International Military Tribunal at Nuremberg
military commissions
negative rights
non-derogable rights
positive rights
truth and reconciliation commission
Universal Declaration of Human Rights
universal jurisdiction
waterboarding

ANSWERS TO TEST YOUR KNOWLEDGE

1. True
2. False
3. False
4. False
5. False
6. False
7. False
8. False
9. False